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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,)	CASE NO. CR-11-0573-JSW
14 Plaintiff,)	
15 v.)	UNITED STATES' MEMORANDUM IN
)	OPPOSITION TO DEFENDANTS' MOTION TO
16 WALTER LIEW, CHRISTINA LIEW, USA)	COMPEL AMENDED BILL OF PARTICULARS
17 PERFORMANCE TECHNOLOGY, INC.,)	(DKT. 436)
18 AND ROBERT MAEGERLE,)	Date: October 3, 2013
Defendants.)	Time: 2:00 pm
)	
)	

20 Defendants' motion to compel an amended bill of particulars should be denied. The bill of
21 particulars filed by the United States on July 3, 2013, complied with the Court's order of June 11, 2013,
22 and fairly puts the defendants on notice of the government's theory as to the two attempt charges at issue
23 (Counts 3 and 5). Defendants' motion should be denied because (1) the level of detail they seek is not
24 the purpose of a bill of particulars; and (2) the attempt statutes charged in the Indictment do not require
25 proof that particular items are trade secrets.

26 The government's theory of the case is that the defendants attempted to misappropriate the entire
27 DuPont chloride-route process and reasonably believed that the process, including certain components,
28 was a trade secret – described in the Indictment as Trade Secret 1. The government, in its bill of

1 particulars, reaffirmed its theory regarding attempted misappropriation of the entire DuPont chloride-
2 route process and identified the components of that process that the evidence will show defendants
3 attempted convey to their Chinese customers. The government also identified “combinations and
4 compilations” that were part of the overall process.

5 In challenging the government’s disclosure, defendants rely on a seriously flawed re-
6 interpretation of the Court’s June 11 order. The Court ordered the government to identify the
7 components of the chloride-route process it will argue at trial defendants attempted to misappropriate.
8 Defendants contend that the Court ordered something vastly greater – something that is inconsistent with
9 the attempt allegations in the Indictment and with the government’s theory of the case.

10 Defendants are never clear about what particulars they are looking for. They contend they want
11 more detail, but don’t come right out and identify the detail they want. That is because they really are
12 seeking discovery and asking the Court to compel the government to explain the ways in which the
13 items listed in the bill of particulars are trade secrets. However, the Court already has ruled discovery is
14 not the purpose of a bill of particulars and held that the government is not required to allege or prove the
15 existence of actual trade secrets in order to prevail on the attempt charges.

16 A. The Attempt Charges

17 Defendants’ motion concerns Counts 3 and 5 of the Second Superseding Indictment (the
18 “Indictment”). Counts 3 charges defendants Walter Liew, Christina Liew, and USAPTI with attempted
19 economic espionage, in violation of 18 U.S.C. § 1831(a)(2) & (4), and Count 5 charges defendants
20 Walter Liew, Christina Liew, Robert Maegerle and USAPTI with attempted trade secret theft, in
21 violation of 18 U.S.C. § 1832(a)(2) & (4). Specifically, the Indictment charges that defendants
22 “knowingly and without authorization attempted to copy, duplicate, sketch, draw, alter, photocopy,
23 replicate, transmit, deliver, send communicate, and convey a trade secret belonging to DuPont,
24 specifically Trade Secret 1,” knowingly and intentionally attempting to benefit a third party – the PRC
25 government and Pangang Group in the case of Count 3 and a party other than DuPont in the case of
26 Count 5.

27 Neither defendants’ motion nor the bill of particulars concern the allegations of or proof related
28 to Trade Secrets 2-5 or the other EEA counts alleged in the Indictment.

1 B. The Court's Order

2 This Court denied defendants motion to dismiss and granted, in part, their prior motion for a bill
3 of particulars. 6/11/13 Order ("Order") (Dkt. 338). The Court held, as to the two attempt charges, that
4 the Second Superseding Indictment is sufficiently specific and that the grand jury was not required to
5 allege the misappropriation of actual trade secrets. The attempt counts, the Court explained,

6 charge Defendants with attempts to violate the EEA, which requires the United States to
7 prove the Defendants "had culpable intent" and "engaged in conduct constituting a
8 substantial step toward commission of the crime that represents the culmination of that
9 intent." Thus it is the Defendants' intent and their actions that form the "core
10 criminality" of these charges, rather than the existence of the asserted trade secret. That
11 is, unlike the situation where a defendant is charged with a substantive violation of the
12 EEA, Defendants' guilt here depends on their intent and their actions, rather than on "a
13 specific identification of fact."

