UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
	)	Case No. 97-0853-CR-Middlebrooks
v.	)	
ATLAS IRON PROCESSORS, INC.,	)	
et al.,	)	Magistrate Judge Robert L. Dubé
	)	(May 7, 1998 Order of Reference)
Defendants.	)	
	)	**RESPONSE OF UNITED STATES**
	)	**OPPOSING DEFENDANTS'**
	)	**JOINT MOTION TO SUPPRESS**
	)	**THE GOVERNMENT'S**
	)	**INTRODUCTION OF**
	)	**DOCUMENTARY EVIDENCE**
	)	**AND TANGIBLE THINGS**

I

INTRODUCTION

The United States opposes Defendants' Joint Motion to Suppress the Government's Introduction of Documentary Evidence and Tangible Things. The defendants' motion is poorly taken and should be denied.

The United States has complied with its obligations under Rule 16(a)(1)(C) and the standing discovery order, long ago making available for inspection and copying all documents and tangible objects in its possession and control that: (1) belong to the defendants; or (2) are intended to be used in the government's case-in-chief; or (3) are material to the defendant's trial preparation. Virtually all of these documents and tangible objects were made available to the defendants between seven to 12 months ago. Moreover, the United States understands its obligations to be continuing in nature and has supplemented its discovery promptly as appropriate.

In short, the defendants' motion is rooted in their belief that not only does Rule 16(a)(1)(C) require the United States to make available for inspection and copying documents and tangible objects

it intends to use in its case-in-chief, but that this Rule also requires the United States to identify its "case-in-chief" documents from a larger group of discoverable documents and designate pre-trial each and every exhibit it will offer at trial. The United States disagrees. The United States believes its obligation under Rule 16(a)(1)(C) is satisfied by making each of the three categories of documents and tangible objects provided for under this Rule available for inspection and copying. This has been the practice followed by the Antitrust Division and its prosecutors in other jurisdictions. Moreover, the United States confirmed with the U.S. Attorney's office in the Southern District of Florida that its position concerning Rule 16(a)(1)(C) is consistent with the U.S. Attorney office's practice. Nevertheless, as explained below, the defendants have in their possession 13 boxes of documents, each of which contains pricing documents of Atlas and Sunshine. The pricing documents in these 13 boxes cover the period September through December, 1992, and contain more than 95 percent of the trial exhibits the United States intends to use in its case-in-chief.

The defendants' arguments about "prejudice" and "unfairness" are misplaced. The defendants were given a road map to the government's case-in-chief almost a year ago. Long ago the United States advised the defendants there are contemporaneous notes of the principal price-fixing meeting which lay out the charged conspiracy. In January, 1998, among other discovery, the United States produced to the defendants a copy of these contemporaneous notes, the grand jury testimony of their author (Sheila McConnell), and other relevant statements discoverable under Rule 16 made by McConnell pertaining to the charged conspiracy. In addition, in its response to the defendants' request for a bill of particulars, the United States laid out the charged conspiracy in detail, identifying specific customers, specific geographic areas, specific prices, the dates and participants at key meetings, and the time frame of the conspiracy. The bill of particulars response, combined with McConnell's notes, her grand jury testimony, and other relevant statements of McConnell produced to the defendants, eliminate any argument defendants can muster about not knowing what documents to review or what pricing documents the United States would rely upon in proving its case. In fact, McConnell's notes,

grand jury testimony and other statements provide a road map of the government's case.[1]

If there was any lingering doubt on the part of the defendants about what documents (or categories of documents) the United States would rely upon in its case-in-chief, this doubt should have ended after the United States responded to the defendants' request for a bill of particulars. In its response dated May 18, 1998, the United States provided, among other things, the following information to the defendants: (1) the evidence (i.e., pricing documents of Atlas and Sunshine) shows the charged conspiracy began at least as early as October 24, 1992, and continued through December, 1992; (2) the names of then-known suppliers subjected to the price-fixing agreement; (3) the then-known geographic areas subjected to the price-fixing agreement; (4) the various grades of scrap subjected to the price-fixing agreement; (5) specific prices; and (6) key meetings and the participants at each meeting. With McConnell's notes, the defendants, and their experienced counsel, all of whom are former prosecutors, had all the information they needed to prepare a defense.

