UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff v. STEVEN KEITH VANDEBRAKE, a/k/a STEVE VANDEBRAKE Defendant. UNITED STATES OF AMERICA, Plaintiff v. KENT ROBERT STEWART, a/k/a KENT STEWART Defendant.	)	Nos. 10-cr-4025-MWB 10-cr-4028-MWB Hon. Mark W. Bennett

CONSOLIDATED SENTENCING MEMORANDUM AND RESPONSE TO DEFENDANT KENT ROBERT STEWART'S "MOTION FOR DEPARTURE"

The United States, through undersigned counsel, hereby submits its sentencing memorandum for the consolidated sentencing hearing for Defendant Kent Robert Stewart and Defendant Steven Keith VandeBrake.[1] The government discusses herein the issues relevant to the Court's determination of each defendant's sentence, including its response to the Motion of Defendant Kent Robert Stewart for the Court to Depart or Vary Downward from the Advisory United Stated [sic] Sentencing Guidelines Range (hereinafter "Motion") and Defendant Kent Stewart's Objections [sic] Presentence Investigation Report (hereinafter "Objections"). The government herein also notifies the Court, the Defendants, and the U.S. Probation Office of the

[1] Designations of unindicted co-conspirators are based on the designations in the Information filed in the VandeBrake case. (VandeBrake Doc. 2) Defendant VandeBrake was the sales manager at Company A, while Defendant Stewart was the President of Company C.

witnesses the government may call and the exhibits the government may seek to admit at the consolidated sentencing hearing.

KENT ROBERT STEWART

I. ISSUES TO BE RESOLVED AT SENTENCING HEARING

Defendant Stewart pleaded guilty to one count of violating 15 U.S.C. § 1, for conspiring with Defendant VandeBrake to fix prices and rig bids beginning at least as early as January 2008 and continuing as late as August 2009. Based on Stewart's Motion and Objections, and the U.S. Probation Office's Draft Presentence Investigation Report for Stewart[2] (hereinafter "Stewart PSIR"), the government identifies the following disputed issues with respect to Stewart's sentence:

A. Whether Defendant Stewart had an agreement with Defendant VandeBrake relating to their companies' respective price sheets for 2009.

B. In the event that the Court finds that an agreement existed regarding the 2009 price sheets, whether the volume of commerce affected by the agreement includes *all* standard-mix concrete sales in the relevant geographic area, or only *undiscounted* standard-mix concrete sales in the relevant geographic area.

C. Whether Defendant Stewart had an agreement with Defendant VandeBrake relating to the following projects: East Okoboji Beach (which Company C won), Sibley Airport (which Company A won), and possibly Spencer Lincoln School (which Company C won).

D. Whether the conspiracy began in January 2008 or earlier, as charged in the Information to which Defendant Stewart pleaded guilty and as agreed to in the plea agreement, or in February 2009, as Defendant Stewart now claims.

E. Whether Defendant Stewart is entitled to the various departures claimed in his Motion and Objections, pursuant to U.S.S.G. § 5K2.0 *et seq.*

F. Whether the Court is bound by the plea agreement stipulation that "the volume of commerce [is] less than $1 million pursuant to U.S.S.G. § 1B1.8."

[2] At the time this document was filed, the Final Presentence Investigation Report for Defendant Stewart had not yet been issued.

G. Whether Defendant Stewart is entitled to a three-level departure for cooperation pursuant to U.S.S.G. § 5K1.1.

H. Whether Defendant Stewart is entitled to a two-level adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1.

There appears to be no dispute that Stewart violated the Sherman Act relating to six projects (May City Water Treatment Plant, Milford Sidewalks and Lighting, Dickinson County Courthouse Parking, Arnold's Park Paving, Bay Harbor Tunnel/West Harbor Trails, and Spencer West Side CDBG Storm Sewer), which result in a volume of commerce of approximately $743,000.[3] *See* Stewart PSIR at ¶ 31. In addition, the government does not dispute that two projects for which Stewart has admitted rigging bids (Spencer Patching Job and Spencer Hospital, which resulted in sales of approximately $93,000) should not be counted against him pursuant to U.S.S.G. § 1B1.8.

II. ARGUMENT

For each of the disputed issues, the United States sets forth below its position, which is supported by a preponderance of the evidence.

A. Defendant Stewart had an agreement with Defendant VandeBrake relating to their companies' 2009 price sheets.

The government is prepared to present the following evidence, which shows that Defendant VandeBrake and Defendant Stewart had an agreement[4] relating to the prices listed on both companies' 2009 price sheets:

[3] The government believes, based on Defendant Stewart's most recent submissions, that there is no dispute about these projects. However, in a letter to the Probation Office dated June 25, 2010, counsel for Defendant Stewart claimed that the affected commerce was "less than $250,000." In the event that Stewart resurrects that position, the government is prepared to rebut it at the sentencing hearing.

[4] "The government. . . is not required to prove a formal, express agreement with all the terms precisely set out and clearly understood by the conspirators. It is enough that the government

- VandeBrake has admitted the agreement. VandeBrake admitted that he told Stewart about his planned price increase for 2009, and that Stewart agreed to go along with the planned increase.
- Former Company A salesman Ryan Lake has corroborated that, as of early 2009, VandeBrake believed that there was an agreement with Stewart. Lake has stated that when the Company A price increase was announced to the sales staff in early 2009, he expressed his concerns to VandeBrake about the magnitude of the planned increase. Lake was concerned about how the price increase would affect his ability to compete with Company C, Company A's main competitor in Lake's sales territory. In response, VandeBrake informed Lake that he believed Stewart would follow Company A's prices.
- Company A's and Company C's 2009 price sheets show identical prices for 3000 psi, 3500 psi, and 4000 psi concrete (hereinafter "standard-mix concrete"). (*Compare* Exhibit D *with* Exhibit E.)
- In contrast, Stewart's story with respect to price sheets has evolved over time. In his proffer on January 13, 2010, Stewart initially admitted that VandeBrake contacted him about the 2008 and 2009 price sheets. Stewart denied that they reached agreements regarding sheet prices, stating that he assumed VandeBrake contacted him to make sure that Stewart would not "undercut" VandeBrake's prices, and that VandeBrake just wanted to see what he could get away with on sheet prices. Then in his transcribed interview on September 8, 2010, Stewart

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shows that the defendants accepted an invitation to join in a conspiracy whose object was unlawfully restraining trade." *United States v. MMR Corp.*, 907 F.2d 489, 495 (5th Cir. 1990) (internal citations omitted).

