UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
	)	CASE NO. 97-0853-CR-Middlebrooks
v.	)	
	)	Magistrate Judge Robert L. Dubé
ATLAS IRON PROCESSORS, INC., *et al.*,	)	(Amended order of reference dated May 7, 1998)
	)	
	)	**UNITED STATES' PROPOSED**
	)	**FINAL JURY INSTRUCTIONS**
Defendants.	)	

COURT'S INSTRUCTIONS
TO THE JURY

Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions — what we call your deliberations.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the Defendants guilty of the crime charged in the indictment.

INSTRUCTION 1

Duty to Follow Instructions
Presumption of Innocence

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendants or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

Authority: Eleventh Circuit Pattern Jury Instructions 2.1 (1997)

INSTRUCTION 1 (Alternate)

Duty to Follow Instructions
Presumption of Innocence
(When Any Defendant Does Not Testify)

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendants or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all; and if a Defendant elects not to testify, you should not consider that in any way during your deliberations. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

Authority: Eleventh Circuit Pattern Jury Instructions 2.2 (1997)

INSTRUCTION 2

Definition of Reasonable Doubt

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

Authority: Eleventh Circuit Pattern Jury Instructions 3 (1997)

INSTRUCTION 3

Consideration of the Evidence, Direct and Circumstantial — Argument of Counsel Comments by the Court

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Authority: Eleventh Circuit Pattern Jury Instructions 4.2 (1997)

INSTRUCTION 4

Credibility of Witnesses

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

Authority: Eleventh Circuit Pattern Jury Instructions 5 (1997)

INSTRUCTION 5

Interviews Prior to Trial

During the trial, there was testimony that certain witnesses were interviewed by the lawyers prior to trial. It is proper for an attorney to interview any witness in preparation for trial.

Authority: House v. Balkcom, 725 F.2d 608 (11th Cir. 1984) (conviction overturned, in part, because attorney failed to interview witnesses pre-trial)

INSTRUCTION 6

Impeachment
Inconsistent Statement
(Defendant Testifies With No Felony Conviction)

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant's testimony.

Authority: Eleventh Circuit Pattern Jury Instructions 6.3 (1997)

INSTRUCTION 7

Expert Witnesses

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Authority: Eleventh Circuit Pattern Jury Instructions 7 (1997)

INSTRUCTION 8

Accomplice — Informer — Immunity

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses.

For example, a paid informer, or a witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because the witness wants to strike a good bargain with the Government.

So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.

Authority: Eleventh Circuit Pattern Jury Instructions, Special Instruction 6.3 (1997)

INSTRUCTION 9

Witnesses — Immunity

Certain witnesses testifying before the grand jury which returned the indictment in this case, and certain witnesses testifying at the trial of this case have notified the Government that they were likely to invoke their constitutional privilege against self-incrimination and to refuse to answer questions directed to them. Therefore, under the provisions of the United States Code, a federal District Court issued orders compelling their witnesses to testimony. Their orders provide that no testimony or other information compelled under them may be used against these witnesses in any criminal case, except a prosecution for perjury or giving a false statement.

You should receive such testimony with care, but the mere fact that a witness may have been a participant, the mere fact that he may have violated the law, does not mean that he has not told the truth; and your are free to convict on the testimony of a participant alone, if you believe his testimony to be true and if it convinces you of the defendant's guilt beyond a reasonable doubt.

Persons violating the law do not usually publically proclaim their activities, and it is therefore necessary in many cases to rely on the testimony of such participants. This is almost always true with regard to criminal conspiracies which, by their very nature and definition, are secret and clandestine in their

function and operation. You may also bear in mind that such testimony may be corroborated by the testimony of other witnesses, and other evidence in the case. Taking these things into consideration, it is within your province, and yours alone, to give to the testimony of each witness such weight and value as you may deem it entitled.

Authority: 18 U.S.C. § 6002 (1998); United States v. Fischbach and Moore, Inc., 576 F. Supp. 1384 (W.D. Pa. 1983), aff'd, 750 F.2d 1183 (3d Cir. 1984), cert. denied, 470 U.S. 1029 (1985). See also United States v. Wuertenburger, Cr. No. 80-111 (W.D.N.C. 1981).