The defendants' argument about "prejudice" or "unfairness" is contrived. In December, 1997, and January, 1998, the United States made its position known to the defendants about the manner in which it would make documents and tangible objects available to them. The United States' position has remained unchanged. Now, only on the eve of trial and with a firm trial date staring them in the face, do the defendants finally raise with the Court their concerns about the government's discovery under Rule 16(a)(1)(C). To boot, the defendants argue they have been given too much information, rather than too little. The "prejudice" about which the defendants complain, however, is manufactured and contrived. It is the result of their own delay and non-action, and they should not now be rewarded for their foot-dragging. Not only is suppression an inappropriate pre-trial remedy given the facts of this case, but even a continuance should be denied.

For the reasons stated more fully below, the defendants' motion should be denied.

---

[1] If there is any doubt about whether these materials provide a road map of the government's case, the United States invites the Court to examine McConnell's materials *in camera*.

II

FACTS

A. DOCUMENTS AND TANGIBLE OBJECTS MADE AVAILABLE TO THE DEFENDANTS PURSUANT TO RULE 16 (a)(1)(C) AND THE STANDING DISCOVERY ORDER

1. Pursuant to Rule 16(a)(1)(C) and the standing discovery order, all documents of defendant Atlas Iron Processing, Inc. ("Atlas") in the possession of the United States were made available to the defendants for inspection and copying more than a year ago. These documents and tangible objects, which were made available on December 14, 1997, included Atlas pricing documents such as scale tickets, check registers, etc.[2] On December 16, 1997, John McCaffrey of Atlas reviewed the Atlas documents for the first time in our office. On behalf of the defendants, McCaffrey has conducted subsequent reviews of Atlas documents. In fact, on at least one occasion, for McCaffrey's convenience, the United States segregated Atlas documents for the year 1992 from the larger group of Atlas documents.

2. Pursuant to Rule 16(a)(1)(C) and the standing discovery order, all documents and tangible objects of defendant Sunshine Metal Processing, Inc. ("Sunshine") in the government's possession were made available to the defendants in two stages. The first group of Sunshine documents (about nine boxes) was made available to the defendants more than a year ago (on December 14, 1997). At the time, these were all the Sunshine documents then in the possession of the United States. A second group of Sunshine documents was made available to the defendants shortly after May 5, 1998, the date when the United States received, under Court order in the Northern District of Ohio, the rest of Sunshine's subpoenaed documents from its bankruptcy trustee.

---

[2] The defendants are fond of referring to the Atlas documents as consisting of a "tractor-trailer load" of documents. The United States has 196 boxes of Atlas documents. There are approximately 10 boxes of Atlas scale tickets covering the period September, 1992 through December, 1992. There are an additional 3 boxes of Sunshine scale tickets covering this conspiratorial period. Thus, there is a total of only 13 boxes of Atlas and Sunshine scale tickets covering the conspiratorial period. Virtually all of the transactional business documents (i.e., scale tickets and related pricing documents) the United States intends to use in its case-in-chief come from these 13 boxes, all of which are currently in the possession of the defendants.

3. In addition to Atlas and Sunshine documents, the United States also has made available for inspection and copying all documents subpoenaed from Everglades Recycling, Inc. ("Everglades"), a competitor of Atlas and Sunshine in the Miami area on certain grades of scrap. Everglades' counsel filed for a protective order. After a protective order was entered by Magistrate Judge Dubé on May 28, 1998, the Everglades documents were made available to the defendants. On behalf of the defendants, McCaffrey reviewed the Everglades documents (eight boxes). McCaffrey requested and received copies of 231 pages of Everglades documents.

4. Pursuant to Rule 16(a)(1)(C) and the standing discovery order, the United States made available to the defendants all documents and tangible objects subpoenaed from Alferrous, Inc., a scrap company doing business in Ohio owned by Sheila McConnell. Among other things, the defendants were given a notebook of McConnell's containing contemporaneous notes of the principal price-fixing meeting. McConnell's notes lay out the charged conspiracy, identifying specific customers, specific geographic areas, specific grades of scrap and specific prices. Indeed, in discussions with defense counsel dating as far back as pre-Indictment meetings held in September and October of 1997, the United States advised the defendants it had contemporaneously-made notes providing a road map of the price-fixing agreement. On behalf of the defendants, John McCaffrey inspected the Alferrous, Inc. documents and McConnell's materials.

5. On January 7, 1998, nearly a year ago, John McCaffrey inspected Sheila McConnell's notebook, as well as other items produced by McConnell and Alferrous, Inc. Copies were requested and made of McConnell's notebook containing the price-fixing agreement; three notepads belonging to McConnell; and a memo dated April 11, 1994.

