UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)
	) CASE NO. 97-0853-CR-NESBITT
v.	)
ATLAS IRON PROCESSORS, INC., et al.,	)
	) Magistrate Judge Robert L. Dubé
	) (February 11, 1998, Order of Reference)
Defendants.	)
	) **RESPONSE OF UNITED STATES TO**
	) **JOINT MOTION OF DEFENDANTS**
	) **ATLAS IRON PROCESSORS, INC.,**
	) **ANTHONY J. GIORDANO, SR.,**
	) **ANTHONY J. GIORDANO, JR.,**
	) **AND DAVID GIORDANO TO**
	) **EXCLUDE EVIDENCE WHICH THE**
	) **GOVERNMENT INTENDS TO**
	) **INTRODUCE AT TRIAL**
	) **PURSUANT TO RULE 404(b)**

I

INTRODUCTION

Defendants Atlas Iron Processors, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr. and David Giordano ("defendants") have moved to exclude evidence which they expect the United States to introduce at trial pursuant to Federal Rule of Evidence 404(b). For the reasons stated more fully below in this Memorandum, the other acts evidence which the United States seeks to introduce at trial should be admitted for two simple reasons: (1) the evidence is admissible under Rule 404(b); and (2) the evidence is admissible for non-404(b) reasons.

As discussed more fully below, there are striking parallels between the charged conspiracy and the other acts evidence involving Atlas and the Giordano defendants. The other acts evidence is necessary for the jury to fully understand the evidence, and will be helpful in allowing the jury to properly determine issues such as the defendants' intent and state of mind in entering the charged conspiracy. The other acts evidence will show that the defendants knowingly entered the charged conspiracy; had a clear motive for doing so; and will disprove any argument that the defendants' conduct is the result of mistake or accident. Contrary to what the defendants would have this Court believe, the other acts evidence is focused and limited, and is in no way unfairly prejudicial to the defendants. In the end, the other acts evidence will help the jury make the right decision.

II
FACTS

On November 13, 1997, the federal grand jury sitting in the Southern District of Florida returned an Indictment charging that the defendants and co-conspirators "entered into and engaged in a combination and conspiracy to suppress and restrain competition by fixing the price of scrap metal, and allocating suppliers of scrap metal, in southern Florida." See Attachment 1, Indictment, ¶ 2. This Indictment charges a conspiracy "[b]eginning at least as early as October 24, 1992, and continuing at least until November 23, 1992, the exact dates being unknown to the Grand Jury." Indictment, ¶ 2. In fact, evidence will be introduced at trial showing that the charged conspiracy continued through January, 1993.

Substantively, the charged combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were: (1) "to fix and maintain prices paid for scrap metal;" (2) "to coordinate price decreases for the purchase of scrap metal;" and (3) "to allocate suppliers of scrap." Indictment, ¶ 3. Thus, the defendants' characterization of this case as involving only "price fixing" understates the charged conspiracy. The means and methods used by the defendants and co-conspirators in forming and carrying out the charged conspiracy are set forth in Paragraph 4 of the Indictment.

On or about January 22, 1998, the United States notified each of the defendants by letter of its intent to introduce certain evidence under Rule 404(b).[1] See Attachments 2-5. Each of these letters was intended to supplement the United States' response to Paragraph H of the Standing Discovery Order filed December 15, 1997, requiring notification of the government's intent to introduce other acts evidence under Rule 404(b). All or some of this evidence, however, may be admissible outside of Rule 404(b) to explain the background of the charged conspiracy and to show the evolution and development of this conspiracy.

As will be discussed more fully below, the other acts evidence that the United States seeks to introduce at trial is strikingly similar to the charged conduct and will be introduced for a proper purpose and in no way are sought to be introduced to show the "bad" character of the defendants. More importantly, contrary to the defendants' suggestion, the other acts evidence that the United States seeks to introduce at trial is focused in scope and consists of discrete acts committed by the defendants. This evidence is relevant and highly probative on issues such as the defendants' intent, knowledge, lack of mistake or accident, motive, and implementation of a common plan. A trial date of November 30, 1998, has been set by Judge Lenore Nesbitt.

III
SUBSTANCE OF THE OTHER ACTS EVIDENCE

In summary, the United States has notified the defendants of its intent to introduce other acts evidence related to the following:

- A collusive agreement between Atlas and its main competitor in Cleveland to divide up and allocate raw material suppliers.

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[1] In fact, the defendants were generally apprised of the nature of the other acts evidence prior to Indictment during discussions between the United States and defense counsel, and also advised that the United States intended to offer this evidence under Rule 404(b) if an Indictment were returned. During these pre-Indictment discussions, the United States revealed to the defendants that their collusive conduct in Miami mirrored their collusive conduct in Cleveland. Any suggestion now that the defendants had no idea that the United States intended to introduce other acts evidence until late in the game, especially other acts evidence related to the defendants' strikingly similar conduct in Cleveland, is disingenuous.

