UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)
	) Case No. 97-0853-CR-Middlebrooks
v.	)
	) Magistrate Dubé
ATLAS IRON PROCESSORS, INC., et al.,	) (Amended order of reference dated May 7, 1998)
	)
	)
Defendants.	) **RESPONSE OF THE**
	) **UNITED STATES TO**
	) **OBJECTIONS OF DEFENDANT**
	) **DAVID GIORDANO**
	) **TO THE PRESENTENCE**
	) **INVESTIGATION REPORT**

I

INTRODUCTION

In this Memorandum, the United States responds to the numerous objections made by defendant David Giordano ("Giordano" or "defendant") in response to the Presentence Investigative Report prepared by the United States Probation Office ("USPO"). The responses of the United States correspond with the paragraph numbers of the objections made by Giordano.

In his preliminary statement, Giordano again rehashes his opinion that the difference between "picked-up" and "delivered" prices is important. The distinction drawn by him bears no significance to this sentencing proceeding. Pursuant to the price-fixing and market allocation agreement reached at Sea Ranch, the defendants agreed on a maximum price that each co-conspirator would pay to specific suppliers of scrap and for various grades of scrap, both generally and with respect to particular suppliers. The fact that Atlas may have cheated on the agreement does

not affect the volume of commerce attributable to it (and Giordano) under U.S.S.G. §2R1.1. The United States treats this red herring issue raised by Giordano fully in its response to Paragraphs 31 and 34 below.

II

RESPONSES TO OBJECTIONS

PART A. THE OFFENSE

The Offense Conduct

Paragraph 6: The Indictment charged that, beginning at least as early as October 24, 1992, and continuing at least until November 23, 1992, the exact dates being unknown to the grand jury, the defendants and co-conspirators engaged in a combination and conspiracy to suppress and restrain competition by fixing the price of scrap metal, and allocating suppliers of scrap metal, in southern Florida. Indictment, ¶ 2. In its Bill of Particulars, the United States stated: "By way of further explanation, the United States believes that the conspiracy alleged in the Indictment ended sometime in January, 1993." Bill of Particulars, p. 8. The evidence at trial showed that the conspiracy continued into January, 1993. Moreover, U.S.S.G. §1B1.3 specifically provides that **all relevant conduct** should be taken into consideration in determining the applicable guideline sentencing range.[1]

David Giordano is wrong in stating that very few of the summaries introduced at trial extended beyond November 23, 1992. For Atlas, nearly all of the summaries relating to car suppliers extended to December 31, 1992. The figures used by the United States in calculating the volume of commerce affected by the

[1] U.S.S.G. §1B1.3, Application Note 1, states: "The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator."

conspiracy and attributable to David Giordano are based on Atlas business records (scale tickets and summary reports) admitted into evidence at trial. The United States intends to submit detailed summaries relating to the volume of commerce at the sentencing hearing.

Paragraph 7: This objection is poorly taken. The uncontroverted testimony at trial was that Sunshine was Atlas' major competitor in the Miami market. Trial Transcript (McConnell), p. 98.

Paragraph 8: The United States does not understand this objection. The Sea Ranch meeting and the subsequent involvement of David Giordano occurred close enough in time to Hurricane Andrew to justify the statement that the price-fixing and market allocation agreement was struck shortly after Hurricane Andrew. Hurricane Andrew struck southern Florida on August 24, 1992. The uncontroverted evidence at trial showed the defendants, including David Giordano, met initially at Charcoal's restaurant on September 21, 1992, to discuss prices and customers relating to Hurricane scrap. A second meeting was held on October 14, 1992, at a restaurant called Casa D'Oro, where the subject of Hurricane scrap again was discussed. Henry Kovinsky testified that Hurricane scrap was a principal subject discussed at Sea Ranch. See, e.g., Trial Transcript (Kovinsky), p. 1505. In his testimony, Kovinsky connected the "Hurricane" scrap discussion at Sea Ranch with the preliminary meetings at Charcoal's and Casa D'Oro. Id. In addition, pursuant to U.S.S.G. §1B1.3, the meetings at Charcoal's and Casa D'Oro are properly included as relevant conduct in setting the Guidelines offense level for David Giordano.

Paragraph 9: David Giordano would have this Court believe that the collusive deal struck at Sea Ranch just happened one day -- apparently out of the blue. That is not the case. Prior to the Sea Ranch meeting, there were two preliminary meetings between the defendants, one of which occurred at Charcoal's restaurant. The meetings at Charcoal's and Sea Ranch are directly connected to

each other. Without question, the meeting at Charcoal's -- which occurred less than one month prior to the Sea Ranch meeting -- planted the seed for the defendants' collusion in southern Florida.

