

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.,) (Amended order of reference dated May 7, 1998)
et al.,)
)
Defendants.) RESPONSE OF THE
) UNITED STATES TO
) OBJECTIONS OF DEFENDANT
) ANTHONY J. GIORDANO, SR.
) TO THE PRESENTENCE
) <u>INVESTIGATION REPORT</u>

I

INTRODUCTION

In this Memorandum, the United States responds to the objections made by defendant Anthony J. Giordano, Sr. ("Giordano, Sr." or "defendant") in 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, Sr.¹

¹ To the extent Giordano, Sr. has adopted objections raised by his co-defendants, Anthony J. Giordano, Jr. and David Giordano, which are not unique offender characteristics of Giordano, Sr., the United States' responses to these objections are in *Response of the United States to Objections of Defendant Anthony J. Giordano, Jr. to the Presentence Investigative Report* and *Response of the United States to Objections of Defendant David Giordano to the Presentence Investigative Report*.

II

GOVERNMENT'S RESPONSES TO OBJECTIONS

Paragraph 38: This objection is not well taken. The evidence adduced at trial amply supports the USPO's conclusion that Giordano, Sr. merits a three-level enhancement for his role in the criminal activity. PSI (Giordano, Sr.), ¶ 38. The United States, too, recommends that a three-level enhancement be added to his offense level.

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 involved *five or more participants or was otherwise extensive*.” 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.

In addition, the conspiracy here was “otherwise extensive.” U.S.S.G. §3B1.1(a).² Though not particularly long in duration, the conspiracy was very

² In making its determination that the criminal conduct here was “otherwise extensive,” the court must look at the totality of circumstances, including, among other factors, the number of participants, width, breadth, scope, complexity, and duration of the conspiracy. *See, e.g., United States v. Holland*, 22 F.3d 1040, 1046 (11th Cir. 1994) (length and scope of conspiracy, as well as number of participants, to be considered in determining “otherwise extensive” nature of conspiracy); *United States v. D'Andrea*, 107 F.3d 949, 957 (1st Cir. 1997) (factors include width, breadth, scope, complexity, duration and number of participants); *United States v. Dale*, 991 F.2d 819, 857 (D.C. Cir. 1993) *cert. denied*, 510 U.S. 906 (1993) (factors include wide geographic scope and extensiveness of the actions taken to further the conspiracy).

broad in terms of geographic and product scope.³ The defendants entered into a comprehensive, 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 not to 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. The United States has identified at least 1,271 victims of the conspiracy.

Under the U.S.S.G. §3B1.1, in distinguishing a leadership/organizational role from one of mere management or supervision, Application Note 4 provides:

Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy.

U.S.S.G. §3B1.1, Application Note 4.

In order for a defendant to receive an adjustment under U.S.S.G. §3B1.1(b),

³ Of course, the duration of a conspiracy is not controlling. For example, in United States v. Reid, 911 F.2d 1456, 1465 (10th Cir. 1990), cert. denied, 498 U.S. 1097 (1991) the court upheld an enhancement under U.S.S.G. §3B1.1(a) for “otherwise extensive” conduct in a conspiracy lasting only three weeks.

“the defendant must have managed or supervised *at least one other participant*.” United States v. Barnes, 993 F.2d 680, 685 (9th Cir. 1993) (emphasis original), cert. denied 513 U.S. 827 (1994) quoting United States v. Helmy, 951 F.2d 988, 997 (9th Cir. 1991), cert. denied, 112 S. Ct. 2287 (1992). See also United States v. McGuire, 957 F.2d 310, 317 n. 4 (7th Cir. 1992); United States v. Savoie, 985 F.2d 612, 616 (1st Cir. 1993); United States v. Johnson, 4 F.3d 904, 918 (10th Cir. 1993) cert denied 510 U.S. 1123 (1994). In this case, but for the participation, acquiescence and approval of Giordano, Sr. in the criminal activity, the conspiracy would not have happened. See, e.g., United States v. Howard, 923 F.2d 1500, 1503 (11th Cir. 1991) (Manager/supervisor enhancement appropriate in drug conspiracy for co-conspirator who fronted money for the transaction and helped make it possible).

Paragraph 38 of the PSI prepared by the USPO lays out the facts supporting Giordano, Sr.’s role as a manager/supervisor. At the time of the conspiracy, Giordano, Sr. was chairman of the board of Atlas. He was Atlas’ top-ranking official. He also is the father of Anthony Giordano, Jr. and David Giordano. Henry Kovinsky testified that Giordano, Sr.’s presence at Sea Ranch bore considerable weight. Trial Transcript (Kovinsky), p. 1564. The evidence conclusively showed Giordano, Sr. was a key participant at the Sea Ranch meeting, where the collusive deal was struck. It is uncontroverted that at Sea Ranch, Giordano, Sr. made certain the price-fixing and market allocation agreement was as comprehensive as possible in scope. McConnell testified as follows:

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 Bahama 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 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. (emphasis added).

It is also uncontroverted that Giordano, Sr. approved of the recruitment of McConnell into the conspiracy. 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 the 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.

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

In short, Giordano, Sr. knew that McConnell was being recruited to participate in the conspiracy and approved of her recruitment at the Sea Ranch meeting.