> retracted his admissions regarding discussions in 2008 about the 2008 price sheets, but continued to acknowledge discussing the 2009 price sheets. At this interview, Stewart stated that when VandeBrake asked him about sheet prices in 2009 Stewart informed VandeBrake that he would "probably be going up," but that he was waiting for other competitors to issue their price sheets. However, Stewart admitted in that same interview that Company A had a greater overlap with Company C's territory than other competitors, and that Company A's prices had a bigger effect on his bottom line compared to other competitors. Meanwhile, Stewart posited that the two companies' identical prices could be attributable to VandeBrake copying Stewart's prices (which VandeBrake has denied), or else to coincidence.

The government finds VandeBrake's admissions, coupled with corroboration from Lake and the price sheets themselves, to be more convincing than Stewart's evolving story. Simply put, the government does not believe that Stewart and VandeBrake–who were already in an antitrust conspiracy–had a generalized discussion about sheet prices for 2009, then, by pure coincidence, ended up with matching price sheets. Rather, as VandeBrake has admitted, the government believes that Stewart agreed to match VandeBrake's sheet prices, and that it is no coincidence that their sheet prices were identical that year.

B. If the Court finds that an agreement existed regarding the 2009 price sheets, the volume of commerce affected by the agreement includes all standard-mix concrete sales in the relevant geographic area.

In the event that the Court finds that an agreement existed regarding the 2009 price sheets, Defendant Stewart objects to the inclusion of all standard-mix concrete sales in the

relevant geographic area as part of the volume of commerce affected by the agreement, and argues that the Court should include only *undiscounted* standard-mix concrete sales. (Objections at 16, 19 & 32-33.) According to Stewart, because the government has produced evidence only of an agreement with respect to the prices listed on the price sheets, not including discounts, discounted sales may not be included. (*Id.* at 16, 19.) This position is contrary to the law regarding the volume of commerce that may be attributed to an antitrust offender under the Sentencing Guidelines.

The Sentencing Guidelines define the volume of commerce attributable to a participant in an antitrust conspiracy as "the volume of commerce done by him or his principal in goods or services that were *affected* by the violation." U.S.S.G. § 2R1.1(b)(2) (emphasis added). Although the Guidelines do not further explain the meaning of "affected by the violation," and the Eighth Circuit has not commented on the matter, every appellate court that has considered the issue has applied a broad definition unconstrained by the specifics of the agreement. As the Seventh Circuit has explained, "[a]n action may affect commerce in many ways other than achieving a pre-determined price level, and [the court] will not frustrate the goal of this provision by grafting some narrow meaning on the ordinary use of the word 'affected.'" *United States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000). The Sixth Circuit has defined it to mean "all commerce that was influenced, directly or indirectly, by the price-fixing conspiracy." *United States v. Hayter Oil*, 51 F.3d 1265, 1273 (6th Cir. 1995). Similarly, the Second Circuit has noted that the term "affected" "expresses a broad and open-ended range of influences . . . . Sales can be 'affected' by a conspiracy when the conspiracy merely *acts upon or influences* negotiations,

sale prices, the volume of goods sold, or other transactional terms." *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83, 90 (2d Cir. 1999) (emphasis added).

Under any of these interpretations, Company C's sales of standard-mix concrete at discounted prices were affected by the price-fixing agreement. *See SKW Metals*, 195 F.3d at 90 (expressing disagreement with district court's narrow construction of § 2R1.1, which treated only sales made at or above agreed-upon price as sales affected by conspiracy); *Andreas*, 216 F.3d at 676-77 (rejecting defendant's argument that sales below an agreed-upon price were not affected by conspiracy); *Hayter Oil*, 51 F.3d at 1273 (holding that volume of commerce includes all sales, regardless of whether they were made at an agreed-upon price). As the Second Circuit explained, "while a price-fixing conspiracy is operating and has *any* influence on sales, it is reasonable to conclude that all sales made by defendants during that period are 'affected' by the conspiracy." *SKW Metals*, 195 F.3d at 90 (emphasis in original).

Stewart acknowledges in his objection that customers received discounts *off of the sheet price* depending on their anticipated annual volume of business, with discounts ranging from $5 to $11 per cubic yard. (Objections at 16, 32.) In other words, the price that he and VandeBrake agreed upon was a baseline from which his discounted prices were determined. That Stewart and VandeBrake did not reach a specific agreement about the amount of the discounts is irrelevant under the law; it is enough that their agreement "influenced, directly or indirectly," the price offered for all of Company C's sales of standard-mix concrete. *Hayter Oil*, 51 F.3d at 1273. Accordingly, should the Court find that an agreement existed regarding the 2009 price sheets, the Court should attribute to Stewart the volume of commerce resulting from all standard-mix

concrete sales by Company C in its relevant area, which the government has calculated to be $925,540.

C. Defendant Stewart had an agreement with Defendant VandeBrake relating to the following projects: East Okoboji Beach (which Company C won), and Sibley Airport (which Company A won).

The government is prepared to present the following evidence indicating that Defendant VandeBrake and Defendant Stewart had agreements relating to the two projects[5] in dispute:

- VandeBrake has admitted that he and Stewart reached agreements related to these two projects. Regarding the East Okoboji Beach project, VandeBrake admitted that he contacted Stewart to inform him that it would be difficult for Company A to do the job given the distance from Company A's plants. Because contractors were contacting him and requesting bids, he asked Stewart for a bid price that would ensure that Company A would not get the project, and Stewart told him what to bid.
- Ryan Lake corroborated that VandeBrake gave him the price to bid on the East Okoboji Beach project, and that the job was "bid high." Lake further stated that

[5] The government also believes that a third project, Spencer Lincoln School, may have been affected by the bid-rigging arrangement between Defendant Stewart and Defendant VandeBrake to bid similar prices in Spencer. Stewart previously admitted that he and VandeBrake had an agreement to bid similar prices for projects in Spencer, and that it was possible that the prices bid for the Spencer Lincoln School project may have been the same. (There is no written bid available for Company C.) However, counsel for Stewart has informed the government that he plans to produce a sworn affidavit from the customer for this project showing that the price bid by Company C was, in fact, substantially different from the price bid by Company A. If Stewart is able to show that the price Company C bid for the project was substantially different from that of Company A, the government will voluntarily withdraw this project from its volume of commerce calculation. The volume of commerce for the Spencer Lincoln School project is $101,733.

he informed VandeBrake that it would be difficult to perform the job, but that contractors had requested bids.