Henry Kovinsky testified at trial that a meeting took place on September 21, 1992, at Charcoal's restaurant. Trial Transcript (Kovinsky), p. 1523-24. Participants at this meeting included the defendants Anthony Giordano, Jr., David Giordano and Randolph Weil. Id. at p.1523. Kovinsky described the Charcoal's meeting as a "kind of feeling out process." Id. Although the defendants may have talked about the possibility of a joint venture to salvage scrap relating to Hurricane Andrew, that was not the only subject discussed. Kovinsky testified as follows:

> Q: Now, you mentioned that at this Charcoals meeting, there was a discussion of a joint venture. Did you propose anything else at this Charcoals' meeting?
>
> A: Not too much. I think the Hurricane was the subject of the day. That certainly was on everybody's mind.
>
> But there was discussion at Charcoals about Hurricane pricing relative to Hurricane. I don't recall suppliers being mentioned or auto wrecking yards. *But I recall Hurricane pricing as it related to yard buying pricing, the scale pricing, as well as prices being offered down in the Hurricane area.*

Trial Transcript (Kovinsky), pp. 1525-26 (emphasis added).

Kovinsky testified at trial that Hurricane pricing was among the subjects discussed at the Sea Ranch meeting:

> Q: Now, were there different subjects discussed at the [Sea Ranch] meeting?
>
> A: Yes.
>
> Q: Do you recall what those subjects were?

A: The subjects were Hurricane pricing, which was also discussed at prior meetings, but Hurricane pricing seemed to be a catalyst that was driving, at least from Randy's standpoint, and the Giordanos' meeting and talking about their -- where there was a tremendous amount of scrap that became available because of the Hurricane.

Trial Transcript (Kovinsky), p. 1505.

The meeting at Charcoal's was a preliminary meeting that opened the door to the collusive deal struck at Sea Ranch. Pursuant to U.S.S.G. §1B1.3, the Charcoal's meeting is relevant conduct to be considered in establishing the Guidelines' offense level for David Giordano.

Paragraph 10: This objection is poorly taken. There is substantial evidence in the record to support the USPO's statement that as the result of the Charcoal's meeting, "[i]t was perceived that what Giordano, Jr. wanted was to fix prices first, see how that worked, and then possibly merge." PSI (David Giordano), ¶ 10. A reference to this is contained in a calendar entry made by Henry Kovinsky dated September 22, 1992 -- the day after the meeting at Charcoals. See Trial Exhibit 2 (Kovinsky's calendar) ("Phoned Tony Giordano, Jr. -- Suggested merger as only way they are interested but want [to] crawl first then merge."). In addition to talking about a possible joint venture, Kovinsky testified: "You know, they talked Hurricane -- basically, Hurricane was a chief topic of discussion as well, on top of the merger and joint venture." Trial Transcript (Kovinsky), p. 1669. Hurricane scrap was also a major part of the discussion at Sea Ranch. Clearly, pursuant to U.S.S.G. §1B1.3, the meeting at Casa D'Oro should be included as relevant conduct in establishing the Guideline offense level for David Giordano.

Paragraph 11: This objection is not well taken. Henry Kovinsky testified that on top of any merger or joint venture discussion, the defendants also talked about the Hurricane. Trial Transcript (Kovinsky), p. 1670. Hurricane scrap also

was a principal part of the discussion at Sea Ranch. Id. at p. 1669. Pursuant to U.S.S.G. § 1B1.3, the meeting at Casa D'Oro should be included as relevant conduct for David Giordano.

Paragraph 12: The evidence was uncontroverted at trial that David Giordano knowingly joined the conspiracy later that same day, after being informed of the meeting by Giordano, Jr. At trial, McConnell testified:

> Q: Do you know what Tony Giordano, Junior did when he returned?
>
> A: Yes, he went into David Giordano's office and shut the door.
>
> Q: Do you know how long--well, let me ask you this: Was there anyone else that you are aware of that was in David's office, other than his brother, Tony Giordano, Junior?
>
> A: No, he just walked into David's office. He was standing in the doorway of his office when we walked in.
>
> Q: And this is while you are in your office?
>
> A: I was standing in the doorway of my office.
>
> Q: Where was your office in location to David Giordano's office?
>
> A: My office being here, David Giordano's office would be where the Judge is sitting.
>
> Q: So you could see it from your office?
>
> A: Yes, quite readily.

Q: Okay. Do you recall, approximately, how long David Giordano and his brother, Tony, Junior, met in the office?

A: No, I do not. Not specifically.

Q: Do you recall Tony, Junior leaving at some point?

A: Yes, I do. He just walked past my-- opened the door, walked past my office and left the building.

Q: Do you recall what David Giordano did after his brother left his office?

A: Yes. He opened the door and was rather--in heavy spirits, and he said **drop the prices**.

Trial Transcript (McConnell), pp. 182-83 (emphasis added).

Although McConnell was not in David Giordano's office during that conversation, her testimony proves beyond a reasonable doubt that David Giordano joined the conspiracy in that closed-door meeting with his brother. Moreover, David Giordano's conduct following the Sea Ranch meeting showed beyond a reasonable doubt that he not only joined the conspiracy, but actively participated in it. The trial testimony conclusively showed that David Giordano was aware of the Sea Ranch agreement and supervised Sheila McConnell's activities closely to make sure she was following the agreement. David Giordano also participated in the key conspiratorial meeting at Don Shula's restaurant on November 23, 1992, where he and his brother accused Randolph Weil of cheating on the agreement.

