UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	) Case No. 97-0853-CR-Nesbitt
	)
v.	) Magistrate Judge Robert L. Dubé
	) (February 11, 1998 Order of Reference)
ATLAS IRON PROCESSORS, INC. et al.,	)
	) **RESPONSE OF THE UNITED STATES**
Defendants	) **OPPOSING THE GIORDANO**
	) **DEFENDANTS' MOTION TO STRIKE**
	) **THE *INSTANTER* ENLARGED REPLY**
	) **BRIEF OF UNITED STATES TO**
	) **MEMORANDUM OF THE GIORDANO**
	) **DEFENDANTS IN OPPOSITION TO**
	) **MOTION *IN LIMINE* OF THE UNITED**
	) **STATES TO EXCLUDE FROM**
	) **ADMISSION AT TRIAL ALL**
	) **EVIDENCE RELATED TO POLYGRAPH**
	) **TESTS AND RESULTS, OR IN THE**
	) **ALTERNATIVE, FOR LEAVE**
	) **TO FILE SURREPLY, AND**
	) **SUPPORTING MEMORANDUM**

I

INTRODUCTION

On June 19, 1998, the United States filed an enlarged Reply Brief in response to the Giordano defendants' memorandum opposing the United States' Motion *in limine* to exclude from admission at trial private, *ex parte* polygraph tests. Along with its enlarged Reply Brief, the United States also filed a separate Motion and supporting memorandum requesting leave of Court to file its enlarged Reply Brief *instanter*. In short, the enlarged Reply Brief was necessitated by the complexity of the issues and the need to fully meet the numerous factual and legal arguments

raised by the defendants and their two experts.

Although the Giordano defendants suggest otherwise, the United States' Motion for leave to file its Enlarged Reply Brief *instanter* was filed pursuant to (and fully consistent with) Local Rule 7.1C(2), which requires prior permission of the Court to file a reply brief in excess of 10 pages.

For reasons discussed more fully below, the Giordano defendants' motion to strike the United States enlarged Reply Brief should be denied. In addition, the Giordano defendants should not be permitted to file a surreply brief, since they have raised no legitimate basis for doing so.

II

LAW AND ARGUMENT

What is really going on here is the Giordano defendants are upset that the United States did not agree to allow them to file yet another "uncontested" surreply brief -- this time in response to the government's *Instanter* Enlarged Reply Brief at issue here. As discussed below, the Giordano defendants already have filed several surreplies in this case. On or about July 7, 1998, counsel for David Giordano, Roberto Martinez, called counsel for the United States, Richard Hamilton, and offered not to contest our *Instanter* Enlarged Reply Brief if we agreed not to contest giving them additional time within which to file yet another surreply in this case. The United States rejected this offer on July 8, 1998. After having agreed (generously) not to contest three previous surreplies filed by the Giordano defendants, the proposed *quid pro quo* arrangement did not sit well with the United States. Now, the Giordano defendants are trying to get even by belatedly asking this Court to strike our *Instanter* Enlarged Reply Brief, even though they are out of rule as to time. Their motion should be denied.

A. THE MOTION TO STRIKE SHOULD BE DENIED

1. The Giordano Defendants' Motion to Strike Is Procedurally Defective And Should Be Denied

The Motion for leave to file the *Instanter* Enlarged Reply Brief which the Giordano defendants' ask this Court to strike was filed by the United States on June 18, 1998. Pursuant to Local Rule 7.1C: "Each party opposing a motion shall serve and file an opposing memorandum of law no later than 10 days after service of the motion as computed in the Federal Rules of Civil Procedure." L.R. 7.1C (emphasis provided). Accordingly, under Local Rule 7.1C, the Giordano defendants' motion to strike was required to be filed on or before July 2, 1998. The Giordano defendants ignored Local Rule 7.1C and filed their motion to strike on July 15, 1998 -- 13 days after it was due.[1] The Giordano defendants' motion to strike, or in the alternative, to file a surreply brief, is out of rule and should be denied.

