UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
	)	Case No. 97-0853-CR-Middlebrooks
v.	)	
	)	
ATLAS IRON PROCESSORS, INC., et. al.,	)	
	)	**RESPONSE OF THE**
	)	**UNITED STATES TO**
Defendants.	)	**DEFENDANTS' RENEWED**
	)	**JOINT MOTION**
	)	**FOR BOND PENDING APPEAL**

I

INTRODUCTION

The United States submits this Memorandum opposing the *Defendants' Renewed Joint Motion for Bond Pending Appeal,* submitted on behalf of defendants Anthony J. Giordano, Sr., Anthony J. Giordano, Jr. and David Giordano.

To put this pleading in perspective, a brief review of recent events in this case is helpful. On July 30, 1999, this Court sentenced Anthony J. Giordano, Sr., Anthony J. Giordano, Jr. and David Giordano (the "Giordano defendants") for their roles in this criminal case. Also, on July 30, 1999, the Giordano defendants filed their initial *Joint Motion for Bond Pending Appeal.* On August 31, 1999, this Court denied the Giordano defendants' initial *Joint Motion*, issuing its *Order Denying Defendant's Joint Motion for Release on Bail Pending Appeal.* On September 3, 1999, the Giordano defendants filed the *Renewed Joint Motion for Bond Pending Appeal* at issue here.

For the reasons provided below, this Court should deny the Giordano defendants' renewed motion for bond pending appeal.

II

THE GIORDANO DEFENDANTS
HAVE WAIVED THEIR RIGHT TO RAISE THIS ISSUE

The sole issue the Giordano defendants raise in their *Renewed Joint Motion* involves their belief that this Court incorrectly calculated the volume of commerce attributable to them under U.S.S.G. §2R1.1. Their initial *Joint Motion* did not raise this -- or any other -- sentencing issue. In their *Renewed Joint Motion* the defendants account for their failure to raise this issue earlier by glibly noting their initial *Joint Motion* "was drafted prior to sentencing." While this may serve as an explanation for the omission, it is not an acceptable excuse. By failing to raise this issue earlier, the Giordano defendants have waived their right to raise it now.

The defendants' explanation rings especially hollow given the conduct of their co-defendant. In his *Motion of Defendant Weil for Release on Bail Pending Appeal*, Randy Weil drafted a motion that raised sentencing issues. Specifically, Weil argued the Court erred in granting him an upward adjustment for his role in the criminal conduct.[1] Weil raised both issues in a single motion. Surely the Giordano defendants, with their phalanx of attorneys, could have done the same. Because the Giordano defendants failed to raise this sentencing issue in their initial *Joint Motion*, they have waived the right to raise it at this time. For this reason, the Court should deny the defendants' *Renewed Joint Motion*.

III

THE COURT SHOULD NOT GRANT THE
GIORDANO DEFENDANTS BOND PENDING APPEAL
BECAUSE THE VOLUME OF COMMERCE
ISSUE THEY RAISE IS NOT A "CLOSE" QUESTION

Even if the Giordano defendants had not waived the right to raise this issue, they still lose on the merits. In the two sections below the United States first

[1] The Court rejected Weil's contention when it issued its *Order Denying Defendant's Joint Motion for Release on Bail Pending Appeal*.

reviews the Eleventh Circuit's standard for granting bond pending appeal. Second, the United States explains why the defendants' volume of commerce issue does not meet the Eleventh Circuit's high standard that discourages granting bond pending appeal.

A. THE LAW DISCOURAGES BOND PENDING APPEAL

As discussed more thoroughly in its prior filings opposing the defendants' motions for bond pending appeal, the Bail Reform Act of 1984, 18 U.S.C. § 3143(b) (1998), governs the release of defendants on bond pending appeal. The Bail Reform Act requires that (1) the appeal raise a "substantial question of law or fact," and (2) "if that substantial question is determined favorably to the defendant on appeal, that decision is likely to result in reversal or an order for a new trial on all counts on which imprisonment has been imposed." United States v. Giancola, 754 F.2d 898, 900 (11th Cir. 1985).