- Regarding the Sibley Airport project, VandeBrake admitted that he contacted Stewart and informed him that he expected Stewart not to go after this job. Vandebrake further stated that Stewart told him not to worry about Company C's bid.

D. The conspiracy began in January 2008 or earlier, as charged in the Information to which Defendant Stewart pleaded guilty and as agreed to in the plea agreement, and not in February 2009, as Defendant Stewart now claims.

Despite pleading guilty to a conspiracy beginning at least as early as January 2008, Defendant Stewart now claims that the initial conspiratorial communications occurred in relation to a project that was bid in February 2009 (the Milford Fire Station project), and he denies that he violated the antitrust laws prior to January 1, 2009. (*See* Exhibit C, Transcript of Stewart Interview, Sept. 8, 2010, at 13 & 118;[6] *see also* Attorney Stoller Letter to Probation, Sept. 14, 2010, at 4.) Indeed, Stewart now claims that he pleaded guilty to an Information alleging conduct going back to January 2008 because "this was the only plea bargain offered and [Stewart] deemed it in his best interest to accept the bargain to obtain the sentencing incentives offered by the prosecution."[7] (Objections at 21.)

[6] Defendant Stewart's own defense counsel specifically asked him on the record: "In your mind did you violate any antitrust laws prior to January 1, 2009?" Defendant Stewart, under oath, answered: "No."

[7] To the extent that Defendant Stewart is arguing that, in order to obtain "sentencing incentives," he perjured himself before Judge Zoss when he admitted that "there was a conspiracy that began at least as early as January 2008 and continued through August of 2009[,]" (*see* Exhibit B, Stewart Plea Hr'g Tr. at 13-14), the argument provides further support for the government's decision not to recommend a downward departure (*see* II.G., *infra*), and, indeed, may be evidence another crime or the need for an obstruction enhancement. *See* U.S.S.G. § 3C1.1 cmt. 4(F).

Notwithstanding Stewart's new story, the government is prepared to present ample evidence–including Stewart's own sworn statements before Magistrate Judge Zoss–that the conspiracy began no later than January 2008:

- Stewart pleaded guilty to having "entered into and engaged in a combination and conspiracy to suppress and eliminate competition by fixing prices and rigging bids for the sales of ready-mix concrete in the Northern District of Iowa," beginning "*at least as early as January 2008* and continuing as late as August 2009." (*See* Stewart Doc. 2, Information at ¶ 1 (emphasis added).) The charged combination and conspiracy "consisted of *a continuing agreement*, understanding, and concert of action among the defendant and co-conspirators, the substantial terms of which were to fix prices and rig bids for the sales of ready-mix concrete in the Northern District of Iowa." (*Id.* (emphasis added).) At his plea hearing before Magistrate Judge Zoss, Stewart acknowledged *under oath* that he did, in fact, enter into a conspiracy as described in the Information. (*See* Exhibit B, Stewart Plea Hr'g Tr. at 12-15.)
- In response to direct questioning by Magistrate Judge Zoss, Stewart admitted the time frame of the conspiracy at the plea hearing:

> THE COURT: And in the information there's an allegation that there was a conspiracy that began at least as early as January 2008 and continued through August of 2009. Was, in fact, there a conspiracy knowingly formed and existing during about that time alleged?
>
> THE DEFENDANT: Yes.

(*See* Exhibit B, Stewart Plea Hr'g Tr. at 13-14.)

- Stewart admitted in his January 13, 2010 proffer that he approached Norlyn VandeBrake (his business partner and Defendant VandeBrake's father) sometime *in mid-2007*, showed him county plat-book pages, told him to tell his son to stay out of Company C's area, and, when Norlyn VandeBrake responded negatively to this proposal, Stewart approached Defendant VandeBrake himself at least one month later, while Defendant VandeBrake was still working for Company A's predecessor entity. Stewart admitted that he proposed to Defendant VandeBrake that, given the overlapping ownership interests, it made sense to have the plant closest to a job (whether Company A or Company C) deliver the concrete, and Defendant VandeBrake agreed with this proposal. Stewart further admitted that the initial discussions focused on which plant would take a project, and that pricing discussions transpired later.
- In spite of his current position that there were no anti-competitive conversations with VandeBrake prior to January or February 2009 (Exhibit C, Transcript of Stewart Interview, Sept. 8, 2010, at 13), Stewart admitted in his January 13, 2010 proffer that he and VandeBrake discussed the 2008 and 2009 sheet prices for their respective companies. Price sheets are typically released to customers no later than spring of each year (prior to construction season). Accordingly, discussions regarding sheet prices for 2008 would have taken place in early 2008.
- VandeBrake also pleaded guilty to a conspiracy with Company C and one or more individuals beginning "*at least as early as January 2008* and continuing as late as August 2009[.]" (*See* VandeBrake Doc. 2, Information at ¶ 12 (emphasis

added).) At his plea hearing before Magistrate Judge Zoss, VandeBrake admitted under oath that this conspiracy was formed and existed at about the times alleged. (*See* VandeBrake Doc. 15, Plea Hr'g Tr. at 16.)

- In an e-mail dated January 22, 2008, Ryan Lake wrote to VandeBrake, "[a]s long as we can keep up the service and Kent keeps his word and not [sic] back stab us things will be on the up side." (Exhibit A). Lake is expected to testify that he was referring in this e-mail to the conspiracy between Stewart and VandeBrake.

In sum, the government believes that ample evidence supports the conspiracy's starting point being at least as early as January 2008. Should Stewart testify at the sentencing hearing that the conspiracy did not begin until February 2009, then either that testimony is perjurious or his statements before Judge Zoss were perjurious; both statements cannot be true.

