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**
	) **MOTION AND MEMORANDUM OF**
	) **DEFENDANT WEIL TO EXCLUDE**
	) **EVIDENCE WHICH THE**
	) **GOVERNMENT INTENDS TO**
	) **INTRODUCE AT TRIAL**
	) **PURSUANT TO RULE 404(b)**

I

INTRODUCTION

Defendant Randolph J. Weil ("Weil") has moved this Court to exclude other acts evidence which he expects the United States to introduce at trial pursuant to Federal Rule of Evidence 404(b).[1] Weil makes three principal arguments. First, Weil argues that the other acts evidence is being introduced for an improper purpose. Second, Weil argues that it will be unfair to him to be tried with his co-

[1] Like Weil, defendants Atlas Iron Processors, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr. and David Giordano ("Giordano defendants") filed a joint motion asking this Court to exclude other acts evidence that the United States seeks to introduce at trial under Rule 404(b). The United States filed its *Response Of United States To Defendants' Atlas Iron Processors, Inc., Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., And David Giordano's Joint Motion To Exclude Evidence Which The Government Intends To Introduce Pursuant To Rule 404(b)* ("*Government's 404(b) Response to Defendants Atlas and the Giordano Defendants*"). See Attachment 1. In responding to the 404(b) motion of Atlas and the Giordano defendants, the United States fully set forth its reasons supporting admission of the other acts evidence under Rule 404(b) and for non-404(b) purposes. In the instant Memorandum, the United States will not rehash the arguments supporting admission of other acts evidence against Atlas and the Giordano defendants. Rather, the purpose of this Memorandum is to respond to Weil's arguments as to why he believes the other acts evidence should be excluded.

conspirators, since most of the other acts involves their conduct. Weil even goes so far to suggest that a mistrial will result if he has to stand trial along with his co-defendants. Third, Weil complains that the notice provided by the United States of its intent to introduce other acts evidence at trial is insufficient. For reasons stated fully below, each of Weil's arguments is not well taken.

Here, the other acts evidence is admissible for a proper purpose under Rule 404(b). 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. Contrary to what Weil would have this Court believe, the other acts evidence is focused and limited, and is in no way unfairly prejudicial him. In the end, the other acts evidence will help the jury make the right decision.

Accordingly, the United States requests that this Court deny Weil's motion to exclude other acts evidence under Rule 404(b) and enter an appropriate order permitting the admission of other acts evidence where such evidence is introduced for a proper purpose under the Rule.

II
FACTS

On November 13, 1997, the federal grand jury sitting in the Southern District of Florida returned an Indictment charging that Weil 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." 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. In fact, evidence will be introduced at trial that the charged crime continued past November 23, 1992, and extended into January, 1993.

The charged combination and conspiracy consists 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."[2] Indictment, ¶ 3. 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. Indictment, ¶ 4.

On or about January 22, 1998, the United States notified Weil, by letter, of its intent to introduce certain evidence under Rule 404(b). See Attachment 2. This letter 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). The bulk of the other acts evidence involves the conduct of defendant Atlas and the Giordano defendants.[3]

As will be discussed more fully below, all of the other acts evidence that the United States seeks to introduce at trial will be introduced for a proper purpose. Weil wrongly states that the government intends to introduce such evidence to prove "bad" character. *Weil Memorandum*, pp. 4-5. Morever, the other acts evidence that the United States seeks to introduce at trial is narrow 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, motive, lack of mistake or accident, and common plan or design. See Rule 404(b). 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 Weil and his co-defendants of its intent to introduce other acts evidence under Rule 404(b) 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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[2] Weil misstates the charged conspiracy. *Weil Memorandum*, p. 2. In addition to charging Weil and his co-conspirators with "price fixing," the Indictment also charges Weil and his co-conspirators with allocating suppliers of scrap metal.

[3] All of the other acts evidence disclosed in this letter, however, may be admissible outside of Rule 404(b) to explain the background of the charged conspiracy; and to show the evolution, context and development of this conspiracy.

- 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 Weil and competitors of defendant Sunshine Metal Processing, Inc., 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.

The bulk of the other acts evidence which the United States seeks to introduce at trial concerns conspiratorial conduct between Weil's co-defendants and their primary competitor in the Cleveland market. This other acts evidence is strikingly similar to the conduct charged in the Indictment, and has been described at length in the *Government's 404(b) Response to Defendant Atlas and the Giordano Defendants*. See Attachment 1, pp. 11-16. Other acts evidence related to the conduct of Weil's co-defendants in the Cleveland market will be presented to the jury by witnesses who directly participated in collusive meetings or discussions involving Atlas and the Giordano defendants. Indeed, one of the government's key witnesses participated in the collusive agreement in Cleveland and the charged conspiracy.