- Defendant Anthony J. Giordano, Jr.'s instruction to an agent of Atlas to meet with a competitor in the Akron, Ohio, market to discuss the potential for a collusive raw material agreement.

- Monthly communications between Atlas and competitors in the Cleveland area, the purpose of which was to discuss raw material buying and pricing in the raw material market.

- Market-related communications between the defendants and defendants Sunshine Metal Processing, Inc. ("Sunshine") and Randolph J. Weil related to the purchase of raw materials, raw material prices, tonnages and volumes of scrap to be purchased and sold, and other market-related or price-sensitive issues. [2]

The bulk of the other acts evidence which the United States seeks to introduce at trial against the defendants involves conspiratorial conduct between Atlas and its primary competitor in the Cleveland market. This conspiratorial conduct resulted in a collusive agreement being struck between principals of Atlas (namely, defendants Giordano, Sr. and Giordano, Jr.) and high-level executives of its main competitor for scrap in the Cleveland market. The collusive agreement struck by principals of Atlas involved, among other things, the allocation of raw material suppliers in the Cleveland area between Atlas and its main competitor. This conspiratorial agreement was implemented shortly after Atlas began operating as a shredder of scrap metal in the Cleveland area. Though struck in late 1987 or early 1988, this conspiratorial agreement in the Cleveland market between Atlas and its main competitor continued close in time to the conspiratorial conduct charged in the Indictment. The charged conspiracy involves conduct beginning at least as early as October 24, 1992; the raw material agreement between Atlas and its main competitor in Cleveland continued at least through April or May of 1991, and perhaps longer.

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[2] The United States also intends to introduce other acts evidence against defendant Weil concerning market-related and price-sensitive communications with competitors other than Atlas, including Everglades Recycling, Inc. These communications between Weil and his competitors involved complaints about pricing and the pricing structure for purchasing raw materials in the Miami market. The United States has responded to Weil's objection to the introduction of other acts evidence under rule 404(b) in a separate memorandum. See *Response Of The United States To Motion And Memorandum Of Defendant Weil To Exclude Evidence Which The Government Intends To Introduce At Trial Pursuant To Rule 404(b)*.

The other acts evidence against Atlas and its principals (namely, defendants Giordano, Sr. and Giordano, Jr.) will be presented through eyewitnesses who directly participated in collusive meetings or discussions, or who are knowledgeable about or directly participated in forming or carrying out the raw material allocation agreement between Atlas and its main competitor in Cleveland. Significantly, at least one of these eyewitnesses was a key participant in the "Cleveland" conspiracy and a co-conspirator in the charged conspiracy in Miami.

Although the United States has not finalized its witness list, the United States presently intends to call no more than a handful of witnesses during its case-in-chief to testify about the other acts evidence. Presently, the United States anticipates that the total time needed to cover the bulk -- if not all -- of its other acts evidence in its direct case-in-chief is approximately only three to four hours. The defendants' suggestion that this other acts evidence will overwhelm the jury is simply not true. Nor is the other acts evidence intended to mask what the defendants would have this Court believe is a weak case. The case against the defendants is strong. The direct evidence against the defendants will include eyewitnesses to collusive meetings and discussions; direct participants in the formation and implementation of the charged conspiracy; contemporaneous notes taken at conspiratorial meetings which lay out the price fixing and supplier allocation agreement; corroborating pricing documents showing that Atlas and Sunshine carried out their collusive agreement; and corroborating expense and telephone records.

IV
AN OVERVIEW OF EVIDENCE ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE RULE 404(b)

In United States v. Miller, 959 F.2d 1535 (11th Cir. 1992), cert. denied, 506 U.S. 942 (1992), the Eleventh Circuit articulated a three-part test for evaluating the admissibility of other acts evidence under Rule 404(b):[3]

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[3] Rule 404(b) provides:

> **(b) Other crimes, wrongs, or acts.** Evidence of other crimes wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall

> First, the evidence must be relevant to an issue other than the defendant's character. Second, as part of the relevance analysis, there must be sufficient proof so that a jury could find that the defendant committed the extrinsic act. Third, the evidence must possess probative value that is not substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of Rule 403.

Miller, 959 F.2d at 1538 (citations and footnotes omitted). A review of Supreme Court, Eleventh Circuit and other relevant case law helps flesh out the contours of Miller.