E. Defendant Stewart is not entitled to the various departures claimed in his Motion and Objections.

As an initial matter, while Defendant Stewart purports to enforce the plea agreement through the departure arguments in his Motion, these departure arguments themselves violate the plea agreement's terms. In the plea agreement, the parties agreed:

- not to seek or support any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this plea agreement.
- that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Sentencing Guidelines justifying a departure pursuant to U.S.S.G. §5K2.0.

(Stewart Doc. 11, Plea Agreement at ¶ 8.) Despite these stipulations, Stewart nevertheless submits multiple proposed departures under U.S.S.G. §§ 5K2.0, 5K2.11 and 5K2.12, and identifies reasons not set forth in the plea agreement in support of his departure arguments. (Motion at 3.) It is telling that Stewart cites to no case law in support of these arguments, as they are plainly in contravention of the applicable law.

1. Stewart is not entitled to a departure under U.S.S.G. § 5K2.11.

Defendant Stewart argues in his Motion that he is entitled to a departure pursuant to U.S.S.G. § 5K2.11, because he was merely trying to avoid "a perceived greater harm." (Motion at ¶ 13.) This argument is inconsistent with both the facts and the law. In fact, the government will provide evidence that Stewart informed federal investigators that he conspired with VandeBrake because he was trying to "keep the peace and make some money." (*Contra* Motion at ¶ 11 ("the Defendant did not engage in this conspiracy for personal profit"), and at ¶ 13 ("the Defendant committed the crime in order to avoid a perceived greater harm to-wit the unfair competitive advantage enjoyed by co-conspirator Company A").)

Additionally, even assuming *arguendo* that Stewart was merely trying to balance the "unfair competitive advantage enjoyed by co-conspirator Company A," the law does not permit a departure on this basis. As succinctly explained in *United States v. Rooney*:

> a downward departure under § 5K2.11's greater harms prong applies only in narrow, extreme circumstances, such as mercy killing. Further, a departure under this prong of § 5K2.11 is typically inappropriate where the defendant could have pursued other means of avoiding the greater harm rather than committing a crime.

370 F. Supp. 2d 310, 316 (D. Me. 2005) (internal quotations and citations omitted); *see also United States v. Wilson*, 220 Fed. App'x 176, 178 (4th Cir. 2007) ("[W]hile a departure on the basis of lesser harms may be appropriate where a defendant commits a crime in order to avoid a

perceived greater harm, a sentencing reduction is inappropriate where the interest in punishment or deterrence is not reduced.") (internal quotations omitted); *United States v. Dyck*, 334 F.3d 736, 742 (8th Cir. 2003) (addressing arguments under the second prong of U.S.S.G. § 5K2.11) .

2. Stewart is not entitled to a departure under U.S.S.G. § 5K2.12.

Defendant Stewart also argues in his Motion and in his Objections that he is entitled to a departure pursuant to U.S.S.G. § 5K2.12, because others would be harmed if he were incarcerated. (Objections at 25-26; Motion at ¶ 13.) While Stewart cites no support for this argument in his Motion, he does cite in his Objections a fifteen-year old case from the Second Circuit, *United States v. Milikowsky*, 65 F.3d 4 (2d Cir. 1995),[8] in support of the claim that a departure is appropriate because he is the operator of a business that may fail without his presence, thereby affecting his "40+" employees. (*See* Objections at 25-26; Motion at ¶ 13.) However, in *United States v. Morken*, the Eighth Circuit decided this very issue and held that "the mere fact a business faces likely failure and 'innocent others will . . . be disadvantaged' when its key person goes to jail is not by itself unusual enough to warrant a departure." 133 F.3d 628, 630 (8th Cir. 1998).

Indeed, the Eighth Circuit has previously vacated a sentence of probation that was based on a finding that the defendant's "approximately forty employees" would be discharged if the defendant were sent to prison. *United States v. Pool*, 474 F.3d 1127, 1129 (8th Cir. 2007). The Court found that "it is not extraordinary that in the area of white collar crime, a principal's business and employees may suffer if he is incarcerated." *Id.* Additionally, assuming as true that Company C would inevitably go out of business if Stewart were incarcerated (Motion at ¶

[8] Defendant Stewart also refers to "[s]everal cases from the 8th Circuit" but does not cite to any of them. (Objections at 26.)

13), the government questions the societal benefit in preserving a business that – by Stewart's own implicit admission–could only survive by colluding with its competitor. *See United States v. Sharapan*, 13 F.3d 781, 785 (3d Cir. 1994) (finding, in context of U.S.S.G. § 5H.12 departure, societal benefits may result from some business failures).

In any event, it is doubtful that Company C would, in fact, go out of business if Stewart were incarcerated. Company C is co-owned by three other individuals whom Stewart with ample financial resources (Norlyn VandeBrake, Dennis Rode, and Brian Bosshart), and who have longstanding ties to the local ready-mix concrete industry. These three individuals are also on Company C's board of directors and have participated in annual meetings relating to the company. While these owners and board members may be precluded by non-compete agreements from engaging in the day-to-day management of Company C, nothing precludes them from hiring a manager to operate the facilities under their supervision.

3. Defendant Stewart is not entitled to a departure under U.S.S.G. § 5K2.0.

Defendant Stewart also offers "explanations" that he believes take his case out of the "heartland" of antitrust offenses (Objections at 1-3; Motion at ¶ 15), and, presumably, entitle him to a departure under U.S.S.G. § 5K2.0. *See United States v. Grinbergs*, 470 F.3d 758, 761 (8th Cir. 2006) (stating that the general 'heartland' exception is embodied in U.S.S.G. § 5K2.0); *see also Rita v. United States*, 551 U.S. 338, 351 (2007).) Despite agreeing in the plea agreement that there were no circumstances justifying a departure pursuant to U.S.S.G. § 5K2.0, Stewart now argues that, because he owned only one-third of the company, "logically then he would have no reason to greedily involve himself in violations of antitrust laws," and that his violations

were not "in the typical context of personal enrichment, but in the context of survival." (Objections at 3.)