In addition, the United States has notified Weil of its intent to introduce other acts evidence against him under Rule 404(b). This other acts evidence against Weil concerns his communications with competitors in the Miami market (including Everglades Recycling, Inc.). These inter-company communications were price-sensitive and concerned Weil's complaining about the price structure of raw materials in the Miami market. In addition, the other acts evidence against Weil concerns his statements to other officers and employees of defendant Sunshine about his frustration with Atlas' pricing on raw materials in the Miami market. Furthermore, this other acts evidence will establish that Weil became very concerned about the pricing structure of raw materials in the Miami market after Atlas began its operation in approximately early 1990. Weil perceived the Giordano defendants as "know-nothings" whose pricing disrupted the Miami market and negatively impacted Weil and his company. This other acts evidence will

show that Weil frequently made statements complaining about the effect on raw material prices caused by Atlas (and other competitors) in the Miami market. This other acts evidence will also show that Weil suggested to his competitors that their prices should be in line with Sunshine's prices. These types of communications between Weil and his competitors began shortly after Atlas and other competitors entered the Miami market and continued until Sunshine effectively exited the market in late 1996.

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 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 during its case-in-chief is approximately only three to four hours.[4]

IV. 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 overview of relevant case law concerning Rule 404(b). To avoid unnecessary duplication for this Court, no such lengthy overview is provided here.

The Eleventh Circuit follows a three-part test in determining the admission of other acts evidence under Rule 404(b):[5]

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[4] Weil's suggestion that the government intends to overwhelm the jury with 404(b) evidence is mistaken. Nor is the other acts evidence intended to mask what Weil mischaracterizes as an "extremely weak" case. The case against Weil and his co-defendants is strong. The direct evidence against Weil and his co-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.

[5] 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.

> 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).

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 Rule 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.[6] 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.[7] United States v. Lail, 846 F.2d 1299, 1301 (11th Cir. 1988).

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

In his motion to exclude the United States from introducing such evidence under Rule 404(b), Weil works hard to understate the charged conspiracy and overstate the scope and breadth of the other acts

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[6] 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.").

[7] In *Government's 404(b) Response to Defendants Atlas and the Giordano Defendants*, the United States provides ample authority for the proposition that other acts evidence is admissible in antitrust cases. See Attachment 1, pp. 8-10. Thus, no special hurdle must be cleared because the instant case involves an antitrust conspiracy and not some other type of conspiracy. See, e.g., United States v. Dynaelectric Co., 859 F.2d 1559 (11th Cir. 1988) cert. denied, 490 U.S. 1006 (1989) (other acts evidence of previous attempts to rig bids relevant to show defendants' intent); United States v. Misle Bus & Equip. Co., 967 F.2d 1227 (8th Cir. 1992) (other acts evidence of uncharged conspiratorial conduct in another state admissible to show defendant's knowledge and intent); United States v. Southwest Bus Sales, Inc., 20 F.3d 1449 (8th Cir. 1994) (alleged bid rigging in another state admissible under Rule 404(b) to prove intent to conspire, motive, and lack of mistake with regard to bid rigging in charged conspiracy); 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).

evidence. Weil does so in an attempt to create an impression of unfairness, or perhaps to infuse the idea that admission of the other acts evidence will overwhelm, complicate or confuse the jury. Weil also mischaracterizes the charged conspiracy as only a "one-month" conspiracy to "fix prices."[8] The admissibility of other acts evidence under Rule 404(b), however, in no way depends on the length of the charged conspiracy or on how many counts are in the Indictment. This is especially so in a criminal 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.").

In addition to misstating the purpose for which the other acts evidence is intended to be introduced, Weil would have this Court believe that the extrinsic acts are too removed in time to be probative of material issues at trial. Weil is wrong. The other acts evidence is close enough in time to the charged conduct to be relevant and highly probative of issues such Weil's and his co-defendants' intent, knowledge, motive, lack of mistake or accident, and common plan or design in entering into the charged conspiracy. The benchmark for evaluating the probativeness (including temporal proximity) of the other acts evidence to the charged conduct is October and November of 1992, not the Indictment date of November 13, 1997. Here, all of the other acts evidence occurred close enough to the charged conduct to be highly probative of issues at trial. Thus, Weil's rhetoric that the United States seeks to introduce a "lifetime of conduct" against Weil, or his suggestion that the government seeks to introduce other acts evidence which is ten year's removed from the charged conduct, is unsupported by the facts.