Paragraph 13: This objection is groundless. Sheila McConnell's testimony on this subject is not ambiguous. McConnell testified as follows:

Q: Was there any conversation between you and Tony

Giordano, Junior on the drive up to Fort Lauderdale [for the Sea Ranch meeting]?

A: Yes.

Q: Can you tell the jury what that conversation was?

A: Well, initially, he started the conversation by just general small talk, you know, asked me what was going on at the facility, what was going on generally in the market, and we talked at length about that.

And then at some point I asked him where we were going and who we were meeting with, and he said that we were going to meet with Sunshine Metal. Randy Weil in particular, he mentioned. And that it was -- he wanted me to fully understand that it was of great concern to him that I was attending this meeting, because I was not principal of any company at that time, of the two companies involved, and that Tony Giordano, Senior and Junior and Randy had grave reservations as to me attending the meeting, but that he felt that I needed to attend this meeting because he really wasn't familiar with the Miami market and he wanted me to make certain that I understood what Randy was referring to.

Q: Did Tony Giordano, Junior, did he tell you what the meeting was going to be about? Did he tell you the gist of the meeting on the drive up to Fort Lauderdale?

A: *He basically said that, you know, we are going to have a meeting to see what we can do about these prices. And with that, I was a little reserved about that. I said, well, to have that kind of meeting is illegal. And he just laughed.*

Q: Was there any other conversation?

A: Other than covering those subjects, no.

Q: Okay. And you say, you know, you said it was illegal?

A: Yes, I did.

Q: And he laughed?

A: Well, I was very concerned about it, because when he said we were having a meeting with Sunshine, all I could remember was that here is Cleveland all over again.

Trial Transcript (McConnell), pp. 135-37 (emphasis added).

Accordingly, the USPO's statement that while driving to the Sea Ranch meeting Giordano, Jr. indicated to McConnell that the purpose of the meeting was to fix prices is amply supported by the evidence adduced at trial.

Paragraphs 14-16: The evidence adduced at trial amply supports the USPO's statements in Paragraphs 14-16. The evidence adduced at trial clearly showed that Atlas, Giordano, Jr. and Giordano, Sr. transported their collusive methods and conduct from Cleveland to Miami. Indeed, their collusive conduct in Miami was strikingly similar to their collusive conduct in Cleveland.

Although this conduct is relevant conduct as to defendants Atlas, Giordano, Jr. and Giordano, Sr., it should not be considered for the purpose of sentencing David Giordano.

Paragraph 17: This objection is not well taken. Henry Kovinsky testified as follows about the Sea Ranch meeting:

I remember Randy [Weil] really accusing, almost, the Miami River Recycling, Giordanos and Sheila, mainly, for running after Danielli, for example, and giving prices or suggesting prices that were higher than what the marketplace should be.

Trial Transcript (Kovinsky), p. 1506.

The following colloquy also took place with Kovinsky:

> Q: When you left the meeting, did you have an understanding that Mr. Giordano, Senior had any objection to what was said at the meeting or what was agreed upon?
>
> A: No, there was no objection from anybody. If there is any objection from -- it would be that maybe Randy knew more to the market, the pricing than they did, and maybe they objected to the way Randy felt that their prices were inappropriate to the market price.
>
> They certainly objected to Mr. Weil's acumen and telling them that they are *overpaying and don't know what they are doing in the business*, and I heard that on several occasions, both at Sea Ranch and before the Sea Ranch.

Trial Transcript (Kovinsky), p. 1515 (emphasis added).

The evidence adduced at trial clearly supports the USPO's statement that the purpose of the meeting was for Atlas and Sunshine to lower their prices. Indeed, defendant Randolph Weil insisted at Sea Ranch that Atlas and the Giordanos were overpaying for scrap. The record amply shows that Weil was concerned about its main competitor -- Atlas -- overpaying for scrap. By overpaying for scrap, Atlas forced Sunshine to raise its prices or risk losing suppliers. There is ample evidence in the record to support the proposition that in the scrap metal industry, the profitability of companies like Atlas and Sunshine is dependent on how cheaply scrap can be purchased.

In addition, McConnell testified that, at the time of the Sea Ranch meeting, she was aggressively quoting higher prices in the market. Trial Transcript (McConnell), p. 191. According to McConnell, "There was basically a *price war* going on at that time." Id. (emphasis added). McConnell further testified that the

market with respect to car suppliers had gotten particularly high. Id.

As the jury found, this competitive situation was resolved by the defendants' collusive agreement reached at Sea Ranch.

Paragraph 18: This objection concerning the existence of McConnell's notes of the Sea Ranch agreement is ridiculous. McConnell testified that Giordano, Jr. directed her to take notes of the agreement reached at Sea Ranch and she did as she was told. Trial Transcript (McConnell), pp. 195-96. See Government Exhibit 1 (McConnell's notebook containing notes of the Sea Ranch meeting, dated October 24, 1992); Government Exhibit 1(a) (McConnell's notes of the Sea Ranch meeting). Indeed, McConnell's testimony about her notes of the Sea Ranch meeting -- and events related to these notes -- run from pages **193 to 243** of the trial transcript. The fact that Henry Kovinsky may not recall anyone taking notes at a meeting that took place nearly six and a half years prior to his testimony in no way supports Atlas' preposterous argument that McConnell did not take notes at Sea Ranch. As was the case at trial, the authenticity of McConnell's notes remain unquestioned.

