UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)
	) Case No. 97-0853-CR-Middlebrooks
v.	)
	) Magistrate Dubé
ATLAS IRON PROCESSORS, INC., et al.,	) (Amended order of reference dated May 7, 1998)
	)
	)
Defendants.	) **MEMORANDUM OF THE**
	) **UNITED STATES OPPOSING**
	) **DEFENDANTS' JOINT MOTION**
	) **TO PRECLUDE THE USE OF**
	) ***TRIAL DIRECTOR*; OR, IN THE**
	) **ALTERNATIVE FOR AN ORDER**
	) **SETTING TERMS AND**
	) **CONDITIONS ON THE USE**
	) **OF *TRIAL DIRECTOR***

I

INTRODUCTION

Defendants Atlas Iron Processors, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr. and David Giordano (hereinafter "defendants") have filed a motion seeking to preclude the United States from using *Trial Director*, a commercial software program, to present and display evidence at trial. In the alternative, the defendants ask this Court to issue an order requiring the United States to turn over its work product and trial strategy related to the use of this program, and to impose limitations on the United States' use of the *Trial Director* program at trial. For the reasons stated below, the defendants' motion is poorly taken and should be denied.

II

FACTS

1. At the initial status conference before Judge Donald M. Middlebrooks on September 9, 1998, the United States advised the Court and the defendants of its intent to use a commercial software program called *Trial Director* to aid in the presentation and display of its evidence at trial. This is a price fixing crime in which numerous transactional business documents (e.g., invoices and related documents) will be presented to the jury showing the defendants carried out their collusive agreement. Through the use of *Trial Director*, the United States believes it can present its case to the jury more efficiently, quickly and understandably, conserving scarce judicial and government resources.

2. *Trial Director* is a commercial product used by the Antitrust Division in its trials. The United States does not own the software program for *Trial Director*; rather, it pays a user fee like everyone else. It is being used successfully in the current Microsoft trial, and was most recently used by the Antitrust Division in the Archer Daniels Midland ("ADM") price-fixing case tried in Chicago. Because of the nature of price fixing cases, which generally require the introduction of a relatively high volume of transactional business documents, *Trial Director* has become a widely-used tool within the Antitrust Division. In addition to *Trial Director*, there are several other types of commercial programs available the public at large. There is no magic to the Antitrust Division's use of Trial Director: It is simply the software program which the Antitrust Division has chosen to use. Defense counsel in other price-fixing cases tried by the Antitrust Division (e.g., ADM) have used a different software program than the *Trial Director* program used by the Antitrust Division. In other cases tried by the Antitrust Division, the defendants have chosen not to use any software program at all.

3. The *Trial Director* program works as follows. Documents are scanned into a computer. The scanned images are then assigned a bar code number. The

document images can then be identified and pulled up at will on a computer (here, a lap top), and the images of the scanned document can then be projected onto a screen or into a television monitor, depending on the make-up of the court room. The primary purpose of *Trial Director* is to limit having to inundate the jury with paper (i.e., trial exhibits).

4. At the hearing on September 9, 1998, the Court seemed very favorable to the use of *Trial Director* in this case. The defendants insisted that they were unfamiliar with the program and wanted to discuss *Trial Director* with the government. The Court asked the United States to meet with the defendants and explain the software program to them. The United States has done so.

5. After the hearing on September 9, 1998, counsel for the United States contacted Chris Riddell, one of the Antitrust Division's trial specialists knowledgeable about *Trial Director*. Ms. Riddell currently is assigned to the Microsoft trial and has been involved in the *Trial Director* program being used in this case. The purpose in talking to Ms. Riddell was to gain her insight into how best to get the defendants up to speed on *Trial Director*, and also to determine her availability to participate in a telephone conference with the defendants if they requested one.

6. After the hearing on September 9, 1998, the United States did not hear again from the defendants until September 18, 1998. In their letter, the defendants asked for information describing the software package, "including any literature [it] may possess." Defendants' letter dated September 18, 1998. (Attachment 1). The defendants also invited the United States to provide them with the software package itself. Id. In addition, the defendants' September 18 letter raised a number of other issues concerning discovery issues.

7. On September 29, 1998, the United States responded to the defendants' September 18 letter. Among other things, the United States asked the defendants to arrange a date and time to discuss the *Trial Director* program. Letter

of United States, dated September 29, 1998. (Attachment 2). The United States advised the defendants that it would arrange for Chris Riddell, one of its trial specialists in Washington, D.C., to participate in the meeting. Counsel for the United States wrote: "Please call me at your earliest convenience to discuss this matter further." Id.