Here, the other acts evidence against Weil and his co-defendants is admissible under several of the express purposes provided under Rule 404(b). Such evidence is relevant and highly probative of Weil's and his co-defendants' intent, knowledge, lack of mistake or accident, motive, and common plan. Weil's

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[8] Weil understates the charged conduct by ignoring that Weil and his co-conspirators 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.).

conclusory accusation that the United States intends to introduce the other acts evidence for an improper purpose is wrong. Moreover, the other acts evidence also is admissible for non-404(b) reasons. As explained fully in its *Government's 404(b) Response to Atlas and the Giordano Defendants*, most, if not all, of its other acts evidence is admissible to explain the background and context of the charged conspiracy. See Attachment 1, pp. 17-18. This evidence completes the story of the crime, and explains the motive and chain of events leading up to the charged conspiracy. See, e.g., United States v. Herre, 930 F.2d 836 (11th Cir. 1991); United States v. Williford, 764 F.2d 1493, 1498 (11th Cir. 1985).

Intent. The intent or state of mind of Weil and his co-defendants in entering into the charged conspiracy is a material issue. Here, the bulk of the other acts evidence against Weil's co-defendants is collusive conduct that is strikingly similar to the charged conduct. The other acts evidence against Weil also will show that he had the requisite intent to enter into the charged conspiracy and knowingly did so. Weil's statements to officers and employees of Sunshine complaining about Atlas' pricing in the Miami market prior to the illegal agreement are highly probative of his intent to enter into and carry out the charged conspiracy.

Lack of mistake or accident. The other acts evidence will demonstrate that Weil and his co-defendants knew what they were doing when they sat down and hammered out a price fixing and raw material allocation agreement. The other acts evidence will show that Weil's and his co-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."). Moreover, the other acts evidence will show that the government's witnesses were not mistaken in interpreting Weil's and his co-defendants' charged acts as part of a price fixing and market allocation conspiracy.

Motive. The other acts evidence will be introduced to establish that Weil and his co-defendants had a motive to enter into the collusive agreement. The other acts evidence against Weil will show that his motive was to depress his raw material costs -- at the expense of innocent scrap suppliers. Such evidence also will show that Weil's company was in financial trouble prior to striking the collusive agreement with his co-defendants. As to his co-defendants, the other acts evidence will show that their motive in entering

into a collusive agreement in the Miami market is rooted in their previous "successful" collusive agreement in Cleveland.

Common plan. The other acts evidence will show that Weil's co-defendants adopted and pursued in the Miami market a common plan that had worked for them in Cleveland. The charged conduct of Weil's co-defendants in the Miami market is strikingly similar to their conspiratorial conduct in the Cleveland market.

VI
WEIL WILL NOT BE UNFAIRLY PREJUDICED BY THE ADMISSION OF 404(B) EVIDENCE IN THIS CASE

Weil argues that he will be unfairly prejudiced by the admission of other acts in this case. Indeed, this appears to be the primary purpose of his motion. The thrust of Weil's argument is that most of the other acts evidence involves the conduct of his co-defendants and that he may be painted with the same broad brush by the jury. Weil even goes so far as to suggest that a mistrial will result if he has to stand trial with his co-defendants and this Court allows other acts evidence to be introduced. *Weil's Memorandum*, pp. 2, n.1; 7. Weil's arguments about unfairness and mistrials, however, are misguided. The probative value of the other acts evidence far outweighs any prejudicial effect on Weil (or his co-defendants) under Rule 403. 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). Weil also ignores the ability of this Court to cure any perceived prejudice through appropriate limiting instructions to the jury.

Weil's argument that he will be unfairly prejudiced by the introduction of other acts evidence against his co-conspirators also must fail. Here, the other acts evidence can hardly be described as being so prejudicial as to likely incite the jury to irrational action. See, e.g., United States v. Eirin, 778 F.2d 722, 732 (11th Cir. 1985); (Evidence too prejudicial under Rule 403 only where it is "likely to incite the jury to an irrational decision. Such irrationality is the primary target of Rule 403."); United States v. Church, 955 F.2d 688, 702 (11th Cir. 1992), cert. denied, 506 U.S. 881 (1992) (same); United States v. Bennett, 848 F.2d 1134, 1138 (11th Cir. 1988) (same). Here, the charged conduct involves an economic crime and is hardly susceptible to inciting irrational jury behavior. Moreover, it is too late in the game for Weil to pick and choose his co-conspirators. Weil should have thought about that before conspiring with them

to cheat innocent suppliers by fixing prices and allocating suppliers in the Miami market.

