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)
	)
	)
Defendants.	) **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**

I
INTRODUCTION

Defendants Atlas Iron Processors, Inc., Anthony Giordano, Sr., Anthony Giordano, Jr., and David Giordano ("Atlas defendants") filed a joint motion requesting a bill of particulars. Defendant Randolph J. Weil filed a motion adopting his co-defendants' request for a bill of particulars. In connection with this Memorandum, the United States has filed a Bill of Particulars, but has objected to many of the requests for reasons stated more fully below.

The information provided by the United States in its Bill of Particulars, combined with the discovery materials disclosed and available to the defendants, is more than sufficient to satisfy the purposes for a bill of particulars; namely, to inform the

defendants of the nature of the charge against them so that they can prepare a defense, avoid prejudicial surprise at trial, and to protect themselves against a second prosecution for the same offense. A bill of particulars is not a discovery device and is not intended to force the United States to disclose the details of its case or its legal theories. Therefore, the Bill of Particulars provided by the United States does not reveal every single fact the defendants seek in their sweeping, interrogatory-style requests. Put simply, the defendants' requests for information go far beyond the proper scope and function of a bill of particulars.

Accordingly, the United States has prepared a proposed order and requests the Court to rule that the particulars provided to the defendants are sufficient to serve the function of a bill of particulars; and that the United States need not provide any further particulars to the defendants.

II
THE DEFENDANTS HAVE RECEIVED EXTENSIVE DISCOVERY IN THIS CASE

The defendants have already received extensive discovery in this case. The United States has fully complied with its obligations under Fed. R. Crim. P. 16. Pursuant to Rule 16(A)(1)(c), all documents in the government's possession which are material to the government's case-in-chief, or which may be material to the defendants' defense, have already been disclosed to these defendants or made available to them for their independent review.[1] In addition, all statements in the government's possession

[1] The United States has disclosed, or made available, to each of the parties all documents subpoenaed from the defendants. The only documents arguably falling under Rule 16 which have not yet been disclosed to the defendants are documents subpoenaed from Everglades Recycling, Inc., a division of Newell Recycling ("Newell"). Newell is not a party to this lawsuit, but operated as a scrap metal shredder in the Miami market during the charged conspiratorial period. The only reason these documents have not been made available to the defendants is because Newell filed a motion with this Court seeking a protective order from disclosure of its documents to the parties. The Court recently denied Newell's motion, and requested that the parties incorporate appropriate protection for Newell's documents in an "agreed-upon" protective order covering the parties. The Court has requested that the parties file their "agreed-upon" protective order with this Court no later than May 22, 1998. As

covered under Rules 16(A)(1)(a) and (b) have been supplied to these defendants, including grand jury testimony covered under Rule 16. In fact, pursuant to Rule 16, the United States has even disclosed relevant grand jury testimony of one of its key trial witnesses, which lays out the charged conspiracy in detail, including participants at conspiratorial meetings, scrap suppliers covered by the collusive agreement, geographic areas covered under the collusive agreement, agreed-upon prices, *etc.* Moreover, the United States has disclosed to the defendants contemporaneous notes made at one of the principal conspiratorial meetings, as well as another co-conspirator's calendar entries revealing dates of conspiratorial meetings and participants at such meetings. Pursuant to its obligations under the Standing Discovery Order entered in this case, the United States already has disclosed to each of these defendants all of the information now in its possession covered under Brady, Agurs, Napue and Giglio. The United States also has disclosed to each of these defendants its intent to introduce other acts evidence under Rule 404(b), disclosing the general nature of this evidence to each of these defendants in the form of a letter. In addition, the United States has also served upon each of the defendants a separate Notice of Alibi pursuant to Rule 12.1. Each such Notice details the main conspiratorial meetings in which each of these defendants participated.

The extensive discovery already provided to the defendants eliminates their need for additional particulars beyond those provided in the government's attached Bill of Particulars. Moreover, any suggestion that the United States has not been diligent in disclosing relevant materials pursuant to its obligations under the Standing Discovery Order is false. The United States fulfilled all of its obligations under the Standing Discovery on or about January 22, 1998. In fact, documents covered under Rule 16 were made available to each of the defendants on or about December 15, 1997. Surprisingly, defendants have spent very little time reviewing, or even asking to review,

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soon as agreement is reached, or a judicial decision is rendered, regarding treatment of Newell's documents, these documents also will be disclosed to the defendants.

any of these documents or materials. Indeed, defendant Weil has reviewed no documents covered under Rule 16.