1. Extrinsic Acts Evidence Must Be Relevant

In Huddleston v. United States, 485 U.S. 681 (1988), the Supreme Court made a careful review of the purpose of and the limitations on Rule 404(b). With respect to Miller's first requirement that "the evidence must be relevant to an issue other than the defendant's character," the Supreme Court held if other acts evidence is offered for a proper purpose, "the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403." Huddleston, 485 U.S. at 688. In fact, the Huddleston Court found that "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence." Id. at 688-89.

In other words, Rule 404(b) is a rule of inclusion, rather than exclusion. United States v. Sarracino, 131 F.3d 943, 949 (10th Cir. 1997). Therefore, Rule 404(b) limits the admission of other acts evidence only if such evidence is offered solely to prove character. Huddleston, 485 U.S. at 688-89. When other act evidence is offered for any purpose other than proving character, such evidence "is subject only to general strictures limiting admissibility such as Rules 402 and 403." Id. at 687-88. Some of the other purposes of 404(b) evidence include proving "motive, opportunity, intent, preparation, plan, knowledge,

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> provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general evidence of any such evidence it intends to introduce at trial.

identity, or absence of mistake or accident . . . ." United States v. Lampley, 68 F.3d 1296, 1299 (11th Cir. 1995) (quoting Fed. R. Evid. 404(b)).

2. Rule 404(b) Requires Sufficient Proof Of The Extrinsic Acts Evidence

Miller's second requirement is that there must be sufficient proof so that a jury could find that the defendant committed the extrinsic act in question. In Huddleston, the Supreme Court held evidence of other acts is relevant "only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." Huddleston, 485 U.S. at 689. To the extent that the defendants argue that this Court must make a preliminary finding that the other acts actually occurred prior to allowing the introduction of such evidence at trial, such a position was expressly rejected in Huddleston. Id. at 688.

Questions of relevance which are conditioned upon a fact are determined by Fed. R. Evid. 104. Id. In Huddleston, the Supreme Court stated: "In determining whether the Government has introduced sufficient evidence to meet Rule 104 . . . [t]he court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . ." Id. at 690. Further, the Huddleston Court stated: "'[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.'" Id. at 690-91. (quoting Bourjaily v. United States, 483 U.S. 171, 179-80 (1987)).

The defendants' argument that the United States is seeking to "parade before the jury unsubstantiated innuendo" is unfounded. All of the other acts evidence will be presented by eyewitnesses or direct participants in conduct involving the defendants, including the strikingly similar collusive agreement between the defendants and their main competitor in Cleveland. This typically is how such evidence is proved in antitrust and other cases. The testimony of these witnesses will be more than enough for the jury to reasonably conclude that the conduct occurred and that the defendants were the actors. Huddleston, 485 U.S. at 689. See United States v. Bechum, 582 F.2d 898, 912, 913 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979).

3. Other Acts Evidence Must Satisfy Rule 403's Requirement That The Probative Value Of Such Evidence Is Not Substantially Outweighed By Its Prejudicial Effect

Miller's third requirement is that other acts evidence introduced under Rule 404(b) must have probative value which is not substantially outweighed by its undue prejudice and must also meet the other requirements of Rule 403. In a recent 404(b) case, the Eleventh Circuit discussed the factors which tend to make evidence of extrinsic acts probative. The Eleventh Circuit held that "other crimes evidence has a relatively high incremental value and is not easily excludable where the government does not have overwhelming evidence of the defendant's predisposition to commit the crime or knowledge of such matters." United States v. Zapata, No. 97-6270, 1998 WL 204570, at *2 (11th Cir. April 28, 1998) (citing United States v. Richardson, 764 F.2d 1514, 1523 (11th Cir. 1985), cert. denied, 474 U.S. 952 (1985)). "Extrinsic evidence which is 'very similar' to the charged offenses as to their 'overall purposes' may be highly probative." Id. (quoting United States v. Delgado, 56 F.3d 1357, 1366 (11th Cir. 1995, cert. denied, 474 U.S. 952 (1985)).

With respect to what factors make evidence prejudicial, the Eleventh Circuit has held the gravamen in determining whether evidence is too prejudicial to be admitted is whether it is "likely to incite the jury to an irrational decision. Such irrationality is the primary target of Rule 403." United States v. Eirin, 778 F.2d 722, 732 (11th Cir. 1985) (citation omitted). See also United States v. Church, 955 F.2d 688, 702 (11th Cir. 1992), cert. denied, 506 U.S. 881 (1992); United States v. Bennett, 848 F.2d 1134, 1138 (11th Cir. 1988).

Significantly, even if there were the potential for prejudice from certain evidence, this problem may be cured by a cautionary or limiting instruction.[4] United States v. Underwood, 588 F.2d 1073, 1077 (5th Cir. 1979). Finally, it should be noted that a district court's decision to admit evidence under Rule 404(b) is reviewable only for abuse of discretion. United States v. Lail, 846 F.2d 1299, 1301 (11th Cir. 1988).