In addition, Weil's half-hearted suggestion that a mistrial will occur if Weil has to stand trial with his co-conspirators is ill-founded. If Weil truly believes that he has grounds to sever himself from being tried with his co-defendants, then the proper vehicle for doing so is for him to file a motion to sever under Fed. R. Crim. P. 8(b). Undoubtedly, the high standard Weil must overcome to sever himself from this trial explains why he has not done so. Weil's suggestion about a mistrial is nothing but a weak effort to make an end run around Rule 8(b).

In addition, Weil's contention that the other acts evidence should be excluded because it does not apply to him is groundless. It takes two competitors to fix prices and allocate a market. Any evidence that the jury reasonably uses to conclude, for example, that Atlas and the Giordano defendants had a motive to fix prices with Weil, is just as relevant to determining Weil's guilt as it is to determining that of his co-defendants. Moreover, any risk of prejudice to some or all of the defendants in this case may be cured by a cautionary or limiting instruction. United States v. Underwood, 588 F.2d 1073, 1077 (5th Cir. 1979). See United States v. Morrow, 537 F.2d 120, 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.").

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

Weil takes issue with the substance of the notice provided to him concerning the United States' intent to introduce evidence under Rule 404(b). The United States believes that its letter to Weil notifying him of its intent to introduce other acts evidence at trial satisfies the requirements of Rule 404(b). The reporting requirement of Rule 404(b) provides only 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, Weil was provided notice of the government's intent to introduce other acts evidence under Rule 404(b) on

or about January 22, 1998, more than 10 months before the scheduled trial is set to begin. In its letter, the United States also apprised Weil of the general nature of the other acts evidence.

Weil also complains about the lack of "proof" put forward by the United States in its letter notifying him of the government's intent to introduce at trial other acts evidence under Rule 404(b). Although the trial is still more than six months away, Weil seemingly argues that the United States should be precluded from introducing any other acts evidence because the 404(b) letter does not "prove" the defendants committed the conduct. Weil reads into the notification procedure provided in Rule 404(b) a requirement that does not exist.

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. Indeed, the other acts evidence will be "proved up" through the eyewitness testimony of individuals who directly participated in the other acts. The United States has presumed that, pursuant to Rule 104, this Court will determine the relevancy of the other acts evidence either during trial in *voir dire* outside the presence of the jury, or immediately before the trial begins. Weil would have this Court make such a determination now on the basis of a letter sent to Weil well in advance of trial, the only purpose of which under Rule 404(b) is to disclose the general nature of the other acts evidence. Weil's argument that the United States should be precluded from introducing other acts evidence based on its 404(b) letter flies in the face of the Rule itself.

The United States is confident that this Court will find that a jury could reasonably conclude that Weil and his co-defendants committed the other acts introduced at trial by the United States. If this Court requires a hearing prior to trial to establish the sufficiency of the other acts evidence, the United States stands ready to provide to this Court whatever information the Court deems necessary to satisfy its threshold inquiry under Fed. R. Evid. 104.

Moreover, the United States has reviewed Local Rule 88.10 H. Nowhere in this Rule does it provide that the United States must go beyond what Rule 404(b) requires in terms of notifying Weil of the general nature of the other acts evidence. The United States has no idea what the basis is for Weil's argument that he is entitled to exact and precise details of the other acts evidence in the government's

404(b) letter.[9] Even so, close review of the 404(b) letter sent to Weil shows that the United States did, in fact, disclose information specific enough to avoid any unfair surprise at trial and to provide him with a sufficient amount of time to investigate matters himself to counter the government's evidence.

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 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. The other acts evidence will help the jury make the right decision.

[9] The United States read Rule 404(b) as a full discovery provision requiring it to lay out with precision the exact details of the other acts evidence. Clearly, the purpose of notification under Rule 404(b) is to prevent unfair surprise at trial by providing Weil and his co-defendants sufficient time to undertake their own investigation of the facts. The notification provided by the United States to Weil and his co-defendants amply satisfies this purpose.

Weil in no way will be unfairly prejudiced as the result of having to stand trial with his fellow co-conspirators. The other acts evidence in this case hardly can be described as being likely to incite the jury to act irrationally, as required under Rule 403. Furthermore, any potential prejudice to Weil (or his co-defendants) may be cured by appropriate limiting instructions by this Court.

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

Respectfully submitted,

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