At the urging and insistence of Giordano, Sr., the defendants fixed the maximum scale price each company would pay 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) unprepared #1 (\$30/net ton); and (6) logs (\$35/net ton). Trial Transcript (McConnell), pp. 227-29.

Giordano, Sr.'s place at the top of the hierarchy of Atlas and his active role in the Sea Ranch is more than sufficient to make him a manager/supervisor of the criminal activity for purposes of U.S.S.G. §3B1.1(b). See, e.g., United States v. DeRiggi, 72 F.3d 7, 8-9 (2d Cir. 1995) (Leadership role warranted under U.S.S.G. §3B1.1(a) where highest-ranking official participated in conspiracy and gave it his imprimatur). In this admitted close-knit, Giordano, Sr. had ample opportunity to reign in his sons and blow the whistle on this criminal activity. Instead, he helped initiate the conspiracy, approved it, and did nothing to stop it.

Based on the foregoing, Giordano, Sr.'s argument that he should receive a two-level downward departure for having a "minor role" in the offense is flat wrong. Moreover, the United States has no idea as to the basis for Giordano, Sr.'s statement that the government has conceded "he is less culpable than most other defendants." Objections of Anthony J. Giordano, Sr., ¶ 38. No attribution is provided supporting this statement. Though it is true Giordano, Jr. and Weil were leaders/organizers of the criminal activity, it is equally true that Giordano, Sr. (And David Giordano) was a manager/supervisor.

Based on the volume of commerce attributable to Giordano, Sr. and the three-level enhancement for his role as manager/supervisor, the United States agrees with the USPO's conclusion that the adjusted offense level is 14 (15-21 months). Probation is not an option at this level. For reasons which will be presented at the hearing, the United States recommends that Giordano, Sr. be sentenced at the top-end of this range and that a sentence of **24 months** imprisonment be imposed.

As stated in the PSI relating to Giordano, Sr., **there are no factors that warrant a departure from the Guidelines.** PSI (Giordano, Sr.), ¶ 112.

Paragraph 42: The United States has calculated that, as the result of the conspiracy, the monetary loss suffered by victims of the conspiracy is approximately \$80,013. Subtotals by grade of scrap and/or supplier are provided in paragraphs 43 to 56 of the PSI relating to Giordano, Sr.

With respect to this objection, perhaps a clarification is needed. The United States has estimated that the amount of undercharge 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 methodology used was simple. 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.

At sentencing, the United States will provide a detailed summary showing the loss attributable to Atlas.

1. The United States disputes Giordano, Sr.'s contention that the Guidelines overstate the seriousness of the offense. Indeed, here the Guidelines dramatically understate the price-fixing conspiracy. Conceptually, because this was a buy-side conspiracy, the more successful the conspiracy was (i.e., the more prices were dropped), the smaller the volume of commerce became.

In addition, Giordano, Sr. confuses the application of U.S.S.G. §2R1.1(d) with the Guidelines' goal of providing restitution to identifiable victims of the conspiracy. In this conspiracy, the true loss of the conspiracy is not measurable, since, for example, we will never know what sales were not made because of the lower fixed prices. Opportunity costs of the conspiracy are immeasurable. Giordano, Sr. confused this with calculating "loss" qualifying as restitution for purposes of the Guidelines. In reality, the "loss" (\$80,013) qualifying as restitution is the gain to Atlas (and its principals). Application Note 3 makes it clear, however, that in setting the Guidelines fine, the "20 percent" proxy for loss based on volume of commerce is appropriate because the loss from a conspiracy always exceeds the gain. U.S.S.G. §2R1.1, Application Note 3. If the Court were to find that the gain/loss of a conspiracy was substantially more or less than 20 percent of the volume of commerce, then "this factor should be used considered in setting the fine within the guideline range fine." Id.

2. The United States understands the Court already has granted, and denied, in part the defendants request for materials from the U.S. Sentencing Commission relating to antitrust cases. The United States does not share the

defendants' opinion that this antitrust case has the same elements as others. Here, the defendants' price-gouging conduct following the tragedy of Hurricane Andrew was reprehensible. Giordano, Sr.'s role in the offense is also a major factor in this case for sentencing purposes. Moreover, pursuant to U.S.S.G. §1B1.4, the fact that Giordano, Sr. colluded elsewhere (i.e., in Cleveland) is a major factor to be considered in his sentencing. The United States intends to submit a memorandum in support of its recommendation to sentence Giordano, Sr. at the top-end of his Total Offense Level of 14 -- **21 months of jail**.

3. The United States disputes the contention that Giordano, Sr. should not be sentenced to jail because of its effect on the company. First, the argument made by Giordano, Sr. is wholly speculative. Second, using the company's employees as a bargaining chip is insulting. There is no basis to conclude that the company could not be run better by outside management rather than by Giordano, Sr. and his sons. Finally, the United States does not share in the hackneyed opinion that a monopoly will be created in either the Miami or Cleveland markets if the company has to fold. At its core, the antitrust laws are designed to prevent horizontal anticompetitive conduct such as the price fixing and customer division done by the Giordanos and their co-conspirators. The position of the Sentencing Commission -- and the United States -- is that deterrence is best served through the imposition of criminal sentences. See U.S.S.G. §2R1.1 Commentary (Background).

III

CONCLUSION

For the reasons stated above, Atlas' objections are not well taken. The United States will submit its sentencing recommendation shortly.

Respectfully submitted,

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