UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA	)	
	)	DEFENDANT KENT STEWART'S RESPONSE
vs.	)	TO GOVERNMENT'S SENTENCING
	)	MEMORANDUM AND BRIEF AND
	)	DEFENDANT'S MOTION FOR DOWNARD
KENT ROBERT STEWART	)	DEPARTURE
a/k/a KENT STEWART	)	Docket No. CR 10-4028-1-MWB

COMES NOW, the Defendant, Kent Robert Stewart, and for his response to the Government's consolidated Sentencing Memorandum and response to Defendant's Motion for Downward Departure respectfully states:

In its consolidated Sentencing Memorandum the United States has identified for the court several issues for resolution. The Defendant will address each of those issues as presented by the United States in the same order in which they were presented to hopefully allow the court an orderly manner for review. However, as a general note the Defendant asks the Court in reviewing the issues to be continually cognizant of the credibility of the witnesses that the Government claims substantiates its position. Both United States District Courts and Appellate Courts throughout the United States have spent considerable time in opining that much of a sentencing court's decision is based on the circumstances of the Defendants before it, the unique circumstances of each case, the evidence presented, and the credibility of the witnesses presenting that evidence.

Prior to addressing the specific issues raised by the United States Stewart would agree with the statements made by the United States at page three of its sentencing memorandum that there is no dispute that Stewart violated the Sherman Antitrust Act relating to six projects

enumerated by the Government which resulted in a volume of commerce of approximately $743,000. Stewart also agrees that projects he admitted by way of protection under U.S.S.G. section 1B1.8 totaling a volume in commerce of approximately $93,000 should not be counted against him. Instead these admissions should be taken as evidence of his acceptance of responsibility.

ISSUES PRESENTED AND ARGUMENT

1. WHETHER DEFENDANT STEWART HAD AN AGREEMENT WITH DEFENDANT VANDEBRAKE RELATING TO THEIR COMPANYS' RESPECTIVE PRICE SHEETS FOR 2009?

Stewart at all times relevant hereto was the President and day to day operator of Great Lakes Concrete, Inc., and VandeBrake, from January 2008, was the general sales manager of GCC Alliance, Inc., a company which was originally incorporated as Corn Corner Acquisitions, Inc., on January 8, 2008, and later changed its name to GCC Alliance, Inc., on January 14, 2008, when it acquired the assets of the former Alliance Concrete, Inc., GCC Alliance, Inc., is not to be confused with Alliance Concrete, Inc., as Alliance Concrete, Inc., was a corporation formed by the merger of two then existing concrete companies with several production facilities in Northwest Iowa. The merger occurred in approximately 2006. At that time Norlyn VandeBrake, the father of Steven VandeBrake, was a shareholder in both Alliance Concrete, Inc., and Great Lakes Concrete, Inc., and while he remains a shareholder in Great Lakes Concrete, Inc., he is not a shareholder in GCC Alliance, Inc. The Court should further not confuse Great Lakes Concrete, Inc., with Lakes Ready Mix, LLC which was formed by Ryan Lake in 2003, and sold to Alliance Concrete, Inc., in 2007, and was later part of the sale of Alliance Concrete, Inc., to GCC Alliance, Inc.

The United States would be hard pressed to allege any agreement for price sheet fixing between Great Lakes Concrete, Inc., and GCC Alliance, Inc., in 2008, as clearly the price sheets of the respective companies which will be introduced in evidence are substantially different in pricing.

The question should also be rightfully considered by the court as to what exactly is a "price sheet"? In terms of the concrete industry in northwest Iowa it is submitted that a price sheet is an advertisement prepared by each concrete producer and either sent out to its regular customers or available for pickup by the general public at any concrete producing facility. A price sheet is subject to change at any time and is not a confidential document. It is easily obtained by any member of the general public by merely asking for the company's price sheet. It is not a tariff document required to be filed with any regulatory agency and as will be testified to has little meaning to any regular purchasers of ready mix concrete in any volume. The only class of ready mix concrete purchasers that the price sheet is applicable to is those purchasing small quantities of ready mix concrete and the testimony will show that even in those cases prices are negotiable with each customer on an individual basis depending on the job, location, volume, and various other considerations.