In Giancola, the Eleventh Circuit adopted the Third Circuit's interpretation of the Bail Reform Act set forth in United States v. Miller, 753 F.2d 19 (3rd Cir. 1985). The Eleventh Circuit explained that the Third Circuit's interpretation of the 1984 Bail Reform Act achieved Congress' intent to limit the availability of bail pending appeal and its intent to reverse the previous presumption in favor of bail. Giancola, 754 F.2d at 900. The Eleventh Circuit stressed the Bail Reform Act "was intended to change the presumption so that the conviction is presumed correct and the burden is on the convicted defendant to overcome that presumption." Id. at 900, 901 (internal citations omitted).

With respect to the Bail Reform Act's first requirement, that the appeal raise a substantial question of law or fact, Miller defined a substantial question as "one which is either novel . . . has not been decided by controlling precedent, or . . . is fairly doubtful." Miller, 753 F.2d at 23. The Eleventh Circuit observed, however, that an issue without controlling precedent may nonetheless be an insubstantial

question.[2] Giancola tightened the Miller standard in yet another way, holding that "a substantial question is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." Giancola, 754 F.2d at 901.

With respect to the Bail Reform Act's second requirement that a decision is likely to result in reversal or an order for a new trial of all counts, Giancola held that it goes to the "significance of the substantial issue to the ultimate disposition of the appeal." Giancola, 754 F.2d at 900. A question may be substantial yet harmless, having nonprejudicial effect, or insufficiently preserved. Id. A reversal or new trial is "likely" only if a court concludes the question is "so integral to the merits of the conviction" that a contrary appellate holding will likely require reversal of the conviction or a new trial. Id.

B. THE VOLUME OF COMMERCE ISSUE RAISED BY THE DEFENDANTS HERE IS NOT A "CLOSE" QUESTION

In their *Renewed Joint Motion* the Giordano defendants make one argument they believe entitles them to bond pending appeal. They assert that the Court miscalculated the volume of commerce attributable to their price-fixing and customer-allocation conspiracy. Specifically, the Giordano defendants argue that the Court should only calculate those materials sold at the fixed price in their volume of commerce. They rely on a single district court case -- United States v. SKW Metals & Alloys, Inc., 4 F. Supp.2d 166 (W.D.N.Y. 1997) -- to support their position. For reasons explained below, this issue does not raise a substantial question of law or fact that likely will result in a reversal, a new trial, or a reduction in sentencing. Accordingly, the volume of commerce contention raised by

[2] Such a case occurs if an issue is "so patently without merit that it has not been found necessary for it to have been resolved," or if a question is without precedent simply because there is no reason to believe the Eleventh Circuit would depart from unanimous resolution of the issue by other circuits. Giancola, 754 F.2d at 901.

the Giordano defendants is not a "close" question under Giancola and, therefore, they are not entitled to bond pending appeal.

The United States is not aware of the basis for the defendants' wild projection as to how long it will take before the Eleventh Circuit, too, rejects their trial and sentencing issues. See *Renewed Joint Motion*, ¶ 5. Their 17-month projection is unsupported. Even more importantly, however, it is not controlling under Giancola and its progeny and should be given no weight.

The Giordano defendants' argument has many problems. First, the defendants wrongly argue that there is a "split in the circuits" regarding the proper method for calculating volume of commerce under the Sentencing Guidelines applicable to antitrust crimes. *Renewed Joint Motion*, ¶ 2. There is no such split. The defendants rely solely on a district court case out of the Western District of New York, SKW Metals, which is presently on appeal before the Second Circuit. SKW Metals stands alone as the only case supporting the Giordano defendants' tortured application of the Sentencing Guidelines. It is an outlying data point. No other court has followed it.

