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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. LAN LEE and YUEFEI GE, Defendants.	No. CR 06-0424 JW **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR BILL OF PARTICULARS** Date: March 30, 2009 Time: 1:30 p.m. Court: Hon. James Ware, Courtroom 8

NOTICE

PLEASE TAKE NOTICE, that on March 30, 2009 at 1:30 p.m., or as soon as the matter may be heard before the Honorable James Ware, defendants Lan Lee and Yuefei Ge will and hereby do move the Court for an order requiring the government to issue a bill of particulars specifying the alleged benefit to a "foreign government, foreign instrumentality, or foreign agent" under 18 U.S.C. sections 1831(a)(3) and (a)(4). This motion is based upon the instant notice, the attached memorandum of points and authorities, the records in this case, and upon such argument as made by made at the hearing on March 30.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The government alleges that defendants Lan Lee and Yuefei Ge illegally possessed trade secrets with the knowledge or the intent that such possession would "benefit" a "foreign instrumentality, or foreign agent," in violation of 18 U.S.C. section 1831(a). The superseding indictment does not explain how the alleged theft of trade secrets could benefit a foreign government, and the prosecution has provided no discovery on this question. Neither court decisions nor legislative history offer guidance on what "benefit" means under this statute. The defendants are thus left to guess how the government will attempt to prove its case.

The lack of specificity severely hampers defendants' trial preparation, allows the government to prejudicially shift its theories mid-trial, and leaves the defendants open to future prosecutions arising from the same alleged theft. Defendants therefore respectfully request the Court order the government to issue a bill of particulars specifying the nature of the alleged benefit to a "foreign instrumentality, or foreign agent" under section 1831.

II. LEGAL STANDARD

On motion of the defendant, the court may order the government to file a bill of particulars. FED. R. CRIM. P. 7(f). Such a motion "is appropriate where a defendant requires clarification in order to prepare a defense." *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983) (*citing Will v. United States*, 389 U.S. 90, 99 (1967)). A bill of particulars serves "to apprise the defendant of the specific charges being presented so as to minimize surprise at trial, to aid the defendant in preparing for trial, and to protect against double jeopardy." *United States v. Burt*, 765 F.2d 1364, 1367 (9th Cir. 1985); *Yeargain v. United States*, 314 F.2d 881, 882 (9th Cir. 1963) (the "purpose of a bill of particulars is to protect a defendant against a second prosecution for an inadequately described offense, and enable him to prepare an intelligent defense". The fact that an indictment sets forth all the elements of the crime charged is not sufficient to defeat a request for a bill of particulars. *See, e.g., United States v. Mosley*, 786 F.2d 1330, 1334 (7th Cir. 1986) ("When an indictment contains all the essential elements of the charged offense, the accused may obtain the factual proof supporting the charges, if vital to his

defense, by a motion for a bill of particulars.").

As originally drafted, Rule 7(f) required a showing of cause before the court could order a bill of particulars. *See* FED. R. CRIM. P. 7(f), Advisory Committee Notes to 1966 Amendment. However, this requirement was stricken in order to "encourage a more liberal attitude by the courts toward bills of particulars." *Id.* "This amendment requires that the defendant be given the benefit of the doubt in gray areas." *United States v. Thevis*, 474 F.Supp. 117, 124 (D.C. Ga., 1979). The committee cited *United States v. Smith,* 16 F.R.D. 372 (W.D. Mo. 1954), as an illustration of the proper use of discretion in ordering bills of particulars. As the Smith court explained, "it seems quite clear that where charges in an indictment are so general that they do not sufficiently advise the defendant of the specific acts with which he is charged, a bill of particulars should be ordered." *Smith,* 16 F.R.D at 375; *see also United States v. Torres*, 901 F.2d 205, 234 (2d Cir. 1990) (bill of particulars is required "where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused").

In determining whether to order a bill of particulars, "the court must examine the totality of the information available to the defendant – through the indictment, affirmations, and general pre-trial discovery – and determine whether, in light of the charges that the defendant is required to answer, the filing of a bill of particulars is warranted." *United States v. Bin Laden*, 92 F.Supp.2d 225, 233 (S.D.N.Y. 2000). However, the court cannot "rely solely on the quantity of information disclosed by the government; sometimes, the large volume of material disclosed is precisely what necessitates a bill of particulars." *Id.* at 234. Because the decision whether to order a bill of particulars rests "on the details of a particular case," courts have observed that "the precedents furnish little help in disposing of requests for bills of particulars in criminal cases." *Id.* (citation omitted). Because a clear and unambiguous indictment is crucial to the preparation of a defense, "any doubt must be resolved in favor of disclosure and the conflicting concerns must yield to the paramount public interest in affording the accused a reasonable foundation for mounting a defense." *United States v. Manetti*, 323 F. Supp. 683, 696 (D. Del. 1971).