14 Order at 8:16-26 (citations omitted).

15 With regard to the two attempt charges (Counts 3 and 5), the Court ordered the government to
16 file a bill of particulars because defendant Walter Liew remains incarcerated and the Trade Secret
17 alleged in Counts 3 and 5 is broader than the other trade secrets alleged in the Indictment. Order at
18 11:20-22. Specifically, the Court directed the government to "provide a bill of particulars that sets forth
19 its theory of what Defendants' reasonably believed the trade secret to be, e.g., whether the United States
20 will argue that Defendants reasonably believed the entire chloride-route process to manufacture TiO₂
21 was a trade secret or whether it will argue that Defendants reasonably believed a subset of the process
22 was a trade secret." Order at 11:26 – 12: 2. If the latter – a subset – the Court ordered

23 the United States, taking into account the EEA's definition of a trade secret, shall identify
24 with particularity: (1) the "ways and means," described in paragraph 14.a [of the
25 Indictment]; and (2) the "proprietary and non-proprietary components," described in
26 paragraph 14.a; (3) and the resulting compilations and combinations that formed
27 substantial portions of the TiO₂ manufacturing process.

28 Order at 12:2-6.

29 C. The Bill of Particulars

30 The government filed a bill of particulars that comports with the Court's order and the evidence.
31 The Court first ordered the government to identify whether it would contend that defendants attempted
32 to misappropriate the entire DuPont chloride-route TiO₂ process or subparts of that process. The
33 government directly answered that instruction by asserting in the first paragraph of the bill of particulars

1 that it will argue at trial “that Defendants reasonably believed the entire, integrated DuPont chloride
2 process to manufacture TiO₂ was a DuPont trade secret.” Bill of Particulars at 1:23-24 (Dkt. 363).

3 The Court further ordered that if the government’s theory is that defendants’ attempted to
4 misappropriate a “subset of the process,” the government was required to identify those subsets with
5 particularity as being in one of the three categories of subsets listed by the Court: “ways and means,”
6 “components,” and “compilations and combinations.”

7 In the second and third paragraphs of the bill of the particulars, the government identified
8 specific “components and subparts” of the DuPont process that defendants believed were DuPont trade
9 secrets. This identification was in compliance with the Court’s order to identify the “proprietary and
10 non-proprietary components” of the process identified in paragraph 14.a of the Indictment. In paragraph
11 two of the bill of particulars, the government identifies with particularity twenty-three components and
12 subparts of the process that defendants reasonably believed were DuPont trade secrets. Bill of
13 Particulars at 1:25-2:22. These twenty-three items are based on specific documents and communications
14 between the defendants that have been produced to the defense in discovery and were identified in the
15 government’s May 30 disclosure.

16 The third paragraph of the bill of particulars lists eight specific components of the chloride-route
17 process and asserts that defendants reasonably believed that DuPont trade secrets were integrated into
18 these components. Bill of Particulars at 2:23-18. These eight items are quoted verbatim from an
19 equipment list prepared by defendants for the 100,000 mtpy factory designed by defendants for the
20 Pangang Group. The bill of particulars also identifies Trade Secret 3 as a trade secret that is included
21 within Trade Secret 1. Bill of Particulars, ¶ 5.

22 The bill of particulars also identifies three “compilations and combinations” (Trade Secrets 2, 4,
23 and 5) which show the ways and means of producing TiO₂, and asserts that defendants reasonably
24 believed that these were DuPont trade secrets. Bill of Particulars, ¶¶ 4, 6-7. These documents were
25 described in detail in the Indictment and have been produced and identified to defendants in the
26 discovery process.

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1 D. The Bill of Particulars Complies with the Court's Order

2 Defendants purport to be seeking additional detail regarding the items listed in the bill of
3 particulars, focusing on the lists of components in paragraphs 2 and 3 of the bill of particulars.
4 Defendants do not address the compilations and combinations identified in paragraphs 4, 6, and 7 or the
5 trade secret identified in paragraph 5.

6 Other than repeating the language of the Court's original order in the conclusion of their
7 memorandum, defendants do not provide any detail regarding the sort of additional specificity they are
8 seeking. The reason for this is obvious: They are either asking the government to identify specific
9 evidence or seeking an explanation as to how and why the listed items are actual trade secrets. If the
10 former, that is not the purpose of a bill of particulars, as the Court has already stated. If the latter, the
11 government is not required to allege or prove that the items that are the subject of Counts 3 and 5 – the
12 attempt charges – are actual trade secrets, as the Court has already held.

13 1. Defendants Are Using The Bill Of Particulars As A Discovery Device.

14 The bill of particulars filed by the United States comports with the Court's order and reflects the
15 theory of the government's case. Defendants declare themselves "disappointed" by the bill of
16 particulars, primarily, it appears, because it is long and contains too many components. Def. Mem. at 2
17 Defendants complain that the bill of particulars "simply lists designs, systems, equipment, components,
18 and processes that encompass the entire chloride-route process and most of its subparts." *Id.*

19 Defendants misapprehend the purpose of a bill of particulars. Defendants are looking for a
20 shortcut around rolling up their sleeves and examining at the evidence. The components of the DuPont
21 process that are listed in paragraphs 2 and 3 of the bill of particulars are based on specific documents
22 and communications between the defendants that have been produced in discovery and identified as
23 exhibits. They will be on the exhibit lists exchanged between the parties in October and on the filed
24 exhibit list filed with the Court in November.