It is the position of the Defendant, Kent Stewart, that there was no agreement with the Defendant Steve VandeBrake to agree on price sheet prices for 2009 and that any such agreement would be meaningless as it affected a very small volume of commerce to a very limited class of purchasers.

The very evidence that the Government seeks to introduce of an agreement between the two Defendants is extremely questionable and weak. Please consider the following:

(a) The price sheets of both companies for 2009 were in the hands of the United States at least by December of 2009 yet the Government, in its information

against Kent Stewart, does not allege price sheet fixing for 2009. To the contrary in its Trial Information against Steve VandeBrake it specifically alleges price sheet fixing at Counts I and III with regard to two other unrelated companies, but not in Count II with regard to Stewart or Great Lakes Concrete, Inc. The Government seeks to excuse this omission by alleging that it later received information from VandeBrake alleging price sheet fixing in 2009. Despite that suggestion the Government has never amended its Trial Information against Kent Stewart.

(b) Despite numerous interviews with Steve VandeBrake, Ryan Lake, and Lee Koontz commencing as early as August 25, 2009, there is no allegation by any of them of any agreement to fix the prices on price sheets for 2009. It is only after the court's acceptance of Steve VandeBrake's second plea agreement that he and his attorney contacted the United States requesting to divulge more information. It is even noted in the Presentence Report that VandeBrake initially stated that he believed that the Defendant (Kent Stewart) proposed the price for 2009, but later corrected himself and later recalled that it was he who proposed the 2009 price (Presentence Report, page 10 footnote 3). Despite VandeBrake's obvious self serving motives and VandeBrake's denial of any conspiracies whatsoever initially the Government still recommends to the court a downward departure for VandeBrake's cooperation with the government following his plea agreement (U.S. Sentencing Memorandum Page 28) and that his sentence should reflect his acceptance of responsibility (Sentencing Memorandum Page 30).

(c) In fact there was no agreement between Stewart and VandeBrake with regard to the 2009 price sheet. The $10.00 per cubic yard price increase reflected by GCC Alliance on its price sheet was as a result of a directive from highly placed officials within GCC and not as a result of an agreement with Kent Stewart. On August 4, 2010, special agent Kent Byers of the US Department of Transportation interviewed Peter Brewin who stated that he was GCC's Us Vice President of ready mix and aggregate since 2008. His area of operations included northwest Iowa. He further stated that starting around January 2008 he began implementing a series of initiatives to create a "unified culture" within the company (Brewin interview, Page 1).

Brewin further stated that at GCC he evaluates the spread between the selling price and cost of materials. That data evaluation and the market place help set the pricing spread. He was not involved in setting GCC's price in 2008, but explained that in 2009 he received his first "whack" at the Iowa budget (Brewin Interview, Page 3) Brewin further testified that in October of each year he began building a budget for the upcoming year. He explained that around September October of 2008 CEMEX, a company he had previously worked for that was a giant

in the industry, particularly in California, had sent out a letter saying that it was raising ready mix prices by $25.00 per cubic yard. Brewin wanted this same increase because he thought the economy was getting bad in northwest Iowa and the price increase would be needed to offset declining sales (Brewin Interview, Page 4-5). Apparently in consultation with GCC managers in northwest Iowa it was agreed that a $10.00 per cubic yard price increase would be implemented for 2009 (Brewin Interview, Page 4). Brewin was also concerned that Iowa's selling price was worse than some and was on the low side of the company's target range (Brewin Interview, Page5). Brewin then stated a meeting of all GCC's manager was held in Denver, Colorado, in 2008, and he thought it was at the same time that CEMEX had raised its prices and would have been discussed at the Denver meeting. He went on to state that GCC's district managers are not skilled enough to complete a budget and that he was not aware of VandeBrake's relationship with Great Lakes Concrete and that his only meeting with Stewart occurred in the late fall or winter after the Government search warrant was conducted at GCC Alliance (which would have made this the winter of 2009). Clearly the sheet price increases that GCC would be taking for the calendar year 2009 where set by upper management with no consultation with Kent Stewart and prior to any time that VandeBrake alleges to have spoken with Stewart.