Stewart appears to want it both ways–he argues that his ownership stake is so insignificant that "logically" he would have no reason to violate the law for financial gain, yet he was willing to do anything–including breaking the law–to ensure the survival of the company he owned. Such contradictory "explanations" are unconvincing. Moreover, the facts belie the claim that Stewart was forced to violate the law so that his company would survive.

The evidence will show that Stewart was behaving anti-competitively well before Company A entered the scene. As discussed *supra,* evidence will be presented at the consolidated sentencing hearing showing that Stewart admitted in his proffer that he approached both Norlyn VandeBrake and Defendant VandeBrake prior to the Company A acquisition to see if he could keep Company A's predecessor entity out of his territories. The evidence will additionally show that Stewart admitted at his proffer that, shortly after Ryan Lake opened his small ready-mix plant (in 2003), Stewart, along with Company C partners Norlyn VandeBrake and Dennis Rode, visited Lake and offered to buy his plant. According to Lake, after he rejected the offer to buy his company at cost, the Company C partners told him to stay within his area.[9] The evidence will further show that, in response to this meeting, Lake sought a partner to join him in his business as he feared being "pushed around."

In addition, Stewart admits bid-rigging discussions relating to seven bids[10] that were agreed to go to Company C, while VandeBrake admits discussions relating to five bids[11] that

[9] Lake recalls that he was visited by Defendant Stewart, Norlyn VandeBrake, and Brian Bosshart (rather than Dennis Rode).

[10] These bids include the Milford Fire Station, which Defendant Stewart now claims was the starting point of the conspiracy, plus the six bids identified in the Stewart PSIR as not being in

were agreed to go to Company A. Given that Company C was agreed to receive a majority of the rigged bids (and a vast majority of the resulting sales), Stewart's story that he was pressured to join the conspiracy is implausible. This story is also inconsistent with Stewart's prior admissions that it was he who initiated the anticompetitive communications with VandeBrake, and that it was he who sought to enforce the conspiracy by threatening to retaliate against VandeBrake when he thought VandeBrake might be straying from the conspiracy's terms. Stewart's story makes even less sense when one takes into account that, after the purchase of Company A's predecessor entity (which the VandeBrake family co-owned), VandeBrake had more financial stake in Company C's business prospects than Company A's. While VandeBrake had no bonus or equity incentives through Company A, his father owned one-third of Company C, and VandeBrake had told others that he either owned or controlled his father's share of the company. Accordingly, both Stewart and VandeBrake had an interest not in driving Company C out of business, but rather in making it profitable.

F. The Court is not bound by the plea agreement stipulation that "the volume of commerce [is] less than $1 million pursuant to U.S.S.G. § 1B1.8."

In the plea agreement, the parties stipulated that "the volume of commerce [is] less than $1 million pursuant to U.S.S.G. § 1B1.8." (Stewart Doc. 11, Plea Agreement at ¶ 8.b.) Because Defendant Stewart has breached the plea agreement, the government no longer considers itself to

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dispute: May City Water Treatment Plant, Milford Sidewalks and Lighting, Dickinson County Courthouse Parking, Arnold's Park Paving, Bay Harbor Tunnel/West Harbor Trails, and Spencer West Side CDBG Storm Sewer. The sales attributable to Company C for these projects is approximately $746,000.

[11] These bids include Sibley Airport, which Defendant VandeBrake proffered pursuant to U.S.S.G. § 1B1.8, along with the Hartley Water Treatment Plant, Lake Park Trails, Walker Street in Sanborn, and a bridge in Osceola County (BRS-CO72(37)-60-72). The sales attributable to Company C for these projects is approximately $115,000.

be bound by this stipulation. Accordingly, the government will not oppose a Guidelines adjustment based on volume of commerce.

In addition, even if the Court were to find that the parties are bound by the stipulation, the Court itself is not bound by the stipulation. The Court may consider affected projects that the government learned about through sources other than Stewart without offending the letter or spirit of U.S.S.G. § 1B1.8. *See* U.S.S.G. § 1B1.8. cmt. 1. Indeed, the government is obliged to provide such information to the Court. *See id.*

Stewart has not disputed that he provided information regarding only two projects not already known to the government. These two projects are the Spencer Patching project and the Spencer Hospital project, totaling $92,946 in sales, and the government believes these projects should be excluded from the volume-of-commerce calculation pursuant to U.S.S.G. § 1B1.8. The remaining projects, which the government learned about from other sources, are:

May City Water Treatment Plant Expansion	$135,121.74
Sidewalks and City Lighting in Milford, IA	$259,818.00
Dickinson County Courthouse Parking	$63,400.00
Arnold's Park Paving	$34,137.18
Bay Harbor Tunnel a/k/a West Harbor Trails	$155,623.00
Spencer West Side CDBG Storm Sewer	$98,297.00
East Okoboji Beach (which Stewart disputes)	$694,537.50
TOTAL	**$1,440,934.42**

Accordingly, U.S.S.G. §1B1.8 does not preclude the Court or the government from considering these projects under the Guidelines. And, as stated above, the government will not object to a Guidelines adjustment based on volume of commerce.

G. The Government will not be making a downward departure motion pursuant to U.S.S.G. §5K1.1, and Defendant Stewart has not established a factual basis for his motion to compel the departure.

The plea agreement provides that, subject to the full and continuing cooperation of Defendant Stewart as described in Paragraph 12 of the plea agreement, the government will make a motion for a three-level downward departure pursuant to pursuant to U.S.S.G. §5K1.1. (Stewart Doc. 11, Plea Agreement at ¶ 9.) Paragraph 12 requires Stewart to "respond[] *fully and truthfully* to all inquiries of the United States in connection with any Federal Proceeding, *without* falsely implicating any person or *intentionally withholding any information* . . . ." (*Id.* at ¶ 12(c) (emphasis added).) Because Stewart is in breach of this obligation, the government will not be making a U.S.S.G. §5K1.1 downward departure motion in connection with his sentencing.