In contrast to the remote position staked out by the Giordano defendants, for purposes of calculating the volume of commerce attributable to the Giordano defendants under the Sentencing Guidelines, the United States' position -- and the methodology used by this Court -- is supported by United States v. Hayter Oil Co., 51 F.3d 1265 (6th Cir. 1995). In addition, as highlighted by the United States at the sentencing hearing and in its pre-sentencing filings with this Court, the volume of commerce position taken by the United States here is firmly supported by the recent decisions in United States v. Andreas, No. 96 CR 762, 1999 WL 51806 (N.D. Ill. Jan. 27, 1999), and in United States v. Maloof, Cr. No. H-97-93 (S.D. Tex., Dec. 1, 1998), a transcript of which was attached to the *Sentencing Recommendation of the United States*. See *Sentencing Recommendation of United States*, pp. 3-9; 13-25; Attachment III (Maloof transcript).

The true state of the law is this: The only Circuit Court to rule on the volume of commerce issue raised here by the Giordano defendants held in favor of the position advocated by the United States and applied by this Court in sentencing the Giordano defendants. See Hayter Oil. The method used in Hayter Oil was most recently used by the district court in the ADM case, the highest profile criminal antitrust case in recent years. See United States v. Andreas, No. 96 CR 762, 1999 WL 51806 (N.D. Ill. Jan. 27, 1999). There is no split in the circuits. The weight of the authority rests entirely with the United States.

Second, Hayter Oil and its progeny are correct. The plain language of the Antitrust Guideline and the Commentary to the Antitrust Guideline supports the Hayter Oil decision. See *Sentencing Recommendation of the United States*, pp. 3-9; 13-26. They are also consistent with the purpose of the Sherman Act's per se rule governing price-fixing and market allocation agreements, which the Commentary expressly endorses. U.S.S.G. §2R1.1, Comment. (Background). For this Court to adopt the SKW Metals definition of "affected by the violation" under §2R1.1(b)(2) would require it to reject the basic tenet of the per se rule that governs all price-fixing and market-allocation agreements, viz., all such agreements are deemed to be per se illegal. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940). In fact, such an agreement violates the Sherman Act even if conspirators never implement it or believe it to be completely unsuccessful. Id. Counting only the volume of commerce purchased at the target prices (rather than all of the commerce purchased while the conspiracy was in effect) forces the United States to prove the very thing it need not prove under the per se rule. This view is confirmed in the Commentary to U.S.S.G. §2R1.1, where the Sentencing Commission explains that it did not base the offense levels directly on the damage to consumers or profits to the defendants.[3] U.S.S.G. §2R1.1, Comment. (Background).

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[3] The SKW Metals court included only sales at or above the agreed price as commerce affected by the conspiracy, apparently in order to tie the sentence to the

Marketplace realities also support Hayter Oil, Andreas and Maloof. A price-fixing conspiracy "affects" all sales (or purchases), even those made below the fixed price. Once "competitors" agree to fix prices, the prices at which their goods are sold (or purchased) are no longer determined solely by the forces of free and open competition. Instead, they are determined, or at least affected, by the price-fixing agreement. A conspirator who cheats, for example, uses the fixed price as a benchmark from which to reduce its price. Sale (or purchase) prices, though not at the fixed price, are set in relation to the fixed price and are thus clearly affected by the conspiracy. Here, the defendants fixed the maximum price they would pay for scrap. Though Atlas occasionally cheated on its price-fixing agreement, the evidence at trial conclusively showed that Atlas used the fixed prices to decide how much to cheat. For example, pursuant to the illegal agreement, Atlas lowered its prices to scrap suppliers using the agreed-upon prices as its benchmark in setting its prices. Contrary to what Giordano defendants appear to argue, their cheating from the fixed prices did not result in competition between Atlas and Sunshine Metal Processing, Inc., during the conspiratorial period. All that happened was that Atlas cheated their customers a little less than what they had agreed to do. Moreover, Sunshine never deviated from the conspiracy, so that Atlas' co-conspirator cheated its customers to the fullest extent of the illegal agreement.