6. Pursuant to Rule 16(a)(1)(C) and the standing discovery order, the United States made available documents and tangible objects produced to the United States by Henry Kovinsky, a former officer and owner of defendant Sunshine. These materials included, among other things, a 1992 calendar of Kovinsky and other documents related to Sunshine. Kovinsky's calendar identified meetings involving the defendants, including the principal price-fixing meeting. The United States also identified these meetings, including the principal price-fixing meeting, in its response to the bill of

particulars request.

7. On January 7, 1998, on behalf of the defendants, John McCaffrey inspected and requested copies of Henry Kovinsky's 1992 calendar and the documents he produced to the United States. Copies of these materials were given to McCaffrey on January 7, 1998.

8. Pursuant to Rule 16(a)(1)(C) and the standing discovery order, the United States also made available to the defendants for inspection and copying other documents and tangible objects in its possession, namely, other documents and materials subpoenaed from non-defendants by the grand jury. These materials consisted of one box.

9. Pursuant to Rule 16 (a)(1)(A), the United States made available to the defendants the grand jury testimony of the following witnesses: (1) Jennifer Suplita; (2) Thomas Earle; (3) Katherine Toderick; (4) Kimberly Lansu; (5) Richard Morris; (6) William White; (7) Charles Morton (I and II); (8) Michael Gegick (redacted); and (9) Sheila McConnell (redacted). These grand jury transcripts were produced on January 7, 1998. McCaffrey agreed to make copies of these materials and send them to counsel for each of the individual Giordano defendants.

10. Pursuant to Rule 16(a)(1)(C) and the standing discovery order, the United States made available for inspection and copying documents and tangible objects produced by Thomas Crane, the former general manager of Everglades. This discovery was made available to the defendants on January 13, 1998. On behalf of the defendants, it was inspected by John McCaffrey on January 20, 1998. In addition to Crane's notebook and handwritten notes, McCaffrey also inspected and received copies of documents labeled SGJ-11, 21 and 22.

11. In a letter dated January 21, 1998, the United States sent to counsel for each of the defendants statements made by Sheila McConnell falling within Rule 16(a)(1)(A) and the standing discovery order. Like her contemporaneous notes and grand jury testimony, Ms. McConnell's Rule 16 statements offer a road map of the government's case-in-chief. These Rule 16 statements, provided in an 18-page document, cover specific customers, specific prices, specific geographic areas, and specific time frames involving the charged conspiracy.

12. Virtually all of the Atlas and Sunshine transactional business documents (e.g., scale

tickets) the United States intends to use in its case-in-chief are located in approximately 13 boxes. These documents comprise more than 95 percent of the total documents the United States intends to use in its case-in-chief. These documents cover the period September, 1992 through December, 1992. Though the defendants attempt to kick up dust with respect to what they characterize as 404(b)-related documents, the United States presently does not intend to use in its case-in-chief any transactional business documents (such as invoices; scale tickets; canceled checks; etc.) submitted by either Luria Brothers or Luntz Corp, the two major competitors of Atlas in Cleveland.

13. The defendants' loose guess about the number of documents submitted by Atlas and Sunshine covering the conspiracy period, and which the government potentially may introduce in its case-in-chief, is vastly overstated. In a recent pleading, the defendants suggest there potentially are 60,000 documents which the government may introduce at trial. See Defendants' brief opposing the United States' motions requiring the Defendant's to comply with Rules 16((b)(1)(A) and (B) (filed December 21, 1998), pp. 4-5. In fact, the United States estimates it will introduce, as expeditiously as possible, a total of between 1,400 and 1,800 scale tickets of Atlas and Sunshine showing the charged conspiracy happened and continued through December, 1992. These pricing documents relate to the specific customers, specific geographic areas, and various grades of scrap identified in McConnell's contemporaneous notes and her grand jury testimony. The selection of these individual documents as potential trial exhibits constitutes the work product and trial strategy of the United States.

B. THE DEFENDANTS' CONDUCT OVER THE PAST WEEK PROVES THEY KNOW EXACTLY WHAT DOCUMENTS ARE MATERIAL TO THE GOVERNMENT'S AND THEIR CASE

1. In support of their motion, the defendants argue the government's failure to identify for them each trial exhibit it intends to introduce in its case-in-chief has so prejudiced them, that "the defendants have been unable to commence meaningful trial preparations." Defendants' brief, p. 4. This statement is outrageous. As provided above, the United States has made available to the defendants all "meaningful" documents related to the charged conspiracy. In addition, the defendants' conduct this past week proves they know exactly what documents are important not only to their case, but also to

the government's case-in-chief.