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III. ALLEGATIONS REGARDING THE FOREIGN ENTITY

Counts One, Two, and Three of the superseding indictment charge defendants with conspiracy and economic espionage in violation of 18 U.S.C. sections 1831(a)(3) and (a)(4). Those provisions apply to any person who, "intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent," knowingly "receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization," or attempts to do the same. The allegedly stolen trade secrets are Netlogic Microsystems, Inc.'s "CAM 3 data sheets" and Taiwan Semiconductor Manufacturing Company, Ltd.'s "Spice Model 0.13µm Logic Salicide computer software program." Indictment at ¶¶ 10, 12. The allegations in the superseding indictment relevant to economic espionage are the following.

First, the indictment discusses the "863 Program," which it describes as a "funding plan created and operated by the government of the People's Republic of China ('PRC')." *Id.* at ¶ 1(c). According to the government, the 863 Program is designed "to develop and encourage the creation of technology in PRC," and focuses on "high technology communications and laser technology, with an emphasis on military applications." *Id.* The indictment claims that the General Armaments Department ("GAD") of the Chinese military "had a regular role in, and was a major user of, the 863 Program." *Id.*

Next, the indictment alleges that Mr. Lee created a corporation called SICO Microsystems, Inc., "for the purpose of obtaining venture capital to develop and sell products based upon trade secrets stolen from NLM and TSMC." *Id.* at ¶ 1(d). SICO is then alleged to have agreed with FBNI, a venture capital company, "to develop and sell microprocessor chips and to assist in securing funding for SICO from the 863 program and the GAD." *Id.* at ¶ 1(e).

Count One of the superseding indictment alleges conspiracy to commit economic espionage. According to the indictment, it was "part of the conspiracy that the defendants intended and planned to obtain venture capital from the 863 program and the GAD, among others, to finance SICO." *Id.* at ¶ 6. The following relevant overt acts are alleged:

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- Mr. Lee is alleged to have "possessed on his home computer a cooperation agreement, dated April 4, 2003, between SICO and FBNI." That document allegedly "set out . . . FBNI's agreement to provide venture capital to SICO . . . [and] stated that 'the Chinese '863' project shall be applied to under the name Beijing FBNI.'" *Id.* at ¶ 8(d).
- Mr. Ge is alleged to have possessed on his computer a letter to a professor in China "'enclosing the employment offer for the '863' program[.]'" *Id.* at ¶ 8(f).
- Mr. Lee is alleged to have had on his home computer a document "assuring him that the PRC government and army are 'not that scary,' and that 'they are only help and support, and satisfy our various needs,'" as well as "application forms for the 863 program." *Id.* at ¶¶ 8(g)-(h).
- Mr. Ge is alleged to have had on his computer "application forms for the 863 program" and "instructional informations [sic] for the 863 program." *Id.* at ¶ 8(i).
- Mr. Lee is alleged to have possessed a "SICO business plan" stating that 'the purpose of this business plan is to seek funding of U.S. $3.6 million from the 863 program or other departments.'" *Id.* at ¶ 8(j).

Counts Two and Three charge both defendants with unlawful possession of the datasheets and the computer program and with "intending and knowing" that such possession "would benefit a foreign government, foreign instrumentality, and foreign agent, the 863 Program, and the GAD, among others[.]" *Id.* at ¶¶ 10, 12.

IV. ARGUMENT

A. No Material Available to the Defense Explains the Alleged "Benefit" to a Foreign Entity

As set forth above, the indictment claims the defendants illegally possessed trade secrets belonging to TSMC and NLM, founded a company to sell products using those trade secrets, and planned to seek funds from the Chinese government-sponsored 863 Program. Thus, the indictment suggests only that the defendants planned to request funds *from* the 863 Program; what the indictment does not explain is how the possession of stolen trade secrets was to *benefit* the 863 Program, GAD, or any other foreign entity. To prepare for trial, the defendants must know how the government believes the illegal possession of trade secrets was intended to benefit a foreign entity.

The discovery provided to the defense is of no help in divining the nature of the charges. The government has provided no documents that reveal what it contends was the benefit conferred on the 863 Program or the GAD by the defendants' actions.

Nor do case law or legislative history shed any light on the question. Section 1831 was enacted in 1996, and there have been no opinions analyzing its elements. No court has interpreted the phrase "benefit [to] any foreign government, foreign instrumentality, or foreign agent." Indeed, counsel is aware of only one decision that even mentions the substance of section 1831. In that case, a prosecution for "ordinary" theft of trade secrets – *i.e.* with no allegation of international espionage – the court briefly outlined the difference between sections 1831 and 1832:

> The [Economic Espionage Act] criminalizes two principal categories of corporate espionage, including "Economic espionage" as defined by 18 U.S.C. § 1831, and the "Theft of trade secrets" as defined by § 1832. The former provision punishes those who knowingly misappropriate, or attempt or conspire to misappropriate, trade secrets with the intent or knowledge that their offense will benefit a foreign government, foreign instrumentality, or foreign agent. The legislative history indicates that § 1831 is designed to apply only when there is "evidence of foreign government sponsored or coordinated intelligence activity." 142 CONG. REC. S12,212 (daily ed. Oct. 2, 1996) (Managers' Statement for H.R. 3723). By contrast, § 1832, the section under which the defendants are charged, is a general criminal trade secrets provision.