8. On October 5, 1998, the defendants sent a letter to the United States discussing, among other issues, the defendants' interest in having the government send them written information concerning the *Trial Director* program. Defendants' Letter dated October 5, 1998. (Attachment 3).

9. On October 8 and 9, 1998, the United States tried to contact John F. McCaffrey, counsel for Atlas, to arrange a date and time for a meeting with Chris Riddell. Letter of United States, dated October 13, 1998. (Attachment 4). Mr. McCaffrey apparently was unavailable and could not be reached directly. Id. Mr. McCaffrey's secretary was reached, however, and a detailed message was left asking that Mr. McCaffrey call the United States to arrange a meeting at his earliest convenience to discuss more fully *Trial Director*. Id.

10. On October 13, 1998, more than three and one-half months before trial, the United States sent the defendants the following materials: (1) a brochure of the trial director program; (2) an example of a court-room set-up; and (3) some articles about courtroom technology. Letter of the United States, dated October 13, 1998. Among other things, the government's letter specifically stated that the Trial Director program is a product made by Indata Corporation located in Gilbert, Arizona. Id. The United States also advised the defendants of its intent to have Ms. Riddell visit the court room and come up with a proposal for setting up the equipment to meet each party's satisfaction. Id. This letter further provided: "Typically, both sides provide their own computers with the evidence and connect to a single system of display monitors." Id. As was mentioned at the hearing on September 9, 1998, the United States specifically stated that it is customary for

both parties to share in the costs associated with renting the display equipment. Id.

11. Inexplicably, more than a month passed before the United States again heard from the defendants concerning their interest in *Trial Director*. On or about December 8, 1998, the United States was contacted by John McCaffrey and he requested that a meeting take place on December 11, 1998. A teleconference was held on December 11, 1998, the first available date mutually convenient for all parties and Ms. Riddell. Participants included counsel for the United States, John McCaffrey, another lawyer from Ralph E. Cascarilla's law firm, and Chris Riddell. Ms. Riddell explained the *Trial Director* program for the defendants, including how it will be used here and how it has been used in other trials. She also answered the defendants' very specific and technical questions, including questions about the use of bar codes. Ms. Riddell also explained to the defendants the following: her review of Judge Middlebrooks' courtroom; her equipment proposal; the nature of cost sharing agreements struck with defendants in other cases; and cost estimates applicable to this case. At the conclusion of this meeting, the defendants asked that we send to them a breakdown of the cost estimates and our proposed court room set-up.

12. On December 11, 1998, shortly after the meeting with Ms. Riddell, the United States faxed a copy of the proposed court room set-up to John McCaffrey. (Attachment 5). On December 15, 1998, the United States sent a letter to the defendants concerning the cost estimates associated for the use of certain equipment required in this case. Letter of the United States dated December 15, 1998. (Attachment 6). (This cost estimate was received from Ms. Riddell on December 14, 1998.) Based on a 30-day rental projection, the total cost of the equipment rental is approximately $10,320.80. Id. The projected labor cost to set up and take down the equipment is about $7,500. Id.

13. The total projected cost for renting the equipment for 30 days is approximately $18,000. The defendants' share thus would be approximately $9,000. There is no reason to believe the defendants cannot afford to pay their fair share if they choose to use *Trial Director* or some other compatible software program.

14. Ms. Riddell visited Judge Middlebrooks' court room the first week of December. Because of space limitations in the court room, Ms. Riddell's proposed plan requires use of the large screen that pulls down from the ceiling in Judge Middlebrooks' court room. This initial proposal also provides for the placement and use of a monitor for the Judge, as well as a monitor for the jurors seated furthest from the screen. This initial proposal does not provide for the use of monitors by either government or defense counsel, due to the closeness of the screen, which pulls down from the ceiling. At the meeting on December 11, 1998, the defendants raised their concern that they would need a monitor for their clients. Counsel for the United States, and Ms. Riddell, proposed placing a monitor on a movable cart and placing it at the end of defense counsel's table. The United states is confident that the court room can be set up to the Judge's and parties' satisfaction. The initial proposal sent to the defendants concerning the set up of the court room is just that -- a first proposal. The United States submits that the calendar call on January 13, 1998, is a good opportunity to discuss the *Trial Director* set-up with the Court. Any concerns raised by the defendants can be addressed there. Perhaps the defendants will come to the Calendar Call with a counter-proposal of their own, rather than just complaints.