An interview was held with Jay Svennes on July 7, 2010. Svennes was a business consultant who had originally worked with Alliance Concrete and stayed on for a while with GCC Alliance. Svennes testifies that despite having price sheets or list prices there were substantial discounts. Svennes advised that they had structured discounts including $7.00 or $9.00 per cubic yard for some situations and even recalled discounts of up to $11.00 a cubic yard. There was a list maintained in the office as to what customers got what discounts.

Svennes also added that after GCC bought Alliance GCC's corporate management set the pricing (Svennes Interview, page 4).

Ryan Lake was reinterviewed on August 2, 2010, by Agent Kent Byers. Lake makes a statement that he was advised that in early 2008 GCC was going to increase its prices $5.00 per cubic yard and Stewart was going to have the same price increase (Lake Interview, page 1). Actually, the evidence will show that Great Lakes Concrete increased its prices by $7.00 per cubic yard in 2008 and evidences that Lake has absolutely no knowledge of what was going on in management other than his own unsubstantiated impressions. Lake also recalls a meeting in early 2009 between GCC's upper management and its sales staff. GCC's corporate representatives wanted a $15.00 per cubic yard increase for 2009 and Lake identified Peter Brewin as the main GCC representative pushing for the $15.00 per cubic yard increase (Lake Interview, page 1). Lake further testifies that VandeBrake ultimately decided on a $10.00 per cubic yard price increase and that VandeBrake thought that Great Lakes Concrete and Tri State Ready Mix would follow and increase their prices as well. Lake was fearful that Stewart would not go along and Lake did not recall VandeBrake mentioning any specific conversations with Stewart about price increases (Lake Interview, page 2). Lake also stated that GCC's price sheet was never a set price for larger customers as they would receive discounts. The discounts given to customers varied upon quantity and the projects respective turnaround time. Other discounts were given by GCC for smaller contractors and for larger commercial contractors. Lake explained that DOT was priced higher due to the possible penalties that could be imposed (Lake Interview, page 2). Lake has effectively then provided information only by innuendo and interpretation and not by actual fact. He was not in on the decision making process and his credibility as a witness is nil. Lake is further interviewed on August 18, 2010, by FBI Special

Agent John Moeller. Lake testifies that Lake had received American Concrete's price sheet from three or four customers and he in turned passed one on to VandeBrake. Lake stated that there were over 10 customers that initially stated they would go to American Concrete due to GCC Alliance's price increases. Lake never told VandeBrake how he got the price sheet, but it is clearly evident as stated before that these price sheets were readily available to anyone. Lake again stated that the 2009 prices were decided upon/dictated by Peter Brewin in December 2008 or in January 2009. Brewin wanted a $15.00 price increase. Customers were notified of the prices in January of 2009. Lake stated that in previous years prices would go out to customers later in the year. By his statements to Special Agent Moeller Lake again destroys any concept that pricing was fixed by Stewart or VandeBrake, but instead was dictated at the higher levels of management at GCC.

VandeBrake himself was again interviewed on July 8, 2010, by Agent Byers and thoroughly discussed price fixing on price sheets with another company, but did not want to talk about 2009 price sheets with Great Lakes Concrete. VandeBrake was again interviewed on July 13, 2010, by Agent Byers and now decided that he and Stewart and talked about price sheet increases for 2009 sometime between December 2008 and February 2009. This, of course, directly conflicts previous statements that prices were determined by Brewin and the price sheet was sent out to GCC customers in January of 2009. The agent also notes that VandeBrake seemed to become somewhat evasive and/or apprehensive regarding the sequence of events regarding contact with Stewart and Van Zee (VandeBrake Interview, page 1).