INSTRUCTION 10

Similar Acts Evidence
(Rule 404(b), F.R.E.)

During the course of the trial, as you know from the instructions I gave you then, you heard evidence of acts of a Defendant which may be similar to those charged in the indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if a Defendant committed the acts charged in the indictment. However, you may consider this evidence for other, very limited, purposes.

If you find beyond a reasonable doubt from other evidence in this case that a Defendant did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine whether a Defendant had the state of mind or intent necessary to commit the crime charged in the indictment, or whether a Defendant acted according to a plan or in preparation for commission of a crime, or whether a Defendant committed the acts for which that Defendant is on trial by accident or mistake.

Authority: Eleventh Circuit Pattern Jury Instructions, Special Instruction 4 (1997)

INSTRUCTION 11

Notetaking

In this case you have been permitted to take notes during the course of the trial, and most of you — perhaps all of you — have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should not give your notes any precedence over your independent recollection of the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

Authority: Eleventh Circuit Pattern Jury Instructions 5 (1997)

INSTRUCTION 12

Introduction to Offense Instructions
(In Conspiracy Cases)

At this time I will explain the indictment which charges a single offense in a single count. I will not read it to you at length because you will be given a copy of the indictment for study during your deliberations.

In summary, the indictment charges that the defendants and co-conspirators knowingly and willfully conspired together to engage in a combination and conspiracy to suppress and restrain competition by fixing and maintaining the price of scrap metal, coordinating price decreases in the price paid for scrap metal, and allocating suppliers of scrap metal in Southern Florida, all in violation of the "Sherman Antitrust Act," 15 U.S.C. § 1. The indictment further alleges that, in forming and carrying out the alleged conspiracy, the defendants and co-conspirators met at various locations and elsewhere and discussed and agreed upon fixing maximum prices to be paid for various grades of scrap metal and allocating suppliers of scrap metal and then actually did purchase scrap metal at the fixed prices and actually did allocate customers. The indictment alleges the conspiracy began as least as early as October 24, 1992, and continued at least until November 23, 1992.

Authority: Eleventh Circuit Pattern Jury Instructions 8 (1997)

INSTRUCTION 13

The Statute Defining the Offense Charged

Section 1 of Title 15 of U.S.C.A., commonly called the "Sherman Antitrust Act", provides, in relevant part, that,

> Every contract, combination . . . or conspiracy, in restraint of trade . . . among the several States, or with foreign nations, is . . . declared to be illegal. Every person who shall make any contract or engage in any . . . conspiracy [declared by sections 1-7] of this title to be illegal shall be . . . guilty" of an offense against the laws of the United States.

Authority: 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 51A.02 (1997 pocket part) (modified to include foreign nations) and cases cited therein.

INSTRUCTION 14

Purpose of
Sherman Antitrust Act

The purpose of the antitrust laws is to preserve the free flow of commerce and trade among the states and with foreign nations and to secure to everyone an equal right and opportunity to engage in the trade and commerce of the country.

So, any unreasonable interference, by contract, or combination, or conspiracy, with the ordinary, usual and freely-competitive pricing or distribution system of the open market in interstate or foreign trade and commerce, constitutes an unreasonable restraint, and is in itself unlawful; and, if knowingly done, is a Federal offense under the Sherman Antitrust Act.

Authority: 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 51A.02 (1997 pocket part) (modified to include foreign nations) and cases cited therein.

INSTRUCTION 15

“Every Person” — Defined

The term "every person" includes not only every individual, but also every corporation, partnership, or other association or organization, of every kind and character.

Authority: 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 51A.04 (1997 pocket part) and cases cited therein.

INSTRUCTION 16

Interstate Commerce Requirement

An essential element of an offense prohibited by the Sherman Act is that the alleged unlawful conduct must involve interstate or foreign trade or commerce. The government must prove beyond a reasonable doubt that the conspiracy charged in the Indictment either occurred in the flow of interstate or foreign commerce or affected interstate or foreign commerce in goods and services. Proof of interstate or foreign commerce as to one defendant or co-conspirator in the conspiracy charged in the indictment satisfies the interstate or foreign commerce element as to every defendant.