4. Other Acts Evidence Is Routinely

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[4] A cautionary instruction will also cure any potential prejudice a defendant would otherwise suffer if evidence is admissible against his fellow conspirators but not against him. See United States v. Morrow, 537 F.2d 120, 136 (5th Cir. 1976), cert. denied, 430 U.S. 956 (1977), ("A joint trial of twenty-three defendants, charged with conspiracy and numerous substantive counts, clearly raised the possibility that the jury might cumulate the evidence introduced by the Government . . . to find guilty a defendant whose connection with the conspiracy was at best marginal. The pernicious effect of cumulation, however, is best avoided by precise instructions to the jury on the admissibility and proper uses of the evidence introduced by the Government.").

Admitted Under Rule 404(b) In Antitrust Cases

A review of Eleventh Circuit precedent and other circuit courts' treatment of 404(b) evidence shows that other acts evidence has been routinely admitted in antitrust cases. No special hurdle must be cleared simply because the instant case involves an antitrust conspiracy and not some other type of conspiracy.

In United States v. Dynaelectric Co., 859 F.2d 1559 (11th Cir. 1988), cert. denied, 490 U.S. 1006 (1989) the government charged defendants Dynaelectric and Paxson Electric with attempting to rig bids on a certain project. To prove its case, the government offered evidence that Dynaelectric and Paxson had, on three separate occasions, attempted to rig bids with each other. The Eleventh Circuit held that the uncharged big rigging attempts were admissible under Rule 404(b) because such other acts evidence was relevant to the defendants' intent to rig bids as charged in the conspiracy. Id. at 1581. See United States v. United States Gypsum Co., 438 U.S. 422, 435 (1978) ("[W]e hold that a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom . . . .").

In United States v. Misle Bus & Equip. Co., 967 F.2d 1227 (8th Cir. 1992), the United States charged the defendants with suppressing competition for the sale of school bus bodies to public school districts in Nebraska and western Iowa. The district court permitted the government to introduce evidence of a similar, uncharged conspiracy in South Dakota. The Eighth Circuit held the district court acted within its discretion in admitting this evidence on the specific ground that it was relevant to and probative of the defendant's knowledge and general intent. Misle Bus, 967 F.2d at 1234. The fact pattern in Misle Bus closely parallels the fact pattern in the instant case. For example, just as evidence of the uncharged "South Dakota" conspiracy was probative of issues material to the charged "Nebraska" conspiracy in Misle Bus, the other acts evidence related to uncharged collusive conduct in the Cleveland market is highly probative of issues critical to the government's case, e.g., the defendants' intent, knowledge, lack of mistake or accident, motive, common plan or design, *etc*.

Contrary to what the defendants would have this Court believe, there is ample authority in the case law permitting the admission of uncharged antitrust violations as other acts under Rule 404(b) in criminal

antitrust cases. See, e.g., United States v. Southwest Bus Sales, Inc., 20 F.3d 1449 (8th Cir. 1994) (alleged bid rigging in Minnesota admissible under Rule 404(b) to prove intent to conspire, motive, and lack of mistake with regard to bid rigging in South Dakota); United States v. Suntar Roofing, Inc., 897 F.2d 469, 479-80 (10th Cir. 1990) (similar market allocation agreements probative and admissible under Rule 404(b) to prove knowledge, intent, or lack of mistake with regard to charged market allocation scheme); United States v. Smith Grading & Paving, Inc., 760 F.2d 527, 530-32 (4th Cir.) (prior bid rigging probative of defendant's intent and knowledge in entering into and carrying out the charged Sherman Act conspiracy and admissible under Rule 404(b)), cert. denied, 474 U.S. 1005 (1985); United States v. Bi-Co Pavers, Inc., (5th Cir. 1984) 741 F.2d 730, 736-37 (prior attempts to rig bids admissible under rule 404(b) as probative of the defendant's intent and whether individual defendant acted with corporation's authority).

V
THE OTHER ACTS EVIDENCE IN THIS CASE IS ADMISSIBLE UNDER RULE 404(b)