15. The United States understands the defendants are in the process of making their own scanned version of Atlas and Sunshine scale tickets for the period covering September through December, 1992. Virtually all of the documents the United States intends to present through *Trial Director* consist of Atlas and Sunshine scale tickets and related documents for this period. Accordingly, the defendants will have a set of scanned documents which closely tracks the

government's scanned set. Presumably, the defendants are gearing up to use the *Trial Director* program, or some commercial equivalent, at trial.

III

LAW AND ARGUMENT

The United States disputes the assertion that the defendants have "diligently attempted to work with the government" concerning the *Trial Director* program. As is par for the course, the defendants have dragged their feet and procrastinated. Now, they wish to benefit from their delaying tactics, asking this Court to preclude, or severely limit, the United States' use of a commercial computer program to present its evidence at trial. The defendants request preclusion, or limitation, even though displaying certain evidence through *Trial Director* will enable the United States to present its evidence in the most efficient manner possible, avoiding unnecessary waste and conserving scarce judicial and government resources. In short, *Trial Director* is nothing more than a way to publish to the jury certain evidence.

Here, the bulk of the documents and evidence the United States intends to publish to the jury through *Trial Director* will be transactional business records, such as invoices and check registers of the defendant companies covering the conspiratorial period. Indeed, virtually all of the documents that the United States intends to present through *Trial Director* are scale tickets of Atlas and Sunshine covering the period September, 1992 through December, 1992. The universe of these documents are contained in approximately 15 boxes (11 boxes of Atlas scale tickets; and 4 boxes of Sunshine scale tickets). These Atlas scale tickets were first made available to the defendants for inspection and copying on December 14, 1997. Counsel for Atlas, John F. McCaffrey, has visited our office on a number of occasions to review materials and documents disclosed pursuant to Rule 16 and the Standing Discovery Order. On at least one occasion, for the convenience of Mr. McCaffrey, the United States segregated all known Atlas documents for the year 1992. It is not

known the extent to which Mr. McCaffrey reviewed Atlas scale tickets covering the period September, 1992 through December, 1992. Sunshine's scale tickets were also made available for the defendants review, immediately after the United States received them from the Trustee of Sunshine pursuant to a Court order entered by Judge Solomon Oliver in the Northern District of Ohio. The Sunshine scale tickets were received by the United States on May 5, 1998. To the best recollection of counsel for the United States, the defendants have never bothered to look at these Sunshine scale tickets.[1]

The defendants' primary complaint is that they should be entitled to the government's work product, i.e., the scanned images. Apparently, the defendants also believe they should have access to this work product, and trial strategy, pre-trial. They are not. As part of its trial strategy, the United States has selected certain documents to be scanned for purposes of presentation at trial through *Trial Director*. It is unreasonable to allow the defendants to make an end run around Rule 16 and grant them pre-trial access to the United States' work product and trial strategy. The defendants deftly try to use the government's intended use of *Trial Director* as a means to achieve what Rule 16 prohibits.

The defendants' claim that they will be prejudiced if the United States does

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[1] On December 14, 1998, at approximately 4:30 p.m., the United States received a telephone call from John McCaffrey. Mr. McCaffrey insisted that certain Atlas scale tickets be made available for his review at 9:30 a.m. on the next business day. McCaffrey explained that he wanted to size up the number of documents so that he could obtain a cost estimate from a local copier. Because of the work involved in gathering these documents, the United States agreed to make the requested documents available for Mr. McCaffrey's review on December 15, 1998, at 11:30 a.m. Mr. McCaffrey reviewed the Atlas scale tickets; and then he reviewed a sample of Sunshine's scale tickets. McCaffrey said that he would call back to arrange for the Atlas and Sunshine scale tickets to be copied. The United States placed calls to Mr. McCaffrey on December 16 and 17, 1998, inquiring as to what arrangements he has made. The United States was told no such arrangements had yet been made. Finally, on December 18, 1998, Mr. McCaffrey called counsel for the United States with copying arrangements. The United States intends to make the requested documents available for pick-up by the defendants' copier on Monday, December 21, 1998.

not reveal its work product and trial exhibits pre-trial is also misplaced. For more than one year, the defendants have had the opportunity to inspect and copy at their convenience virtually every document that the United States intends to present at trial through *Trial Director*. Even more outrageous is the fact that the defendants insist they should get access to the scanned images and related materials, without ever even offering to split the significant costs already incurred by the United States and sunk into this project. The defendants now attempt to hold the United States hostage, requesting up-front all of the government's work product and pre-trial strategy, or else making the United States forego the manner of presenting its evidence which best suits its case.

