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
	)	(May 7, 1998, Amended Order of Reference)
Defendants.	)	
	)	**RESPONSE OF UNITED STATES TO MOTION OF DEFENDANT RANDOLPH WEIL TO STRIKE NOTICE OF FILING SUPPLEMENTAL NOTICE OF EVIDENCE THE UNITED STATES INTENDS TO INTRODUCE UNDER FED. R. EVID. 404(b), AND RESPONSE IN OPPOSITION TO SUPPLEMENTAL NOTICE**

I

INTRODUCTION

Defendant Randolph J. Weil's ("Weil") *Motion to Strike Notice of Filing Supplemental Notice of Evidence the United States Intends to Introduce Under Fed. R. Evid. 404(b)*, seeks to prevent the United States from introducing newly-discovered other acts evidence pursuant to Federal Rule of Evidence 404(b). Weil makes four arguments. First, the evidence is insufficiently precise for him to investigate. Second, the United States did not mention the evidence at the hearing on November 9, 1998. Third, the evidence is not admissible as a co-conspirator's statement under Fed. R. Evid. 801(d)(2)(E). Fourth, the evidence does not complete the background of the conspiracy. For reasons stated below, Weil's motion is misplaced and should be denied.

II
FACTS

The Indictment charges that Weil and his 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." Indictment, ¶ 2. The 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. The United States' bill of particulars specifies the conspiracy continued into January 1993. The conspiracy consisted of a continuing agreement: (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. The methods by which the co-conspirators formed and carried out the conspiracy are described in Paragraph 4 of the Indictment. Indictment, ¶ 4.

On November 9, 1998, at a motion hearing the United States advised the Court and Weil's attorney that it presently did not intend to introduce "other acts" evidence against Weil. Sometime after the hearing on November 9, 1998, the United States learned of a new witness who could provide 404(b) testimony. On December 2 and 3, 1998, the United States debriefed this witness. The next day the United States filed its supplemental notice of 404(b) evidence. See *Notice of Filing Supplemental Notice of Evidence the United States Intends to Introduce Under Fed. R. Evid. 404(b)*. On January 8, 1999, the United States received Weil's motion opposing the introduction of this evidence.

III
SUBSTANCE OF THE OTHER ACTS EVIDENCE

In summary, the newly discovered evidence to be introduced against Weil concerns a meeting that took place in 1990 or 1991 at the Fountainbleau Hotel in Miami Beach, Florida. Weil and defendant Anthony J. Giordano, Jr. agreed to cooperate for their common good with respect to pricing strategies and raw material providers. The second piece of other acts evidence consists of a meeting where Anthony J. Giordano, Jr. discussed an agreement that he and his company, defendant Atlas Iron

Processors, Inc., had with Weil and defendant Sunshine Metal Processing, Inc., to allow Atlas to buy sufficient amounts of scrap.

IV
LAW AND ARGUMENT

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

In the *Government's 404(b) Response to Defendants Atlas and the Giordano Defendants,* the United States provided an in depth treatment Rule 404(b) and its application to this case. To avoid duplication, the United States will summarize the law here. The Eleventh Circuit follows a three-part test in determining the admission of other acts evidence under Rule 404(b):[1]

> 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.

United States v. Miller, 959 F.2d 1535, 1538 (11th Cir. 1992), cert. denied, 506 U.S. 942 (1992), (citations and footnotes omitted).

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[1] 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 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.

In Huddleston v. United States, 485 U.S. 681 (1988), 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. See United States v. Bechum, 582 F.2d 898, 912, 913 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979). Therefore, to the extent Weil argues 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. The Supreme Court held: "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)).

If other acts evidence is admissible for a proper purpose, then it may be excluded only if its probative value is substantially outweighed by its prejudicial effect. See Fed. R. Evid. 403. The touchstone for determining whether evidence is too prejudicial to be admitted is whether such evidence 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 any potential for prejudice from certain evidence, this problem may be cured by a cautionary or limiting instruction. 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).

B. WEIL'S ARGUMENTS TO EXCLUDE THE OTHER ACTS EVIDENCE ARE MISPLACED

1. The Other Acts Evidence Is Not Inadmissible For Lack Of Specificity

Weil first argues the other acts evidence is not specific enough for him to investigate. This is simply wrong. Weil knows Tom Luntz will testify about the Fountainbleau meeting. Luntz lives in the Miami area. Weil has hired an ex-FBI special agent, Hugh Cochran, to investigate his case. All Weil need do is interview Tom Luntz to evaluate his credibility and ascertain any other information he believes necessary to his defense. Weil also knows exactly where the conversation took place and he knows it took place in association with an industry meeting held in Miami. More important, the Fountainbleau meeting consisted of a conversation involving, among others, Weil and defendant Anthony J. Giordano, Jr. The second piece of other acts evidence also involved a meeting and discussion between Luntz and Anthony J. Giordano, Jr. about the arrangement between Giordano, Jr. (and Atlas) and Weil (and Sunshine) concerning a raw material allocation in Miami. Weil can investigate both of those pieces of other acts evidence by interviewing Giordano, Jr.

2. The Other Acts Evidence Is Not
Inadmissible Because It Was Recently Discovered

Weil's second argument is that the United States' newly-discovered evidence is inadmissible because it was not mentioned at the November 9, 1998, hearing. This argument would resonate if the United States had known of the other acts evidence at the time of the hearing. The evidence did not become available to the United States until after the hearing, and could not be confirmed until December 3, 1998. It is not unusual for witnesses to criminal activity to surface late in an investigation. The nature of the crime with which Weil is charged is, after all, a conspiracy, the very nature of which is secret. The United States wishes that it had this other acts information earlier in the investigation, but it did not. It would be manifestly unfair to prevent the United States from introducing this evidence when Weil learned of it more than six weeks before the trial.

3. The Other Acts Evidence Is Not A
Co-conspirators' Statement Pursuant To Fed. R. Evid. 801(d)(2)(E)

Weil's third argument is that the other acts evidence is not an exception to hearsay pursuant to Fed. R. Evid. 801(d)(E). This argument misses the point, however. Here the other acts evidence is admissible to show motive, intent and lack of mistake.

4. The Other Acts Evidence Completes The Background Of The Conspiracy

This other acts evidence is also admissible to show the background of the conspiracy. The meetings and agreements referred to above evidence the background and beginning of the illegal cooperation in the Miami-area scrap metal market between the defendants. At most, the meetings took place only two years before the charged conspiracy, so they are temporally relevant. More important, the meetings involved the same principals of the same companies who are all now defendants in this case. As the Court held in United States v. Van Dorn, 925 F.2d 1331, 1338 (11th Cir. 1991), "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." Clearly this evidence meets the Van Dorn criteria.

V

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 Weil and his co-defendants knowingly entered the charged conspiracy; had a clear motive for doing so; and will disprove any argument that the conduct of Weil and his co-defendants is the result of mistake or accident. Accordingly, the United States requests the Court deny Weil's motion.

Respectfully submitted,

WILLIAM J. OBERDICK
Acting Chief
Cleveland Field Office

By: RICHARD T. HAMILTON, JR.
Court I.D. No. A5500338

PAUL L. BINDER
Court I.D. No. A5500339

IAN D. HOFFMAN
Court I.D. No. A5500343

Trial Attorneys,
U.S. Department of Justice
Antitrust Division
Plaza 9 Building
55 Erieview Plaza, Suite 700
Cleveland, OH 44114-1816
Phone: (216) 522-4107
FAX: (216) 522-8332