As explained more thoroughly in its *Sentencing Recommendation of the United States*, SKW Metals also is inapposite because it had nothing to do with market allocation. Here, the Giordano defendants not only fixed prices, but they

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defendants' ill-gained profits. SKW Metals, 4 F. Supp.2d at 168-69. Aside from the fact that the Commentary to the Antitrust Guideline specifically states the sentence is not to be based directly on damages or profits, limiting commerce to sales made at or above the agreed price does not tie the sentence to damages or profits. Profits gained as the result of the conspiracy can only be determined by knowing a defendant's costs and the market price it would have obtained absent the conspiracy. As to damages (a factor the SKW court did not consider), customers are damaged by sales below, as well as sales above, the fixed price, if the sale prices are higher than they would have been absent a conspiracy. Thus, a conspiracy can harm consumers even if it is "unsuccessful" by the SKW Metals definition.

also agreed on an elaborate scheme to allocate the market. SKW Metals nowhere provides any guidance as to how to calculate volume of commerce when conspirators agree to allocate suppliers. Here, the Giordano defendants' illegal supplier and volume allocation agreement affected all of their scrap purchases, regardless of the whether the agreed-upon fixed price was achieved or modified by the Giordano defendants to suit their benefit. Accordingly, Hayter Oil provides the correct method of calculating the volume of commerce.

For the foregoing reasons, in using the Hayter Oil methodology in sentencing the Giordano defendants, this Court correctly calculated the volume of commerce attributable to the Giordano defendants pursuant to U.S.S.G. §2R1.1. For these reasons, the issue raised by the Giordano defendants is not the type of "close" question Giancola envisioned when it described those few cases in which a defendant could qualify for bond pending appeal. Accordingly, their motion for bail pending appeal should be denied.

IV

THE GIORDANO DEFENDANTS SEEK INAPPROPRIATE RELIEF

Even if the Court were to find that the Giordano defendants have raised a "close" question under to Giancola, they do not seek appropriate relief. Assuming arguendo the Giordano defendants were to prevail on the volume of commerce issue and successfully argue that the volume of commerce attributable to them was less than $400,000 (See U.S.S.G. §2R1.1(b)(2)(A)), they each would still fall squarely within a Level 12 on the Sentencing Table. At a Level 12 (and with a Criminal History Category of I), the Sentencing Guidelines provide for incarceration of 10 to 16 months -- all of which may be required to be served in a federal penitentiary. Accordingly, the 12-month jail sentence imposed on each of the Giordano defendants by this Court is well within the Guidelines range -- either under a Level 13 or a Level 12. Thus, the Giordano defendants are wrong in contending that if they prevail on the volume of commerce issue their incarceration will likely be

reduced. It is just as likely that there jail sentence will remain unchanged and they will be ordered to serve 12 months in jail.

Moreover, even if the Giordano defendants were to prevail on their volume of commerce argument on appeal and then receive the most permissive sentence allowable, they would still face incarceration. *Renewed Joint Motion*, ¶ 3. Even the most permissive sentence available to them under a Level 12 would require each of them to serve five months in jail and another five months of home detention. In an instance such as this, 18 U.S.C. § 3143(b)(1)(B)(iv) is applicable. That statue provides that, if a district court finds that bond pending appeal is warranted, in the instance where an appeal would result in "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process," then "the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence." 18 U.S.C. § 3143(b)(1)(B)(iv) (1999).

In other words, even if the Court finds merit in the defendants' volume of commerce argument, it should not grant the defendants bond pending appeal right now. Instead, it should determine what sentence it would likely impose upon the defendants if they were at a Level 12, rather than a Level 13. Then, it should grant the defendants bond pending appeal only after they had served their likely "reduced" sentences -- whatever those may be. Even at a Level 12, the current sentences imposed on the Giordano defendants are well within the Guidelines range. And at a minimum, they each would have to serve five months in jail under the best of circumstances for them. This discussion is all theoretical, of course, since the Giordano defendants (1) cannot overcome Giancola's hurdle of showing that a "close" question is involved and (2) cannot overcome the untimeliness of their motion. Moreover, there is no reason to believe that the Giordano defendants would likely ever be sentenced to serve less than 12 months of jail regardless of the

volume of commerce, since their jail terms are well within the Guideline range for a Level 12, as well as a Level 13.

V

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court deny the *Defendant's Renewed Joint Motion for Bond Pending Appeal*.

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