The term "interstate commerce" includes transactions or commodities that are moving across state lines or national boundaries or that are in a continuous flow of commerce from the commencement of their journey until their final destination in a different state or country. If the conduct challenged in the indictment involves transactions that are in the flow of commerce, the interstate or foreign commerce element is satisfied and the size of any such transaction is of no significance. The conspiracy charged in the indictment therefore would have occurred in the flow of interstate or foreign commerce if at least one defendant or one co-conspirator, in carrying out the charged conspiracy, crossed state lines or national boundaries or sold or transported scrap metal across state lines or national or boundaries.

The term "interstate commerce" also includes such transactions that are entirely within a state and are not part of a larger interstate transaction, if the conduct challenged in the indictment has had an effect on some other appreciable activity demonstrably in interstate or foreign commerce. In determining whether the charged conspiracy has had an effect on some other appreciable activity in

interstate or foreign commerce, you may add together the total amount of all the interstate transactions.

Although the government must prove that the conspiracy charged in the indictment either affected interstate or foreign commerce or occurred within the flow of interstate or foreign commerce in goods or services, the Government's proof need not quantify an adverse impact of the charged conspiracy or show that the charged conspiracy had any anticompetitive effect. It is a question of fact for the jury to determine whether the defendants' conduct charged in the indictment involved interstate or foreign commerce.

Authority: McLain v. Real Estate Board of New Orleans, 444 U.S. 232 (1980); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Construction Aggregate Trans., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 767 n.31 (11th Cir. 1983); United States v. Aquafredda, 834 F.2d 915, 917 (11th Cir. 1987).

INSTRUCTION 17

Corporation Can Act
Only Through Agents

As a general rule, whatever any person is legally capable of doing himself can be done through another as agent. So, if the acts of an employee or other agent are voluntarily and intentionally ordered or directed, or authorized or consented to by the accused, then the law holds the accused responsible for such acts, the same as if the acts had in fact been done by the accused.

A corporation is in law a person, but, of course, it cannot act otherwise than through its directors, or officers, or employees, or other agents. The law, therefore, holds a corporation criminally responsible for all unlawful acts of its directors, or officers, or employees, or other agents, provided such unlawful acts are done within the scope of their authority and to benefit the corporation.

Authority to act for a corporation in a particular matter, or in a particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact in issue in a criminal case, need not be established by direct evidence, but may be established by circumstantial evidence.

Authority: 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 51A.07 (1997 pocket part) and cases cited therein.

INSTRUCTION 18

Conspiracy

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed, you may consider the acts and words of all the alleged participants. The agreement may be inferred from all the circumstances and the conduct of all of the alleged participants.

Only a Defendant's own acts and words show whether that particular Defendant joined the conspiracy. You may consider the acts and words of all the alleged participants to decide what it was a particular Defendant did and said or to help you to understand a Defendant's acts and words.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the members are. So, if a defendant has a general understanding of the unlawful purpose of the plan and knowingly joins in that plan on one occasion, this is sufficient to convict that defendant for conspiracy even though the defendant did not participate before, and even though the defendant played only a minor part.

A conspiracy is a kind of "partnership" and under the law each member is an agent or partner of every other member and each member is bound by or responsible for the acts of every other member done to further their agreement. The "agreement or understanding" need not be an express or formal agreement, be in writing, or cover all the details of how it is to be carried out. Nor is it necessary that the members have directly stated between themselves the details or purpose of the scheme.

The conspiracy charged in the Indictment includes two different types of conduct, an agreement to fix prices and an agreement to allocate customers. It is

not necessary for the government to prove that the conspiracy charged in the Indictment includes both types of conduct. It would be sufficient if the Government proves beyond a reasonable doubt a conspiracy to commit one of the types of conduct charged in the Indictment; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the types of conduct was the subject of the conspiracy entered into by a particular Defendant. If you cannot agree in that manner, you must find the Defendant not guilty of the conspiracy charged.

Authority: United States v. Solomon, 686 F.2d 863, 867 n.2 (11th Cir. 1982); United States v. Starett, 55 F.3d 1525, 1549 (11th Cir. 1995); United States v. Byrom, 910 F.2d 725, 734-35 (11th Cir. 1990); United States v. Diecidue, 603 F.2d 535, 547 (11th Cir. 1979); United States v. Hartley, 678 F.2d 961, 975 (11th Cir. 1982); United States v. Dennis, 786 F.2d 1029, 1040 n.13 (11th Cir. 1986).

