UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**Case No: 3:17-cr-** 71
v.	)	
	)	**Judges:** Varlan / Shirley
BERTHOLD TECHNOLOGIES U.S.A., LLC	)	
	)	
	)	
Defendant.	)	

PLEA AGREEMENT

The United States of America, by the United States Attorney for the Eastern District of Tennessee, and the defendant, BERTHOLD TECHNOLOGIES, USA (hereinafter "BERTHOLD USA" or "the defendant"), by and through its authorized representative, General Manager Jon Buchanan, and its attorney, Wade V. Davies, have agreed upon the following:

1. The defendant agrees to plead guilty to the Information filed in the above-captioned case, which is incorporated herein by reference, charging violations of 49 U.S.C. § 5124(a), knowingly violating 49 U.S.C. § 5104(a) by misrepresenting that package complied with requirements for transportation of hazardous materials. The punishment for this offense is a fine of up to $500,000 and a special assessment of $400.00 per count.

2. The defendant has read the Indictment and understands the crimes charged. The defendant is pleading guilty because the defendant is in fact guilty. In order to be guilty, the defendant agrees that each of the following elements of the crime must be proved beyond a reasonable doubt:

a. The defendant, by and through its employees or officers or others authorized to act on its behalf and within their scope of employment, made a

representation, by marking or otherwise, that a package, component of a package, or packaging for transportation of hazardous material met the requirements of the applicable regulation or regulations, to wit, that the package had been subjected to water spray, free drop, stacking, and penetration testing pursuant to 49 C.F.R. § 173.465;

b. such representation was false; and

c. the defendant acted knowingly, in that it had actual knowledge of the facts giving rise to the violation, or a reasonable person acting in the circumstances and exercising reasonable care would have the knowledge of the violation.

3. In support of the defendant's guilty plea, the defendant agrees and stipulates to the following facts, which satisfy the offense elements. These are the facts submitted for purposes of the defendant's guilty plea. They do not necessarily constitute all of the facts in the case. Other facts may be relevant to sentencing. Both the defendant and the United States retain the right to present additional facts to the Court to ensure a fair and appropriate sentence in this case

a. BERTHOLD USA is a limited liability corporation registered in the State of Tennessee. BERTHOLD USA's principal business address is 99 Midway Lane, Oak Ridge, Tennessee. BERTHOLD USA is a wholly-owned subsidiary of Berthold Technologies, GmBH& Co. (hereinafter "Berthold DE"), located in Bad Wildbad, Germany. BERTHOLD USA is a "person" as that term is used in the statutes referenced herein.

b. The Pipeline and Hazardous Materials Safety Administration (hereinafter "PHMSA") of the United States Department of Transportation regulates the

packaging requirements for the transportation of hazardous materials, including certain radioactive materials pursuant to 49 C.F.R. Part 178, Subpart K, and 49 C.F.R. Part 173, Subpart I. These regulations require, among other things, that the packaging for "Class 7" radioactive materials, which includes Cesium 137, meet certain design and performance requirements as provided in 49 C.F.R. 173.465, including water spray, free drop, stacking, and penetration testing.

c. BERTHOLD USA developed a density measuring device, known as the Berthold Technologies LB8010 Heavy Duty Source Shield (hereinafter "U.S. LB8010"), for measuring fluid density to be used in the oil and gas "fracking" industry to measure the density of fluids being injected into underground wells. The LB8010 employed a gamma particle emitter that contained Cesium-137, and was subject to the Type A packaging requirements under 49 C.F.R. Part 173, Subpart I. The applicable regulations required that the US LB8010 be subjected to water spray, free drop, stacking, and penetration testing as set forth in 49 C.F.R. § 173.465. The LB8010 was to be manufactured in the United States.

d. Berthold DE had previously produced a device (hereinafter "the DE LB8010") similar to the U.S. LB8010; however, there were significant and material design differences between the design and construction of the US LB8010 and of the DE LB8010.