Paragraph 21: This objection is poorly taken. McConnell testified that, at the Sea Ranch meeting, it was agreed that Atlas and the Giordanos would stay away from suppliers located on Cairo Lane, which was the street on which Sunshine was located, and in return Atlas would receive a shipment of cars originating from the Bahama Islands. Trial Transcript (McConnell), pp. 163-65. This amply supports the USPO's statement about a *quid pro quo* arrangement involving Cairo Lane suppliers.

Paragraph 22: This objection is unfounded. David Giordano continues to be confused by the difference between the illegal agreement and its implementation. McConnell testified at trial that, at the Sea Ranch meeting, the defendants agreed on the maximum price that it would pay for various grades of scrap, commonly referred to as scale prices. McConnell testified:

Q: Now, what was talked about next at this

[Sea Ranch] meeting?

A: At that juncture of the meeting, we had basically finished discussing the Bahamas cars and Cairo Lane, and they felt at that time they had pretty much covered all of the car carriers in given areas that were to be priced a certain way.

And then Tony Giordano, Senior brought up the pricing of the scale. He said in as much as we have gotten this far, why don't we just -- just discuss the scale and see what we can do there. We might as well do the whole thing.

Q: What do you mean by "scale?"

A: Scale is the general pricing that you have to the general public for various grades of scrap that they would generate, in addition to buying from the auto wreckers and towers.

Trial Transcript (McConnell), p. 223.

McConnell testified that, at the Sea Ranch meeting, the defendants fixed the maximum price to be paid by them for the following grades of scrap: (1) appliances ($20/net ton); (2) sheet metal ($26/net ton); (3) unprepared #2 ($30/net ton); (4) prepared #2 ($38/net ton); (5) prepared #1 ($30/net ton); and (6) logs ($35/net ton). Trial Transcript (McConnell), pp. 227-29. The price of whole cars was also fixed at $40/net ton. Though defendants suggest otherwise, McConnell's trial testimony is the same as her grand jury testimony.

The colloquy cited by Atlas proves nothing other than that Atlas cheated from the agreement. The lack of full implementation, however, does nothing to undercut the central fact that Atlas and the defendants fixed the maximum price that each would pay for various grades of over-the-scale scrap. Moreover, David Giordano ignores the fact that Sunshine did follow the agreement on scale prices, making the

co-conspirators liable for Sunshine's collusive conduct.

Paragraph 25: This objection is not well taken. There is ample evidence in the record to support the USPO's statements that Atlas needed a certain amount of tons for its shredder and, further, that one of the goals of the conspiracy was to satisfy the Giordanos' request for a certain volume of tons. Kovinsky testified that, among other things, the subject of tonnages was discussed and agreed-upon at Sea Ranch. Trial Transcript (Kovinsky), p. 1505-06. Kovinsky testified:

> Q: What were the other subjects [discussed at Sea Ranch]?
>
> A: The other subjects were suppliers, their pricing. And there was some tonnage. I really don't know how to describe this. I don't know that it was a formula, that the Giordanos were rather insistent on getting X amount of tons. How those tons were made up, I really couldn't tell you, not being involved.
>
> But there was some magic tonnage figure of 3, 4,000 tons, or whatever that was, per month. If they could get assurances from Randy [Weil] that tonnage would be available, then they would cooperate and work with the pricing, work with the suppliers, work with the territories, geographical territories.

Trial Transcript (Kovinsky), pp. 1505-06. See also Trial Transcript (Kovinsky), p. 1512. Kovinsky's testimony is clear: Atlas wanted a certain amount of tonnage in order to agree to lower prices. Id. at 1512.

In support of his ill-conceived argument, David Giordano cites to a part of Kovinsky's testimony having nothing to do with the Sea Ranch meeting whatsoever. In paragraph 25 of his Objections, the defendant cites to page 1667 of the trial transcript. This colloquy is limited to the meeting at Casa D'Oro; it has nothing to

do with the tonnage arrangement which the Giordanos insisted upon at Sea Ranch. Kovinsky's testimony that the defendants talked about tonnages at Sea Ranch remains uncontroverted.

Paragraph 29: This objection is not well taken. The description of events contained in this paragraph are consistent with McConnell's testimony. McConnell testified that, after the Sea Ranch meeting, she and Giordano, Jr. went back to Atlas' office in Miami. Trial Transcript (McConnell), pp.159; 181. Giordano, Jr. and David Giordano met in David's office behind closed doors. Id. at 182. After David Giordano met with his brother, McConnell testified that David exited his office and exclaimed: "[D]rop the prices." Id. at 183; 298. Consistent with the Sea Ranch agreement, McConnell testified she "went to [her] office to start dropping [prices]." Id. at 298. The fact that not all scale prices were dropped -- because Atlas cheated on the agreement -- is not relevant. The evidence at trial conclusively established that, consistent with the Sea Ranch agreement, Atlas did drop prices on cars (both flattened and whole) and certain grades of scrap. Nor is it controlling that all of the agreed-upon prices were not changed by Atlas on October 24, 1992.