25 As the Court has held, "a defendant may not use a motion for a bill of particulars to obtain full
26 discovery of the government's evidence." Order at 10:14-15, *citing United States v. Geis*, 597 F.2d
27 1170, 1181 (9th Cir. 1979). Defendants have come back to the Court for precisely this purpose. What
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1 they are looking for is an exposition of the evidence; they are fishing for evidentiary detail under the
2 cover of a request for a bill of particulars.

3 Defendants contend that the government has identified too many documents in discovery for
4 their experts to review – some 13,000 according to their count. Thirteen thousand, however, includes all
5 of the potential exhibits in the case and not all are technical documents or communications between the
6 parties. The documents the government relied upon to formulate the lists in paragraphs 2 and 3 of the
7 bill of particulars, moreover, are located in the original paper files to which defendants have a standing
8 invitation to review and in the electronic communications that are contained in searchable electronic
9 files.

10 Defendants are asking the Court to order the government to identify all of the evidence on which
11 they will rely at trial and to explain how that evidence relates to the government’s theory of the case.
12 Their motion, in substance, is a request for interrogatories, not a proper request for a bill of particulars.
13 The various questions they posit throughout their memorandum, *e.g.* Def. Mem. at 8:14-23, are
14 answered by the discovery that has been provided (which in the case of the items listed in paragraph 3
15 consists of a document written by defendants). A bill of particulars is not the proper vehicle with which
16 to obtain answers – a review of the discovery is the appropriate vehicle.

17 2. The Particulars Defendants Seek Are Not Required By The Attempt Statutes At Issue.

18 If not discovery of the specific evidence on which the government intends to rely to prove its
19 case, defendants are seeking detail surrounding whether the items listed in the bill of particulars are
20 actual trade secrets. Defendants adhere to the mistaken premise that the bill of particulars is about
21 identifying actual trade secrets. The bill of particulars filed by the government, defendants claim,
22 “leaves open the possibility that the Government can argue that literally *any* minor feature of a large
23 component of the chloride-route process, such as a single flow rate or temperature in the chlorinator, *is*
24 *the misappropriated trade secret*, without any warning to Defendants.” Def. Mem. at 9 (bold italics
25 added).

26 The Indictment does not allege that any of the items listed in sections 2 and 3 of the bill of
27 particulars are, in fact, misappropriated trade secrets and the Court has held that this is not required. The
28 bill of particulars simply makes clear that these are components of the DuPont chloride-route process

1 that the evidence will show defendants believed to be trade secrets and attempted to convey to the
2 Chinese companies. At issue are Counts 3 and 5, which allege that defendants *attempted* to copy,
3 duplicate, sketch, draw, replicate, transmit, deliver, send, communicate, and convey the DuPont
4 chloride-route manufacturing process, identified as Trade Secret 1, to Chinese state-owned companies.
5 The Court has held that the government need not allege or prove the existence of actual trade secrets in
6 order to support the attempt charges alleged in the Indictment.

7 The government's theory as to Counts 3 and 5 is that defendants obtained confidential trade
8 secret information from DuPont and used that information to design chloride-route factories for Chinese
9 state-owned companies. The DuPont information was not publicly available and the Chinese companies
10 had been unable to obtain information necessary to design a chloride-route factory from other sources.
11 As to Counts 3 and 5 specifically, the Indictment alleges and the government will prove that defendants
12 attempted to copy, duplicate, sketch, draw, replicate, transmit, deliver, send, communicate, and convey
13 DuPont trade secrets to Chinese state-owned companies by designing for them TiO₂ plants that could
14 not be designed based on publicly-available information. The bill of particulars is very clear in listing
15 the components that were copied, duplicated, sketched, drawn, replicated, transmitted, delivered, sent,
16 communicated and conveyed based on the DuPont trade secrets defendants obtained. The items in
17 section 2 of the bill of particulars are based on documents and communications between the defendants -
18 - they are not simply a random list of components of TiO₂ factories. The items in section 3 are based on
19 an equipment list created by defendants. The bill of particulars also identifies three specific
20 compilations of DuPont trade secrets that are alleged to be part of Trade Secret 1 and a separate trade
21 secret that is part of Trade Secret 1. These items have been provided to the defense in discovery and
22 identified specifically as part of the governments Rule 16 disclosures.