III
THE COURT HAS DISCRETION
TO DENY A MOTION FOR A BILL OF PARTICULARS

A motion for a bill of particulars rests within the sound discretion of the trial court and will be reversed only if a defendant's rights are prejudiced. United States v. Draine, 811 F.2d 1419, 1421 (11th Cir. 1987). "A defendant possesses no right to a bill of particulars . . . ." United States v. Burgin, 621 F.2d 1352, 1358 (5th Cir. 1980), cert. denied, 484 U.S. 827 (1987). In fact, a court need not order a bill of particulars at all if it finds the indictment adequately apprises the defendants of the charges against them, Wong Tai v. United States, 273 U.S. 77, 82 (1927), or that the information sought is already in the defendant's possession, United States v. White, 753 F. Supp. 432, 434 (D. Conn. 1990). Materials provided through discovery may obviate the need for a bill of particulars. United States v. Gordon, 493 F. Supp. 814, 816 (N.D.N.Y. 1980).

Accordingly, whether a defendant is entitled to a bill of particulars is determined on a case-by-case basis. A trial court's decision to grant or deny a bill of particulars is reviewed only for abuse of discretion. United States v. Colson, 662 F.2d 1389, 1391 (11th Cir. 1981).

IV
A BILL OF PARTICULARS IS NOT A DISCOVERY DEVICE

The function of a bill of particulars is to inform a defendant of the nature of the charge in the indictment with sufficient precision to enable the defendant to prepare for a trial, or to plead his acquittal or conviction to bar another prosecution for the same offense. See, e.g., United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986), cert. denied, 480 U.S. 931 (1987); United States v. Cole, 755 F.2d 748, 760 (11th Cir. 1985). Courts have uniformly held that a bill of particulars is not intended to function as a discovery device. United States v. Davis, 582 F.2d 947, 951 (5th Cir. 1978), cert. denied, 441 U.S. 962 (1979); United States v. Rosenthal, 793 F.2d 1214, 1227 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987).

The Eleventh Circuit has identified three justifications for a bill of particulars:

> The purpose of a true 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."

Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986) (citing United States v. Cole, 755 F.2d 748, 760 (11th Cir. 1985) (citations omitted)). See also Davis, 582 F.2d at 951 (bill of particulars exists to reduce trial surprise, enable adequate defense preparation, and, critically, to flesh out charges to illuminate dimensions of jeopardy).

Above all, "it is well established that generalized discovery is not a permissible goal of a bill of particulars." Davis, 582 F.2d at 951. Thus, "[a] bill of particulars may not be used to compel the government to provide the essential facts regarding the existence and formation of a conspiracy . . . [or] all overt acts that might be proven at trial." Rosenthal, 793 F.2d 1214, 1227 (11th Cir. 1986). "Nor is the defendant entitled to a bill of particulars with respect to information which is already available through other sources such as the indictment or discovery and inspection." Id. See also United States v. Martell, 906 F.2d 555, 558 (11th Cir. 1990) (same). That is because "[a] bill of particulars, properly viewed, supplements an indictment by providing the defendant with information necessary for trial preparation." United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986). Thus, a judge must tailor a bill of particulars to an individual case. Davis, 582 F.2d at 951. Where the factual makeup of a conspiracy is "wholly of a garden variety,"[2] less is required of the bill of particulars. Id. The above-mentioned requirements ensure that the defendants will be informed of the charges against them with sufficient precision to facilitate preparation of their defense and to avoid double jeopardy.

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[2] Such as is this case, which involves a garden variety price-fixing and market-allocation conspiracy.

With regard to reducing trial surprise, where the evidence consists mainly of conversations and meetings in which a defendant participated and the activity was witnessed by a defendant in his place of business, such defendant can "'hardly [be] surprised by the government's proof at trial.'" Cole, 755 F.2d 748, 760 (11th Cir. 1985). Much of the government's evidence in this case will consist of conversations and meetings in which the defendants themselves participated and actions they took in their own place of business. Here, each of the individual defendants is intimately involved in either the formation or implementation of the charged conspiracy.