Paragraph 31: Again, David Giordano confuses the illegal agreement with its implementation. McConnell testified that the defendants agreed to drop their scale prices, setting maximum prices to be paid for various grades of scrap. Atlas and Sunshine documents (scale tickets and summaries of scale tickets) conclusively show the defendants did, in fact, drop their prices consistent with the collusive agreement. In particular, Atlas and Sunshine followed the agreement most closely with respect to the agreed-upon prices to be paid to car suppliers. In many cases, the prices actually paid to the car suppliers by the defendants were identical.

David Giordano continues, however, to confuse issues with his muddled argument about the difference between "delivered" and "picked-up" prices. Again, this issue concerns only the implementation of the illegal agreement; it does not undercut in any way the uncontroverted testimony of McConnell and Kovinsky that

the defendants struck a deal at Sea Ranch fixing the maximum price to be paid to specific suppliers, fixing the maximum price to be paid to suppliers within specific geographic areas, and fixing the maximum price to be paid for specific grades of scrap.

Paragraph 34: This objection concerning the volume of commerce affected by the conspiracy and attributable to David Giordano is misguided. The United States submits that, based on the evidence, the volume of commerce affected by the conspiracy and attributable to David Giordano is $614,436.39. See U.S.S.G. §2R1.1. U.S.S.G. §1B1.3 provides that all relevant conduct may be considered in establishing the appropriate Guidelines offense level for a defendant and the concomitant criminal fine.

David Giordano's reliance on United States v. SKW Metals & Alloys, Inc., 4 F. Supp. 2d 166, 167 (W.D.N.Y. 1997) ignores contrary -- and more compelling -- relevant case law. In United States v. Hayter Oil Co., Inc., 51 F.3d 1265 (6th Cir. 1995), the Sixth Circuit agreed with the government's conclusion that "there is nothing in the language of the Antitrust Guideline [U.S.S.G. §2R1.1,] that suggests that the Sentencing Commission intended the district court 'exclude from a defendant's volume of commerce sales of a product that was the direct object of a price-fixing agreement, because those sales were made at less than the agreed-upon price.'" Hayter Oil, 51 F.3d at 1273. Rather, the court in Hayter Oil held:

> Construing the plain language of the Antitrust Guideline, we conclude that the volume of commerce attributable to a particular defendant convicted of price-fixing includes all sales of the specific types of goods or services which were made by the defendant or his principal during the period of the conspiracy, without regard to whether individual sales were made at the target price.

Hayter Oil, 51 F.3d at 1273.

The Hayter Oil court found its conclusion about the application of the Antitrust guideline to be "consistent with the purposes of the Sherman Act." Hayter Oil, 51 F.3d at 1273. The court acknowledged that all price-fixing agreements are illegal *per se*. Id. The court in Hayter Oil posited the following:

> It would be an anomaly to declare price-fixing illegal per se, without regard to its success, merely because of its plainly anticompetitive effect, but to provide for a fine only if the price-fixing were successful. Such a rule would result in the government being relieved of the burden of ascertaining a conspiracy's effect and success for purposes of obtaining a conviction only to have to bear that very burden to establish the propriety of any fine.

Hayter Oil, 51 F.3d at 1274.

In addition, the court in Hayter Oil found that its interpretation of U.S.S.G. §2R1.1 is entirely consistent with the Sentencing Commission's Commentary to the Antitrust Guideline, which is to be given controlling weight so long as it does not violate the Constitution or a federal statute. Hayter Oil, 51 F.3d at 1274. The Court stated that it "clearly appears that the Sentencing Commission intended that the government have the benefit of a per se rule both at trial and at sentencing to avoid the protracted inquiry into the day-to-day success of the conspiracy." Id. Accordingly, the Hayter Oil court rejected the defendants argument that the volume of commerce attributable to them consisted of only the 40 weeks when the conspirators successfully achieved their target price, and instead held that the volume of commerce for purposes of sentencing under U.S.S.G. §2R1.1 involved "all sales of gasoline made by the defendants during the entire 234-week period of the conspiracy." Id.

The defendant also ignores the recent decision in United States v. Michael D. Andreas, *et al.*, 1999 WL 51806 (N.D. Ill.), in which the court followed the reasoning

of the Sixth Circuit in Hayter Oil and expressly rejected the district court's reasoning in SKW Metals. Andreas, at *2. In Andreas, the court concluded that the decision in SKW Metals "is flawed because it imposed a narrow construction of affect based on an erroneous interpretation of §2R1.1's background and application notes." Andreas, at *2. The court stated: "Indeed, the application notes clearly demonstrate that affect should be broadly construed in a manner to effectuate the per se rule." Id. According to the Andreas court,

> Whether the agreement actually caused the objective price increase is irrelevant because the definition [of "affect"] neither guarantees nor requires the causal force to induce a response or reaction. Instead the stimulus must present a possible response or reaction. Hence, the plain meaning permits a broad construction to attach liability even if there is only a theoretical affect on commerce, regardless of its actual effect on the price of lysine.