2. On December 14, 1998, John McCaffrey called Ian Hoffman of the United States at approximately 4:45 p.m. and requested that he be given an opportunity to review Atlas scale tickets (i.e., invoices) covering the period September, 1992 through December, 1992. The United States agreed to make these documents available for inspection and copying the next business day (December 15, 1998) at 11:30 a.m. McCaffrey reviewed these Atlas documents, and then requested that the United States make available for inspection and copying Sunshine scale tickets covering the same time period. According to McCaffrey, the purpose of his review was to get a handle on the number of documents so the defendants could get them copied. McCaffrey promised he would get back to the United States immediately with information about which copy service would copy the documents. This immediate attention did not happen.[3]

3. Finally, on December 18, 1998, McCaffrey called the United States and identified the copy service (The Legal Pad) he would use to copy the relevant Atlas and Sunshine documents. Counsel for the United States called the copy service later that day and made arrangements for the documents to be picked up on December 22, 1998.

4. On December 22, 1998, 13 boxes of Atlas and Sunshine scale tickets covering the months of September, October, November and December of 1992, were sent to the defendants' copy service. On behalf of the defendants, McCaffrey selected these months. The United States understands that the defendants are copying these invoices, marking them, and then scanning their images into a computer, presumably for use with *Trial Director* or some other comparable commercial product.

5. Dating as far back as pre-Indictment meetings with the defendants, as well as in subsequent discussions with defense counsel, the United States has advised the defendants the pricing documents for the charged conspiratorial period are powerful and show the conspiracy was

---

[3] The United States placed telephone calls to McCaffrey on December 16 and 17, 1998, asking what arrangements had been made for copying the documents. The United States wanted to make sure it had appropriate staff to coordinate the pick-up and delivery. McCaffrey responded that no arrangements had been made.

implemented. Why the defendants waited until the eve of trial to copy the Atlas and Sunshine invoices covering the conspiratorial period is inexplicable -- especially in view of their having had possession of McConnell's notes, grand jury testimony and other statements for nearly a year. The defendants' inaction is inexplicable, and their claim of "prejudice" rings hollow.

III

LAW AND ARGUMENT

A. RULE 16(a)(1)(C) DOES NOT REQUIRE THE UNITED STATES TO SEGREGATE AND IDENTIFY ITS TRIAL EXHIBITS PRE-TRIAL

Contrary to the defendants' argument, Rule 16(a)(1)(C) does not require the United States to select and identify pre-trial each and every document it intends to introduce at trial in its case-in-chief. Rule 16(a)(1)(C) provides:

> (C) **Documents and Tangible Objects**. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Fed. R. Crim. P. 16(a)(1)(C).

The leading case on the scope of the government's obligations under Rule 16(a)(1)(C) is United States v. Fischbach & Moore, Inc., 576 F. Supp. 1384 (W.D. Pa. 1983). In Fischbach & Moore, the defendants objected to the government's production of a voluminous quantity of documents related to construction bids in connection with that section of Rule 16(a)(1)(C) requiring the production of documents the government intended to introduce in its case-in-chief. Fischbach & Moore, 576 F. Supp. at 1391. In Fischbach & Moore, as here, the defendants argued that Rule 16(a)(1)(C) required the government to designate which documents it intended to introduce in its case-in-chief and identify each such document it intended to offer as a trial exhibit. Id. The court in Fischbach & Moore flatly rejected the defendants' argument, holding: "Insofar as defendants request designation of exhibits by the government, we find no case law supporting this particular request." Id. See also United States v.

Villareal, 752 F. Supp. 851, 853 (N.D. Ill. 1991) (Defendant's request for identification of the government's trial exhibits exceeds Rule 16(a)(1)(C): "The government is only required to make the physical objects available for inspection or copying.").

There are striking parallels between the facts in our case and those in Fischbach & Moore. In Fischbach & Moore, the court found it important that the government had identified specific contracts it alleged were involved in the bid rigging, holding this identification "will sufficiently aid the defendants in culling significant documents." Fischbach & Moore, 576 F. Supp. at 1391. Accordingly, the court in Fischbach & Moore held "the government has satisfied its obligation of production under Rule 16(a)(1)(C)." Id. In our case, the United States has identified specific customers, specific geographic areas, specific grades of scrap, specific time frames and the actual agreed-upon prices. Indeed, the defendants were given a road map to the charged conspiracy at least a year ago. This road map consists of the notes of Sheila McConnell, her grand jury testimony, and any statements made by her covered under Rule 16(a)(1)(A).

