

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

CRIMINAL NO. 00-80278

Plaintiff,

HON: Denise Page Hood

v.

VIOLATION: 15 U.S.C. § 1
18 U.S.C. § 371

D-1 SAUGER INDUSTRIES, INC., and

D-2 JOHN A. BAKER,

FILED: March 19, 2001

Defendants.

**RESPONSE AND MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION FOR BILL OF PARTICULARS**

I.
INTRODUCTION

Defendants have filed a Motion for a Bill of Particulars, requesting five categories of information. The United States opposes the Motion as unnecessary and inappropriate. The Indictment, the documentary discovery already provided, Mr. Baker's own admissions, and additional information recently provided to Defendants make a Bill unnecessary. Moreover, because of the ample information already available to Defendants, ordering a Bill here is inappropriate because Defendants cannot make the requisite showing of "actual surprise and substantial prejudice" required by Sixth Circuit precedent for a Bill of Particulars. Accordingly, the United States requests that the Court deny the Motion.

II. BACKGROUND

In a two-count Indictment, Defendants were charged with violating the Sherman Act (15 U.S.C § 1) and conspiracy against the United States (18 U.S.C. § 371) with mail fraud and money laundering as the objects of the conspiracy. The Indictment is nineteen pages in length, beginning with almost five pages of background information regarding the Defendants, their co-conspirators, and a description of the bidding process. Count I then sets forth the elements of a violation of 15 U.S.C. §1, identifies co-conspirators, specifies the beginning and ending dates of the conspiracy, details the bid rigging process, and gives a lengthy description of the conspiracy. In Count II, the Indictment details the 18 U.S.C. § 371 conspiracy, the beginning and ending dates of the conspiracy, and includes a lengthy recitation of fifty-one overt acts committed by the conspirators.

The United States has also provided Defendants with extraordinary discovery. On January 16, 2001, a letter, attached as Exhibit 1, was sent to Defendants outlining the United States' Federal Rule of Criminal Procedure 16 production. Appended to that letter was a group of approximately 330 Bates-stamped documents that the United States had pulled, copied, and sent to the Defendants with the notification that these were documents that the United States considered as central to its case.¹ Also appended to the January 16th letter was a copy of a report

¹The United States also made the universe of documents gathered in the investigation available for inspection and copying. The United States assisted that process by providing an index of the documents and by stationing a paralegal to assist counsel in his retrieval and examination of the materials. Defendants reviewed the documents on February 14 and 15, 2001, and another 675 pages of documents were copied.

of interview with Mr. Baker by an FBI agent and an IRS agent in 1996. In that interview, Mr. Baker admitted the outline of the conspiracies and identified his co-conspirators.

Finally, counsel requested, in a letter dated February 26, 2001, the same General Motors' contracts and co-conspirator names as he has requested in his Motion for a Bill of Particulars. In response, the United States sent counsel a letter, attached as Exhibit 2, providing further information, including a listing of the contracts that the United States considers as objects of the bid rigging conspiracy. The information already provided to Defendants goes far beyond that required and renders a Bill unnecessary.

III.
A BILL OF PARTICULARS IS NOT NECESSARY ABSENT
ACTUAL SURPRISE AND SUBSTANTIAL PREJUDICE

A bill of particulars is designed: 1) to inform the defendant of the nature of the charges against him so that he can adequately prepare for trial; 2) to avoid or minimize the danger of unfair surprise at trial; and 3) to enable the defendant to plead double jeopardy if he is later charged with the same crime when the indictment itself is too vague and indefinite for such purposes. *United States v. Birmley*, 529 F.2d 103, 108 (6th Cir. 1976). It is not a discovery tool. *United States v. Salisbury*, 983 F.2d 1369, 1375 (6th Cir. 1993). *See also, United States v. Martin*, 1987 WL 38036, *3 (6th Cir. 1987) (“Clearly, a bill of particulars is not to be used as a general discovery device”). A defendant also has “no unconditional right to a bill [of particulars].” *United States v. Bales*, 813 F.2d 1289, 1294 (4th Cir. 1987). Rather, the decision to order a bill of particulars is within the sound discretion of the court. *Salisbury*, 983 F.2d at

1375. A court does not abuse its discretion by denying a bill of particulars in light of a detailed indictment. *Salisbury*, 983 F.2d at 1375. Furthermore, “[a Bill] is not meant as a tool for the defense to obtain detailed disclosure of all evidence held by the government before trial.” *Id.* Rather, in this Circuit a bill of particulars is required only where the defendant would suffer “actual surprise and substantial prejudice” at trial. *United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991). *Accord United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993). Analysis of these cases shows that surprise and prejudice are determined by examining the indictment and the other facts known to the defendant, from whatever source. *See Phibbs*, 999 F.2d at 1086, *Rey*, 923 F.2d at 1222. Ordering a Bill under the facts in this case would be inappropriate since Defendants cannot make the requisite showing of “actual surprise and substantial prejudice.” Each of Defendants’ requests will be analyzed in turn.