2. The United States' Motion To File Its Enlarged Reply Brief *Instanter* Is Well-Taken and Should Granted

The United States' Motion to file its *Instanter* Enlarged Reply Brief is well-taken. In short, the additional length was necessitated by three factors: (1) the complexity of the legal and factual issues raised by the Giordano defendants in their opposing memorandum; (2) the overwhelming amount of negative materials discrediting the Giordano defendants' principal expert (Dr. David C. Raskin), who is one of the leading pro-polygraph experts in the United States, that the United States was compelled to set forth to rebut the large body of materials the Giordano defendants submitted in support of their opposing memorandum; and (3) the serious misrepresentations made about the quality of the work performance of the Giordano defendants' private polygraph examiner (Clifford Cormany) while he was employed

[1] The certificate of service accompanying the Giordano defendants' motion to strike and supporting memorandum states that these pleadings were filed on July 15, 1998. Inexplicably, the United States did not receive these pleadings until 11:31 a.m. on July 21, 1998. The late receipt of these pleadings deprived the United States of the opportunity of filing a more prompt response.

by the FBI. The *Instanter* Enlarged Reply Brief was dedicated solely to meeting the numerous factual and legal arguments (and side-arguments) raised by the Giordano defendants in their memorandum in opposition to the United States' Motion *in limine*. Indeed, even a quick read of our *Instanter* Enlarged Reply Brief shows that the United States has not wasted this Court's time in rehashing arguments previously made in its Motion *in limine* and supporting Memorandum. Rather, the enlarged reply was intended to benefit the Court by fully addressing issues (primarily factual ones) that the government believes are critical to this Court's deciding the substantive motion *in limine*.

3. The Giordano Defendants' Side-Argument About Local Rule 88.9A Is Not Well-Taken

The Giordano defendants' suggestion that the United States' Motion to file its *Instanter* Enlarged Reply Brief is contrary to Local Rule 88.9A is misplaced. The Giordano defendants misread this Rule; reading into it something that makes no sense. The United States reads this Rule to require opposing counsel to confer prior to filing motions only where such a conference may result in some agreement between the parties that resolve the subject matter of the contemplated motion (*e.g.*, two parties agreeing not to file a motion pending resolution of outstanding issues.) L.R. 88.9A. This Rule has no application here. Surely, the United States and the defendants in this case could not agree to bind this Court and force it to grant the government's Motion to file its enlarged Reply Brief *instanter*. Such a decision is solely within the discretion of this Court. Because the subject matter of the government's Motion to file its *Instanter* Enlarged Brief could be resolved only by this Court and not by the parties; any such conference between the parties is meaningless. The Giordano defendants' reading of this Rule represents an intrusion on this Court's discretion.

Instead, the United States proceeded in the correct manner contemplated under the Local Rule 7.1C(2). The United States filed its *Instanter* Enlarged Reply Brief; accompanying it with a Motion and supporting Memorandum asking permission of this Court to do so *instanter*.

Ironically, on July 9, 1998, the Giordano defendants filed an enlarged surreply in connection with the government's Notice of Alibi defense pursuant to Fed. R. Crim. P. 12.1(a). See *Joint Response of Defendant's Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., and David Giordano to the Government's Reply and Proposed Order Precluding Defendants from Presenting any Alibi Witnesses at Trial.* This surreply brief was 14 pages long -- exceeding the page limit provided in Local Rule 7.1C by 4 pages. Unlike the correct procedure followed by the United States when it filed the *Instanter* Enlarged Reply Brief at issue here, the Giordano defendants never sought permission of this Court to file their enlarged surreply in connection with the Notice of Alibi.[2] On July 22, 1998, the United States filed a Motion contesting this blatant disregard of applicable procedural rules. See *Memorandum of the United States Opposing Joint Response of the Giordano Defendants to the Government's Reply and Proposed Order Precluding Defendants from Presenting any Alibi Witnesses at Trial* (filed on July 22, 1998). Apparently, the Giordano defendants believe that the procedural rules they now embrace run only one way and apply to the United States alone.

