UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)
	) Case No. 97-0853-CR-Middlebrooks
v.	)
	)
ATLAS IRON PROCESSORS, INC., et al.,	)
	) **RESPONSE OF THE**
	) **UNITED STATES**
Defendants.	) **TO JOINT SENTENCING**
	) **MEMORANDUM OF DEFENDANTS**
	) **ATLAS IRON PROCESSORS, INC.,**
	) **ANTHONY J. GIORDANO, JR.,**
	) **ANTHONY J. GIORDANO, SR.**
	) **AND DAVID GIORDANO**

I

INTRODUCTION

The United States submits this Memorandum in response to the joint sentencing memorandum of Atlas and the Giordano defendants. The United States has briefed most of these issues extensively in its *Sentencing Memorandum of the United States* and in its responses to their objections to the Presentence Investigation Report. Therefore, the responses contained in this Memorandum will be brief, hitting only the highlights, in the order presented by the defendants.

II

RELEVANT FACTS

A. THE GOVERNMENT'S EVIDENCE AT TRIAL PROVED A CONSPIRACY LASTING THROUGH DECEMBER 31, 1992

The testimony and evidence offered at trial that the conspiracy lasted at least from October 24, 1992 (the date of the Sea Ranch meeting) at least through December 31, 1992. In its case-in-chief, the United States introduced business

records of Atlas covering the October through December, 1992 time period. These business records included scale tickets, checks and summary compilations for each scrap transaction affected by the Sea Ranch agreement. These Atlas pricing documents unequivocally show the agreed-upon Sea Ranch pricing was used by Atlas at least through December 31, 1992. Indeed, these business records provide the best proof that the conspiracy lasted at least through December 31, 1992. The business records of Sunshine corroborate the continuation of the conspiracy through December 31, 1992, as these records unequivocally show Sunshine's pricing after Sea Ranch followed in lock step with the agreed-upon pricing.

Also, in her testimony, Sheila McConnell, the chief car buyer for Atlas who was recruited into the conspiracy, testified that she concocted a "secret" deal in buying scrap from M&L Auto, a major car supplier. According to McConnell, she paid M&L Auto a price of $54/ton for its scrap after Sea Ranch. In order to buy this scrap, however, McConnell agreed -- on the side -- that Atlas would pay M&L Auto an additional $6/ton beginning in January, 1993. This side deal was cut by McConnell so as not to tip off the Giordanos that she was cheating on the Sea Ranch agreement. If there was no agreement to cheat on, then M&L Auto's invoice would simply have reflected a price of $60/ton.

Nor is the meeting at Don Shula's restaurant on November 23, 1992, proof of withdrawal from the conspiracy. There is no evidence that anyone at this meeting said the deal was over. It was simply a heated discussion aimed at policing the agreement and furthering the conspiracy. The Atlas and Sunshine documents show this clearly. For example, after the Shula's meeting, the pricing of Atlas and Sunshine does not change at all -- especially with respect to cars, the principal focus of the illegal agreement.

The defendants use pricing to Bubba's to argue the conspiracy ended after Shula's. But they are wrong. Bubba's pricing is nothing more than an example of McConnell's cheating on the agreement. In fact, with the exception of Bubba's, all

other car suppliers received the same price from Atlas after the Shula's meeting as they did before the Shula's meeting. And that price was the agreed-upon Sea Ranch price. The defendants fail to mention this fact.

B. THE APPROPRIATE METHOD FOR DETERMINING THE VOLUME OF COMMERCE AFFECTED BY THE CONSPIRACY IS PROVIDED IN *HAYTER OIL* AND ITS PROGENY

The United States has briefed this issue extensively in its Sentencing Recommendation and in its responses to each of the defendant's objections to the Presentence Investigation Report.

The "delivered" versus "picked up" pricing spiel of the defendants is not relevant to this sentencing. Consistent with U.S.S.G. §2R1.1 and United States v. Hayter Oil, 51 F.3d 1265, 1273 (6th Cir. 1995), the method employed by the United States in calculating volume of commerce simply uses the price actually paid to the suppliers who were defrauded as the result of the agreement. Not surprisingly, the method employed by the defendants relies on the disfavored approach used in SKW Metals & Alloys, Inc., 4. Supp. 2d 166 (W.D.N.Y. 1997). See, e.g., United States v. Andreas, et al., 1999 WL 51806 (N.D. Ill.); United States v. Mark Albert Maloof, Transcript of proceedings before the Honorable Nancy F. Atlas at 61, Criminal No. H-97-93 (S.D. Texas, Houston Div., December 1, 1998) (attached to *Sentencing Recommendation of the United States*). Both Andreas and Maloof expressly rejected the disfavored SKW Metals method, which the defendants urge this Court to use.