Andreas, at *2.

Accordingly, the court held consistent with Hayter Oil that, for sentencing purposes under U.S.S.G. §2R1.1, all domestic lysine sales made by the Archer Daniels Midland Corporation during the scope of the conspiracy should be included as volume of commerce attributable to the defendant, Michael Andreas. Andreas, at *3.

Accordingly, the United States submits that all of the scrap purchases made by Atlas during the scope of the conspiracy, and which were affected by the price-fixing and market allocation agreement, are properly included as volume of commerce under U.S.S.G. §2R1.1. The categories of scrap unequivocally affected by the conspiracy include flattened cars, whole cars, appliances, sheet metal, various unprepared and prepared grades, and logs. Each of these grades of scrap were objects of, and subject to, the conspiracy. In addition, the United States submits

that the category of scrap which Atlas referred to as "shred" should also be included in the volume of commerce. This "shred" grade included the agreed-upon prepared and unprepared grades of scrap, since Atlas did not refer to its scrap in the same manner as Sunshine. For example, Atlas did not classify its scrap as "unprepared #2," "prepared #2," or "prepared #1."

The documents (i.e., scale tickets and summaries) admitted at trial show the conspiracy continued at least through December 31, 1992. Though there was some cheating on the agreement, mostly by Atlas, there was no affirmative withdrawal from the conspiracy by either Atlas or Sunshine before December 31, 1992. In January, 1993, however, the documents admitted at trial show that the conspiracy began to break down. Accordingly, the United States submits that the conspiracy continued through December 31, 1992.

Using the scale tickets and other business records of Atlas, the United States has added up the volume of commerce affected by the conspiracy and attributable to Atlas for the period October 24, 1992 through December 31, 1992. That figure is $614,436.39.

David Giordano's argument that Atlas' freight costs should be deducted from the volume of commerce attributable to him finds no support in U.S.S.G. §2R1.1 or relevant case law. The figures used by the United States in calculating the volume of commerce attributable to David Giordano are the actual amounts paid to suppliers for their scrap. These actual amounts represent the true amount of the volume of commerce affected by the conspiracy. You would no more deduct freight costs from the volume of commerce than you would any other internalized cost (*e.g.*, plant, power, equipment, labor, etc.).

Accordingly, pursuant to U.S.S.G. §2R1.1, the United States agrees with the method used by the USPO in arriving at the volume of commerce affected by the

conspiracy and attributable to David Giordano for sentencing purposes.[2] In addition, David Giordano's contention finds no support in U.S.S.G. §1B1.3, which provides that all relevant conduct should be included in arriving at the volume of commerce attributable to him.[3] The defendant attempted to confuse the jury with his "picked-up" versus "delivered pricing" spiel at trial, but failed. His attempt to confuse issues at sentencing with the same spiel should also fail.

Role Assessment

Paragraph 37: David Giordano's novel approach to his Role Assessment is has no substance whatsoever. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984), is a substantive rule of antitrust law that applies to the Sherman Act, 15 U.S.C. § 1. In Copperweld, the Court held that for purposes of 15 U.S.C. §1, a parent company (Copperweld) is incapable of conspiring with its wholly owned subsidiary. Copperweld, 467 U.S. at 777. This substantive antitrust rule,

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[2] For sentencing purposes, the figures used by the United States in calculating the volume of commerce attributable to Atlas (and David Giordano) are the actual dollar amounts paid by Atlas to its suppliers of scrap. These actual amounts represent the true amount of the volume of commerce affected by the conspiracy. You would no more deduct freight costs from the volume of commerce than you would any other internalized cost (e.g., plant, power, equipment, labor, etc.). Pursuant to U.S.S.G. §2R1.1, all scrap purchases made by Atlas affected by the conspiracy should be included as volume of commerce attributable to David Giordano for sentencing purposes. See, e.g., United States v. Hayter Oil Co., Inc., 51 F.3d 1265 (6th Cir. 1995); United States v. Michael D. Andreas, *et al.*, 1999 WL 51806 (N.D. Ill.).

[3] Furthermore, according to the trial testimony, the agreed-upon prices represented "delivered" prices, i.e., it was assumed that if the conspirators picked up the scrap, the cost of the freight would be deducted from the agreed-upon price. McConnell testified that she did not want to go along with the conspiracy so, whenever Atlas picked up scrap, McConnell did not further reduce the price Atlas paid by deducting freight costs. She did not do so because she wanted to cheat on the agreement to ensure supply to Atlas. Because this is a buy-side conspiracy, her cheating actually increased the dollar volume of commerce affected by the conspiracy and attributable to Atlas and David Giordano. David Giordano should not now be allowed for sentencing purposes to decrease his volume of commerce to offset the fact that, during the conspiracy, Atlas' cheating increased the volume of commerce.

however, has no application whatsoever to the Sentencing Guidelines, including U.S.S.G. §3B1.1(b). Copperweld had nothing to do with the application of the Sentencing Guidelines, which serve a far different purpose. David Giordano cites no case holding that Copperweld acts as a bar to the individual role enhancement for him under U.S.S.G. §3B1(b).