VandeBrake was interviewed yet again by Agent Byers on July 16, 2010, and related that he and Peter Brewin discussed the $10.00 per cubic yard price increase for 2009. VandeBrake goes on to say he thinks (emphasis added) he gave Stewart the $10.00 per cubic yard price

increase, but could not say for certain. He says that Stewart went along with the price increase. He does not recall Stewart's specific reaction or particulars, but it was his "understanding" that Stewart agreed with the $10.00 per cubic yard price increase (VandeBrake interview, page 1). Obviously VandeBrake is incorrect or at best self serving in his recollection because Stewart and Great Lakes Concrete did not increase their price sheets by $10.00, but instead by $7.00 per cubic yard which is exactly the same price increase that they had taken the previous year.

Confronted with the porous nature of its evidence the Government insisted on further interviews with Kent Stewart which he agreed to based on the cooperation provisions in his plea bargain. Confronted with what Stewart and his attorney believed were misstatements of his previous interviews Stewart agreed to a final interview in early August, 2010 provided that it be reported by a certified court reporter. The Government initially objected, but eventually agreed. Stewart's desire for a recording of the interview was to make certain that this court had before it a written record of questions and answers rather than the interpretive notes of the Government agents which they had continually refused to provide to Stewart. Obviously Stewart would not request a certified reporting if he didn't intend to tell the truth and the certified reporting, which will be introduced as an exhibit, will evidence to the court the argumentative and suppositional questions and answers that the Government requested of Stewart in an attempt to put words in his mouth to clarify the poroust testimony of Lake and VandeBrake.

The Government, then confronted with not only the weakness of any evidence relating to price sheet fixing in 2009, but also with calculations that if in fact there was price sheet fixing the value of commerce attributable to Stewart was only $54,000 then changed its tactic in an attempt to persuade this court that the volume of commerce affected should include all standard

mix concrete sales in the relevant geographic area. Respectfully the Government misinterprets the legal precedent.

II. IN THE EVENT THAT THE COURT FINDS THAT AN AGREEMENT EXISTED REGARDING THE 2009 PRICE SHEETS WHAT IS THE PROPER DETERMINATION OF THE VOLUME OF COMMERCE EFFECTED BY THE AGREEMENT?

The Government would ask the Court to determine a volume of commerce affected by the agreement as being the entire volume of commerce of standard mix concrete sold during the relevant time period. "Standard-mix concrete" is actually a misstatement. The real product is standard weight concrete which is generally measured in increments of 2,500, 3,000, 3,500, and 4,000 pound per cubic yard concrete with no special additives. It is noted for the court that the weight determination is not the weight per cubic yard of the concrete itself, but the strength bearing load that it can endure. It is the type of concrete generally used in agricultural and residential construction, but not used on highway projects or other "engineer-designed" projects which generally require a specific design of concrete that is specified by an engineer, formulated by the ready mix producer, tested by the engineer, approved, and then set as a computer formula for batching. The evidence will show that the computers of Great Lakes Concrete contain over 100 such formula designs. The Government then asked Great Lakes Concrete to give it a computation in dollar volume of its sales of standard weight concrete for the year 2009 and when advised that the Great Lakes computers did not keep track in that manner Great Lakes was asked to estimate as a percentage of its total volume of sales the amount of standard weight concrete and determined that it was 30%. The Government then apparently assumed that that the 30% was all sold at price sheet prices and applied its own unexplained formula of determining which plants were affected, the time period

affected and the areas where the plants did not overlap and there would be no affect. It arbitrarily produced a number of approximately $925,000 as the value of commerce affected by price sheet fixing in standard weight concrete.