The defendants also are wrong in their critique of the rationale underlying Hayter Oil. For example, though the defendants correctly point out there is a minimum guideline fine for an individual under U.S.S.G. §2R1.1(c), there is no such minimum fine for a company.

Nor are the defendants correct in arguing the rule of lenity applies in this case because of the competing decisions of Hayter Oil and SKW Metals. The reasoning they employ is tortured. The defendants seemingly argue that whenever two or more courts disagree, the rule of lenity applies. This is ridiculous. The

Eleventh Circuit has recognized that the rule of lenity is "not an inexorable command to override common sense and evident statutory purpose." United States v. Trout, 68 F.3d 1276, 1280 (11th Cir. 1995), quoting United States v. Brame, 997 F.2d 1426, 1428 (11th Cir. 1993). Moreover, it is clear that in relying on SKW Metals, the defendants are relying on an outlying data point. The United States has not found a single reported case citing SKW Metals, other than Andreas, which expressly rejected the approach used by the district court in SKW Metals. The rule of lenity has no application in this case.

III

DEFENDANTS' MISGUIDED RELIANCE ON SENTENCING DATA

A. PAST SENTENCING TRENDS

The defendants' collection of data regarding past sentencing trends in criminal antitrust cases is remarkable only in its unhelpfulness. The defendants have cobbled together data which they claim represent sentences imposed in criminal antitrust cases against individuals in 1993, 1994 and 1995. Without even going to the accuracy or completeness of this information, the only important fact that jumps out is that only one case involved the conviction of an individual. And in that case, that individual (Jerry Bullis) was sentenced to 30 months of imprisonment. All of the other cases relied on by the defendants in their spreadsheet involved plea agreements. Of course, the sentences imposed against individuals who plead guilty will be different (i.e., lower) than those convicted at trial. Accordingly, to the extent the defendants data proves anything, it supports the goverment's position that convicted individual defendants should be sentenced to imprisonment within the guideline range. Here, the United States recommends only that each of the Giordano defendants be sentenced at the top-end of their respective guideline ranges.

B. RECENT SENTENCING TRENDS

Similarly, the defendants' reliance on recent sentencing trends also is misguided. Again, most of these cases involved plea agreements, distinguishing them from the present case. Nor is it remarkable that some of the large plea agreements involving foreign-based companies (e.g., F. Hoffman-Laroche) have not resulted in the imprisonment of individuals, who are domiciled in a foreign country and generally not subject to personal jurisdiction in the United States. The defendants also completely ignore the circumstances surrounding these large plea agreements, which may have involved either the Antitrust Division's well-known amnesty program and/or significant cooperation from the defendants (and their corporate officers) in prosecuting others for violating the antitrust laws. The defendants' "apples" to "oranges" comparisons are not only irrelevant, they are misleading.

The defendants' reliance on the sentences imposed in Andreas also is misplaced. There, the court stuck to the guideline imprisonment range, adding 7 levels to the base offense level of 10 because the volume of commerce attributable to the ADM defendants (e.g., Michael Andreas) exceeded $100 million. U.S.S.G. §2R1.1(b)(2)(G). Michael Andreas was sentenced to imprisonment of 24 months, which was within his guideline imprisonment range of 24 to 30 months.
The defendants also ignore the sentence recently imposed on Mark Albert Maloof: 30 months imprisonment, which was within his guideline range. Both Andreas and Maloof involved individual defendants convicted at trial.

The defendants seemingly suggest that the Guidelines should be ignored and a sentence imposing imprisonment is unwarranted here with respect to the Giordano defendants. They have to argue this, since they are advocates. The Sentencing Commission, however, made a different decision. Indeed, the only "recent" trend seen in the sentencing of criminal antitrust defendants is that individuals convicted a trial will be sentenced within the guideline imprisonment

range, absent a reason to depart. Here, as the United States Probation Office has already concluded, there is no reason to depart from the Guidelines for any of the defendants in this case.