23 Thus, the bill of particulars makes clear that the government intends to prove under subsections
24 (a)(2) and (a)(4) of sections 1831 and 1832 that (1) defendants attempted to copy, duplicate, etc. without
25 authorization the entire DuPont TiO₂ process (paragraph 1); (2) defendants attempted to copy, duplicate,
26 etc. a laundry list of specific components that were part of that process (paragraphs 2 and 3); and (3)
27 defendants attempted to copy, duplicate, etc. several specific trade secrets, including three compilations
28 and combinations of trade secrets (paragraphs 4-7). As the Court has held, under the EEA's attempt

1 statutes, there is no requirement that the government allege or prove that the items were trade secrets,
2 though the government intends to prove that Trade Secrets 2-5 are actual trade secrets.

3 Defendants, using the fume disposal system as an example, argue that this is a complex process
4 and neither the bill of particulars nor the government's experts "specify which part of the fume disposal
5 system was allegedly thought by Defendants to be secret or unique." Def. Mem. at 7:18-20. Defendants
6 point out that the government's experts do not even mention the fume disposal system. *Id.* But the
7 Court did not order the government to "specify which part" of a particular component "was allegedly
8 thought by Defendants to be secret or unique." The Court ordered the government to "identify with
9 particularity" the "proprietary and non-proprietary components" that make up Trade Secret 1 as alleged
10 in paragraph 14.a of the Indictment. The fume disposal system, for example, is one of those components
11 – and the government's theory is that defendants understood that they had illegally stolen that system
12 from DuPont. The Indictment does not allege and the Government is not required to prove that
13 DuPont's the fume disposal system is a trade secret. The government's experts will not offer opinions
14 that the DuPont fume disposal system is a trade secret – whether it is or is not. The proof will be that the
15 DuPont TiO₂ process, including its components, were not available publicly; that trade secrets showing
16 the process and its components were obtained by the defendants; and that the defendant attempted to
17 convey that secret process and its components to Chinese state-owned companies in exchange for
18 millions of dollars.

19 The other example to which defendants point – the degassing screw conveyor – illustrates not
20 lack of specificity by the government, but exemplifies either disingenuousness or lack of preparation by
21 the defense. This item is quoted directly from an equipment list prepared by USAPTI and reviewed by
22 defendants in September 2009. Defendants feign ignorance as to what it is, but it is not only specific but
23 it is recited in defendants' own words and taken from one of their own documents. The government's
24 identification of this item, like the other items listed in section 3, alerts the defendants to precisely the
25 components that will be the subject of the government's proof. As with the fume disposal system, the
26 government's theory is that defendants understood that they had copied the screw conveyor from
27 DuPont and conveyed it without authorization to their Chinese customers.

1 Inexplicably, defendants claim that “the Government may argue that Defendants believed a
2 particular combination of multiple elements are a trade secret, *but the Bill of Particulars nowhere*
3 *indicates what that combination might be.*” Def. Mem. at 9:25-26 (emphasis in original). Quite to the
4 contrary, the bill of particulars specifically identifies the three compilations and combinations the
5 government intends to prove. Bill of Particulars, ¶¶ 4, 6-7.

6 The truth is that defendants simply do not want to try the attempt charges as they are alleged in
7 the Indictment. Defendants would prefer a trial in which they endeavor to mire the jury for weeks in
8 patents and technical details regarding components like the fume disposal system. Defendants would
9 prefer to put the victim, DuPont, in the uncomfortable position of having myriad details regarding their
10 process exposed to scrutiny at trial. Defendants would prefer a trial in which the jury’s attention is
11 shifted from their own inculpatory statements to a battle between retained experts over technical
12 minutiae. Defendants, as they have stated, view this case as a civil dispute and would like to treat it as
13 such. But it is not.

14 There is substantial evidence that the defendants believed that the entire DuPont process is a
15 trade secret, as well as particular components of that process that they attempted to convey to their
16 Chinese customers. It would be wasteful of resources, detrimental to DuPont, and unnecessary for
17 purposes of revealing defendants’ “core criminality,” to spend weeks and months of trial focused on the
18 subparts of the components identified in the bill of particulars when the evidence of defendants’ belief
19 and intent regarding these items is so clear. That evidence defendants seek through the bill of particulars
20 is irrelevant to the attempt charges alleged in the Indictment.

21 Defendants asked for and the Court ordered specifics regarding the components and compilations
22 on which the government’s proof will focus. The components and compilations are identified in the bill
23 of particulars and the documents on which the listed items were based have been produced and then
24 separately identified to the defendants. The particulars are consistent with the evidence and with what
25 the government believes it will be able to prove regarding defendants’ reasonable beliefs regarding
26 DuPont trade secrets. No more is required.

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1 E. Conclusion

2 Defendants' motion to compel an amended bill of particulars should be denied.

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4 Respectfully submitted,

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7 *John H. Hemann*

8 Dated: September 12, 2013

9 _____
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