When this number was disclosed to Kent Stewart further work was done at Great Lakes Concrete which will be presented by exhibit to show that actual dollar volume of sales in standard weight concrete from the price sheet at an undiscounted price. The total is approximately $54,000 and the balance of the standard weight concrete was sold at various negotiated prices based upon volume, customer, job location, and other factors that affected the cost of production and transportation. When confronted with this obvious error in logic in that the Government had never inquired of any party whether there was any price fixing agreement as to the level or amount of discounts or negotiated prices that a majority of customers received it then asked the court to accept a proposition that the Government is not required to prove a formal, express agreement with all terms precisely set out and clearly understood by the conspirators. It is enough that the Government shows that the Defendants accepted an invitation to join in a conspiracy whose object was unlawfully restraining trade (Sentencing Memorandum, page 4 citing United States v. MMR Corp). The Government also relies on United States v. Andreas, United States v. Hayter Oil, and United States v. SKW Medals & Alloys, Inc. cited at pages 4, 6, and 7 of the Government's Sentencing Memorandum for the general proposition that the courts have defined "affected" sales as all sales taking place pursuant to a conspiracy and having any influence on sales of those products. With due respect the Government misinterprets the case law.

In MMR Corp the 5th Circuit of Appeals in 1990 found that the Defendant had accepted an invitation to join in a conspiracy whose object was unlawfully restraining trade. There was an evidentiary dispute as to the actual terms of the conspiracy and the agreements flowing there from. The court found that the Government was not required to prove a formal, express agreement with all the terms precisely set out and clearly understood by the conspirators. It is submitted that the conclusion of the court is, of course, logical assuming that in the underlying case the Government proved by at least circumstantial evidence and beyond a reasonable doubt that the conspiracy existed and that it violated the law. MMR Corp is distinguishable from the present case in that the Government has not alleged, let alone proven, that any conspiracy existed to fix discounts given to customers based on their particular circumstances, type of job, volume of concrete, or any other of a laundry list of factors that would determine the profitability of a specific order for the ready mix producer. This is not a matter of asking the Government to prove each and every one of the specifics, but instead simply stating that the Government has not proven that any such agreement even existed or that anyone extended or accepted an invitation to join in a conspiracy to fix discounts.

The Government's only rebuttal contention is that the "discounts" were figured from a price sheet that was based upon illegally fixed prices. The contention has very little merit for the reasons set forth above regarding the actual issue of price fixing in 2009 on price sheets and further because the testimony at sentencing will be that the prices were determined on a customer by customer basis based on numerous factors-none of which were related to the price sheets.

The situation Hayter Oil decided by the 6th Circuit Court of Appeals in 1995 also is clearly distinguishable from the present case. In Hayter a predominate group of gasoline jobbers and retailers attempted to agree over a significant period of time to raise the retail price of gas in a specific geographical area. The problem they encountered was that one large competitor could not be approached to join the conspiracy and was continually undercutting the conspirator's agreed upon prices so that only for short periods of time could the conspiracy work. The 6th Circuit was faced with the question of whether the volume of commerce should be computed only on those sales which were successfully inflated due to the conspiracy or on all of the sales during the long-running conspiracy whether they were successful or not in increasing the price. The court looked to the definition of the term "affected by the violation" as the court interpreted the term to mean under U.S.S.G. section 2R1.1(b). The Court noted that the District Court recognized that a price fixing scheme is a violation of the Sherman Act even if it was not effective. Id at page 1272. The Court found that no previous court had interpreted the term "affected" and the commentators suggest that the phrase is ambiguous. Id page 1272. The court then looked to the everyday usage of the term "affect" as being defined "to produce an effect...upon" or "to have a detrimental influence on" and is synonymous with the term influence. Id page 1272.