Here, the United States advised the defendants well in advance of trial, more than four and one-half months, of its intent to use a commercial product to present and display evidence at trial. The United States has offered to split the costs of renting the equipment necessary to run the *Trial Director* program and any compatible commercial service the defendants wish to use. There is nothing inequitable or unfair about the United States' intended use of Trial Director in this case. The United States has a case to try, as do the Defendants. Unlike the defendants, however, the United States does not presume to dictate the manner in which the defendants choose to try their case or present their evidence.

The defendants overreach in suggesting that a "penalty" is being exacted upon them if they are required to pay their fair share of the rental equipment. Indeed, if the defendants choose to tie into the rental equipment through the use of their own display program, it would be unfair for them not to pay their fair share for the equipment. Based on the extensive motion practice and litigation to date, there is no basis to believe that an "inability to pay" issue exists on the part of the defendants. Moreover, if at trial the defendants wish to use the scanned images of documents the United States prepared, there is nothing unfair about having the defendants pay for those scanned images. Indeed, the United States understands

the Atlas defendants are in the process of making their own scanned version of Atlas and Sunshine scale tickets covering the period September, 1992 through December, 1992.

The defendants also overreach in suggesting that because *Trial Director* is being used, they are entitled to the early disclosure of Jencks material. The defendants apparently rely on United States v. Labovitz, No. 950-30011-MAP, 1996 U.S. Dist. LEXIS 10498 (D. Mass. July 24, 1996) (attached to the defendant's brief), for this proposition. Labovitz, however, is inapposite, perhaps even unique. Indeed, in the past year and a half that the United States has used *Trial Director*, it is aware of no case in which the Antitrust Division has been subjected to the limitations imposed by the Labovitz Court.)

In Labovitz, the United States insisted on a "paperless" trial. As best the United States can tell from the cryptic order and supporting memorandum, the intent of the government in Labovitz was to eliminate the use of all paper in the presentation of its case. Labovitz, at *4-6. Unlike Labovitz, in our case the United States is not insisting on a completely "paperless" trial; the United States is merely trying to present its case in the most efficient and best manner it believes possible, without having to pass out a tremendous amount of paper. We all know that passing out a lot of paper at trial not only bores the jury, but also causes a tremendous waste of judicial and governmental resources. The United States simply wants to limit the amount of paper it will pass out to the jury at trial. The United States does not, however, presume to advise the defendants how best to present their case. The defendants are free to pass out as much, or as little, paper as possible.

It is impossible to determine from the reported decision in Labovitz the particular facts of the case; nor is it clear to what extent the court determined the defendants in Labovitz were in a disparate position vis-a-vis the government from an “ability to pay” standpoint. It does appear, however, as if the court in Labovitz

took advantage of the government's work and sunk costs. Although advantageous to the defendants in Labovitz, the United States submits the result was unfair.[2] The defendants cite no other case in support of their motion.

Lastly, the defendants raise a red herring and complain about the proposed court room set-up. Clearly the Court and the parties must be comfortable with the courtroom set-up. This can be discussed fully at the Calendar Call on January 13, 1999. Further, if convenient for the Court, the United States plans on setting up the courtroom for *Trial Director* on the Friday before trial, January 22, 1998. Any problems or perceived problems in the proposed court room set-up can be solved at that time.

IV

CONCLUSION

For the foregoing reasons, the defendants' motion should be denied. The defendants are trying to use an unfounded complaint about the United States' proposed use of *Trial Director* to make an end run around Rule 16 and gain access to the United States' trial strategy and work product. The *Trial Director* program is one of several available commercial programs that defendants can choose from if they decide to present their evidence in the same manner as intended by the United States. If *Trial Director* is not used here, the United States will have no choice but to inundate the jury with paper. The United States believes that, if the use of *Trial Director* is not permitted here, the government's presentation of the evidence will be unduly prolonged, which will work to prejudice the government's case. There is

[2] It bears noting that the Labovitz decision was decided nearly two and a half years ago (July 24, 1996). Ms. Riddell has informed the United States that the costs associated with using *Trial Director* and similar commercial programs has fallen dramatically over this period of time.

nothing unfair about the United States' not having to turn over its work product and trial strategy pre-trial. The defendants' request is unreasonable. Accordingly, the defendants' motion should be denied.

Respectfully submitted,

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