

notified the parties that it might impose consecutive sentences for the three counts in light of the court's decision in *United States v. Kreitinger*, 576 F.3d 500 (8th Cir.2009), as well as the PSR and letters and statements from Lone Fight's supporters and from the victims' family. The court in Lone Fight felt it necessary to fashion a sentence under 18 U.S.C. § 3553(a) that would account for the horrific accident resulting in the deaths of three innocent victims. In reading the court's decision, it is obvious that the consecutive sentences were based entirely upon the §3553(a) factors which took into consideration Lone Fight's, "extensive criminal history which culminated in this tragic accident and the deaths of three individuals." Lone Fight at pg 2. It was because of Lone Fight's extensive criminal history including more than forty alcohol-related offenses and his violation of the terms of his pretrial release by consuming alcohol, that the court saw as, "a significant risk that Lone Fight will reoffend and commit another alcohol-related offense" Lone Fight at pg 2. Lone Fight was a danger and menace to society and the sentence imposed by the court was the only way to protect the public from his continuing to commit more alcohol related offenses. There was a strong likelihood that based upon his past behavior he would again consume alcohol and drive a vehicle again resulting in serious if not fatal injuries to innocent third parties. *United States v. Jarvis* 606 F.3d 552 (8th Cir. 2010), also imposed a consecutive sentence. In *Jarvis*, the defendant was convicted of being a felon in possession of a firearm and possession of stolen firearms. The PSR grouped his two convictions together and computed a base offense level 20. The PSR also recommended a ten-level enhancement based on the numerous firearms, some of which were stolen and used in another offense, and Jarvis's obstruction of justice. He ended up with an offense level of 27. His criminal history category was IV giving him a guidelines range of 100 to 125 months' imprisonment. The statutory maximum under 18 U.S.C. § 924 was ten years imprisonment on each count, and the PSR

recommended a 120 month sentence on count one; a 120 month sentence on count two, with five months running consecutively; for a total of 125 months imprisonment. *Jarvis at page 553*. The court in relying on 18 U.S.C. §§ 3553(a) and 3584 varied upward and imposed an additional fifty months of the sentence for the second count to run consecutively to the sentence for count one. During the sentencing, the court in *Jarvis* discussed the factors under § 3553(a) that supported consecutive sentences: the firearms were stolen during a burglary committed for revenge; the defendant had egregiously obstructed justice; the defendant was undeterred by his prior incarceration; his prior criminal history was violent; and the public needed protection from his further crimes. *Jarvis at pg 554*. The court further explained, “that a sentence within the guidelines range would neither reflect *Jarvis*’s egregious obstruction of justice nor address the fact that his statements at sentencing were inconsistent with an acceptance of responsibility”. It also found that the public was in need of protections from *Jarvis* in light of his significant criminal history, which included violence and bizarre behavior. *Jarvis at 554*. In *United States v. Rutherford* 599 F.3d 817. (8th Cir. 2010), the defendant plead guilty to two counts of using interstate communications to transmit a threat. The defendant was indicted on three counts of conspiracy to use interstate commerce facilities in the commission of murder for hire, in violation of 18 U.S.C. § 1958, and two counts of using interstate communications to transmit a threat in violation of 18 U.S.C. § 875(c). In exchange for the Government not charging him with the more serious § 1958 counts, the defendant agreed to plead guilty to the two § 875(c) counts. The case involved defendant who while in jail having been incarcerated on a prior assault, attempted to solicit a third party to kill the individual that he had assaulted and the victims attorney who pursued a successful civil suit against him for damages. The defendant had sent several letters to a third party with instructions on where to find guns and shotgun shells, with

directions on where the lawyers law office was located and pictures of the victims house. At his hearing, both the victim and the victim's attorney testified that they continued to fear for their safety even though Mr. Rutherford was in custody. *Rutherford at 819*. Like Lone Fight, a consecutive sentence was reasonable. In *United States v. Kreitinger 576 F. 3d 500 (8th Cir. 2009)* the defendant while on supervised release for credit card fraud and wire fraud plead guilty to credit card fraud and aggravated identity theft. She was sentenced to consecutive terms on her more recent credit card fraud conviction and imposed consecutive revocation sentences on her original credit card conviction and on her wire fraud conviction. For background information, investigation in her initial crimes found that she had fraudulently obtained credit cards in the names of other individuals and used the cards to obtain cash and merchandise. Investigators also located approximately 373 individuals for whom defendant had obtained names, social security numbers and dates of births. Upon her release from prison her supervised release was revoked due to her noncompliant behavior at a residential facility. While on supervised release she used a credit card account number from another person to place unauthorized orders for merchandise. While she was detained pending sentencing of her most recent charges, she asked at least three people if they would be interested in "running" credit cards with her upon their release from prison. She also reviewed recent obituaries and local telephone books for information that she could use in future credit card schemes. *Id at 502*. The court explained that it would "craft a sentence under 18 U.S.C. § 3553 (a) on these three cases that would account for the seriousness of her criminal history, the ongoing nature of her criminal conduct even when incarcerated and the very serious likelihood that she will recidivate and continue to engage in these kinds of financial frauds." *Id at 503*.