In addition, on May 18, 1998, in responding to the defendants' request for a bill of particulars, the United States provided them with significant information: (1) the dates and places of key meetings, including the principal price-fixing meeting; (2) a list of specific customers and specific geographic areas subject to the charged conspiracy, along with specific prices; and (3) identification of grades of scrap affected by the charged conspiracy. Most important, the United States provided the defendants with a time frame, putting them on notice that the evidence shows the charged conspiracy continued through December, 1993. The charged conspiracy involves price-fixing. What kinds of documents do the defendants believe the government will introduce in its case-in-chief? What epiphany took place on December 14, 1998, when the defendants finally decided to copy the scale ticket invoices of Sunshine and Atlas covering the period September, 1992 through December, 1992? For the defendants to now argue they have no idea what documents are relevant to the government's case is disingenuous.

In United States v. McDade, 1992 WL 382351 (E.D.Pa. December 11, 1992) (Attachment I), the defendants argued they had been buried under an avalanche of documents and electronic materials, rendering the defense incapable of determining which materials were germane and relevant to the impending trial. McDade, 1992 WL at *1. The McDade court held the government was not required to identify for the defendants pre-trial the exhibits it will rely upon at trial. Id. In so holding, the McDade court relied upon the leading Third Circuit case on this subject, United States v. Kenny,

462 F.2d 1205, 1211-12 (3d Cir. 1972), cert. denied, 409 U.S. 914 (1972). The McDade court related that in Kenny, the defendants had been given access to a roomful of documents, six days per week before trial and seven days a week during trial. Id. Although the defendants in Kenny claimed they were overwhelmed by the large volume of documents and could make no meaningful use of them, the Third Circuit rejected this argument, finding the defendants in Kenny had been given adequate time before and during trial to examine the documents. Id. Likewise, in McDade, the court refused to grant the defendants access to the work product and trial strategy of the government and held the government was not required to turn over its trial exhibits pursuant to Rule 16(a)(1)(C). Id. Accordingly, the McDade court refused to require the government to expressly identify what documents and tangible objects it would introduce in its case-in-chief; but instead required the government to simply indicate to the defendants which piles of documents were so far afield that the defendants did not to have to inspect them. Id. at *2.

In United States v. Litman, 547 F. Supp. 645 (W.D. Pa. 1982), the defendants requested that the government designate which documents, among those provided to the defendants pursuant to Rule 16(a)(1)(C), it intended to use as trial exhibits. Litman, 547 F. Supp. at 652. Factually, in Litman the materials involved in the defendants' request concerned insurance company files and physicians' files pertaining to personal injury claimants identified in the indictment. Id. Despite the large number of documents involved, the Litman held: "We find no case or statutory law supporting the defendants' request for such a list." Id. The Litman court presumed the defendants were sufficiently familiar with the majority of the documents (since they were the documents of the defendants), negating any possible hardship. In our case, too, the defendants are sufficiently familiar with their own documents, negating any possible hardship. The Litman court thus rejected the same argument advanced by the defendants in our case.

Another instructive case, rejecting the argument pressed by the defendants in our case, is United States v. Labovitz, 1997 WL 289732 (D. Mass. May 30, 1997) (Attachment II). In Labovitz, the court held the government is not required under Rule 16(a)(1)(C) to segregate and identify documents and tangible things it intends to introduce in its case-in-chief. Labovitz, at *7. Rather, the

court held "[t]o the extent that these documents [and tangible things] are contained among the materials already made available to the defendant, the defendant may retrieve them as easily as the Government." Id. In addressing the government's responsibility with respect to making available documents and tangible objects "material" to the defense, the Labovitz court held as follows:

> A consistent theme throughout the defendant's motion is the argument that the Government is obligated to provide certain documents under Fed. R. [Crim.] P. 16 (a)(1)(C). According to defendant, this rule not only requires the Government to provide the documents but also, where the documents are voluminous, to take responsibility for culling out all responsive documents and providing them in a package to the defendant. There are a number of problems with this argument.
>
> First, as noted, defendant has failed to make an adequate, specific prima facie showing of materiality to invoke Rule 16. (citations omitted)
>
> Second, even assuming that Rule 16 applies, the Government has satisfied its obligation by permitting the defendant to inspect and copy the documents himself.
>
> Third, defendant's suggestion that the Government has an obligation to take responsibility, at its peril, for culling out responsive documents from the large quantity of paper made available to defendant, and then provide these in a neat package to the defendant, has no basis. The defendant has had access to all of the relevant documents in this case for more than a year. To require the government to sift through thousands of pages of documents and make a determination as to which may be deemed 'material,' at risk of an accusation of impropriety if any document defendant later deems responsive is omitted, is not only unfair but unworkable.