U.S.S.G. §3B1.1(b) provides that an increase in the offense level should be applied "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity that involved *five or more participants or was otherwise extensive*, increase by 3 levels." U.S.S.G. §3B1.1(b) (emphasis added). In this price-fixing and market-allocation conspiracy, there were more than five participants. Application Note 1 of this Guideline provides: "A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." At a minimum, at least seven individuals participated in the conspiracy and were criminally responsible for it, including the following: Anthony Giordano, Jr.; Anthony Giordano, Sr.; David Giordano; Randolph Weil; Henry Kovinsky; Dan Allen; and Sheila McConnell.

David Giordano attempts to argue that he should not be given an enhancement because of his role as a manger or supervisor by referring to Application Note 4 of U.S.S.G. §3B1.1. That Note, however, distinguishes a leadership role, a four-level enhancement, from that of management or supervisory role, a three-level enhancement, which the USPO attributed to David Giordano. David Giordano was clearly a manger or supervisor of the criminal activity. As David Giordano acknowledges, he supervised and managed Sheila McConnell in her role to implement the conspiracy. The fact that the defendant may have been an incompetent manager does not excuse his role in the conspiracy. The fact that he may have been brought into the conspiracy by his brother, does not mean that he could not exercise a management or supervisory role in the conspiracy. A defendant need only manage or supervise one other person in a criminal enterprise to be

entitled to the three level enhancement. United States v. Barnes, 993 F. 2d 680 (9th Cir. 1993) cert denied, 513 U.S. 827 (1994) (affirming three-level role enhancement); United States v. Johnson, 4 F.3d 904, 917 (10th Cir. 1993) cert denied, 510 U.S. 1123 (1994): United States v. Savoie, 985 F. 2d 612 (1st Cir. 1993). Here, David Giordano supervised, in addition to others at the Miami facility, Sheila McConnell.

The evidence adduced at trial overwhelmingly proved that David Giordano was a manager and supervisor of the conspiracy on the Atlas-end. David Giordano was in charge of the entire Miami shredding facility. He was an officer of Atlas. He instructed and, later, directed McConnell to lower Atlas' prices. He instructed McConnell that if she had any questions about the agreement, she should call Sunshine's office. Trial Transcript (McConnell), p. 236. David Giordano, in McConnell's presence, spoke to Randolph Weil of Sunshine about the conspiracy. Id. at 289. David Giordano instructed McConnell to go to Sunshine and observe how much scale business Sunshine was doing, which she did, because he believed Sunshine was cheating on the agreement. Id. at 290. David Giordano, like his brother, constantly asked McConnell if she had lowered prices consistent with the agreement. Id. at 339. David Giordano and his brother berated Weil at Shula's Restaurant because they believed that Sunshine was cheating on the agreement. Trial Transcript (Kovinsky), p. 1566-1568. David Giordano attended two key preliminary meetings to Sea Ranch, one at Charcoal's restaurant and the other at Casa D'Oro. Nor is it a true statement that McConnell did whatever she wanted price-wise: McConnell testified that at some point after Shula's, David Giordano (and his brother) began to exert more and more control over her buying of scrap, including directing from whom she could buy scrap. Trial Transcript (McConnell), p. 178.

In addition, the conspiracy here was also "otherwise extensive." Though not particularly long in duration, the conspiracy was broad in geographic and product

scope. The defendants entered into an illegal agreement covering nearly all of their scrap purchases in southern Florida, including their most important commodity for shredding purposes, cars. Pursuant to their illegal agreement, the defendants fixed the price to be paid to specific car suppliers; fixed the price to be paid to car suppliers in specific geographic areas; fixed the price to be paid on a variety of scrap grades, which primarily affected the smaller peddler traffic; and agreed to not solicit certain customers (e.g., customers located on or near Cairo Lane). At the time, Atlas and Sunshine were the predominant shredders operating in south Florida, especially with respect to purchasing car bodies in the Miami area.

There is ample evidence in the record to support the USPO's position that the conduct of David Giordano merits a three-level enhancement for his role in the criminal activity. The United States, too, recommends that the three-level enhancement be applied to David Giordano.

Victim Impact

Paragraph 41: The United States does not understand this objection. Based on the business records provided by Atlas and admitted into evidence at trial, the United States has counted at least 1,271 different victims of the conspiracy. These victims are comprised of suppliers who made sales to Atlas during the conspiracy period. Though it is true some of these victims cannot be located, it is also true that Atlas' records show they were victimized by the conspiracy, since they sold to Atlas scrap that was subject to the illegal agreement reached at Sea Ranch.

Paragraph 42: With respect to this objection, perhaps a clarification is needed. The United States has estimated that the amount of underpayment in this case to identifiable victims is $80,013. The time period used was October 24, 1992, through December 31, 1992, the period under which the conspiracy was in effect. The United States simply compared the last pre-Sea Ranch price for each supplier with the fixed prices. For example, in calculating the loss to Bubba's, a car supplier, the United States compared the last non-fixed price of $65 (pre-Sea Ranch) with the

agreed-upon price of $52. In this case, Bubba's price was dropped $13 per ton. We then multiplied the tons of scrap Bubba's sold to Atlas during the conspiracy period by this differential figure ($13). No decrease was made for freight allowances, since no such decrease is appropriate under U.S.S.G. §2R1.1.