In their motion to exclude the United States from introducing evidence of other acts under Rule 404(b), the defendants work hard to understate the charged conspiracy and overstate the scope and breadth of the other acts evidence. The defendants seemingly do so in an attempt to create an impression of unfairness, or to project that the admission of other acts evidence will infuse the trial with complicated or confusing issues that a jury will be unable to grasp. The admissibility of other acts evidence under Rule 404(b), however, does not turn on whether the charged conspiracy involves "one count" or multiple counts. Moreover, even though the defendants are wrong in characterizing the charged conspiracy as a "one month" conspiracy, the admissibility of other acts evidence under Rule 404(b) in no way depends on the length of the conspiracy. This is especially so in an antitrust case, where the agreement itself constitutes the complete crime and no proof of any overt act is necessary other than the proof of an agreement. See, e.g., United States v. Socony Vacuum Oil Co., 310 U.S. 224-26 n.59 (1940); Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330 (1991) ("[T]he essence of any violation of § 1 [of the Sherman Act] is the illegal agreement itself -- rather than the overt acts performed in furtherance of it."); United States v. Flom, 558 F.2d 1179, 1182 (5th Cir. 1977). The defendants also understate the charged conduct by ignoring that

the defendants were also charged with "allocating suppliers of scrap metal," conduct which itself constitutes a *per se* violation of the Sherman Act. See, e.g., Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 708 (1962) (Allocation of customers is *per se* violation of § 1 of Sherman Act.).

Importantly, the defendants' rhetoric about trials within trials is simply that. In fact, the other acts evidence that the United States seeks to introduce is focused and limited. As will be discussed below, the other acts evidence is strikingly similar to the charged conduct -- in substance and in proximity to the charged conspiratorial conduct. Nor does the United States have any idea where the defendants pull from thin air the notion that the other acts evidence will "quadruple" the government's case if such evidence is admitted. See Defendant's Memorandum, p. 12. This suggestion is not only wrong, but totally unsupportable.

Moreover, the defendants would have this Court believe that the extrinsic acts that the government seeks to introduce here are too removed in time to have any probative value. The defendants are wrong. Although the Indictment was returned on November 13, 1997, the charged conduct and resulting conspiracy occurred beginning at least as early as October 24, 1992 and continuing at least as late as November 23, 1992. Thus, from a time perspective, the benchmark for determining the probative value of the other acts evidence to the charged conduct is October and November of 1992, not the Indictment date of November 13, 1997. The other acts evidence is close enough in time to the charged conduct to be probative of material issues at trial. For example, the defendants' collusive agreement in Cleveland pre-dated the charged conduct by no more than 15 to 16 months. Defendants ignore this in their sweeping rhetoric about "ten year" periods. See Defendant's Memorandum, p. 2. The striking similarity between the other acts evidence (*e.g.*, the collusive agreement in Cleveland) and the charged conduct diminishes further any argument that the other acts are too removed in time from the charged conduct to have probative value.

1. The Other Acts Evidence Is Admissible Under Rule 404(b)

Contrary to the contention of the defendants, the other acts evidence is relevant to several matters that will be at issue at trial other than the character of the defendants or their propensity to commit "bad" acts. Here, the United States seeks to introduce the other acts evidence to show the intent, motive,

knowledge, lack of mistake or accident, and common plan or scheme on the part of the defendants. See Fed. R. Evid. 404(b).

Intent. The defendants' intent or state of mind is a material issue. Although the United States is not required to prove that the defendants had a specific intent to engage in anticompetitive conduct, the United States is required to show that the defendants knowingly entered the charged conspiracy. See Gypsum, 438 U.S. at 443-46 (holding that a defendant's intent or state of mind is an element of a criminal antitrust offense). Here, the other acts evidence (*e.g.*, the raw material allocation agreement in Cleveland, or Giordano, Jr.'s instruction to an Atlas agent to meet with a competitor to discuss the potential for a raw material agreement) against the defendants is substantially similar to the charged conduct. The other acts are thus admissible under Rule 404(b) to show that the defendants knowingly entered into and participated in the charged conspiracy.

Lack of mistake or accident. The flip side of the defendants' intent is their lack of mistake or accident in entering the charged conspiracy. The other acts evidence will show the defendants knew what they were doing when they sat down with their main competitor in Miami and hammered out a price fixing and raw material allocation agreement. The United States expects the defendants to admit that certain meetings and discussions between the defendants and their co-defendants took place, but to deny that any such meetings or discussions resulted in a conspiratorial agreement. The other acts evidence thus establishes that the defendants' participation in the charged conspiracy was not the result of mistake or inadvertence. See, e.g., United States v. Greenwood, 796 F.2d 49, 53 (4th Cir. 1986) ("The existence of prior similar wrongdoings reduces the plausibility . . . of inadvertence or accident."). This is especially important here, where the defendants are expected to introduce economic or expert testimony to try to show that the prices in the Miami market during the charged conspiratorial period were the result of factors other than collusive agreement. Thus, the other acts evidence is admissible under Rule 404(b) to show lack of mistake or accident involving the defendants' entering and participating in the charged conspiracy.