Labovitz, at *7 (emphasis added).

The Labovitz decision makes it clear that the government's obligation under Rule 16(a)(1)(C) is simply to make documents and tangible objects available to the defendants for inspection and copying. Even where the documents production is voluminous, the Labovitz court flatly rejected any argument that under Rule 16, the United States is required to cull from a larger document production responsive documents or provide all responsive documents in a neat little package. Labovitz, at *7.

In United States v. George, 786 F. Supp. 11 (D.D.C. 1991), the court made it clear that Rule 16(a)(1)(C) does not require the government to "expend excessive time and effort securing documents for the defendant." George, 786 F. Supp. at 14. In George, however, where the government already had certain documents in its possession, the court held the government satisfied its obligation under Rule 16(a)(1)(C) by simply making the documents available to the defendants for inspection and copying. Id. The court's reasoning has equal force whether the documents at issue are covered under the "documents material to the defense" prong of Rule 16(a)(1)(C), or covered under the "documents to be used in the case-in-chief" prong of this Rule. The cases cited by the defendants in support of their motion are readily distinguishable, providing weak or no support. For example, the defendants principally rely on United States v. Rodriguez, 799 F. 2d 649 (11th Cir. 1986). The defendants, however, totally misread the facts and holding in this case. Factually, in Rodriguez the United States had taken the defendant's wallet on arrest. Rodriguez, 799 F.2d at 651. The United States refused to allow the defendant to inspect and copy the contents of the wallet as required under Rule 16(a)(1)(C). Id. In so doing, the United States failed to produce things which "were obtained from or belong to" the defendant, which is one of three categories of documents falling within Rule 16(a)(1)(C) and the applicable standing discovery order. Id. In Rodriguez, the government refused to make the contents of the wallet available to the defendant. Id. The government mistakenly believed that since the contents of the wallet were not going to be introduced in its case-in-chief, no disclosure was necessary under provision requiring the government to make available for inspection and copying documents and tangible objects obtained from or belonging to the defendant. Id. Unremarkably, the Rodriguez Court simply held: "If they were taken from [the defendant], the government is obligated to permit discovery of them." Id. at 652.

The facts and legal holding of Rodriguez are completely unrelated to the facts and issues in our case. First of all, not only did Rodriguez involve a completely different part of Rule 16(a)(1)(C), it also involved the actual suppression of evidence rather than the disclosure of too much material. Rodriguez concerned that part of Rule 16(a)(1)(C) concerning the disclosure of materials taken from or belonging to the defendant, not that part of the Rule (as in our case) concerning documents and tangible objects

related to the government's case-in-chief. Unlike in Rodriguez, there is no dispute that here the United States has made available for inspection and copying all documents and tangible objects obtained from or belonging to the defendants. Moreover, unlike in Rodriguez, here the United States has not refused to allow the defendants to inspect and copy each category of documents falling within the scope of Rule 16(b)(1)(C). Rather, the defendants in our case now complain because they believe too much material has been made available to them. Though the defendants suggest otherwise, the Rodriguez Court never even addressed the issue raised in their motion, which is whether the United States is required to identify and designate pre-trial each and every document and tangible object it intends to use in its case-in-chief.

The other case principally relied upon by the defendants is an unreported case out of the Southern District of New York, United States v. Weissman, 1996 WL 761996 (S.D.N.Y. December 26, 1996) (attached as Exhibit "E" to defendants' motion). Though the Judge in Weissman may believe that, under Rule 16(a)(1)(C), the "considerable weight of authority" requires the government to identify its trial exhibits, the decisions in Fischbach & Moore, Litman and McDade clearly hold otherwise. Moreover, in Weissman, the Judge's reliance on United States v. Bortnovsky, 820 F.2d 572 (2d Cir. 1987) calls into question his understanding of Rule 16(a)(1)(C). Bortnovsky has nothing to do with Rule 16(a)(1)(C). Rather, the issue in Bortnovsky was whether the district court had erred in denying the defendants' request for a bill of particulars.[4] Bortnovsky, at 574-75. The rule to be taken from Bortnovsky is simply that a defective indictment, without a bill of particulars, cannot be cured by simply making documents available to the defendants.