INSTRUCTION 19

Success of
Conspiracy Immaterial

The government is not required to prove that the parties to or members of the agreement or conspiracy were successful in achieving any or all of the objects of the agreement or conspiracy.

Authority: 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 28A.08 and cases cited therein.

INSTRUCTION 20

Price Fixing — Defined

The Indictment charges the Defendants with conspiring to fix prices. A conspiracy to fix prices is an agreement or mutual understanding between two or more competitors to fix, control, raise, lower, maintain, or stabilize the prices charged or to be charged for products or services.

A price-fixing conspiracy is commonly thought of as an agreement to establish the same price; however, prices may be fixed in other ways. Prices are fixed if by agreement prices are raised or, as alleged in the indictment, lowered. They are fixed because they are agreed upon. Thus, any agreement to lower a specific price, to set a maximum price, to stabilize prices, to set a specific price, or to maintain a specific price is illegal.

The aim and result of every price-fixing agreement, if successful, is the elimination of one form of competition.

Therefore, if you find that a price-fixing conspiracy has been established, it does not matter whether the prices agreed upon were too high or too low or reasonable or unreasonable. It is not for you to determine whether particular price-fixing schemes are wise or unwise, healthy or destructive.

If you should find that the Defendants did enter into an agreement to fix prices, the fact that they did not observe it, or that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objectives, is no defense. The agreement is the crime, even if it is never carried out.

Similarity of competitive business practices of the Defendants and alleged co-conspirators, or the mere fact that they may have charged identical prices for the same goods, does not alone establish an agreement or mutual understanding to

fix prices, since such practices may be consistent with ordinary and proper competitive behavior in a free and open market.

A person may lawfully charge prices identical to those charged by competitors and still not violate the Sherman Act. A person may follow and conform exactly to the price policies and price changes of competitors; and such conduct, without more, would not be violative of the law, unless you find it was done pursuant to an agreement or mutual understanding between two or more persons, as charged in the Indictment.

Nevertheless, you may consider such facts and circumstances along with all other evidence in determining whether the similarity or identity of prices resulted from the independent acts or business judgment of the Defendants freely competing in the open market, or whether it resulted from an agreement or mutual understanding between the Defendants and one or more competitors.

Authority: Modified Sample Jury Instructions in Criminal Antitrust Cases #54, p. 153-54 (Antitrust Sec. of ABA, 1984); United States v. Misle Bus & Equipment Co., 967 F.2d 1227, 1235 (8th Cir. 1992).

INSTRUCTION 21

Customer Allocation

A second aspect of the conspiracy charged in the indictment charges the defendants with conspiring with others to allocate or divide up customers for whom they would otherwise compete.

A conspiracy to allocate customers is an agreement or understanding between competitors not to compete for the business of a particular customer or customers. Customer allocation exists, for example, where two or more competitors agree not to solicit or sell to the customer or customers to which the others sell.

Every conspiracy to allocate customers is unlawful, regardless of the motives of the parties or any economic justification.

The aim and result of every customer allocation agreement, if successful, is the elimination of one form of competition.

Therefore, if you find that a customer allocation conspiracy has been established, it does not matter whether the conspiracy was reasonable or unreasonable. It is not for you to determine whether particular customer allocation schemes are wise or unwise, healthy or destructive.

If you should find that the defendants entered into an agreement to allocate customers, the fact that the defendants or their co-conspirators did not observe it, or that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objectives, is not a defense. The agreement is the crime, even if it was never carried out.

A business concern, however, has the right independently to select its customers and to sell its products to whomever it chooses. Likewise, a business concern has no legal obligation to sell to a particular customer. A business concern may decide not to solicit or sell to a customer, provided the decision results from an independent business judgment and not from an understanding with a competitor.

Authority: Modified Sample Jury Instructions in Criminal Antitrust Cases #23, p. 69 (Antitrust Sec. of ABA, 1984); United States v. Misle Bus & Equipment Co., 967 F.2d 1227, 1235 (8th Cir. 1992).