The Giordano defendants cite three cases in support of their motion to strike. None of these cases interpret the local rules applicable within the Southern District of Florida. Moreover, each of these cases stand only for the simple proposition that it is within this Court's discretion whether to grant the United States' Motion for leave to file its enlarged Reply Brief *instanter*. In Goltz v. University of Notre Dame du Lac, 177 F.R.D. 638 (N.D. Ill. 1998), the district court rejected a party's enlarged

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[2] Moreover, the Giordano defendants never conferred with the United States seeking an agreement to allow them to file this enlarged surreply response. Thus, the Giordano defendants violated their own understanding of Local Rule 88.9.

reply brief, but did so because the party never sought permission (i.e., leave) of the court to do so. Goltz, 177 F.R.D. at 642. Unlike in Goltz, the United States has sought permission of this Court to file its Instanter Enlarged Reply Brief.

The Giordano defendants' reliance on Haynes v. Shoney's Inc., No. 89-30093-RV, 1991 WL 354933 (N.D. Fla., Sept. 27, 1991) is also misplaced. In Haynes, the defendant moved to strike the plaintiff's 20-page response to a motion for a protective order, arguing that the plaintiff had exceeded the court-ordered limit of 15 pages. Haynes at *11. In fact, the Haynes Court resolved the dispute by striking only the offending addendum (a 20-page attachment) to the plaintiff's response, leaving the remaining response unaffected. Indeed, the Judge in Haynes stated that although the plaintiff's violated his order: "I do not consider this a grievous violation which would justify striking the entire response." Id. In the only other case cited by the Giordano defendants, Anderson v. Aurora Township, No. 97-C-2477, 1997 WL 802099 at *2 (N.D. Ill. Dec. 29, 1997), the party filing the enlarged reply brief did not seek permission of the court to do so. Thus, this case, too, is inapposite.

B. THE GIORDANO DEFENDANTS' ALTERNATIVE REQUEST TO FILE A SURREPLY SHOULD ALSO BE DENIED

In the alternative, the Giordano defendants ask this Court for permission to file a surreply. This request is not well-taken and should also be denied.

To date, the United States has filed no surreplies in this case. Sure, the United States would like to have the first and last word in every pleading filed with this Court; but the rules of pleading are not set up that way. The United States understands this; the defendants do not. Unlike the United States, the Giordano defendants (either through company counsel or their individual counsel) have filed surreplies on at least three occasions.[3] If the Giordano defendants are permitted to

[3] The surreplies filed by the Giordano defendants, either individually or on behalf of their company (defendant Atlas Iron Processors, Inc.) include the following: (1) defendant Atlas Iron Processors, Inc., filed a surreply in response to the United States' Reply Brief in support of its Motion for a Protective Order governing the disclosure of grand jury materials; (2) the defendant Anthony J. Giordano, Jr. filed a surreply in

file a surreply here, it will be their fourth time overall. Indeed, the Giordano defendants' counsel apparently feel that they are entitled always to have the last word. The United States made no objection to their first three surreplies. After three such strikes, however, the defendants should be out. This Court should not allow them to have another swing.

There is no express provision for surreplies in the Local Rules. Nonetheless, counsel for the Giordano defendants have taken this extraordinary pleading and made it common place. In the instant motion to strike, the Giordano defendants state that they "welcome the opportunity" to submit a surreply brief. Giordano Defendants' Memorandum in Support of Motion to Strike, p. 4. This is not surprising. The Giordano defendants, however, provide no legitimate basis for being allowed to file such a pleading.