Unlike in Bortnovsky, the indictment and bill of particulars response provided by the United States in this case has put the defendants on notice as to the charged conduct and has provided the defendants with crucial information to aid in their defense, including: the time frame of the charged

---

[4] In Bortnovsky, the defendants complained that the indictment failed to put them on notice as to the dates and substance of the charged criminal conduct. Id. at 574. The government responded that it had informed the defendants of the charges, in the indictment and in its production of 4,000 documents for the defendants' review. In fact, the court in Bortnovsky "commend[ed] the Government for cooperating in the turning over of documents prior to trial . . . ."

conspiracy (October 24, 1992 through December 31, 1992); specific suppliers subject to the conspiracy; specific geographic areas subject to the conspiracy; specific grades of scrap subject to the conspiracy; and the agreed-upon prices. In Bortnovsky, the defendants had no guidance, but a lot of documents. In our case, the United States has not only provided sufficient guidance to the defendants in its indictment and bill of particulars response, but has provided a road map to the defendants in the notes of Sheila McConnell and her grand jury testimony and other related statements. The guidance and direction already given to the defendants here also distinguishes our case from United States v. Turkish, 458 F. Supp. 874, 882 (S.D.N.Y. 1978), where the defendant sought some guidance as to which of the approximately 25,000 documents dumped on him were intended to be used by the government. Another case relied upon by the defendants is United States v. Poindexter, 727 F. Supp. 1470 (D.D.C. 1989). But see McDade, supra, at *1 (rejecting Poindexter). Poindexter, however, is distinguishable in that it does not deal with documents the government intends to introduce in its case-in-chief; rather, "[t]he priority at this time is to produce to defendant those documents that may be material to his defense." Poindexter, 727 F. Supp. at 1486. Unlike in the instant case, the defendant in Poindexter made very specific requests for documents "material" to his defense. (Here, the defendants have simply made a very broad request for all documents material to their defense.) Although the defendants ignore this point, in Poindexter the court rejected the defendant's request that the government "be required to categorize all the documents it produces . . . ." Id. Instead, the court found it sufficient for the government to simply identify documents according to several major, clearly defined categories. Id. Though the defendants suggest otherwise, the Poindexter court never addressed the issue of whether the government is required to segregate and identify documents it intends to use in its case-in-chief from the larger categories of documents "material" to the defense. Nor did the Poindexter court require the United States to identify its trial exhibits.

B. ANY "PREJUDICE" SUFFERED BY THE DEFENDANTS IS THE RESULT OF THEIR OWN NEGLECT AND NON-ACTION

Obviously, the defendants are feeling pinched because they are behind in their preparation and will have to push hard to catch up. The defendants now wish to push the blame for their lack of

preparedness on the United States, rather than own up to their neglect and procrastination. Further, the defendants now wish to benefit from their protracted non-action, asking this Court to suppress documents and tangible objects which have been available to them for more than a year. The defendants' motion is poorly taken.[5]

The defendants' conduct (or lack thereof) after the hearing on September 10, 1998, is a perfect example of how the defendants' claim of "prejudice" is really the result of their own neglect and non-action. The defendants claim that at this hearing, they learned for the "first time" the United States intends to introduce "thousands" of invoices at trial in proving the charged conspiracy.[6] Defendants' brief, p. 2. After learning this information, however, the defendants did not come to the government's office, located across the street from counsel for Atlas, and review documents. Nor did the defendants file a motion with the Court advancing their argument that the United States has not complied with Rule 16(a)(1)(C). Instead, the defendants eschewed any review of documents and waited nearly 10 weeks to raise the subject matter of this motion with the Court. The United States has repeatedly insisted it believes it has satisfied its obligations under Rule 16; and the United States has advised the defendants on numerous occasions that it does not believe it is required to identify its trial exhibits pre-trial. Nothing changed between September 10, 1998 and the succeeding 10 weeks to further ripen the issue

---

[5] In addition to their argument that the government has not complied with Rule 16(a)(1)(C), the defendants also raise a side issue concerning Local Rule 88.10(P), the substance of which is also provided in the standing discovery order governing our case. Standing Discovery Order, ¶ O. The defendants confuse two unrelated issues. The Local Rules and the standing discovery order require the parties to file a written statement with the Court "generally describing all discovery material exchanged." Local Rule, ¶ 88.10(P); Standing Discovery Order, ¶ O. Both the standing discovery order and the Local Rule require this statement to be filed with the Court within five days following the Calendar Call, scheduled here for January 13, 1999. In a letter to defense counsel, the United States advised the defendants it looks forward to collaborating with them on the preparation of this written statement. The defendants are mistaken in their belief that the United States agreed to disclose 7 days before trial its trial exhibits. Given the defendants lack of reciprocation, the United States has no intention of disclosing its trial exhibits before the start of trial. Nor does Paragraph O of the standing discovery order or Local Rule ¶88.10(P) require any such disclosure of trial exhibits pre-trial.