INSTRUCTION 22

Elements Of Offense; Burden Of Proof

In order to establish the offense of conspiracy to fix prices and allocate customers charged in the Indictment, the Government must prove these elements beyond a reasonable doubt:

> One, that the conspiracy described in the Indictment was knowingly formed and was in existence at or around the time alleged;
>
> Two, that the Defendant knowingly became a member of the conspiracy; and
>
> Three, that the alleged conspiracy restrained interstate or foreign trade or commerce.

If you find beyond a reasonable doubt, from the evidence in the case, that the existence of the conspiracy charged in the indictment has been proved, then the conspiracy-offense charged is complete, whether the defendant knowingly became a member at the beginning of the conspiracy, or afterwards during the continuance of the conspiracy, if you also find beyond a reasonable doubt from the evidence that the trade or commerce restrained by such conspiracy was interstate or foreign in nature. In addition, one who joins an existing conspiracy or who participates in only part of a conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy, or as if he had participated in every phase of the conspiracy.

If, on the other hand, you find from your consideration of all of the evidence that any of these elements has not been proved beyond a reasonable doubt, then you should find the Defendant not guilty.

The conspiracy charged in the Indictment includes two different types of conduct, an agreement to fix prices and an agreement to allocate customers. It is not necessary for the government to prove that the conspiracy charged in the Indictment includes both types of conduct. It would be sufficient if the Government proves beyond a reasonable doubt a conspiracy to commit one of the types of conduct charged in the Indictment, but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the types of conduct was the subject of the conspiracy entered into by a particular Defendant. If you cannot agree in that manner, you must find the Defendant not guilty of the conspiracy charged.

Authority: 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, §§ 51A.15, 51A.19 (Pocket Part 1997) and modified by cases cited therein; the last paragraph was taken from Manual of Model Criminal Jury Instructions for the District Courts of the Eight Circuit, 5.06F and is supported by United States v. Miller, 471 U.S. 130, 135-38 (1985); United States v. Muelbl, 739 F.2d 1175, 1178-84 (7th Cir. 1984); United States v. Kramer, 711 F.2d 789, 797 (7th Cir. 1983).

INSTRUCTION 23

Per Se Violations

The Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are conclusively presumed to be an unreasonable restraint on trade and are per se illegal, without inquiry about the precise harm they have caused or the business excuse for their use. Included in this category of unlawful agreements are agreements to fix prices and allocate customers. Therefore, if you find that the conspiracy charged in the Indictment existed and that one or more Defendants was a member of that conspiracy, you need not be concerned with whether the agreement was reasonable or unreasonable, or the justifications for the agreement, or the harm done by it.

It is not a defense that the parties thereto may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results. If you find the conspiracy charged in the Indictment existed, it was illegal. If the Government has failed to prove the charged conspiracy, the Defendants should be found not guilty.

Authority: Sample Jury Instructions in Criminal Antitrust Cases #52, p. 149 (Antitrust Sec. of ABA, 1984).

INSTRUCTION 24

Ignorance of Antitrust Laws No Defense

It is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law.

Thus, if the jury should find, beyond a reasonable doubt, from the evidence in the case that the conspiracy was knowingly formed and that a defendant, knowingly became a member of the conspiracy, as charged, then the fact that a defendant may not have known that his conduct was unlawful under a particular statute would not be a defense.

Authority: 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 51A.17 (Pocket Part 1997) and cases cited therein.

INSTRUCTION 25

Motives Prompting
Conspiracy Immaterial

A conspiracy to fix prices in or affecting interstate or foreign trade and commerce is unlawful, even though the conspiracy may be formed or engaged in for what appear to the conspirators to be laudable motives.

A price-fixing conspiracy, such as charged in the indictment, cannot therefore be justified under the law, even though the conspiracy may have been formed, or engaged in, to prevent or halt ruinous competition, or to eliminate the evils of price cutting, or to give each competitor what the conspirators think is his fair share of the market.

Authority: 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 51A.18 (Pocket Part 1997) and cases cited therein.

INSTRUCTION 26

Proof of Overt Act Unnecessary

The evidence need not show that the members of the alleged conspiracy did any act or thing to further, or accomplish, any object or purpose of the agreement or arrangement or understanding. Nor is it necessary for the evidence to show that a defendant actually adopted, or followed, or adhered to, any price, price schedule or formula or list which may have been agreed upon or arranged or understood.