A. Vague Allegations in the Indictment

Defendants complain that the Indictment is too “vague, indefinite, and incapable of reasonable understanding.” On the contrary, this Indictment is extraordinarily long, detailed, and specific. It specifies the elements of both crimes, including the dates of each conspiracy; names co-conspirators; provides a multi-page “Description of the Offense” for each count; and in the case of Count II, describes fifty-one overt acts committed in furtherance of the crime.

In addition, the discovery package sent to Defendants expands their knowledge of facts surrounding the Indictment, including every overt act for which there are documents. For example, several overt acts concern checks written by Albert Charles to D & M Investments. Included in the copied documents are the complete records of D & M Investments as they relate

to checks written by Al Charles over several years, and include documents relating to the underlying loans which gave rise to the checks. These materials vastly expand Defendants' base of knowledge concerning these overt acts. This is but one example of the type of materials provided to Defendants. This information eliminates any possible claim of "actual surprise and substantial prejudice" and negates the allegations of vagueness and indefiniteness.

Moreover, Defendant Baker's admissions to the case agents also demonstrates an understanding of the conspiracies alleged in the Indictment. By outlining the conspiracies and his role in them, and identifying his co-conspirators, Baker simply cannot say that he does not understand the charges or is incapable of preparing a defense. It is hard to imagine better evidence than a defendant's own admissions when deciding whether there has been actual surprise or substantial prejudice.

B. End Date of the Conspiracy

Defendants ask for the date of the last payments from General Motors to any conspirator and the last payments or money transfers among or between any of the conspirators, supposedly in order to determine the end date of the conspiracies. Defendants already know the ending date of the conspiracies; it is stated in paragraph two of Counts I and II of the Indictment.

(Indictment, pgs. 5 and 8). What Defendants really want is the help of the United States in affirmatively attacking the Indictment. As noted earlier in *Birmley*, 529 F.2d at 108, a Bill is designed to avoid surprise, allow defendants to plead double jeopardy if necessary, and inform them of the charges so they can prepare a defense. Asking the United States to arm Defendants so they might attack the Indictment is improper.

1. Date of Last Payment by General Motors To Conspirators

Moreover, Defendants already have the documents that show the last payments, assuming that this is a proper request. A simple reading of the Indictment, together with a review of the supplemental information, provides ample information on the payments from General Motors. Payments from General Motors to various conspirators are detailed in Count II of the Indictment as overt acts 23, 26, 35, and 37. (Indictment, pgs. 14 and 16). Defendants were also provided with computer listings of payments from General Motors to each of the conspiring contractors which details the date of the payment, the amount of the payment, and the contract for which the payment was made. If that is not enough, Defendants have reviewed all of the documents provided by General Motors. The Indictment and supporting documents eliminate the possibility of “actual surprise and substantial prejudice” on this issue. That is all that is required.

2. Payments Between the Conspirators

Defendants also have sufficient information to answer the question as to the dates of the last payments to or among the co-conspirators. Count II alleges overt acts 42-45 and 47-51, which are the checks written by Charles to D & M Investments discussed earlier. These transactions continued into April of 1995, the end date of the conspiracies as alleged in the Indictment. As detailed earlier, the discovery package expands and amplifies the information contained in these overt acts by detailing the entire relationship between Charles and D & M Investments. Defendants already possess the information on this issue and ultimately, proof of these overt acts at trial cannot form the basis for actual surprise and substantial prejudice. Therefore, there is no basis for a Bill.

C. Identities of Co-Conspirators

Defendants ask that the United States identify each co-conspirator. Courts have been particularly sensitive to such a request, suspicious that it is nothing more than a request for the government's witness list. "A district court does not abuse its discretion in denying an order for a bill of particulars where the purpose of the bill is to obtain a list of the government's witnesses." *United States v. Largent*, 545 F.2d 1039, 1043 (6th Cir. 1976). Indeed, the Sixth Circuit has upheld a denial of a motion for a bill of particulars as to the identity of co-conspirators. "As long as the indictment contained the elements of offense and gave defendant notice of the charges against him, it is not essential that a conspirator know all other conspirators." *United States v. Rey*, 923 F.2d at 1227.

In this case, the United States has already provided far more information. The Indictment names several individual co-conspirators. Specifically, Richard Bellestri, Albert Charles, Charles Long, Frederick Watson, and Theodore Sawchuk all appear in the Indictment (Indictment, pgs. 2-3), along with background as to their companies. Defendant Baker's own admissions to the agents names most, if not all, of the above parties.