Significantly, the other acts evidence also is highly probative of the state of mind of the government's witnesses, showing that such witnesses were not mistaken in interpreting the defendants' charged acts as part of a price fixing and market allocation conspiracy. For example, one of the

government's key witnesses is an individual who directly participated in the charged conspiracy in Miami, including meetings and discussions between competitors involving the formation and implementation of the charged conspiracy. This key witness also participated in the raw material allocation agreement in Cleveland between Atlas (and its principals) and its main competitor. Thus, the other acts evidence is highly probative of the defendants' intent because it will show that this key witness (as well as other government witnesses) did not misinterpret the actions and statements of the defendants in forming and implementing the charged conspiracy. Moreover, this other acts evidence provides critical background and context for the charged conspiracy -- which did not just happen one day, but was the result of previous action by the defendants. For example, this other acts evidence explains why this key government witness was directed by the defendants to attend conspiratorial meetings in Miami, and provides the motive and context for this witness' participation in the charged conspiracy.

Motive. The other acts evidence is highly probative of the defendants' motive in entering into a collusive agreement with their main competitor in Miami. As in the charged conspiracy, the other acts evidence will show that the defendants initially struggled when they began their shredding operation in the Cleveland market. As in the charged conspiracy, Atlas entered the Cleveland market with an existing dominant "competitor" already in place. As in the charged conspiracy, Atlas and the Giordano defendants worked out an agreement with its main competitor in Cleveland, dividing up raw material suppliers. Rather than competing aggressively on its own to survive and become profitable in the Cleveland market, Atlas and its principals took the easy and illegal path of colluding with its competitors in order to insulate itself from the vigors of the market place. It worked in the Cleveland market; so Atlas and the Giordano defendants sought the same easy path of collusion in the Miami market.

Indeed, Atlas encountered many of the same difficulties in Miami that it had previously faced in Cleveland. In Miami, Atlas entered an established market with one dominant "competitor" already in place (defendant Sunshine). This, too, was the case in Cleveland. Initially, Atlas struggled in both the Miami and Cleveland markets. Raw material costs were a significant part of Atlas' costs in both its Miami and Cleveland operations. The other acts evidence will show that shortly before entering the collusive agreement in Miami, Atlas' shred operation in Miami was doing poorly financially. The collusive agreement

with its main competitor in Miami was intended to find an easy way around what would have been a difficult competitive struggle. The motive for Atlas and its principals (defendants Giordano, Sr., Giordano, Jr., and David Giordano) to enter into the charged conspiracy is rooted in their previous "successful" collusive arrangement in Cleveland. Here, the other acts evidence is thus admissible under Rule 404(b) to show that the defendants had a motive to enter into and participate in the charged conspiracy.

Common plan. The other acts evidence will show that the defendants' conduct in the Miami market was substantially similar to its business conduct in the Cleveland market. In effect, Atlas and the Giordano defendants exported the plan that had worked for them in Cleveland to its new operation in Miami. Unfortunately for suppliers of scrap metal in Miami, the plan that had worked so well for the defendants in Cleveland was rooted in a collusive arrangement with their main competitor. In both Cleveland and Miami, the defendants adopted as a common strategy controlling their raw material costs through collusive agreements with their main competitor in each market. Here, the other acts evidence is thus admissible under Rule 404(b) to show that the defendants had a common plan to enter and participate in the charged conspiracy.

2. There Is Sufficient Proof Establishing That The Defendants Committed The Other Acts

The defendants complain about the lack of "proof" put forward by the United States in its letters notifying them of the government's intent to introduce at trial other acts evidence under Rule 404(b). The defendants seemingly argue that the United States should be precluded from introducing any other acts evidence because it has not "proved up" such evidence before trial. This argument is misplaced and premature.

At trial, the United States will present to this Court evidence sufficient for it to find that, pursuant to Fed. R. Evid. 104, "the jury can reasonably conclude that the [other] act occurred and that the defendant was the actor." Huddleston, 485 U.S. at 689. Huddleston makes it clear that the Court "neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. Huddleston, 485 U.S. at 690. Rather, "[t]he court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." Id. Here, the other acts will be "proved up" by direct testimony.

The defendants' claim that the United States should be precluded from introducing evidence under Rule 404(b) because it has not yet "proved up" the evidence to this Court's satisfaction not only is premature, but flies in the face of the general notification procedure provided for in Rule 404(b). The United States is confident that it will "prove up" its other acts evidence to the satisfaction of this Court. The United States presumes that this Court will make such a determination either by conducting *voir dire* of other acts witnesses outside the presence of the jury, or by allowing the United States to proceed at trial subject to having the other acts evidence stricken if it fails to meet the Court's satisfaction. The United States stands ready to provide whatever information this Court deems necessary to satisfy the Court's threshold inquiry under Fed. R. Evid. 104.