e. The DE LB8010 was safety tested according to the International Atomic Energy Agency standards for Class 7 radioactive materials and, as such, could be used to transport the DE LB8010 in the United States *See* 49C.F.R. § 173.415(d).

f. BERTHOLD USA produced, marketed, and sold the US LB08010

throughout the United States and represented that it was manufactured in Germany and had been tested and conformed to the DOT Type A Package testing requirements; however, in truth and in fact, at the relevant times set forth herein, the US LB8010 was manufactured in Oak Ridge, Tennessee, and had not been subjected to the requisite water spray, free drop, stacking, and penetration safety testing as set forth in 49 C.F.R. § 173.465.

g. BERTHOLD USA affixed a label plate to the US LB8010 that falsely and fraudulently represented that the device had been manufactured in Germany.

h. On or about March 21, 2014, BERTHOLD USA sold and shipped two of the above-described US LB8010s from the Eastern District of Tennessee to a business located in Midland, Texas.

i. On or about October 21, 2014, BERTHOLD USA sold and shipped three of the above-described US LB8010s from the Eastern District of Tennessee to El Reno, Oklahoma.

4. The defendant understands that by pleading guilty the defendant is giving up several rights, including:

a. the right to be indicted by a grand jury;

b. the right to plead not guilty;

c. the right to a speedy and public trial by jury;

d. the right to assistance of counsel at trial;

e. the right to be presumed innocent and to have the burden of proof placed on the United States to prove the defendant guilty beyond a reasonable doubt;

f. the right to confront and cross-examine witnesses against the defendant;

g. the right to testify on one's own behalf, to present evidence in opposition to the charges and to compel the attendance of witnesses; and

h. the right not to testify and to have that choice not used against the defendant.

5. The parties agree that the appropriate disposition of this case would be the following as to each count:

a. The Court may impose any lawful fines and any lawful term of probation up to the statutory maximums.

b. The Court will impose special assessment fees as required by law; and

c. No promises have been made by any representative of the United States to the defendant as to what the sentence will be in this case. Any estimates or predictions made to the defendant by defense counsel or any other person regarding any potential sentence in this case are not binding on the Court, and may not be used as a basis to rescind this plea agreement or withdraw the defendant's guilty plea. The defendant understands that the sentence in this case will be determined by the Court after it receives the presentence investigation report from the United States Probation Office and any information presented by the parties. The defendant acknowledges that the sentencing determination will be based upon the entire scope of the defendant's criminal conduct, the defendant's criminal history, and pursuant to other factors and guidelines as set forth in the Sentencing Guidelines and the factors set forth in 18 U.S.C. § 3553.

6. Pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, the defendant and the United States agree to recommend that the Court impose the sentence set forth

below. In the event that the Court declines to accept the parties' position on the recommended sentence, the defendant will not have a right to withdraw the defendant's guilty pleas:

a. On or before the date of entry of defendant's guilty plea, the defendant shall pay $50,000 to the Clerk, United States District Court for the Eastern District of Tennessee, which shall be credited toward the full fine amount to be paid at sentencing, as set forth below;

b. The sentencing of this matter shall be set approximately 18 months after the entry of the defendant's guilty plea. Prior to sentencing, the defendant shall undertake remediating, re-packaging, or otherwise curing any packaging deficiencies with the US LB8010s that the defendant sold or placed into commerce between April 1, 2007 and December 31, 2016, as required by PHMSA (hereinafter "remedial measures"), and submit documentation of expenditures for such remedial measures to the United States Attorney's Office and United States Probation Office for the Eastern District of Tennessee;

c. The minimum fine to be paid by the defendant shall be $50,000, paid upon entry of the defendant's guilty plea, as set forth above;

d. The total combined cost of the full fine and the remedial measures to be paid by the defendant shall be $500,000;

e. The defendant shall pay the $800.00 special assessment on the day of sentencing;