The government believes that Stewart is not being truthful regarding: (1) the duration of the conspiracy and (2) the scope of the conspiracy.[12] In addition, the government believes that, at a minimum, Stewart has withheld information relating to: (1) an agreement on the 2009 price sheets, (2) an agreement on the East Okoboji Beach project, and (3) an agreement on the Sibley Airport project.[13] Consequently, the government believes that Stewart has breached his cooperation obligations which, had they been met, would have led the government to make the downward departure motion.

[12] The basis for this belief is explained in II.D. *supra*.

[13] The basis for this belief is explained in II.A. and II.C. *supra*.

Stewart argues that, if the government does not make the downward departure motion, its decision would be "arbitrary, capricious, and without foundation in evidence and fact." (Motion at ¶ 6.) Accordingly, Stewart urges the court to "su esponte [sic] make that departure." (Objections at 24.) The government has identified above multiple reasons why it considers Stewart to have breached his cooperation obligations and thus is not entitled to a downward departure. Although the government's reasons for not making the departure motion are neither arbitrary nor capricious, the Court should nevertheless refuse Stewart's invitation to apply an "arbitrary and capricious" standard to compel the government to make a § 5K1.1 motion.

In the Eighth Circuit, the Court may compel the government to make a U.S.S.G. §5K1.1 departure motion where the government's decision:

> (1) was prompted by an unconstitutional motive, such as the defendant's race or religion; or (2) was not rationally related to a legitimate government interest.

United States v. Perez, 526 F.3d 1135, 1138 (8th Cir. 2008) (also noting intra-circuit split concerning whether court may compel based on government's bad faith); *see also United States v. McClure*, 338 F.3d 847, 850 (8th Cir. 2003). In *Perez*, the government declined to make a downward departure motion in part because the defendant provided false statements to federal agents. 526 F.3d at 1139; *see also United States v. Davis*, 583 F.3d 1081, 1098 (8th Cir. 2009) (upholding denial of U.S.S.G. §5K1.1 departure based in part on inconsistencies between the defendant's proffer and grand jury testimony). Recognizing that the government has a legitimate interest in obtaining fully truthful answers from cooperating defendants, the *Perez* court denied the defendant's claims that he was entitled to a compelled U.S.S.G. §5K1.1 departure, and clarified that unsupported claims and "generalized allegations" would "not entitle a defendant to a remedy or even to discovery or an evidentiary hearing" on this issue. *Id.* at 1138.

Because the government's decision here, as in *Perez*, was not prompted by an unconstitutional motive and was rationally related to a legitimate government interest, Defendant Stewart is not entitled to a compelled U.S.S.G. §5K1.1 departure. The government's motion for a U.S.S.G. § 5K1.1 departure was made expressly contingent on conditions that Defendant Stewart, like the defendant in *Perez*, has failed to meet. Just as Perez's plea agreement provided that "[n]o motion will be made unless the defendant is completely and fully truthful[,]" Stewart's plea agreement required him to respond "fully and truthfully" to questions and not to "intentionally withhold[] any information[.]" *Compare* 526 F.3d at 1137 *with* Doc. 11, Stewart Plea Agreement at ¶ 12(c). Because Stewart has not been fully truthful and has withheld information–a legitimate reason under Eighth Circuit precedent–the government is declining to make a § 5K1.1 motion. Likewise, the Court should not compel such a departure in this case.

H. There is substantial doubt as to whether Defendant Stewart is entitled to a two-level adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1.

The United States believes that the Court should consider withholding an acceptance of responsibility adjustment for Defendant Stewart because his post-plea statements and positions suggest that he has not accepted responsibility for his crime. As the Court knows, a defendant who enters a guilty plea is not entitled to an adjustment under U.S.S.G. § 3E1.1 as a matter of right. U.S.S.G. § 3E1.1 cmt. 3. A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility. *Id.* at cmt. 1(a). Because this determination is dependent on facts to be determined by the Court, the government makes no recommendation at this point as to whether Stewart is or is not entitled to the adjustment. Rather, the government here identifies factual issues that the Court would need to resolve to determine whether he has accepted responsibility.

First, as set forth above, Stewart denies: (1) that he had an agreement relating to price sheets with VandeBrake, (2) that he had an agreement relating to two specific projects with VandeBrake, and (3) that the conspiracy began at least as early as January 2008. These factual issues are to be resolved via documentary evidence and witness testimony at the sentencing hearing. If the Court determines that the facts denied by Stewart are in fact true, the government would recommend that the Court not apply a downward adjustment pursuant to U.S.S.G. § 3E1.1.

Second, it should be noted that some of Stewart's denials not only are contradicted by other evidence, the evidence will show that they are contradicted by his own prior admissions:

- Stewart has pleaded guilty to a conspiracy beginning at least as early as January 2008, and prior to his plea admitted facts supporting the existence of a conspiracy in that timeframe, but now he claims that the conspiracy began in February 2009.
- Stewart has previously admitted that he was guilty of a conspiracy lasting at least one and a half years (January 2008 through August 2009), which ended only due to the execution of a search warrant at his co-conspirator's office. However, in his Motion, he states "there is nothing to suggest that the Defendant perpetuated the conspiracy over an extended period of time".[14] (Motion at ¶ 9.)
- Stewart has previously admitted that he initiated the anticompetitive communications with his business partner Norlyn VandeBrake and then his co-conspirator Defendant VandeBrake. However, in his Motion, he states that he "did not instigate this conspiracy." (Motion at ¶ 12.)

[14] Note, however, that despite his prior admissions, Defendant Stewart now denies a significant portion of the duration of the conspiracy.

- Stewart admitted in an interview with a federal investigator that he committed the crime to "keep the peace and make some money." However, in his Motion, he states that he "did not engage in this conspiracy for personal profit" and "committed the crime in order to avoid a perceived greater harm to-wit the unfair competitive advantage enjoyed by co-conspirator Company A[.]" (Motion at ¶¶ 11, 13.) In addition, in his Objections, Stewart states that he did not commit the violations "in the typical context of personal enrichment, but in the context of survival." (Objections at 3.)

In sum, while these issues may not be resolved in full until the sentencing hearing, given that Stewart is denying relevant conduct that is supported by the evidence, including his own prior admissions, and has attempted to justify his illegal conduct, the government believes there is reason to question whether Defendant Stewart has admitted responsibility for his crime. *See* U.S.S.G. § 3E1.1, cmt. n.3 & n.1(a).