The District Court excluded from the Defendant's volume of commerce those sales which were made at less than the agreed upon price, but the Court of Appeals found that all of the sales were pursuant to an ongoing conspiracy which at times worked and which at times didn't. Id page 1273.

Hayter as distinguished from the present case acknowledges that at all times during the period of the conspiracy the conspirators were attempting to fix prices for profit and their lack of success should not be counted in their favor. In the present case there is no evidence that the conspirators even considered an agreement for the discounting of standard weight concrete in any type of conspiracy and that the conspiracy was primarily aimed at rigging bids or submitting complimentary bids on major projects and not on the day to day commerce of the two companies. Hayter then is inapplicable to this case. Simply the commerce generated by either company in its individual pricing of standard weight concrete to its many customers was not commerce affected by any violation or even part of any conspiracy and should not be included by this court in a determination of the value of commerce affected. Similarly SKW Medals is distinguishable because the conspiracies entered into between the two companies did not act upon or influences any negotiations with the day to day customers in setting the sale prices for a majority of the customers, the volume of goods sold, or other transactional terms. The Government cannot show any influence on the individually negotiated prices paid by customers of either company for standard weight concrete.

III. DID THE DEFENDANT STEWART HAVE AN AGREEMENT WITH DEFENDANT VANDEBRAKE RELATING TO THE EAST OKOBOJI BEACH PROJECT? THE SIBLEY AIRPORT? OR THE SPENCER LINCOLN SCHOOL?

All three of these projects occurred in 2009. With regard to the Spencer Lincoln School project it has been agreed by the Government that if the concrete contractor involved submits an Affidavit that he did not even receive a bid for concrete from Great Lakes Concrete for the project, but instead relied on his standard pricing that this project would not be included in the volume of commerce (Government Brief, Page 8, Footnote 5).

The Sibley Airport patching was just exactly what it sounds like--the patching of a runway at the Sibley, Iowa airport. VandeBrake's statements upon interview (again after his plea) were that he contacted Stewart and informed him that he expected Stewart not to go after this job. Stewart's statements upon interview were that he didn't specifically recall the job, but would not have been bidding on the job because the type of concrete required for the job had characteristics that made it legally unusable after a very short period of time and that Great Lakes Concrete did not have a production facility close enough to the airport to allow it to batch the mix, load it on the truck, deliver it, and have it poured in place within the legal time requirements. This project simply was not a consideration for Great Lakes Concrete and not acted upon or discussed in any manner.

The project referred to as the East Okoboji Beach project was a larger project on the easterly side of Spirit Lake, Iowa, which involved not only the paving of roads, but a significant amount of grading and restoration. There were a larger number of contractors bidding on the project including grading contractors, concrete contractors, and the like. Stewart was quizzed about this project in his proffer of January 13, 2010, and the Government apparently found no wrongdoing. Any reference to the project again surfaced after Steve VandeBrake's entry of a plea and his sudden recollection that Kent Stewart had told him what to bid on the project.

The background of this project is extensively discussed in the Defendant's objections to the Presentence Report and his Sentencing Memorandum. In summary, the Defendant's recollection was that he was called by Steve VandeBrake originally to discuss whether given the size of the project the companies might joint venture on the work. Stewart explained to VandeBrake that he had two plants in the immediate vicinity that could handle the project, that GCC's plant was too far away to be competitive, and that Stewart would be bidding the project

very low because some of the concrete contractors had their own portable concrete plants that they could bring to the area and produce their own ready mix concrete at a very competitive price. He was negotiating with them to give them a price low enough to discourage them from bringing in their own plants so that his facilities could enjoy at least a minimal profit on the project, amortize fixed overhead, and keep his people busy. That concluded the conversation. There would be no logical reason for Steve VandeBrake to ask Kent Stewart what he should bid on the project when he had already acknowledged that it was not a doable project for his company.

