UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	) Case No. 97-0853-CR-Nesbitt
	)
v.	) Magistrate Judge Robert L. Dubé
	) (February 11, 1998 Order of Reference)
ATLAS IRON PROCESSORS, INC. et al.,	)
	) **MEMORANDUM OF THE UNITED STATES**
	) **IN OPPOSITION TO THE JOINT MOTION**
Defendants.	) **OF DEFENDANTS ATLAS IRON**
	) **PROCESSORS, INC., ANTHONY J.**
	) **GIORDANO, SR., ANTHONY J. GIORDANO,**
	) **JR., AND DAVID GIORDANO FOR**
	) **BILL OF PARTICULARS WITH**
	) **SUPPLEMENTAL REQUEST FOR**
	) **PARTICULARIZATION OF THE**
	) **SUBSTANCE AND TERMS OF THE**
	) **ALLEGED AGREEMENT, AND IN**
	) **OPPOSITION TO THE MOTION OF**
	) **RANDOLPH WEIL TO ADOPT THE**
	) **GIORDANO DEFENDANTS' JOINT MOTION**

Defendants Atlas Iron Processors, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., David Giordano ("Giordano defendants") have moved to obtain further information from the United States in response to their original motion for a bill of particulars.[1] Defendant Randolph J. Weil has filed a motion

[1] Joint Motion of Defendants Atlas Iron Processors, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., and David Giordano for Bill of Particulars with Supplemental Request for Particularization of the Substance and Terms of the Alleged Agreement. ("Motion for Supplemental Bill of Particulars".)

to join the Giordano defendants' motion.[2] For the reasons stated more fully below in this Memorandum, the defendants are not entitled to the information requested in their motion.

I
THE MOTION FOR A SUPPLEMENTAL BILL WAS NOT FILED WITHIN THE DEADLINE SET BY THE COURT FOR PRETRIAL MOTIONS

On March 30, 1998, this Court granted the *Joint Motion for Extension of Time to File Pretrial Motions* and entered an Order providing that all pre-trial motions were to be filed on or before April 20, 1998. (Order on Motions.) The instant Motion for a Supplemental Bill of Particulars was served on June 18, 1998. The defendants did not seek leave of court to file this motion.

The Motion for a Supplemental Bill of Particulars and the Memorandum in Support do more than argue the merits of the defendants original request for a bill of particulars; they seek new information in fifteen separate particulars.[3] This Court, therefore, should deny the Motion for a Supplemental Bill of Particulars because it has not been filed within the time set by the Court.

II
THE UNITED STATES HAS PROVIDED THE DEFENDANTS WITH AMPLE DISCOVERY TO MEET THE REQUIREMENTS OF A BILL OF PARTICULARS

The Indictment in this case charges the defendants with agreeing: (a) to fix and maintain prices paid for scrap metal; (b) to coordinate price decreases for the purchase of scrap metal; and (c) to allocate suppliers of scrap metal. (Indictment ¶ 3.) The Indictment further defines the agreement as follows:

> For the purpose of forming and carrying out the charged combination and conspiracy, the defendants and co-conspirators did the following things, among others:

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[2] Motion of Defendant Randolph Weil to Adopt Joint Motion of Defendant for a Bill of Particulars with Supplemental Request for Particularization of the Substance and Terms of the Alleged Agreement. Collectively, the Giordano defendants and Weil will be referred to as the"defendants."

[3] The defendants original request for a bill of particulars was entitled Defendants Atlas Iron Processors, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr. and David Giordano's Joint Motion for a Bill of Particulars (filed March 26, 1998).

(a) met at various restaurants and elsewhere, and discussed and agreed upon fixing the price of scrap metal;
(b) discussed and agreed to reduce the prices to be paid for scrap metal;
(c) discussed and agreed upon the maximum price to be paid to specific suppliers of scrap metal;
(d) discussed and agreed upon the maximum price to be paid to suppliers of scrap metal located in specific geographic areas of southern Florida;
(e) discussed and agreed upon the prices to be paid for various categories and grades of scrap metal (e.g., sheet metal, appliances and white goods, whole cars, unprepared #2 scrap, prepared #2 scrap, unprepared #1 scrap and "logs");
(f) discussed and agreed upon allocating suppliers of scrap metal, denying such suppliers a competitive price;
(g) discussed and agreed upon the price to be paid for scrap metal resulting from the destruction caused by Hurricane Andrew;
(h) bought scrap metal from suppliers at collusive, non-competitive prices;
(i) paid suppliers for scrap metal at the agreed-upon, fixed prices; and
(j) enlisted the support of others to help carry out the collusive agreement.