III. CONCLUSION

Based on Defendant Stewart's multiple violations of the plea agreement and retraction of substantial factual bases for the plea agreement, the government is not making a downward departure motion pursuant to U.S.S.G. § 5K1.1 and is also no longer willing to recommend the sentence set forth in the plea agreement. Rather, while the government strongly believes that imprisonment is warranted in this (and every criminal antitrust) case, the government otherwise defers to the Court's determination of the appropriate term of imprisonment.

STEVEN KEITH VANDEBRAKE

I. ISSUES TO BE RESOLVED AT SENTENCING HEARING

Defendant VandeBrake pleaded guilty to three counts of violating the Sherman Act, 15 U.S.C. § 1, in connection with his participation in three conspiracies involving three different companies, along with representatives of those companies, to fix prices and rig bids over the following time periods:

Count One: At least as early as June 2008 and continuing until as late as March 2009;

Count Two: At least as early as January 2008 and continuing until as late as August 2009;

Count Three: At least as early as January 2006 and continuing until as late as August 2009.

His plea agreement includes an agreed-upon sentencing recommendation of a term of imprisonment of 19 months and a fine of $100,000, based on the Sentencing Guidelines calculation set forth in the plea agreement.[15]

The government believes there are no disputed issues between the government and VandeBrake. Nevertheless, in response to previous statements by the Court, the government wishes to provide information on the following issues, which the Court has indicated will be relevant to its sentencing determination:

A. Whether, under U.S.S.G. § 3B1.1, the Court should impose a 3-level enhancement for "role in the offense," as set forth in the plea agreement, or a 4-level enhancement, as recommended in the U.S. Probation Office's Presentence Investigation Report (hereinafter "VandeBrake PSIR").

[15] Because Defendant VandeBrake pleaded guilty prior to indictment and accepted responsibility for his offenses, should the Court find VandeBrake eligible for a two-level adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1(a), the government plans to make a motion under U.S.S.G. § 3E1.1(b) for an additional one-level adjustment.

B. Whether, under U.S.S.G. § 1B1.8, the Court should exclude from its volume-of-commerce calculation affected sales that the government learned about through Defendant VandeBrake's cooperation with the government.

C. Whether, under 18 U.S.C. § 3553(a), there are any aggravating or mitigating circumstances that the Court should take into account.

II. ARGUMENT

A. The Court should impose a three-level enhancement for "role in the offense" under U.S.S.G. § 3B1.1.

The VandeBrake PSIR recommends a four-level enhancement under U.S.S.G. § 3B1.1(a). *See* VandeBrake PSIR at ¶ 80. However, in the plea agreement, the government and Defendant VandeBrake agreed that a three-level enhancement under U.S.S.G. § 3B1.1(b) was appropriate. The government believes that a three-level enhancement is appropriate for the following reasons.

First, the evidence does not indicate that VandeBrake exercised any "degree of control and authority" or "decision making authority" over his co-conspirators at the other companies. *See* U.S.S.G. § 3B1.1 cmt. 4. While the evidence is clear (and VandeBrake does not dispute) that, as the highest-level executive of his company to participate in the three charged conspiracies, VandeBrake supervised and managed salespersons at his company who participated in the criminal activity, it is far less clear that he had any authority over his co-conspirators at the other companies, who were free to withdraw from or renegotiate the terms of the conspiracy as they wished. For example, in Count One, Company B withdrew by reporting the conspiracy to the government. In Count Three, meanwhile, Company D renegotiated the terms of the conspiracy in early 2009, when the agreed-upon prices were generating complaints in one area.

Second, while it appears that VandeBrake initiated the conspiracies in Counts One and Three, the evidence indicates that the conspiracy charged in Count Two was initiated by Defendant Stewart. Stewart has previously admitted that, when Defendant VandeBrake was still working for the predecessor to Company A, Stewart approached both Norlyn VandeBrake (his business partner and Defendant VandeBrake's father) and Defendant VandeBrake to discuss keeping each company within agreed-upon territories.[16] In addition, Stewart has previously admitted that, when he was unhappy with VandeBrake's compliance with their agreement, he would threaten to expand his business into VandeBrake's territory. In contrast, there is no evidence that VandeBrake threatened Stewart in the same fashion. Accordingly, while VandeBrake's initiation of Counts One and Three is some evidence of leadership, it is difficult to characterize VandeBrake as having been a leader or organizer with respect to Count Two.

Finally, the evidence does not indicate that VandeBrake coerced or pressured any of the three co-conspirator companies (or their representatives) into participating in the anti-competitive conspiracies. Rather, the evidence indicates that in each conspiracy, high-level representatives of each company, on equal footing with one another, agreed to violate the antitrust laws to further the profit motive of their respective companies.

B. The Court should apply U.S.S.G. § 1B1.8 to exclude from its volume-of-commerce calculation affected sales that the government learned about through Defendant VandeBrake's cooperation with the government.

The Court previously indicated that it was considering whether to extend protection to Defendant VandeBrake (and, presumably, to Defendant Stewart) for information provided under

[16] While Defendant Stewart disputes a number of facts, he does not appear to dispute that he initiated the conspiracy. According to a letter by Stewart's counsel to the Probation Office on September 14, 2010, "this whole matter really started *when Kent Stewart simply approached Steve VandeBrake* in February of 2009." (emphasis added).

U.S.S.G. § 1B1.8. The Court noted that defendants in other cases in the Northern District of Iowa have not been extended this protection. While the Antitrust Division (which is prosecuting this case) cannot speak to the practices of other federal prosecuting offices with jurisdiction in this district, the Antitrust Division wishes to inform the Court that the ability to extend U.S.S.G. § 1B1.8 protection is critical to its investigations.

As the Court has recognized, antitrust crimes are unique in that they go to the heart of our system of economic free enterprise, and are much more difficult to discover than other types of fraud. As a result, the Antitrust Division has implemented a Leniency Program to incentivize participants in antitrust conspiracies to report wrongdoing. Providing these incentives allows the Division both to detect conspiracies and to deter their formation.