A bill of particulars is not intended to eliminate any chance of surprise about the charged conspiracy; it is intended only to avoid prejudicial surprise about the charge. United States v. Ferguson, 460 F. Supp. 1, 4 (E.D. Tenn. 1977), aff'd, 582 F.2d 1280 (6th Cir. 1978); United States v. Marks, 364 F. Supp. 1022, 1029 (E.D. Ky. 1973), aff'd, 520 F. 2d 913 (6th Cir. 1975), rev'd on other grounds, 430 U.S. 188 (1977). As stated in United States v. Manetti, 323 F. Supp. 683 (D. Del. 1971):

> [I]t is not the function of a bill of particulars to fully inform the defendant of the evidence which the government will present. Of necessity, therefore, while one of the legitimate functions may be to reduce the role of surprise in criminal cases, it will not do to say that the rule must be applied to shield defendants from the possibility of confrontation with unanticipated evidence. Nor is the rule intended to give the defendant the benefit of the government's investigative efforts.

Id. at 695 (footnotes omitted).

Furthermore, contrary to what the defendants would like this Court to believe, antitrust cases do not necessarily require bills of particular. United States v. Greater Kansas City Retail Coal Merchants' Ass'n, 85 F. Supp. 503, 512 (W.D. Mo. 1949) (a price fixing case against seven corporations, six corporate officers, and nine individuals in which the court denied the defendants' motion for a bill of particulars); United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796, 810 (E.D. Pa. 1980) (a Sherman Act

case involving five corporations and eight individuals, in which the court denied a request for detailed particulars).

As it stands, the United States has fully complied with its obligations under Rule 16, disclosing and making available all grand jury testimony, statements, and documents to which each of these defendants is entitled. The United States fulfilled its obligations under Rule 16 nearly three months ago. The United States also has disclosed to each of these defendants all information now in the government's possession to which they are entitled under Brady, Agurs, Napue and Giglio, which was done nearly four months ago. The United States also has disclosed to each of these defendants its intent to introduce other acts evidence under Fed. R. Evid. 404(b), which was done nearly four months ago. Furthermore, the United States has disclosed to the each of these defendants a Notice of Alibi pursuant to Fed. R. Crim. P. 12.1, disclosing with specificity meetings between the defendants.

In fact, the instant case involves a simple, uncomplicated conspiracy to fix scrap prices and allocate scrap suppliers in the Miami market. The charged conspiracy involves only two corporations, involves only four individual defendants (three of whom are related corporate officers), and concerns a limited geographic scope (the Miami market) and a limited period of time. Indeed, even cursory review of most, if not all, of the defendants' previous pleadings with this Court reveals they have routinely understated and diminished the charged conspiracy, mocking its scope and breadth. Curiously, now that they seek a bill of particulars, the defendants have had an epiphany. Now, all of the sudden, the defendants switch gears, overstating the complexity of this case and suggesting that the charged conspiracy involves such complex issues that a detailed bill of particulars is required. They cannot have it both ways. The charged conspiracy is of a "garden variety" and is simply understood. Moreover, all of the conspiratorial conduct is in the defendants' knowledge and possession. In their sweeping request for a bill of particulars, the defendants ask the United States to synthesize and correlate all of the information in its possession in a comprehensive format. In short, they ask this Court to force the United States to do

their work. The defendants, however, are in no way entitled to this relief, and their individual requests far exceed the proper scope and function of a bill of particulars.