(Indictment ¶ 4.)[4]

The Bill of Particulars explains the conspiracy charged in the Indictment. The Bill of Particulars sets forth the identities of co-conspirators, the identities of suppliers allocated in the conspiracy, and the geographic locations discussed by the defendants. (Bill of Particulars at 2-5.) The Bill of Particulars further provides that:

[4] The defendants have referred to a comment by Judge Nesbitt that the Indictment is "not much help." This comment concerned the appropriateness of venue in the Southern District of Florida, not the terms of the agreement to fix prices. The defendants, moreover, have not contested venue in the Southern District of Florida.

> With respect to specific scrap suppliers, the defendants and co-conspirators agreed upon maximum pricing to these suppliers. With respect to suppliers in specific geographic areas, the defendants and co-conspirators agreed upon maximum pricing to suppliers in these geographic areas. The defendants and co-conspirators also agreed upon over-the-scale prices for particular grades of scrap, including, sheet metal, appliances or white goods, unprepared and prepared scrap, whole cars, and logs.

(Bill of Particulars at 6.)

In addition, the defendants have received extensive discovery of documents which the United States believes are material to the preparation of the defendants' defense. Among those documents are calendars which set forth the dates of conspiratorial meetings, the same meetings that are set forth in the Bill of Particulars. The defendants have also received portions of the grand jury testimony of a key witness, who is a former employee of the defendant Atlas. That grand jury testimony sets forth the substance of the agreement in the words of Atlas' own employee and more than satisfies the defendants' request to learn more about the "substance" and "terms" of the agreement.

The case law, moreover, does not support the defendants' position. As explained throughly in the *Memorandum in Support of United States' Response to Defendants Atlas Iron Processors, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., and David Giordano's Joint Motion for a Bill of Particulars; and in Response to Motion of Defendant Weil to Adopt Motion of Codefendants for a Bill of Particulars,* pp. 4-10, the Bill of Particulars the United States previously filed satisfies the requirements for bills of particulars as established by Eleventh Circuit case law. Even though courts have uniformly held that a bill of particulars is not intended to function as a discovery device, United States v. Rosenthal, 793 F.2d 1214, 1227 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987), United States v. Davis, 582 F.2d 947, 951 (5th Cir. 1978), cert. denied, 441 U.S. 962 (1979), the nature of the defendants' requests prove that this is exactly how they intend to use their proposed bill.[5]

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[5] "The rationale for restricting the use of the bill is to protect the government from forced disclosure of its evidence and its theory of the case, and to avoid 'freezing' the government's case as a

The real purpose of a bill of particulars is threefold: "to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense." United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986), cert. denied, 480 U.S. 931 (1987) (citing United States v. Cole, 755 F.2d 748, 760 (11th Cir. 1985) (citations omitted)). Because the defendants have already been afforded extensive discovery in this case, these delineated purposes of a bill of particulars have already been met.

The defendants, on the other hand, rely on two, 20-year-old district court cases and one 30-year-old district court case (none of which are from the Eleventh Circuit) to justify their panoramic bill of particulars request. In their Memorandum of Support of Motion for Supplemental Bill of Particulars, the defendants argue they are entitled to "particularization as to: (1) the substance and terms of the alleged agreement; (2) the effect of the agreement; and (3) any overt acts deemed in furtherance of the agreement." In support of this argument they cite three cases: United States v. Greater Syracuse Bd. of Realtors, Inc., 438 F. Supp. 376 (N.D.N.Y. 1977); United States v. Tedesco, 441 F. Supp. 1336 (M.D. Pa. 1977); and United States v. Covelli, 210 F. Supp. 589, (N.D. Ill. 1962). The defendants also attempt to distinguish the instant case from United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796 (E.D. Pa. 1980), a case the United States cited previously in its Memorandum in Support of its Bill of Particulars. Analysis of these cases shows that neither Greater Syracuse, Tedesco, Deerfield nor Covelli offers support for the defendants' bill of particulars request; in fact, the opposite is true: those four cases support the United States' position that it has already provided the defendants with a more-than-adequate bill of particulars.

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result of the rule that evidence at trial must conform to the bill of particulars." United States v. Raineri, 91 F.R.D. 159, 160 (W.D. Wis. 1980). In United States v. Nacrelli, 468 F. Supp. 241, 250-51 (E.D. Pa. 1979), in a fact situation similar to the case at hand where the government had provided the defendant with the date of each alleged racketeering act, set forth the date of each act and produced Rule 16 discovery (each of which the government has done in this case), the court denied a nine-page bill of particulars because the defendant already had such "clear and definite information as to make a bill of particulars unnecessary." Id. at 250.

In Greater Syracuse the court held,

> Many courts have responded to Bill of Particulars inquiries into what this proof will be with denials, finding them to be purely evidentiary requests. In fact, many courts have posited that, with respect to any criminal charge of conspiracy, the Government need not reveal the overt acts which it intends to show at trial. United States v. Murray, 527 F.2d 401 (5th Cir. 1976).