IV

THE APPROPRIATE SENTENCES FOR EACH OF THE GIORDANO DEFENDANTS IS PROVIDED IN THE *SENTENCING RECOMMENTION OF THE UNITED STATES*

A. THE GOVERMENT'S SENTENCING RECOMMENDATIONS

The United States has provided its sentencing recommendation for each of the defendants in the *Sentencing Recommendation of the United States*.

B. VOLUME OF COMMERCE SHOULD BE CALCULATED AS PROVIDED IN *HAYTER OIL*, *ANDREAS* AND *MALOOF*

As disussed above, in its sentencing memorandum and in its responses to the objections raised by the defendants to the Presentence Investigation Reports, the method used in Hayter Oil, Andreas and Maloof is the appropriate method for determining the volume of commerce in this case.

1. The Conspiracy Continued At Least through December 31, 1992

Though the defendants argue the conspiracy ended as the result of the meeting at Shula's on November 23, 1992, the best proof as to when the conspiracy ended lies in the business records of Atlas and Sunshine. With the exception of Bubba's, the prices paid by Atlas to its major car suppliers (listed in McConnell's contemporaneously-made notes of the Sea Ranch meeting) after the Shula's meeting were the same as the prices paid before the Shula's meeting.

The defendants' reliance on pricing to Bubba's is intended to mislead this Court. After Sea Ranch, Bubba's sold a load of scrap to Atlas on October 26, 1992. From then until November 23, 1992, Bubba's sold no scrap to Atlas. Instead, Bubba's sold its scrap to Sunshine at the agreed-upon price of $52 ($2.60/ hwt). When Atlas again began to buy scrap from Bubba's on November 23, it did so at a

price that was still $7 below its pre-Sea Ranch price to Bubba's. All this proves is that Atlas cheated on the agreement. Nothing more. Atlas' prices to its other major car carriers (all of which were listed in Sheila McConnell's notes) did not change at all as the result of the Shula's meeting: (1) the agreed-upon price paid to Woodard continued through January 22, 1993; (2) the agreed-upon price paid to All Parts continued through January 28, 1993; (3) the agreed-upon price paid to Vern's Perine (Atlas cheated, paying $1 dollar more) continued through December 29, 1992; (4) the agreed-upon price paid to Rafi Rastro -- Atlas' major car supplier -- continued through January 30, 1993; (5) the agreed-upon price paid to M&L Auto continued through January 7, 1993; (6) the agreed-upon price paid to Atlantic Auto (Atlas cheated, paying $1 more) continued through January 7, 1993; and (7) the agreed-upon price to Bud's continued through December 21, 1992. Moreover, the Sunshine business records show virtually no change in prices following the Shula's meeting. Sunshine stuck to the agreement not only after Sea Ranch, but also after Shula's.

It also is important to note that according to McConnell, after the Shula's meeting, Anthony Giordano, Jr. and David Giordano began to become more involved in her pricing, directing her as to what prices to pay and how much scrap to buy and at what price. McConnell testified that after the Shula's meeting, she advised Anthony Giordano, Jr. and David Giordano that she had not followed the Sea Ranch agreement to the letter. This infuriated them. What happened next is clear. Anthony Giordano, Jr. and David Giordano became even more involved in monitoring and running the conspiracy, diminishing McConnell's limited authority even further.

Though defendants wish it had been otherwise, the United States presented evidence at trial conclusively proving the conspiracy continued at least through December 31, 1992.

2. The United States Has Identified and Included In Its Volume of Commerce the Appropriate Grades of Scrap

There is not much disagreement as to the products that are properly included in the volume of commerce calculations. The United States agrees the following products are properly included in the volume of commerce calculations: (1) flattened and whole (or tow) cars; (2) sheet metal; and (3) shred. Logs also should be included, however. The defendants are flat wrong in stating they did not characterize scrap as "logs/shred" on their scale tickets. See Goverment Exhibit 103. Since logs were included as part of the Sea Ranch agreement -- with an agreed-upon price of $35 -- the United States, too, has included this category of scrap.

The United States, however, seriously disagrees with the flawed method used by the defendants in selecting (and de-selecting) scrap purchases covered under the Sea Ranch agreement and included (or not included) as volume of commerce under U.S.S.G. §2R1.1. Fundamentally, the defendants' reliance on SKW Metals -- and the notion that no scrap purchases should be included as volume of commerce unless the "target" price was reached -- makes their calculations meaningless. In a word, the defendants seriously understate the volume of commerce.