In its *Instanter* Enlarged Reply Brief, the United States did nothing more than meet the numerous factual and legal arguments and misrepresentations raised by the Giordano defendants in their opposing memorandum. Now, the Giordano defendants complain that government's Reply Brief is comprised of "unwarranted, excessive and personal" attacks on their counsel and their experts. (In a nutshell, that is all they offer in support of their request to file a surreply.) In fact, the government's Reply Brief does no such thing. Instead, the Reply Brief exposes the credibility of the Giordano defendants' experts and undermines the legal arguments made by their defense counsel. Surely, the Giordano defendants knew that once they proffered Dr. Raskin as their principal expert, the United States would have

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response to the United States' Reply Brief in support of its Motion to Disqualify Ralph E. Cascarilla from representing Giordano, Jr. at trial; (3) the Giordano defendants filed a joint surreply in response to the United States Reply Brief in Support of its Request for Notice of Alibi Defense Pursuant to Rule 12.1 and proposed Order precluding alibi witnesses from testifying at trial. Essentially, the Giordano defendants' request for a supplemental Bill of Particulars is accompanied by a memorandum that also is best characterized as a surreply, though not styled as such. If nothing else, the Giordano defendants have demonstrated a willingness to put pen to paper until being shut down by this Court, making surreplies a common staple of their pleading practice.

considerable grist to undermine his pro-polygraph views -- which have been widely discredited by his peers and in the relevant case law. Furthermore, surely the Giordano defendants knew the United States would run an FBI check to establish the "accuracy" of their polygraph examiner's over-stated performance claims.

The Giordano defendants now want an opportunity to rehabilitate their experts by filing yet another surreply in this case. Of course, this decision is completely within this Court's discretion. The United States, however, respectfully submits that this request should be denied. The United States believes that the issues raised in its Motion *in limine* have been fully discussed and treated by the parties.

III

CONCLUSION

For the reasons stated more fully above, the Giordano defendants' motion to strike the *Instanter* Enlarged Reply Brief of the United States should be denied. Moreover, the Giordano defendants request, in the alternative, to file a surreply is wholly unfounded and should also be denied by this Court.

Respectfully submitted,

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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

CERTIFICATE OF SERVICE

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

1) *Response of the United States Opposing the Giordano Defendants' Motion to Strike the Instanter Enlarged Reply Brief of United States to Memorandum of the Giordano Defendants in Opposition To Motion in Limine of the United States to Exclude from Admission at Trial All Evidence Related to Polygraph Tests and Results, or in the Alternative, for Leave to File Surreply, and Supporting Memorandum; and*

2) *Order Denying Giordano Defendants' Motion to Strike the Reply Brief of United States to Memorandum of the Giordano Defendants in Opposition To Motion in Limine of the United States to Exclude from Admission at Trial All Evidence Related to Polygraph Tests and Results, or in the Alternative, for Leave to File Surreply, and Supporting Memorandum.*

were sent via Federal Express to the Office of the Clerk of Court on this 22nd day of July, 1998. Copies of the above-captioned pleadings also were served upon the defendants via U.S. Mail on this 22nd day of July, 1998.

Benedict P. Kuehne, Esq.
Sale & Kuehne, P.A.
Nationsbank Tower, Suite 3550
100 Southeast 2nd Street
Miami, FL 33131-2154

Ralph E. Cascarilla, Esq.
Walter & Haverfield
1300 Terminal Tower
Cleveland, OH 44113-2253

Robert C. Josefsberg, Esq.
Podhurst, Orseck, Josefsberg,
Eaton, Meadow, Olin & Perwin, P.A.
City National Bank Building, Suite 800
25 West Flagler Street
Miami, FL 33130-1780

Patrick M. McLaughlin, Esq.
McLaughlin & McCaffrey, L.L.P.
Ohio Savings Plaza, Suite 740
1801 East Ninth Street
Cleveland, OH 44114-3103

Roberto Martinez, Esq.
Colson, Hicks, Eidson, Colson
Matthews, Martinez & Mendoza, P.A.
First Union Financial Center, 47th Floor
200 South Biscayne Boulevard
Miami, FL 33131-2351

Marc S. Nurik, Esq.
Ruden, McClosky, Smith, Schuster,
& Russell, P.A.
First Union Plaza, 15th Floor
200 East Broward Boulevard
Post Office Box 1900
Fort Lauderdale, FL 33301

WILLIAM J. OBERDICK
Acting Chief
Cleveland Field Office

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

Trial Attorney,
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