Id. at 380 (some citations omitted). The court also pointed out that occasionally courts have required specification of overt acts to be proven at trial to allow for adequate defense preparation and avoid unfair surprise. Because the Greater Syracuse court anticipated a complex case, it followed the latter line of cases and ordered that all overt acts and effects of the agreement the government intended to mention at trial needed to be "specified to an extent sufficient to allow the defendants to identify and investigate them." Id.

The United States finds Greater Syracuse instructive for three reasons. First, it holds that many courts *do not* require the government to specify any overt act, while only "other" courts take the opposite tack. The majority of courts, therefore, would not even require the United States to produce as extensive of a bill of particulars as it has already.[6]

Second, the Greater Syracuse court made the government specify overt acts *only because the case was complex*. In contrast, the instant price-fixing case is simple. It involves no more than two Miami-area scrap metal processing companies whose principals met a few times and agreed on means of manipulating the Miami scrap metal market. Though antitrust cases can at times be complicated, the instant case involves a conspiracy much simpler than most of the conspiracies that come before the Court.

Third, even if the Court were to adopt Greater Syracuse's disfavored approach to bills of particulars, the United States has already met those more stringent requirements: (1) it described for the defendants overt acts (including conspiratorial meetings) it intends to prove at trial; (2) it named the meetings' principal participants, and listed where and when the meetings occurred; and, (3) it stated the

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[6] Interestingly, the Greater Syracuse court observed that in antitrust cases decisions on bills of particulars vary widely and that their use as precedent is "futile." Id.

"effect" of the conspiracy was to establish prices which the two defendant companies would pay for scrap metal.

Murray, the Fifth Circuit decision relied upon by the court in Greater Syracuse but curiously omitted by the defendants in their Memorandum in Support, specifically held that there is no general requirement that the United States must disclose all the overt acts it intends to prove in a conspiracy trial. The Bill of Particulars provided by the United States is perfectly consistent with the Murray decision.

The defendants' reliance on Tedesco is misplaced. In that case the court required the United States to reveal these particulars as they related to the substance of the agreement:

1. State whether the alleged price fixing conspiracy included an agreement among competitors to charge the same or similar prices.
2. State whether the alleged price fixing conspiracy included an agreement not to reduce prices without prior notification of competitors.
3. State whether the alleged price fixing conspiracy included an agreement not to raise prices without prior notification of competitors.
4. State whether the alleged price fixing conspiracy included an agreement to maintain specified price differentials among different quantities, types or sizes of coal.
5. State whether the alleged price fixing conspiracy included an agreement to charge prices on a geographical basis.
6. State whether the alleged price fixing conspiracy included an agreement involving collusion in bidding.
7. State whether all grades and sizes of coal were included in the alleged price fixing conspiracy, and if only some were, state which ones.

Tedesco, 441 F. Supp. at 1343-44. If this Court follows Tedesco's lead, the United States will not have to produce any more specifics than it has already produced in its initial Bill of Particulars. When juxtaposed with Tedesco, the United States has already informed the defendants that the conspiracy agreement included an agreement: (1) among competitors to charge maximum prices; (2) and (3) are not applicable; (4) to maintain specified prices upon over-the-scale prices for particular grades of

scrap, including sheet metal, appliances or white goods, unprepared scrap, whole cars, and logs; (5) to charge prices on a geographical basis; (6) which did not involve bid rigging; and (7) which involved particular grades of scrap, including sheet metal, appliances or white goods, unprepared scrap, whole cars, and logs. See Bill of Particulars at p. 6, Indictment at ¶ 4. These particulars provided by the United States to the defendants closely track those the Court mandated in Tedesco. For this reason, Tedesco provides no support for the defendants' argument that the Court should require the United States to produce a more extensive bill of particulars.

The defendants also claim that the United States has inaccurately characterized United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796 (E.D. Pa. 1980). The truth is, in Deerfield the court denied all but two of the defendant's bills of particulars requests. The first request the Deerfield court granted tracked extremely closely the requests the court granted in Tedesco. Id. at 808. For reasons explained above, the United States' first Bill of Particulars provided the defendants with the answers to each of the questions contained in the first request. The second request the Deerfield court granted asked whether the government contended the defendants acted with "a conscious object of producing anti-competitive effects," or whether they acted with "with knowledge of the likely occurrence of anti-competitive effects and that such anti-competitive effects actually occurred." Id. In the instant case, the United States has never made any representations about the defendants' intention to produce anticompetitive results in the market. The defendants' actions may have had an anticompetitive impact on the market, and such evidence would certainly be admissible at trial; however, any discussion of whether the defendants intended to produce an anticompetitive impact is not properly within the scope of a bill of particulars.