The defendants continue to misunderstand the difference between the illegal agreement and the implementation of the illegal agreement. They also fail to understand that just becuse a price change is not made, that does not mean scrap purchased at the unchanged price falls outside the scope of a conspiracy for volume of commerce purposes. For example, if a competitor agrees with another that they each will charge no more than 25 cents for a can of coke, that agreement is illegal. It makes no difference that one of the competitors was already charging 25 cents and, thus, did not need to change his price. In this example, under Hayter Oil, Andreas, and Maloof, until that illegal agreement ends, all coke sales made by the

competitors is affected by the conspiracy and is volume of commerce under U.S.S.G. §2R1.1.

There are other flaws with the defendants' volume of commerce calculations. Their figures are wrong. For example, in reviewing the same Atlas materials (the "Bluebooks") used by the defendants in arriving at their numbers, the United States came up with different numbers. These materials show Rafi Rastro sold 492.37 tons to Atlas from Sea Ranch through November 23, 1992, not the 433.50 tons shown by defendants. Likewise, the defendants totals are wrong with respect to Bubba's (we calculated 29.25 tons); Vern's Perine (we calculated 304.94 tons); Joe Woodard (we calculated 50.74). Similarly, the defendants' totals for sheet, shred and whole/tow cars also are wrong.

The government's volume of commerce figures, on the other hand, are based on the actual scale tickets admitted at trial. In reviewing the defendants' numbers, the United States has concluded the summary "Bluebooks" used by the defendants are incomplete -- they do not contain all the scale ticket transactions admitted at trial in document and summary form.

C. EACH OF THE GIORDANO DEFENDANTS SHOULD RECEIVE AN ENHANCEMENT FOR THEIR ROLES IN THE CRIME

This issue has been extensively briefed and discussed in the *Sentencing Recommendation of the United States* and in the government's responses to the objections raised with the Presentence Investigation Reports.

At the outset, the defendants are wrong about the basis upon which the United States Probation Office applied U.S.S.G. §3B1.3. In the revised Presentence Investigation Reports, the probation officers have stated that, in addition to the fact there were more than five participants involved in the criminal activity, the criminal activity also was "otherwise extensive." See, e.g., Addendum to Presentence Investigation Report, Anthony J. Giordano, Jr. p. 2.

1. The Criminal Activity Involved More Than Five Participants

This issue has been extensively briefed. See, e.g., *Sentencing Recommendation of the United States.*

The defendants continue to confuse the import of Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), making an argument that demonstrates a fundamental lack of appreciation of basic antitrust law and the purpose of the Guidelines. Copperweld held only that a wholly-owned subsidiary cannot conspire for purposes of violating the Sherman Act (15 U.S.C. §1) with its parent company. It is true the Sherman Act does not reach agreements between the Giordano defendants and Atlas. But that is not an issue. The Sherman Act does reach agreements between the Giordano defendants and their competitors, as well as between Atlas and its competitors. Here, the jury found that, at the Sea Ranch meeting on October 24, 1992, an illegal agreement was entered into by the defendants in violation of section 1 of the Sherman Act. Thus, the issue is who is criminally responsible for this illegal agreement. The jury found each of the Giordano defendants to be criminally responsible. If, for example, Copperweld officials had entered into an agreement not with its wholly-owned subsidiary but with another competitor, then the Sherman Act would have been violated. Under this scenario, all Copperweld officials involved in the illegal agreement would be criminally liable for their conduct and that of the company. U.S.S.G. §3B1.1 serves a completely different purpose than the substantive rule of antitrust law announced in Copperweld. The Giordano defendants simply do not understand this.

2. Anthony. J. Giordano Was an Organizer/Leader

This issue has been extensively briefed. See *Sentencing Recommendation of the United States.* The United States agrees with the U.S. Probation Office: a four-level enhancement is justified for Anthony Giordano for his role as an organizer/leader in the criminal activity.

The Giordano defendants make the interesting argument that no one deserves a role enhancment because they each had equal decision-making authority. They miss the mark, however, in failing to realize that U.S.S.G. §3B1.1 expressly contemplates there can be more than one person who qualifies as a leader or organizer of a criminal activity. U.S.S.G. §3B1.1 comment. (note 4).