What the evidence in the case must show, beyond a reasonable doubt, in order to establish the offense charged in the indictment, is that the conspiracy alleged was knowingly formed, and that one or more of the conspirators knowingly became a member of the conspiracy at the beginning or afterwards during the existence of the conspiracy. As stated before, the success or failure of the conspirators to accomplish or achieve any object or purpose of the conspiracy is immaterial.

The gist of the crime charged in the indictment is knowingly making or arriving at an agreement, or arrangement, or understanding, in unreasonable restraint of interstate or foreign trade and commerce.

Authority: 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 51A.19 (Pocket Part 1997) and cases cited therein.

INSTRUCTION 27

Evidence — Unindicted Co-conspirators

In determining whether each defendant now here on trial is guilty or not guilty, you will not be concerned with whether or not or why any others may or may not have been made defendants in this case. These are not matters for you to surmise or speculate upon. You are to consider only what is in evidence here before you as it relates to the guilt or innocence of each of the defendants now on trial.

Authority: Jury Instructions in Criminal Antitrust Cases 1976-80, C, p. 113 (Antitrust Sec. of ABA, 1982) (citing United States v. Andrew Carlson & Sons, Inc. *et. al*, 76-CR-139 (E.D.N.Y. Nov. 2 1976), aff'd 584 F.2d 974 (2d Cir. 1978)).

INSTRUCTION 28

Statute of Limitations

The statute of limitations for the offense charged in the indictment is five years. This means that you cannot find the defendants Atlas Iron Processors, Inc., Sunshine Metal Processing, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., David Giordano, and Randolph J. Weil guilty unless you find, beyond reasonable doubt, that a conspiracy continued or existed within the period beginning November 13, 1992, and ending November 13, 1997, which is the date on which the indictment was filed.

This does not mean, however, that you must exclude from consideration evidence of acts or conduct prior to November 13, 1992. A conspiracy may be a continuing thing which may be proved by a composite of acts. You may, therefore, consider evidence of a defendant's conduct prior to November 13, 1992, as proof of the existence of a conspiracy.

Authority: 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 51A.20 (1997 pocket part) (final sentence modified) and cases cited therein.

INSTRUCTION 29

Jurisdiction and Venue

Before you can find the defendants Atlas Iron Processors, Inc., Sunshine Metal Processing, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., David Giordano, and Randolph J. Weil guilty, you must find, beyond reasonable doubt, that within the five-year period immediately preceding November 13, 1997, some means, method, practices or overt act was committed the authority of the members of the alleged conspiracy within the Southern District of Florida which includes Miami and its surrounding communities.

Authority: 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions, § 51A.21 (1997 pocket part) and cases cited therein.

INSTRUCTION 30

On or About — Knowingly (Only)
(When Willfulness or Specific Intent is Not an Element)

You will note that the indictment charges that the offense was committed "at least as early as" a certain date, or “at least until” a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly," as that term has been used in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident. It does not mean that the act was done with knowledge that it was illegal.

Authority: Eleventh Circuit Pattern Jury Instructions 9.2 (1997)

INSTRUCTION 31

Caution — Punishment
(Multiple Defendants — Single Count)

The case of each Defendant and the evidence pertaining to each Defendant should be considered separately and individually. The fact that you may find any one of the Defendants guilty or not guilty should not affect your verdict as to any other Defendant.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether each Defendant is guilty or not guilty. Each Defendant is on trial only for the specific offense alleged in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If a Defendant is convicted the matter of punishment is for the Judge alone to determine later.

Authority: Eleventh Circuit Pattern Jury Instructions 10.3 (1997)

INSTRUCTION 32

Duty to Deliberate

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges — judges of the facts. Your only interest is to seek the truth from the evidence in the case.

Authority: Eleventh Circuit Pattern Jury Instructions 11 (1997)

INSTRUCTION 33

Verdict

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

[Explain verdict]

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

Authority: Eleventh Circuit Pattern Jury Instructions 12 (1997)

The foregoing proposed Jury Instructions are hereby submitted by the United States.

Respectfully submitted,

WILLIAM J. OBERDICK
Acting Chief
Cleveland Field Office

By: _____
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