In addition, as the United States told Defendants in its letter of March 1st, other individuals associated with Jedav Industries, Clarr Industries, Motorama, and SA-GO also made statements and committed acts in furtherance of the conspiracy, either individually or in their capacity as corporate representatives. The fact that individuals associated with the already known conspiring companies may have also participated in the conspiracies cannot come as any surprise to Defendants. The United States should not have to name these individuals, since it would be

tantamount to a witness list. The case law only requires that the Defendants be apprised of the conspiracy, not of the names of the conspirators. *Rey*, 923 F.2d at 1227. In this case, the Defendants know far more.

Furthermore, Defendants' authority does not support their request. Defendants cite *United States v. Rosa*, 891 F.2d 1063 (3d Cir. 1989) and *United States v. Previti*, 644 F.2d 318 (4th Cir. 1981), as authority to support their claim that identities of co-conspirators must be released. These cases are either completely inapposite or factually unrelated. Addressing *Previti* first, the case deals not at all with the identity of co-conspirators. Rather, *Previti's* holding concerned whether an indictment failed to charge an offense. *Id.* at 319. Nowhere does the opinion treat the issue of revealing the identity of a co-conspirator in a bill of particulars.

Turning to *Rosa*, the Third Circuit held that the district court's denial of a bill of particulars to identify the supervisees controlled by defendant in a continuing criminal enterprise (CCE) was not abuse of discretion because defendant had suffered no prejudice. *Rosa*, 891 F.2d at 1067. In dicta, the court said that it believed that a defendant should be advised prior to trial of the individuals claimed by the government to be controlled persons so that he or she may prepare a defense and avoid surprise at trial. *Id.* at 1066. But the facts there indicated neither actual surprise nor substantial prejudice because the defendant knew the names from other sources.

The instant case is not a CCE case, and even if it were, the controlling authority in the Sixth Circuit is *United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993). In *Phibbs*, the court held that where a defendant failed to establish actual surprise at trial and prejudice, "there is no requirement that an indictment or a bill of particulars identify the supervisees in a [CCE case]."

Id. at 1086. These cases simply do not support the assertion that the United States must reveal the names of co-conspirators.

D. GM Tooling Contracts That Were Objects of the Conspiracy

Defendants request that the United States identify the General Motors contracts that it believes were the object of the conspiracies. Again, the Indictment and the discovery package provide much information. Some of the contracts that were the objects of the conspiracy are identified in the Indictment under overt acts 23, 26, 35 and 37. (Indictment, pgs. 14 and 16). These overt acts also were supplemented by additional information provided in the discovery package. In that package the request for quotes, the bids, General Motors' bid compilations, and other supporting documentation were provided. In addition, in an effort to expedite the discovery process and negate any argument of surprise at trial, the United States provided a list of contracts as Attachment 1 to the government's March 2nd letter to Defendants. Again, this goes far beyond what is required by case precedent and precludes any credible argument of actual surprise and substantial prejudice.

IV.
CONCLUSION

The controlling authority requires a showing of actual surprise and substantial prejudice for granting of a bill of particulars. The United States has provided extensive information to the Defendants, through the Indictment and through discovery. Defendant Baker's admitted knowledge of the conspiracy further negates any surprise and prejudice. This is enough. The

United States respectfully requests that this Court deny Defendants' Motion.

Respectfully submitted,

SCOTT M. WATSON
Chief
Cleveland Field Office

_____/s/_____
By: MICHAEL F. WOOD
Assistant Chief

KEVIN C. CULUM
BRIAN J. STACK

Trial Attorneys,
U.S. Department of Justice
Antitrust Division
Plaza 9 Building
55 Erieview Plaza, Suite 700
Cleveland, OH 44114-1816
Phone:(216) 522-4107
FAX: (216) 522-8332

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Response and Memorandum in Opposition to Defendants' Motion for Bill of Particulars* was sent via Federal Express to the Office of the Clerk of Court on this 16th day of March 2001. In addition, a copy of the above-captioned pleading was served upon the defendants via regular U.S. mail on this 16th day of March 2001.

James H. Hudnut
Colombo and Colombo, P.C.
40701 Woodward Suite 50
P.O. Box 2028
Bloomfield Hills, Michigan 48304

“/s/”

MICHAEL F. WOOD

Assistant Chief

U.S. Department of Justice

Antitrust Division

Plaza 9 Building

55 Erieview Plaza, Suite 700

Cleveland, OH 44114-1816

Phone:(216) 522-4107

Fax: (216) 522-8332