The United States intends to submit a detailed summary showing the amount of restitution which should be paid by Atlas.

Paragraph 60: The one-point enhancement for volume of commerce is appropriate. The volume of commerce attributable to David Giordano is **$614,436.39**. Pursuant to U.S.S.G. §2R1.1(b)(2), a one-point enhancement should be added to David Giordano's base offense level of 10.

Paragraph 62: For the reasons stated above in Paragraph 37, David Giordano clearly merits a three-level enhancement for his role as a manager and supervisor of the criminal activity. The United States agrees the three-level enhancement is appropriate based on the USPO's statements in paragraph 37 of its PSI.

Paragraph 64: For the reasons provided above in Paragraphs 36, 60 and 62, the USPO is correct in concluding the maximum Adjusted Offense Level (subtotal) is 14. The United States recommends that a jail sentence at the top-end of the applicable sentencing range be imposed on David Giordano -- **21 months**. The United States intends to submit a sentencing recommendation setting forth its reasons for the sentence and will be prepared to discussed these reasons fully at the sentencing hearing. Among other things, sentencing factors include (1) the collusive agreement was entered into on the heels of a tragic event (Hurricane Andrew) and was designed unfairly to take full advantage of other people's misfortune; (2) false statements made by David Giordano denying his involvement in the agreement, including the attempted introduction of bogus polygraph tests; and (3) his role in the offense, including his acquiescence in forcing a participant (Sheila McConnell) to join the conspiracy against her will.

Paragraph 66: There is no basis for a downward departure of two levels for David Giordano. Like the USPO, the United States apparently will have to wait for a "subsequent submission" before knowing the basis for the requested departure.

PART C. OFFENDER CHARACTERISTICS

Physical Condition

Paragraph 80: The United States does not have sufficient information to comment upon this Objection.

Financial Condition: Ability to Pay

Paragraph 91: The United States does not have sufficient information to comment upon the value of a $218,000 loan to Atlas as an asset. The United States believes that David Giordano has sufficient assets to pay the Guidelines fine in this case. The criminal fine to be paid by David Giordano is not large. Pursuant to U.S.S.G. §2R1.1(c)(1), a special instruction, the range of his criminal fine is between one to five percent of the volume of commerce, but not less than $20,000. The volume of commerce is $614,436.39. The fine range is thus between $6,144.36 and $30,721.82. Accordingly, under the Guidelines, David Giordano's criminal fine must be at least $20,000, but cannot be more than $30,721.82.

The country club golf membership to Sand Ridge, whether it is $400 a month or $1365 a month, is an unnecessary expense that can be eliminated in order to help pay any criminal fine. The USPO lists a number of other expenses that appear to be unnecessarily high and could be cut (or eliminated altogether) to help satisfy payment of a criminal fine.

Paragraph 93: The United States does not have sufficient information to comment upon this Objection.

Paragraph 96: The United States has no information to confirm or dispute this. For the reasons stated above in paragraph 91, David Giordano surely can pay the criminal fine to be imposed in this case.

Paragraph 99: The United States does not have sufficient information to

assess whether a $400 per month country club expense is extravagant, but such an expense could hardly be considered necessary. The USPO has provided information about other unnecessary expenses.

Paragraph 100: The United States does not have sufficient information to assess this Objection. It appears, however, that the defendant and the USPO agree on the amount of the monthly support payment.

Paragraph 101: In light of the amount of the fine, his income and his assets, David Giordano can pay a fine. The defendant may also be able to pay his fine in installment payments.

PART D. SENTENCING OPTIONS

Paragraph 103: The position of the USPO and the United States is that the Total Offense Level is 14, not 10. His range is thus **15 to 21 months** under the Sentencing Table. He does not qualify for sentencing under U.S.S.G. §5C1.1(c)(2) or (3).

Paragraph 108: The United States disagrees with this objection insofar as the defendant suggests a criminal fine under 18 U.S.C. § 3571(d) is inappropriate as a matter of law in this case. (David Giordano inadvertently refers to it as 18 U.S.C. § 3371(d).) The United States, however, does not intend to use this alternative fine provision against David Giordano.

Paragraph 109: This objection is wrong. The individual defendant's fine in this case -- as in all antitrust cases -- is governed by U.S.S.G. §2R1.1(d). Pursuant to U.S.S.G. §5E1.2(b), a special instruction provided for in Chapter Two takes precedence over the provisions set forth in U.S.S.G. §5E1.2(c). Thus, David Giordano must pay a criminal fine of at least $20,000. The United States recommends that a criminal fine at the top end of the range (5 percent of $614,436.39) be imposed. Accordingly, the United States recommends a criminal fine of $30,721.82 be imposed on David Giordano.

Paragraph 112: This objection is groundless. **There is no basis to support a downward departure for Giordano, Jr.**

III

CONCLUSION

For the reasons stated above, David Giordano's objections are not well taken. The United States will submit a sentencing recommendation prior to the hearing.

Respectfully submitted,

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