

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	Criminal No.: H-97-93
	)	
v.	)	Violations:
	)	
MARK ALBERT MALOOF,	)	15 U.S.C. §1
	)	18 U.S.C. § 371
Defendant.	)	FILED 6/23/97

**UNITED STATES' RESPONSE TO DEFENDANT'S MOTION FOR
BILL OF PARTICULARS**

The United States of America, through its undersigned attorney, hereby responds to Defendant's Motion for Bill of Particulars. The Indictment in the case and the extensive discovery to be afforded the defendant prior to trial will be sufficient to fully apprise him of the charges pending against him and to enable him to prepare for trial. In addition, this Response voluntarily provides defendant with further details regarding the Indictment. Accordingly, there is no need for a formal bill of particulars in this case and therefore the defendant's Motion should be denied.

**A. Purposes and Requirements
of a Bill of Particulars**

Fed. R. Crim. P. 7(f) provides, in part, that "[t]he court may direct the filing of a bill of particulars." The decision whether to grant or deny a bill of particulars is committed to the sound discretion of the trial court. Wong Tai v. United States, 273 U.S. 77, 82 (1927); United States v. Burgin, 621 F.2d 1352, 1358 (5th Cir.), cert. denied, 449 U.S. 1015 (1980). The general purposes of a bill of particulars are to inform the defendant of the

charges against him with sufficient precision to: (1) enable him to prepare his defense, (2) obviate surprise at trial, and (3) enable him to plead his acquittal or conviction in the case as a bar to subsequent prosecution for the same offense. United States v. Davis, 582 F.2d 947, 951 (5th Cir. 1978), cert. denied, 441 U.S. 962 (1979).

A bill of particulars should not be expanded into a device to circumvent the restrictions on pretrial discovery of specific evidence contained in Fed. R. Crim. P. 16. Cooper v. United States, 282 F.2d 527, 532 (9th Cir. 1960). See also Davis, 582 F.2d at 951 ("generalized discovery is not a permissible goal of a bill of particulars"). Where the indictment itself and the bill of particulars supplied by the government provide the defendant with adequate information with which to conduct his defense, additional requests for particulars should be denied. Harlow v. United States, 301 F.2d 361, 367-68 (5th Cir.), cert. denied, 371 U.S. 814 (1962).

In analyzing requests for a bill of particulars or information to be disclosed in one, courts have not confined themselves to the indictment or to the government's voluntary bill, if provided. Rather, courts have taken into account other sources of information provided by the government, including discovery materials. United States v. Long, 706 F.2d 1044, 1054 (9th Cir. 1983) (broad discovery can serve as a substitute for the "trial preparation" function of a bill of particulars). See, e.g., United States v. Feola, 651 F. Supp. 1068, 1133 (S.D.N.Y. 1987) (court considered whether the information requested had been provided elsewhere, including through discovery).

In this case, in addition to the detailed and clearly-worded indictment, the government will provide the defendant with sources of information under its general discovery obligations. Pursuant to Fed. R. Crim. P. 16, the government will make available

to the defendant documents produced by his company, various co-conspirators and third parties, such as customers and suppliers, that relate to the charged price-fixing conspiracy. In addition, defendant will receive numerous telephone, fax and expense records that relate to the charged wire fraud conspiracy. These documents contain information that connects the defendant to the alleged conspiracies. Because a sizeable portion of these documents belong to the defendant's company, he already has particular knowledge and expertise regarding the information contained in these documents. See United States v. Cantu, 557 F.2d 1173, 1178 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978); United States v. Miller, 210 F. Supp. 716, 717 (S.D. Tex. 1962); United States v. Kirchjen Bros., Inc., 15 F.R.D. 147, 148 (N.D. Ill. 1953) (defendant not entitled to bill of particulars when the information sought is within his own knowledge).

In addition, three days prior to trial, the government will make available to the defendant all statements to which he is entitled under the Jencks Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2 (hereinafter, "Jencks").

Finally, in this Response, the government has voluntarily provided the defendant with additional details regarding the identities of co-conspirators, both individual and corporate, identities of suppliers, and identities of co-conspirators and documents referred to in overt acts. Taken together, the information provided herein, the clearly- and concisely-worded indictment, along with the extensive discovery to be made available to the defendant in advance of trial, are more than sufficient to apprise him of the charges against him and to enable him to adequately prepare for trial.

