UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)
	) CASE NO. 97-0853-CR-NESBITT
v.	)
	) Magistrate Judge Robert L. Dubé
ATLAS IRON PROCESSORS, INC., et al.,	) (February 11, 1998, Order of Reference)
	)
	) **REPLY OF UNITED STATES**
Defendants.	) **TO DEFENDANT RANDOLPH J.**
	) **WEIL'S RESPONSE TO UNITED**
	) **STATES' DEMAND OF NOTICE**
	) **PURSUANT TO RULE 12.1 OF**
	) **INTENTION TO OFFER**
	) **DEFENSE OF ALIBI**

I

INTRODUCTION

Pursuant to Rule 12.1 of the Federal Rules of Criminal Procedure, the United States served a notice of demand upon defendant Randolph J. Weil ("Weil") of his intention to offer a defense of alibi to certain identified meetings. This demand set forth the date, time and location of five meetings attended by Weil and his co-conspirators in connection with the charged conspiracy. The demand specifically stated: "These meetings constitute a partial list of the acts performed by Randolph J. Weil in furtherance of the Sherman Act conspiracy charged in the Indictment that began at least as early as October 24, 1992, and continued at least as late as November 23, 1992." *Demand of Notice Pursuant to Rule 12.1 of Defendant Randolph J. Weil's Intention to Offer Defense Of Alibi* ("Government's Notice of Alibi Demand"), p. 2. Weil has failed to respond to this demand

as required under Rule 12.1. Accordingly, as provided in Rule 12.1, the United States requests that Weil be precluded from introducing any alibi witnesses concerning defendant's presence or absence at the meetings listed in the United States' demand.

II

FACTS

In its demand, the United States set forth five meetings in which Weil participated with his co-conspirators in the charged conspiracy. The demand specifically stated that these meetings took place at the following locations, dates and times:

(1) Charcoal's restaurant in Miami Lakes (on September 21, 1992, beginning between 3:00 p.m. and 3:30 p.m.);

(2) La Costa D'Oro restaurant in Boca Raton (on October 14, 1992, beginning around 8:00 p.m.);

(3) Sea Ranch condominium in Fort Lauderdale (on October 24, 1992, beginning in the morning and lasting until about noon);

(4) Don Shula's Steakhouse in Hialeah (on November 23, 1992, beginning in early to mid-afternoon, perhaps beginning at 4:30 p.m.); and

(5) Cafe Max restaurant in Pompano Beach (on December 21, 1992, beginning about 7:00 p.m.).

Government's Notice of Alibi Demand, pp. 1-2. In addition, the United States specifically identified the participants at each such meeting.

Weil has responded to the demand by taking the position that he is not required to respond. Weil finds fault with the phrasing of the demand and has advanced three ill-conceived arguments in support of his position. Weil argues that he is not required to respond to the demand because: (1) "[t]he government has failed to allege in the demand that a criminal offense was committed at the time and place specified therein;" (2) "[t]he Indictment does not allege that the meeting described in this demand ever occurred;" and (3) "the Indictment does not allege this purported meeting as an overt act." *Defendant Randolph J. Weil's Response to United States' Demand of Notice of Intention to Offer*

Defense of Alibi, pp. 1-5. Weil's arguments are not well taken, finding no support in either the law or facts.

III

LAW AND ARGUMENT

Discovery under Rule 12.1 is designed to give the government notice of a defendant's alibi defense in order to avoid unfair surprise and any delay at trial. United States v. Dupuy, 760 F. 2d 1492, 1498 (9th Cir. 1985). Moreover, "[t]he legislative history shows that the rule was designed to benefit the government." Id. (citations omitted). Rule 12.1 clearly is not intended to serve as a bill of particulars. United States v. Vela, 673 F.2d 86 (5th Cir. 1982); Dupuy, 760,F.2d at 1499.

In United States v. Vela, 673 F.2d 86 (5th Cir. 1982), a criminal defendant objected to the government's demand for alibi under Rule 12.1, arguing that Rule 12.1 required the government to use the notice-of-alibi procedure for an entire criminal transaction or to eschew the use of the Rule entirely. Vela, 673 F.2d at 88. The thrust of the defendant's argument in Vela was that the government was limited to proof at trial of those events which took place during the time frame indicated in its demand under Rule 12.1. The Fifth Circuit rejected the defendant's argument, stating that many crimes, like the conspiracy charged in Vela, are committed over a long period of time. Id. The Fifth Circuit thus held that it is proper under Rule 12.1 for the government to "narrow its notice-of-alibi demand to a more limited interval." Id. at 89. Importantly, the Fifth Circuit held that rather than render Rule 12.1 useless in conspiracy situations, it is "permissible and consistent with the [R]ule's purpose for the prosecution to seek notice-of-alibi with respect to a *discrete temporal aspect* of the crime charged." Id. at 89 (emphasis added). See Dupuy, 760 F.2d at 1499 (stating that Vela is "precisely on point," and holding that the government can invoke Rule 12.1 as to "discrete temporal aspects of the crime charged.").

A. THE DEMAND SPECIFICALLY STATES THAT THE MEETINGS CONSTITUTE A PARTIAL LIST OF ACTS PERFORMED BY WEIL IN FURTHERANCE OF THE CHARGED CONSPIRACY

In the instant case, the five meetings listed in the demand served upon Weil are discrete temporal aspects of the charged criminal conspiracy. The law is clear that the United States may tailor its demand to discrete components of the charged conspiracy. Moreover, Weil's argument that the demand does not state that the alleged offense was committed at each of the meetings is simply untrue. In its demand, the United States specifically states that the meetings "constitute a partial list of the acts performed by Randolph J. Weil in furtherance of the Sherman Act conspiracy charged in the Indictment that began at least as early as October 24, 1992, and continued at least as late as November 23, 1992." Government's Notice of Alibi Demand, p. 2.