The benefits of the Leniency Program are available only to one member per conspiracy. However, often the Program applicant may provide information sufficient to establish the existence of the conspiracy but may not have information necessary to uncover all aspects of the conspiracy–for example, what products/services were within the scope of the conspiracy, when the conspiracy began, who participated in the conspiracy, and how the conspiracy was formed and implemented. In such situations, the Antitrust Division must be able to incentivize other members of the conspiracy to cooperate and provide information vital to the prosecution of these crimes. U.S.S.G. § 1B1.8 protection is critical to this effort.

U.S.S.G. § 1B1.8 protection allows other co-conspirators to obtain a benefit from cooperation. Although a cooperating co-conspirator may not be able to avoid criminal liability altogether, the co-conspirator is more likely to provide additional useful information before others do so if he knows that the information will not be applied to increase his punishment

under the Guidelines. *See* U.S.S.G. § 1B1.8(b)(1). Denying such protection would seriously hinder the government's goal of investigating, prosecuting, and deterring antitrust crimes. Accordingly, the government urges the Court to apply U.S.S.G. § 1B1.8 protection to qualifying information that it obtained from VandeBrake (and Stewart).

C. The Court should consider mitigating and aggravating factors under 18 U.S.C. § 3553(a).

The government believes that the Court should consider as a mitigating factor Defendant VandeBrake's cooperation with the government following his guilty plea. VandeBrake agreed to be interviewed on multiple occasions, answered numerous questions relating to both Count Two and Count Three, and provided information previously unknown to the government. Indeed, based on the government's assessment that VandeBrake has provided truthful information, some of the information provided by him is now being presented against Defendant Stewart. To be clear, as the government informed VandeBrake prior to his cooperation, the government will not be making any motion for downward departure pursuant to U.S.S.G. § 5K1.1. Nevertheless, the government believes that VandeBrake's cooperation should be considered under 18 U.S.C. § 3553(a).

Meanwhile, the government is aware of two facts that the Court may consider to be aggravating factors under 18 U.S.C. § 3553(a):

First, as the Court is aware, VandeBrake has pleaded guilty to three separate violations of the Sherman Act. The facts establish that VandeBrake engaged in three separate conspiracies to fix prices and rig bids. In comparison, most Sherman Act violators are involved in only one conspiracy. However, the impact of this aggravating factor is mitigated by the fact that, under the Guidelines, the volume of commerce affected by all charged conspiracies is aggregated.

Accordingly, because the penalty is based in part on the total affected commerce, it should make no difference under the Guidelines whether a defendant has participated in one conspiracy or three; what matters is the total commerce affected by the criminal activity. Of course, the Court may nevertheless consider these facts in its analysis of the nature and circumstances of the offense under 18 U.S.C. § 3553(a).

Second, the Court may wish to consider that in April 2009 VandeBrake attempted to rig two projects with Company B that were not counted as part of his volume of commerce for Count One. At that time, Company B was cooperating with the government's investigation, and so, unbeknownst to VandeBrake, the conspiracy had already ended. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984). Consequently, the government did not present the sales resulting from these two bids in its calculation of commerce affected by the conspiracy

Nevertheless, the Court may wish to consider these projects under 18 U.S.C. § 3553(a). With respect to the first project, VandeBrake and a representative of Company B agreed that it would go to VandeBrake's company; however, the project was rebid at a date after the conspiracy had ended, and, consequently, there were no affected sales. In contrast, the second project was awarded to VandeBrake's company after VandeBrake underbid Company B despite previously agreeing that Company B would win the project. VandeBrake was able to underbid Company B because a representative of Company B had previously shared with him the price Company B planned to bid (with the expectation that VandeBrake would bid above it). The sales resulting from this project are $888,699.

III. CONCLUSION

The government recommends that the Court impose the sentence reflected in Defendant VandeBrake's plea agreement: 19 months' imprisonment and a fine of $100,000. The recommended sentence accounts for VandeBrake's acceptance of responsibility, his role in the offense, the volume of commerce attributable to him, and the information he provided to the government. As set forth in the discussion above, the recommended sentence is an appropriate sentence under the Sentencing Guidelines based on the facts of this case.

Respectfully submitted,

/s/

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GOVERNMENT WITNESS AND EXHIBIT LIST

I. WITNESSES

At the consolidated sentencing hearing, the United States expects to call some or all of the following witnesses:

A. Ryan Lake (former Company A salesman)

B. Lee Konz (former Company A salesman)

C. Jon Moeller (FBI agent)

D. Kent Byers (USDOT-OIG agent)

As the Court has recognized, the government cannot compel the testimony of either defendant. Nevertheless, the government understands from defense counsel that both Defendant Kent Robert Stewart and Defendant Steven Keith VandeBrake plan to testify on their own behalf, and the government plans to cross-examine both defendants.

II. EXHIBITS

The government expects that, depending on the remaining issues in dispute at the time of the sentencing hearing, it may use the following exhibits (sent under separate cover):

A. January 22, 2008 email from Ryan Lake to Defendant VandeBrake

B. Transcript of Plea Taking for Defendant Stewart, May 24, 2010

C. Transcript of Defendant Stewart Interview, Sept. 8, 2010

D. Company A Price Sheets (2009)

E. Company C Price Sheet (2009)

F. Summary of telephone calls between Defendant Stewart and Defendant VandeBrake

G. Chart of telephone calls between Defendant Stewart and Defendant VandeBrake

H. Summary of telephone calls between Defendant Stewart and Lee Konz

I. Company A Bid – Sibley Airport Patching

J. Company A Bid – East Okoboji Beach, Dickinson County

K. Company A Bid – Spencer West Cide CDBG Storm Sewer

L. Company A Bid – Spencer 2009 Lincoln School Parking

M. Company C Bid – East Okoboji Beach Paving

N. Company C Bid – 2009 West Side CDBG Storm Sewer

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2010, the foregoing United States' CONSOLIDATED SENTENCING MEMORANDUM AND RESPONSE TO DEFENDANT KENT ROBERT STEWART'S "MOTION FOR DEPARTURE" was filed electronically and to the best of my knowledge, information and belief, counsel for defendant will be notified through the Electronic Case Filing System.

DATED: November 24, 2010 at Chicago, IL

/s/

Andre M. Geverola
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