B. United States' Voluntary Bill of Particulars

The government voluntarily discloses the following information, corresponding in number to the requests in defendant's Motion:

1. The various individuals and corporations who participated as co-conspirators as alleged in paragraph 4, of Count One of the Indictment are:

Daniel Allen Schmidt	Bay Insulation Supply Co.
Mark Albert Maloof	Bay Insulation Supply Co.
Janne Lea Smith	Bay-Star of Texas
Huber Wallace Rhodes, Jr.	Mizell Bros. Co.
E. Hix Mizell	Mizell Bros. Co.
Jerrold Warren Killingsworth	Brite Insulation
Yun Lung Yueh a/k/a Peter Yueh	Brite Insulation
Danny Fong	Brite Insulation
Jim Denton (deceased)	PBI Supply Co.
Ron Trevathan	TMG, Inc.
Susan Trevathan	TMG, Inc.

2. The names of fiberglass suppliers referred to in paragraph 7 of Count One of the Indictment are:

Knauf Fiber Glass GmbH
CertainTeed Manson
Owens-Corning Fiberglass Corp.
Schuller International, Inc.
Fibras Aislantes, S.A.

3. The customers located outside the State of Texas who purchased and received insulation from facilities in Texas, as referred to in paragraph 8 of Count One of the Indictment, will be identified to defendant as part of Rule 16 discovery.

4. The customers whom the defendant and co-conspirators schemed to defraud, as referred to in paragraph 3 of Count Two of the Indictment, are those customers to whom defendant and co-conspirators sold or attempted to sell metal building insulation from facilities in Texas during the period alleged in the Indictment.

5. Regarding paragraph 5 of Count Two of the Indictment, the instances where prices charged were the result of a communication and agreement between the defendant and co-conspirators will be identified to defendant as part of Rule 16 discovery. To the extent the defendant seeks additional details, the government objects to the request, because the government has no obligation to disclose in a bill of particulars the precise manner in which the crimes alleged in the indictment were committed. See United States v. Remy, 658 F. Supp. 661, 669 (S.D.N.Y. 1987), citing United States v. Andrews, 381 F.2d 377, 377-78 (2d Cir. (1967) (per curiam), cert. denied, 390 U.S. 960 (1968); and United States v. Leonelli, 428 F. Supp. 880, 882 (S.D.N.Y. 1977). Moreover, much of this information will be evident from the discovery to be made available to the defendant under Rule 16 and Jencks. Therefore, a bill of particulars is neither appropriate nor necessary to obtain this information.

6. Regarding overt act (b) of Count Two of the Indictment, the co-conspirator in Kansas City, Missouri referred to is Huber Wallace Rhodes, Jr., the customer in Texas is Tri-City Steel, and the Bay employee is Janne Smith.

7. Regarding overt act (c) of Count Two of the Indictment, the co-conspirator referred to is Huber Wallace Rhodes, Jr., and the facsimile transmission is a CGI Silvercote, Inc. cover letter and price sheet, dated April 28, 1994.

8. Regarding overt act (d) of Count Two of the Indictment, the co-conspirator referred to is Huber Wallace Rhodes, Jr., and the facsimile transmission is a Mizell Bros. Co. draft price sheet, dated May 5, 1994.

9. Regarding overt acts (e), (f) & (g) of Count Two of the Indictment, the co-conspirator referred to is Huber Wallace Rhodes, Jr.

Conclusion

The defendant has or shortly will have access to extensive information in this case through (1) the detailed and precisely-worded indictment; (2) voluminous discovery to be afforded him under Rule 16, Jencks and Brady; and (3) details summarized in this response. This information is more than sufficient to fully apprise him of the charges pending against him and to enable him to prepare for trial. To the extent he seeks evidentiary details in excess of these needs, his requests exceed the proper scope of a bill of particulars. Accordingly, the Motion should be denied.

Respectfully submitted,

/s/

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ORDER

Given the United States' Response to Defendant's Motion for Bill of Particulars, the Defendant's Motion is hereby DENIED.

DONE AND ENTERED THIS ____ day of _____, 1997.

United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the United States' Response to Defendant's Motion for Bill of Particulars was sent via Federal Express this ____ day of June, 1997, to:

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