3. The Probative Value Of The Other Act Evidence Substantially Outweighs Its Prejudicial Effect Under Rule 403

The other acts evidence in this case is highly probative of issues material to the charged conduct. The probative value is high because the other acts evidence is strikingly similar to the charged conduct. See, e.g., Smith Grading & Paving, Inc., 760 F.2d at 530 (substantial similarity of other acts evidence outweighs any prejudicial effect resulting from admission at trial). Like its conduct in Cleveland, the charged conduct involves an agreement between Atlas and its principals to enter into and carry out an agreement with its main competitor in the market concerning the purchase of raw materials. Like its conduct in Cleveland, the charged conduct in Miami involves a collusive agreement intended to allow Atlas to have the raw material suppliers in close proximity to its plant. Like its conduct in Cleveland, the collusive agreement struck between Atlas and its main competitor in Miami (Sunshine) was entered into by Atlas' principals, the Giordano defendants. Like its conduct in Cleveland, the Giordano defendants policed the collusive agreement in Miami to ensure that it was being followed. Like its conduct in Cleveland, the motive for the raw material allocation agreement in Miami was driven by Atlas' entry position into that market and desire to find an easy way around any competitive struggle. Like its conduct in Cleveland, the defendants' agreement with its main competitor in Miami resulted after preliminary discussions and meetings with principals of their main competitor. Like its conduct in Cleveland, the purpose of the charged conspiracy in Miami was to enable the defendants to control their raw material costs, enhancing their profitability. In short, the charged conduct mirrors the other acts evidence in Cleveland.

Moreover, the other acts evidence is highly probative because it is close in time with the charged conduct. Though the collusive agreement struck between the defendants and their main competitor in Cleveland dividing up scrap suppliers in the Cleveland area was initiated in late 1987 or early 1988, this collusive agreement was still in place at least through April or May of 1991. The charged conduct occurred on the heels of Hurricane Andrew, which hit Southern Florida in August, 1992. Thus, the temporal proximity of the charged conduct with the bulk of the other acts evidence is closer to 15-16 months; not the "ten year" period suggested by the defendants. Moreover, Giordano, Jr.'s direction to an agent of Atlas to meet with a competitor on raw materials in the Akron, Ohio market area occurred in close proximity to the charged conduct, and also involved a key government witness who was involved in the formation and implementation of the charged conspiracy.

The probative value of the other acts evidence is high; but the prejudicial effect of such evidence is slight. The Eleventh Circuit has held the benchmark in determining whether evidence is too prejudicial to be admitted is whether it is "likely to incite the jury to an irrational action. Such irrationality is the primary target of Rule 403." United States v. Eirin, 778 F.2d 722, 732 (11th Cir. 1985). See also United States v. Church, 955 F.2d 688, 702 (11th Cir. 1992), cert. denied, 506 U.S. 881 (1992); United States v. Bennett, 848 F.2d 1134, 1138 (11th Cir. 1988); United States v. Greenwood, 796 F.2d at 53 (The prejudice that 404(b) is designed to prevent is "jury emotionalism or irrationality."); United States v. Masters, 622 F.2d 83, 87 (4th Cir. 1980) (In weighing the potential for undue prejudice, the court should consider whether the nature of the other acts evidence would create a "genuine risk that the emotions of the jury will be excited to irrational behavior

. . . ."). Here, the other acts evidence can hardly be described as being so prejudicial as to likely incite the jury to irrational action. The other acts evidence involves an economic crime similar to the charged conspiracy and neither is prone to inciting irrational jury behavior.

Moreover, the defendants' contention that the other acts evidence should be excluded because it does not apply to all of the defendants is ill-founded. Any potential for prejudice to some or all of the defendants may be cured by a cautionary or limiting instruction. United States v. Underwood, 588 F.2d 1073, 1077 (5th Cir. 1979). Indeed, a cautionary or limiting instruction is the preferred remedy, not

exclusion. See United States v. Morrow, 537 F.2d at 136 (5th Cir. 1976) ("A joint trial of twenty-three defendants, charged with conspiracy and numerous substantive counts, clearly raised the possibility that the jury might cumulate the evidence introduced by the Government . . . to find guilty a defendant whose connection with the conspiracy was at best marginal. The pernicious effect of cumulation, however, is best avoided by precise instructions to the jury on the admissibility and proper uses of the evidence introduced by the Government.").