Finally, the defendants cite United States v. Covelli, 210 F. Supp. 589, (N.D. Ill. 1962), in which the court held,

> The Government cannot put the defendant in the position of disclosing certain overt acts through the indictment and withholding others subsequently discovered, all of which it intends to prove at the trial. This is the type of surprise a bill of particulars is designed to avoid.

Covelli, 210 F. Supp. at 590. The defendants represent that Covelli is an antitrust case, which is not apparent from the opinion. More than likely, it is not.

The United States has provided a Bill of Particulars which includes the time, date, location and participants with respect to each Miami price-fixing meeting of which it has knowledge. In requiring the government to describe overt acts in a bill of particulars in conspiracy case, Covelli constitutes the minority case law. Even were Covelli a correct statement of the law, however, the United States has already more than met Covelli's bill of particulars requirements. Moreover, as previously mentioned, the United States has met the bill of particulars burdens established Greater Syracuse and Tedesco, the two other cases the defendants cite.

III
THE DEFENDANTS DO NOT NEED ADDITIONAL PARTICULARS TO SATISFY DOUBLE JEOPARDY CONCERNS

Throughout the six months of pretrial proceedings that have taken place in this case, the United States has presumed this case would result in a jury trial. Assuming trial is likely, the defendants' ability to plead their convictions as a defense to a subsequent prosecution does not turn on the bill of particulars.

The defendants' concern about double jeopardy is based upon a lack of fundamental knowledge of the protection's basic principles. Jeopardy attaches in a jury trial, in most instances, when the jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28 (1978), Downum v. United States, 372 U.S. 734, 734-38 (1963); United States v. Baggett, 901 F.2d 1546, 1548 (11th Cir., cert. denied, 498 U.S. 862). The basis for choosing this point for the attachment of jeopardy is "the need to protect the interest of the accused in retaining a chosen jury." 437 U.S. at 35. At the present time, therefore, jeopardy has not yet attached to the defendants in this case.

Following a jury trial, when a second court decides if the accused has been twice put in jeopardy, the court first looks to the trial record from the initial prosecution as the clearest proof of what the defendant has been convicted of in the first trial. See United States v. Benefield, 874 F.2d 1503, 1506 (11th Cir. 1989) ("[I]t is particularly difficult, because of the absence of a trial record . . . to determine whether the conspiracies arose from one unlawful agreement or two"); United States v.

Stricklin, 591 F.2d 1112, 1117 (5th Cir. 1979 cert. denied, 444 U.S. 963 (1979)). Assuming there is a trial in this case, the trial record will be the basis of asserting the defendants' double jeopardy claim.

The defendants' stated concerns about double jeopardy are only meaningful in the context of a plea of guilty to the Indictment. In that situation, a second court would look at the Indictment, the Bill of Particulars and the discussion at the plea hearing because a trial record does not exist.[7] However, even assuming that the defendants enter guilty pleas in this case, the Indictment and the Bill of Particulars are more than sufficient to protect them from a second prosecution for the same offense. The Eleventh Circuit has set forth various factors to be considered assessing double jeopardy conspiracy claims. Those factors include:

> (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place.

United States v. Harvey, 78 F.3d 501, 505 (11th Cir. 1996), (citation omitted).

The Indictment and the Bill of Particulars in this case provide the time of the offense, the identities of co-conspirators, the statutory offense, the principal meetings held by the defendants in the Southern District of Florida, the dates, locations and participants of those meetings and the means and methods by which the charged conspiracy was carried out. In addition, the Bill of Particulars sets forth the identities of various suppliers and the geographic locations discussed by the conspirators.

The Bill of Particulars, in fact, broadens the double jeopardy protections to the defendants. The Bill specifies that the conspiracy ended sometime in January 1993, further defining and extending the time period set forth in the Indictment. It also sets forth the dates of the principal conspiratorial meetings, the latest of which occurred in December 1992. The Indictment and the Bill of Particulars

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[7] This procedure is consistent with the double jeopardy component of the purpose of a bill of particulars.

are more than sufficient to allow the defendants to assert their conviction as a bar to a subsequent prosecution for the same offense.

IV
CONCLUSION

Based upon the foregoing, the *Joint Motion of Defendants Atlas Iron Processors, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., and David Giordano for Bill of Particulars with Supplemental Request for Particularization of the Substance and Terms of the Alleged Agreement* and the *Motion of Defendant Randolph Weil to Adopt Joint Motion of Defendants for a Bill of Particulars with Supplemental Request for Particularization of the Substance and Terms of the Alleged Agreement* should be denied.

Respectfully submitted,

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