United States v. Hsu, 155 F.3d 189, 195 (3d Cir. 1998) (footnote omitted). The indictment in this case does not allege "foreign government sponsored or coordinated intelligence activity."

The legislative history only highlights how vague is the government's allegation of "benefit" to a foreign entity. According to the House Report, "benefit" is "intended to be interpreted broadly." H.R. REP. No. 104-788 (September 19, 1996), 1996 U.S.C.C.A.N. 4021, 4030.

> The defendant did not have to intend to confer an economic benefit to the foreign government, instrumentality, or agent, to himself, or to any third person. Rather, the government need only prove that the actor intended that his actions in copying or otherwise controlling the trade secret would benefit the foreign government, instrumentality, or agent in any way. Therefore, in this circumstance, benefit means not only an economic benefit but also reputational, strategic, or tactical benefit.

Id.[1] Senator Kohl, one of the bill's sponsors in the Senate, explained only that the proposed law would target "industrial espionage that is sanctioned and supported by foreign governments" and

[1] The United States Attorney's Manual quotes this language from the House Report but provides no further guidance on the term "benefit." *See* Criminal Resource Manual § 1128 (*available at* www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01128.htm).

that the prosecution must therefore prove "the perpetrator intended to or knew that his or her actions would aid a foreign government, instrumentality, or agent." 142 CONG. REC. S12,211 (October 2, 1996). Because Congress apparently intended the statute to be interpreted broadly and did not narrow the definition of the term, the government's failure to give the defendants any guidance in this regard is even more prejudicial.

B. The Defense Cannot Prepare for Trial Absent Information on the Alleged Benefit to a Foreign Entity

Given the lack of specificity in the indictment and the breadth of the relevant terms, there are an almost unlimited number of ways the government could attempt to show aid or economic, reputational, strategic, or tactical benefit to the Chinese government. For example, the prosecution could argue at trial that the defendants planned simply to hand TSMC's computer program and the NLM datasheet to the GAD. Or the government could claim the defendants were going to use the software and the datasheet to design a chip and then allow the GAD to manufacture it and sell it. Maybe the government believes the defendants planned to design and manufacture chips and give those chips to GAD to sell. The government may argue that the defendants intended to design, manufacture, and sell chips and then donate their profits to the 863 Program. Maybe the government believes the defendants would have had to repay any funding from the 863 Program with interest, thereby providing an economic benefit to the program. Maybe the government's theory is that the defendants planned to assist the GAD with the development of military technology. Or the government could attempt to prove the defendants intended to establish a business in China and the resulting tax revenue would have benefitted the Chinese government. Or maybe the government believes that *any* Chinese national who founds a new business confers "reputational" benefit on the Chinese government.

In short, there is no way to know how the alleged misappropriation of the datasheet and the software was supposed to benefit a foreign entity. Without more specificity, the defense cannot prepare for trial. For example, if defendants guess the government wishes to prove no more than that the defendants were going to establish a business in China, they will be severely prejudiced at trial if in fact the government argues that Mr. Lee and Mr. Gee planned to design

military technology for the GAD.

The lack of specificity gives rise to a second danger. The superseding indictment gives the government the latitude to shift course mid-trial. The government could argue the defendants were intending to benefit the foreign government in one way, and, if the defense effectively rebuts that argument at trial, the government could simply change their definition of "benefit." Given the broad, unbounded language of the indictment, there would be nothing to prevent the government from engaging in such tactics.

Finally, the indictment as drafted gives the defense no meaningful protection against double jeopardy. If the government were to lose at trial, it could recharge the defendants with a violation of the same statute. The government could argue that the benefit at issue in the first trial was different from that at issue at the second trial, and therefore charges were not barred by double jeopardy.

The indictment as currently written raises all of these dangers. It undermines the defense's right to a fair trial by leaving the defense guessing, perhaps until closing argument, about what they have been charged with. There should be no room for such game-playing at trial. The defendants have a right to know what they are alleged to have done. The government has an obligation to stick with its charges throughout trial. The only way that can be guaranteed is if the government is required to spell out the benefit the defendants allegedly tried to supply to a foreign entity.

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V. CONCLUSION

Based on the foregoing, defendants respectfully request that the Court order the government to file a bill of particulars specifying the nature of the alleged benefit to the "foreign government, foreign instrumentality, or foreign agent."

Date: March 13, 2009

Respectfully submitted,

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