The courts in Lone Fight, Jarvis, Rutherford and Kreitinger all placed special emphasis on the seriousness of the defendants criminal history, and the very serious likelihood that each defendant would recidivate and continue to engage in their respective criminal conduct ie. driving while intoxicated for Lone Fight, further crimes of violence for Jarvis, further victim intimidation and threats of fear for Rutherford and continued credit card fraud for Kreitinger. Contrastingly, VandeBrake's criminal history is just the opposite. He has a category I criminal history and his character references would indicate that he is truly remorseful for his criminal conduct. In addition he has been forthright in dealing with the Government, provided beneficial information and has accepted responsibility for his actions. "When seeking to impose an above guidelines sentence via consecutive terms of imprisonment, the court must articulate (1) why an above guidelines sentence is sufficient, but not greater than necessary under §3553(a); and (2) why consecutive terms of imprisonment are reasonable under §3584 in light of the §3553(a) factors." *U.S. v. Jarvis* 606 F.3d 552, 554 (8th Cir. 2010). See also Lone Fight at page 5. VandeBrake has already addressed the court's tentative disagreement regarding the treatment of multiple counts at page 12 of his sentencing memorandum dated November 24th, 2010. The court in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a). *Rutherford* at page 822. There is nothing exceptional about VandeBrake's crimes when considering the 3553(a) factors set out below that would warrant that his sentence for his crimes run consecutively and not concurrently. A review of those factors is set out as follows:

§3553(a)(1) The nature and circumstances of the offense and the history and characteristics of the defendant.

Defendant has committed the crimes of anti-trust violations specifically bid rigging and price fixing. All crimes can be characterized as serious, however, when compared to most anti-trust violators, VandeBrake's crimes would be considered small by virtue of the affected volume of commerce. According to the United States Department of Justice article prepared by Scott Hammond he comments at pg 6, "There are few issues in the area of antitrust criminal remedies more firmly settled than that volume of commerce is the most appropriate method for distinguishing the severity of criminal antitrust violations."

The court is aware of the defendant's criminal history and character as previously discussed in his sentencing memorandum dated November 24, 2010 so no further mention needs to be made in this supplemental memorandum.

§3553(a)(1) The need for the sentence imposed

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; VandeBrake believes that the sentence agreed to by the DOJ is reasonable and reflects the seriousness of the crime and promotes respect for the law and provides just punishment. The Department Of Justice Antitrust Division would never have agreed to such a sentence if they did not believe that it was not a reasonable sentence taking into consideration the §3553(a) factors.

(B) to afford adequate deterrence to criminal conduct; According to comments set out in the United States Department of Justice article prepared by Scott Hammond, he comments at pg 1, "The detection, prosecution, and deterrence of criminal cartels in the highest priority of the Antitrust Division....". The Antitrust Guideline seeks to deter both individual and

corporate violations by imposing strict fines and a term of imprisonment within the guideline ranges. See Background Commentary to the antitrust guideline.

(C) To protect the public from further crimes of the defendant Unlike Lone Fight, defendant has a category I criminal history and his crimes are not crimes of violence. There is no evidence that he is likely to reoffend and all indications would lead to the conclusion that VandeBrake is not be a risk to the public and will live a law abiding life. “Defendants who commit this type of crime are also one of the lowest when it comes to recidivism rates.” See pg 6 of Hammond Article.

(D) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

No comments necessary

§3553(a)(3) The kinds of sentencing available; VandeBrakes sentencing range is up to a maximum of 10 years for each offense. He is unaware of any anti-trust violator being given the maximum sentence of 10 years. He is not requesting a downward variance or a sentence of probation.

§3553(a)(4) The kinds of sentence and the sentencing range established for similar offenses;

The Department of Justice has told the court that the sentencing range established for Vandebrake is fair and in line with sentencing ranges for other like defendants. Defendant believes that his case is a “mine-run” or ordinary antitrust case and that USSG § 2R1.1 takes into account all aspects of his offense.

§3553(a)(5) Any pertinent policy statements; In addressing the Guidelines Manual one of its main focuses had to do with sentences by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.

§3553(a)(6) The need to avoid unwarranted sentence disparities among defendants with similar records; See comments at (a)(4). To sentence VandeBrake in excess of the recommended sentence would in fact create a disparity among defendants with similar records.

§3553(a)(7) Need to provide restitution to any victims

VandeBrake has set up a restitution fund to pay victims who have been identified pursuant to the court's instructions.

III. Conclusion

This court has the discretion to impose both consecutive and concurrent sentences and defendant does not challenge that authority. However it is the belief of defendant that in this case based upon the factors enumerated in 18 U.S.C. § 3553(a) including the sentencing guidelines that any sentence that he receives should run concurrently and in accord with the recommendations made by the Government in the Federal Rule of Criminal Procedure 11(c)(1)(B) plea agreement.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2010, a copy of the foregoing document was served on all counsel of record via the Court's electronic filing system.

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