V
BECAUSE THE SHERMAN ACT REQUIRES NO PROOF OF OVERT ACTS; THE DEFENDANTS, ARE NOT ENTITLED TO A DESCRIPTION OF ALL OVERT ACTS

The violation of the Sherman is the agreement itself; an act in furtherance of the agreement need not be alleged or proved. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 n.59 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 402 (1927); United States v. Fischbach and Moore, Inc., 576 F. Supp. 1384, 1389 (W.D. Pa. 1983). It is fundamental that "[t]he heart of a Section One violation is the agreement to restrain; no overt act, no actual implementation of the agreement is necessary to constitute an offense." United States v. Flom, 558 F.2d 1179, 1182 (5th Cir. 1977). See also United States v. Dynaelectric Co., 859 F.2d 1559, 1565 (11th Cir. 1985). Thus, "[b]ecause § 1 Sherman Act cases are unconcerned with overt acts, a bill of particulars for a § 1 Sherman Act case need not refer to overt acts." United States v. Gaev, Crim. No. 92-457, 1992 WL 368123, at *1 (E.D. Pa. Dec. 4, 1992); United States v. Maine Lobstermen's Ass'n, 160 F. Supp. 115, 121 (D. Me. 1957); United States v. Greater Kansas City Retail Coal Merchants' Ass'n, 85 F. Supp. 503, 512 (W.D. Mo. 1949); United States v. Sherwin-Williams Co., 9 F.R.D. 69, 71 (W.D. Pa. 1949); United States v. Macleod Bureau, 6 F.R.D. 590, 592-93 (D. Mass. 1947).

Accordingly, the United States objects to defendants' requests seeking information about overt acts committed in furtherance of the charged conspiracy. These objections are so noted in its Bill of Particulars.

VI
THE BILL OF PARTICULARS MORE THAN SATISFIES THE LEGAL REQUIREMENTS

The defendants' request for a bill of particulars far exceeds the proper scope and function of a bill of particulars. This is especially so in light of the extensive discovery materials that already have been disclosed and made available to them. By and large, the defendants request information to which they are neither entitled nor which is

legally relevant for purposes of a bill of particulars, such as precise and exact details about overt acts committed in furtherance of the charged conspiracy. The defendants also use their sweeping request as a device for learning about the legal conclusions and theories of the United States.

The defendants' interrogatory-style bill of particulars request consists of 4 lettered parts and 17 separately numbered sub-parts. In its Bill of Particulars, the United States has addressed each of the sub-parts in turn, stating its objections to those sub-parts which demand more information than must be provided under the law. The United States' overriding objection is that the defendants' requests for information go well beyond what the law requires the government to produce in a bill of particulars and are tantamount to requests for the United States' legal conclusions. Succinctly put, "[a bill of particulars] is not designed to compel the government to detailed exposition of its evidence or to explain the legal theories upon which it intends to rely at trial." Burgin, 621 F.2d at 1359. Courts have denied requests for a bill of particulars like the defendants which seek "the identities and addresses of unindicted co-conspirators, dates and locations of alleged acts in furtherance of the conspiracy, and [other] detailed information . . . ." See, e.g., Colson, 662 F.2d 1389, 1391. The United States has amply answered many of the defendants' bill of particulars requests, but many others simply ask for too much detail (e.g., request C(2) seeks "the specific acts and/or statements made by each co-conspirator deemed to have been made in furtherance of the alleged conspiracy"), or seek the United States' legal theories (e.g., request D asks the United States to "identify each prior or subsequent act of any defendant which the government will seek to introduce at trial pursuant to Fed. R. Evid. 404(b)"), or information to which the defendants are not entitled. In the cases where the United States had an objection to a particular request, it has been noted on the attached bill of particulars.

VII
CONCLUSION

The attached Bill of Particulars contains more than ample information such that the defendants are now informed of the charge against them with sufficient precision

that they can prepare their defense and any prejudicial surprise about the charge is eliminated. More importantly, the defendants are sufficiently informed to

protect them from double jeopardy. For this reason, no other bill of particulars should be required. Accordingly, the United States respectfully requests this Court to enter the United States's attached Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

1) *Bill Of Particulars In Response To Joint Motion Of Defendants Atlas Iron Processors, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., and David Giordano For A Bill Of Particulars; And In Response To Motion Of Defendant Weil To Adopt Motion Or Codefendants For A Bill Of Particulars;*

2) *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 Or Codefendants For A Bill Of Particulars.*

3) *Order Finding United States' Bill Of Particulars Sufficient For Defendants Atlas Iron Processors, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., and David Giordano; and*

4) *Order Finding United States' Bill Of Particulars Sufficient For Defendant Randolph J. Weil.*

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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