The defendants' statement that there is no evidence showing Anthony Giordano, Jr. exercised any more decision-making authority than his father or brother is patently wrong -- and contrary to the evidence regarding the formation and continuation of this conspiracy. Giordano, Jr. amply exhibited his decision-making authority at the Sea Ranch meeting, serving as Atlas' primary negotiator in hammering out the illegal agreement with Weil. He also exhibited his leadership role at the Shula's meeting, a conspiratorial meeting intended to police and further the Sea Ranch agreement. Throughout the conspiracy, there was ample other evidence adduced at trial showing Giordano, Jr. was a leader/organizer. Giordano, Jr. had numerous communications with Weil concerning the conspiracy; he had numerous communications with his brother about the conspiracy; and he had numerous communications with Sheila McConnell, insisting that she follow the Sea Ranch agreement. When he found out McConnell was cheating on the agreement, he exerted more control over her pricing and customer selection. This is all consistent with the fact that he was the president and chief executive officer of Atlas.

The Eleventh Circuit held in United States v. Mathews, 168 F.3d 1234 (11th Cir. 1998), that control over one's co-conspirators, or the power to enforce them to engage in criminal acts, is not required to justfy an enhancement under U.S.S.G. §3B1.3(b). Even so, any suggestion that Anthony Giordano, Jr. did not have control over Sheila McConnell is ridiculous. He sent her to Miami. He recruited her to the meeting at Sea Ranch. He told her to drop prices, though she told him it was illegal (at least twice). He persisted in his efforts to make her follow the agreement. He

certainly had the degree of control necessary to justify a four-level enhancement.

3. David Giordano and Anthony J. Giordano, Sr. Were Both Managers/Supervisors of the Criminal Activity

These issues have been extensively briefed. See, e.g., *Sentencing Recommendation of the United States*. Again, David Giordano confuses the factors to be considered in evaluating whether one was a leader/organizer with that of a manager/supervisor role. David Giordano clearly managed and supervised Sheila McConnell, in particular, and the entire Miami shred operation generally. The evidence adduced at trial showed he had numerous communications with McConnell about the Sea Ranch agreement, including his persistence in ensuring that she had dropped prices. David Giordano also had numerous communications with his brother -- and with Randy Weil -- related to the Sea Ranch agreement. After learning McConnell had not followed the agreement to the letter, David Giordano became more involved in her pricing and buying, the purpose of which was to ensure compliance with the Sea Ranch agreement. Unquestionably, David Giordano was a manager/supervisor of the conspiracy and deserved a three-level enhancement.

For the reasons discussed more fully in its Sentencing Recommendation, Anthony Giordano, Sr. also was a manager/supervisor of the conspiracy and deserves a three-leval enhancement. He participated in the price-fixing and market allocation meeting at Sea Ranch. His role at that meeting was active, denying that Atlas and McConnell were overpaying for scrap in the market and insisting that scale prices also be fixed. He was at the top of the chain at Atlas -- the Chairman of the Board and the patriarch of the family. His role in the company and his approval of the illegal agreement certainly diminished the inhibitions or scruples of his two sons. See, e.g., United States v. DeRiggi, 72 F.3d 7 (2d cir. 1995) (Highest ranking authority plus role in the offense justify leader/organizer role enhancement); cf. United States v. Duncan, 42 F.3d 97, 105-06 (2d Cir. 1994) (Company's top officer properly assessed four-level enhancement as leader/organizer where he knew of and

implicitly approved of offense conduct over which he had control, even though he may have been a "passive" participant). The evidence at trial showed Giordano, Sr. clearly stamped his imprimatur on this crime.

For reasons discussed in its Sentencing Recommendation, even assuming this Court were not to find a role enhancement appropriate for any one Giordano defendant, however, nothing prevents this Court from departing upward.

D. THERE ARE NO GROUNDS FOR DEPARTURE

For the reasons discussed in its Sentencing Recommendation and in its responses to objections filed by the defendants, the United States agrees there are no grounds to support a downward departure either for Atlas or for any of the Giordano defendants.

IV

MISCELLANEOUS

The defendants raise other items in their sentencing memorandum concerning a variey of issues, including volume of commerce calculations, restitution calculations and the methodology used, calculation of the applicable fines for Atlas and each of the Giordano defendants, etc. The positions of the United States with respect to each of these issues have been treated fully in its Sentencing Recommendation and in its responses to the objections of the defendants to the Presentence Investigation Reports. Suffice it to say, the United States disputes the methodology used by the defendants in calculating the volume of commerce attributable to them, restitution owed to victims of the conspiracy, and in calculating any applicable fines for the company and individuals.

V

CONCLUSION

The United States respectfully requests that this Court enter sentences consistent with the *Sentencing Recommendation of the United States.*

Respectfully submitted,

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