VI
THE UNITED STATES HAS PROVIDED THE DEFENDANTS WITH SUFFICIENT NOTICE OF ITS INTENT TO INTRODUCE OTHER ACTS EVIDENCE UNDER RULE 404(b)

The defendants take issue with the substance of the notice provided to them concerning the United States' intent to introduce evidence under Rule 404(b). The United States believes that its letters notifying the defendants of its intent to introduce such evidence satisfy the requirements of Rule 404(b). The reporting requirement of Rule 404(b) provides that defendants in a criminal case are entitled to "*reasonable notice in advance of trial . . .* of the *general nature* of any such evidence it intends to introduce at trial." Fed. R. Evid. 404(b) (emphasis provided). Here, the defendants were provided notice of the government's intent to introduce other acts evidence under Rule 404(b) more than 10 months before the scheduled trial is set to begin. The United States also has apprised the defendants of the general nature of the other acts evidence. The United States does not read Rule 404(b) as requiring it to identify the witnesses who will testify at trial about the other acts evidence; nor does the United States read Rule 404(b) as a full discovery provision requiring it to provide excess details about its other acts evidence.

Clearly, the purpose of notification under Rule 404(b) is to prevent unfair surprise at trial by allowing the defendants a sufficient amount of time to undertake their own investigation of the facts. The notification provided by the United States to the defendants in this case satisfies this purpose.

VII
THE EVIDENCE THAT THE UNITED STATES SEEKS TO INTRODUCE AT TRIAL IS ADMISSIBLE FOR PURPOSES OTHER THAN OTHER ACTS EVIDENCE UNDER RULE 404(b)

For reasons stated above, the other acts evidence is admissible under Rule 404(b) because it is more probative than prejudicial and is relevant for a purpose other than to show "bad" character. Even so, such evidence also is admissible for reasons that do not rely on Rule 404(b). In United States v. Herre, 930 F.2d 836 (11th Cir. 1991), the defendant Herre was arrested for transporting marijuana through the Florida Keys. After his arrest, the district court gave him use immunity and compelled his testimony before a grand jury. Herre refused to testify and was later prosecuted for criminal contempt. At Herre's trial the government introduced evidence of Herre's arrest for transporting marijuana.

On appeal Herre argued it was error to allow evidence of his arrest in his trial for criminal contempt. The Eleventh Circuit confirmed his conviction and held,

> [T]he evidence of Herre's prior arrest was inextricably intertwined with the evidence of the charged offense. The proffered evidence was essentially a part of 'the chain of events explaining the context, motive, and set-up of the crime' and was properly admitted 'to complete the story of the crime for the jury.' The evidence presented the jury with necessary background information showing why Herre had been subpoenaed and provided the jury with some basis to understand the reasons behind the charged offense. As a result, the evidence was essentially part of the charged offense. . . .

Herre, 930 F.2d at 837-38 (citation omitted). See also United States v. Williford, 764 F.2d 1493, 1498 (11th Cir. 1985) ("Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury."). Significantly, if this Court finds that the other acts evidence is admissible as one of the "background" factors, it need not engage in a 404(b) analysis. Williford, 764 F.2d at 1499.

In this case the other acts evidence is appropriately used to provide the jury with the proper types of background information identified in Herre and Williford that will aid the jury in making its decision. The other acts evidence will show the Giordanos knew very little about the scrap metal industry and had no experience in the industry before forming Atlas in Cleveland and diving headfirst into the market. The evidence will further show that the collusive agreements in both Cleveland and Miami were helpful financially to the defendants. The evidence will further show that, after reaping "success" from their collusive arrangement in Cleveland, the defendants employed substantially similar methods in the Miami market, resulting in the charged conspiracy. Much, if not all of the proffered 404(b) evidence, is really evidence relevant to the jury's understanding the background, development and workings of the charged conspiracy. Thus, for reasons exclusive of Rule 404(b), the other acts evidence is admissible to show the context and background of the charged conspiracy. Such evidence will be beneficial to the jury, explaining how the charged conspiracy developed and why it was effective.

VIII
CONCLUSION

There are striking parallels between the charged conspiracy and the other acts evidence. The other acts evidence is necessary for the jury to fully understand the evidence, and will be helpful in allowing the jury to properly determine issues such as the defendants' intent and state of mind in entering the charged conspiracy. The other acts evidence will show that the defendants knowingly entered the charged conspiracy; had a clear motive for doing so; and will disprove any argument that the defendants' conduct is the result of mistake or accident. The other acts evidence will help the jury make the right decision.

Accordingly, the United States requests an appropriate Order permitting the introduction of other acts evidence at trial and denying the defendants' motion to exclude such evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the following:

1) *Response Of United States To Joint Motion Of Defendants Atlas Iron Processors, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., and David Giordano To Exclude Evidence Which The Government Intends to Introduce At Trial Pursuant To Rule 404(b);*

2) *Response Of United States To Motion And Memorandum Of Defendant Weil To Exclude Evidence Which The Government Intends to Introduce At Trial Pursuant To Rule 404(b);*

were sent via Federal Express to the Office of the Clerk of Court on this 18th day of May, 1998. Copies of the above-captioned pleadings were served upon the defendants via Federal Express on this 18th day of May, 1998.

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