f. In the event that the defendant has not completed the remedial measures prior to the sentencing, the defendant shall be placed on probation for a period of time, up to two years, sufficient to complete the remedial measures; furthermore,

the computation of the total amount of fine to be paid shall be based upon the costs of the remedial measures as of the date of sentencing. If the defendant has completed the remedial measures and fulfilled its financial obligations hereunder at the time of sentencing, the defendant shall not be placed on probation; and

g. In the event that the ownership of Berthold USA is sold or transferred to another party, defendant shall notify the representatives of any successor owner of Berthold USA of terms of this Plea Agreement, including but not limited to the remedial measures and payment of the fine amount as set forth above, prior to the sale.

7. Given the defendant's agreement to plead guilty, the United States will not oppose a two-level reduction for acceptance of responsibility under the provisions of Section 3E1.1(a) of the Sentencing Guidelines. Further, if the defendant's offense level is 16 or greater, and the defendant is awarded the two-level reduction pursuant to Section 3E1.1(a), the United States agrees to move, at or before the time of sentencing, the Court to decrease the offense level by one additional level pursuant to Section 3E1.1(b) of the Sentencing Guidelines. Should the defendant engage in any conduct or make any statements that are inconsistent with accepting responsibility for the defendant's offenses, including the commission of additional offenses prior to sentencing, the United States will be free not to make such motion or to withdraw such motion if already made, and will be free to recommend to the Court that the defendant not receive any offense level reduction for acceptance of responsibility under Section 3E1.1 of the Sentencing Guidelines.

8. Financial Obligations. The defendant agrees to pay all fines imposed by the Court to the Clerk of Court. The defendant also agrees to tender the full fine amount to the Clerk of

Court on the date of sentencing.

9. The defendant acknowledges that the principal benefits to the United States of a plea agreement include the conservation of limited government resources and bringing a certain end to the case. Accordingly, in consideration of the concessions made by the United States in this agreement and as a further demonstration of the defendant's acceptance of responsibility for the offense committed, the defendant voluntarily, knowingly, and intentionally agrees to the following:

a) The defendant will not file a direct appeal of the defendant's conviction or sentence.

b) The defendant will not, whether directly or by a representative, request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including, without limitation, any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a.

10. This agreement becomes effective once it is signed by the parties and is not contingent on the defendant's entry of a guilty plea. If the United States violates the terms of this agreement, the defendant will have the right to withdraw from this agreement. If the defendant violates the terms of this agreement in any way (including but not limited to failing to enter guilty pleas as agreed herein, moving to withdraw guilty pleas after entry, or by violating any court order or any local, state or federal law pending the resolution of this case), then the United States will have the right to void any or all parts of the agreement and may also enforce whatever parts of the agreement it chooses. In addition, the United States may prosecute the defendant for any and all federal crimes that the defendant committed related to this case,

including any charges that were dismissed and any other charges which the United States agreed not to pursue. The defendant expressly waives any statute of limitations defense and any constitutional or statutory speedy trial or double jeopardy defense to such a prosecution. The defendant also understands that a violation of this plea agreement by the defendant does not entitle the defendant to withdraw the defendant's guilty plea in this case.

11. This plea agreement and the supplement constitute the full and complete agreement and understanding between the parties concerning the defendant's guilty plea to the above-referenced charges, and there are no other agreements, promises, undertakings, or understandings between the defendant and the United States. The parties understand and agree that the terms of this plea agreement can be modified only in writing signed by all of the parties and that any and all other promises, representations, and statements whether made before, contemporaneous with, or after this agreement, are null and void.

NANCY STALLARD HARR
UNITED STATES ATTORNEY

10 July 2017
Date

By: Matthew T. Morris
Matthew T. Morris
Assistant United States Attorney

July 6, 2017
Date

Berthold Technologies, U.S.A., LLC
Defendant
By: General Manager Jon Buchanan
Authorized Representative

7/6/2017
Date

Wade V. Davies
Wade V. Davies
Attorney for the Defendant