Weil's argument also loses steam in view of the Indictment and Bill of Particulars. The Indictment states that, among other things, the defendants and co-conspirators "met at various restaurants and elsewhere, and discussed and agreed upon fixing the price of scrap metal." Indictment, ¶4. Further, the Bill of Particulars filed by the United States on May 18, 1998, lists the same meetings as identified in the demand, describing them as meetings "in connection with which occurred most of the collusive communications in furtherance of the charged conspiracy." Bill of Particulars, p. 7. It is clear from the record that the United States has identified the meetings listed in the demand as comprising part of the charged conspiracy.

B. RULE 12.1 DOES NOT REQUIRE THAT THE INDICTMENT SPECIFICALLY ALLEGE THE MEETINGS LISTED IN THE DEMAND ACTUALLY OCCURRED

Weil's argument that the demand is defective because the Indictment fails to specifically identify these meetings is pulled from thin air. Tellingly, Weil cites no case law or other authority for this proposition. That is because there is no case law to support this argument. Rather, the law is clear that a demand under Rule 12.1 is not intended to serve as a bill of particulars, nor is it intended to replace the Indictment. See, e.g., Vela, 673 F.2d at 89; Dupuy, 760 F.2d at 1499. Weil reads into Rule 12.1 a requirement that does not exist.

C. RULE 12.1 DOES NOT REQUIRE THAT THE INDICTMENT IDENTIFY THE MEETINGS LISTED IN THE DEMAND AS OVERT ACTS

Weil also argues that he is not required to respond to the demand because the Indictment fails to specifically allege that the meetings listed in the demand are overt acts committed in furtherance of the charged conspiracy. Again, Weil pulls this argument from thin air, reading into Rule 12.1 a requirement that does not exist.[1]

Moreover, Weil's argument totally ignores the demand itself, which specifically states that the listed meetings "constitute a partial list of the acts performed by Randolph J. Weil in furtherance of the Sherman Act conspiracy charged . . . ." Government's Notice of Alibi Demand, p. 2. Weil's argument also finds no support in the Bill of Particulars, which also describes the meetings listed in the demand as a partial list of acts committed in furtherance of the conspiracy. Bill of Particulars, p. 7.

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[1] Indeed, Weil's argument also is inconsistent with Section 1 of the Sherman Act, which requires no proof of any overt act in furtherance of the conspiracy. The agreement itself is what constitutes the crime under the Sherman Act. Consequently, the United States is not required to allege any overt acts in its Indictment. Taking Weil's argument to its extreme, however, a criminal defendant charged with price fixing or market allocation under the Sherman Act would never be required to respond to a demand for alibi under Rule 12.1 if the Indictment does not specifically allege the date, time and location of an overt act committed in furtherance of the conspiracy. Not surprisingly, Weil cites no case law in support of his contention.

IV

CONCLUSION

Pursuant to Rule 12.1(d), the United States respectfully requests that Weil be precluded from presenting at trial any witnesses concerning his absence from any of the meetings set forth in the demand. Weil's arguments in support of his non-response are not supported by the facts or law and are poorly taken. Instead of complying with mandates of Rule 12.1, Weil would rather waste the Court's time with frivolous objections. Accordingly, this Court should enter the enclosed Order precluding Weil from presenting any alibi witnesses for the meetings listed in the demand.

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
FAX: (216) 522-8332

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing were sent via Federal Express to the Office of the Clerk of Court on this 15th day of June, 1998. Copies of the foregoing were served upon the defendants via regular U.S. mail on this 15th day of June, 1998.

Benedict P. Kuehne, Esq.
Sale & Kuehne, P.A.
Nationsbank Tower, Suite 3550
100 Southeast 2nd Street
Miami, FL 33131-2154

Ralph E. Cascarilla, Esq.
Walter & Haverfield
1300 Terminal Tower
Cleveland, OH 44113-2253

Robert C. Josefsberg, Esq.
Podhurst, Orseck, Josefsberg,
Eaton, Meadow, Olin & Perwin, P.A.
City National Bank Building, Suite 800
25 West Flagler Street
Miami, FL 33130-1780

Patrick M. McLaughlin, Esq.
McLaughlin & McCaffrey, L.L.P.
Ohio Savings Plaza, Suite 740
1801 East Ninth Street
Cleveland, OH 44114-3103

Roberto Martinez, Esq.
Colson, Hicks, Eidson, Colson
Matthews, Martinez & Mendoza, P.A.
First Union Financial Center, 47th Floor
200 South Biscayne Boulevard
Miami, FL 33131-2351

Marc S. Nurik, Esq.
Ruden, McClosky, Smith, Schuster
& Russell, P.A.
First Union Plaza, 15th Floor
200 East Broward Boulevard
Fort Lauderdale, FL 33394

WILLIAM J. OBERDICK
Acting Chief
Cleveland Field Office

_____

RICHARD T. HAMILTON, JR.
Court I.D. No. A5500338
Trial Attorney,
U.S. Department of Justice
Antitrust Division
Plaza 9 Building
55 Erieview Plaza, Suite 700
Cleveland, OH 44114-1816
Phone: (216) 522-4107
FAX: (216) 522-8332