[6] This is an interesting statement, since the trial was postponed from February, 1998, to November 23, 1998, in large part because of the defendants' argument at the initial Calendar Call before Judge Lenore Nesbitt that they needed time to review the large number of documents involved in this criminal antitrust prosecution. This initial Calendar Call was more than 10 months ago.

for the defendants.[7] And yet they chose to wait. And only now, little more than a month before trial, do they claim irreparable "prejudice."[8]

Even though Rule 16 does not require the United States to identify pre-trial its trial exhibits, in a letter dated September 29, 1998, the United States indicated it would be willing to consider identifying such documents if the defendants would (1) reciprocate in identifying their "defense" exhibits; and (2) stipulate to the authenticity of the business documents (since virtually all of the documents to be used in the government's case-in-chief are business records of Atlas and Sunshine). The defendants never responded to the government's offer, proving again that it's either their way or no way.

C SUPPRESSION IS AN INAPPROPRIATE REMEDY

Even if this Court were to decide the government's obligations in this case under Rule 16(a)(1)(C) are different than what the United States believes them to be, the remedy sought by the defendants clearly is not appropriate.

The Eleventh Circuit rule is that a court, in enforcing its discovery orders, "should impose the least severe sanction necessary to ensure prompt and complete compliance with its discovery orders." United States v. Turner, 871 F.2d 1574, 1580 (11th Cir. 1989), cert. denied, 493 U.S. 997 (1989). See generally, United States v. Euceda-Hernandez, 768 F.2d 1307, 1312 (11th Cir. 1985). In deciding whether a sanction is appropriate, factors to be considered include reasons for the delay; whether there is any bad faith on the part of the government; prejudice to the defendant; and the availability and means to cure the prejudice, including continuances and recesses. Turner, 871 F.2d at 1580. The court should also consider the importance of the evidence to the government's case before

---

[7] The United States communicated its position as to Rule 16 discovery as early as December, 1997, and January, 1998. That is, the United States objected to the defendants' request to segregate its trial exhibits from other evidence which must be produced under Rule 16(a)(1)(C), namely, documents and tangible things taken from the defendants and documents material to their defense.

[8] It is ironic that the defendant fail to practice what they preach, proving again their belief that the "rules" they espouse only apply to others. In responding to the Standing Discovery Order, the defendants stated that any document or tangible item they may introduce at trial as part of their case-in-chief is contained in the "tractor trailer load" of subpoenaed documents dumped on the United States. Apparently, the defendants believe it is okay for them to comply with Rule 16 in this manner.

suppressing the evidence. Euceda-Hernandez, 768 F.2d at 1313. Here, the defendants ask this Court to suppress crucial evidence, namely, the business records of Atlas and Sunshine, which clearly show the conspiracy happened and continued through December, 1992.

In the instant case, no factor points to suppression. The United States has acted in good faith and confirmed its position with the U.S. Attorney's office in the Southern District of Florida. There has been no prejudice to the defendant, for the reasons stated above in this Memorandum. If this Court were to decide that Rule 16(a)(1)(C) imposes obligations unknown to the United States, then a continuance, rather than suppression, is the appropriate remedy. For all of the reasons discussed above in this Memorandum, however, the United States respectfully submits that a continuance, too, is not called for here.

III

CONCLUSION

For the foregoing reasons, the defendants' motion should be denied. The United States has fully complied with its obligations under rule 16(a)(1)(C).

Respectfully submitted,

WILLIAM J. OBERDICK
Acting Chief
Cleveland Field Office

By: ______________________________
RICHARD T. HAMILTON, JR.
Court I.D. No. A5500338

PAUL L. BINDER
Court I.D. No. A5500339

IAN D. HOFFMAN
Court I.D. No. A5500343

Trial Attorneys,
U.S. Department of Justice
Antitrust Division
Plaza 9 Building
55 Erieview Plaza, Suite 700
Cleveland, OH 44114-1816

Phone: (216) 522-4107