On August 20, 2010, Spcial Agent John Moeller again interviewed Ryan Lake. As part of that interview discussion was had about the East Okoboji Beach paving project. The agent's notes reflect, "Lake told VandeBrake that this would be a difficult job to do because GCC Alliance would have to drive their trucks through Spirit Lake and around the lake. Lake received phone calls to bid this job. Lake stated that they bid the job because of these phone calls. Lake stated that the job was bid high, yet they would have taken the job if someone was willing to pay this high bid."

The agent's notes further reflect that Lake was asked about portable plants and provided information about which paving contractors had portable plants. Lake was also asked if there was any talk of joint ventures with Great Lakes Concrete (other than the windmill project) to which he stated there was not (Lake Interview, pages 2 and 3).

Lake's statements confirm that VandeBrake bid this project high because he really didn't want it, but was willing to do it if the price was high enough. Lake gives no indication of any influence from Kent Stewart on the bidding. He also cooberates Stewart's statement about portable plants and isn't even aware of VandeBrake's assertions that he had originally called

Kent Stewart looking for a joint venture. Simply concluded there was no conspiracy on this project.

IV. WHEN DID THE CONSPIRACY START?

Kent Stewart pled guilty to a Trial Information alleging the beginning of a conspiracy as early as January 2008 and extended as late as August 2009. He later sought to reduce the time period of the conspiracy from January of 2009 through May 15, 2009, when the last project bid was rigged. The Government now contends that Stewart perjured himself either in his interviews or in his sworn plea before Magistrate Judge Zoss. The simple fact is that Kent Stewart's statements were made not in the course of perjury, but as a result of confusion and embarrassingly his attorney allowed that confusion to continue for some time before seeking clarification.

The confusion stems from a project called City of Milford New Fire Station which was bid by Great Lakes Concrete on February 10, 2009. A copy of the bid is attached. Kent Stewart openly admitted at each of his interviews that he was angry with Steve VandeBrake for underbidding Great Lakes Concrete on this project. He openly admitted that he had contacted Steve VandeBrake seeking to get the concrete order for this project because it was just a few blocks from Great Lakes Concrete's Milford, Iowa, facility. He was angered that VandeBrake agreed and then undercut his bid. Ryan Lake explains that Lake placed the bid without knowledge of the agreement. Stewart goes on in his interview to state that he felt he was owed this project because he had "bailed out" GCC on a water treatment plant in Milford that was overdue on schedule and GCC did not have the ability to supply concrete in the winter. Stewart agreed to step in and fulfill GCC's commitments provided that he would continue to have the work in the spring and once again VandeBrake did not honor that agreement. Stewart's

confusion arose in that he thought that the bid on the City of Milford New Fire Station was in February of 2008 not 2009 and that work certainly would have begin on putting the bid together in January of 2008 and therefore his acceptance of the Government's timeframe. The court will hopefully understand that Kent Stewart has never before engaged in criminal activity and was quite scared, confused, and disoriented when this matter arose. He repeatedly expressed lack of memory over specific dates and projects given that this was not a formal conspiracy reduced to writing and well planned. When we were finally able to extract the actual City of Milford Fire Station bid and realized it was in 2009 the timeframes became more apparent, but it was too late to retract the admissions made and there was a distinct fear that the Government would retract its plea offer. This fear was very real as the Government attorneys had repeatedly threatened that without full cooperation the plea agreement could be retracted or nullified. No wrongdoing was intended on the part of Kent Stewart

The Court should also recognize that despite the timeframe admitted to by Kent Stewart for the conspiracy that the Government has not shown a single bid rigged project in 2008, any evidence of price sheet fixing in 2008, and bid rigging after May 15, 2009. The Government alleges that the conspiracy for bid rigging ended in August because the investigation had gone overt or alternatively that both companies were at full capacity working on a joint venture. The Government has failed to realize that the joint venture used the capacity of only one plant from each company and that Kent Stewart was not aware of the investigation other than a search warrant had been served at GCC's headquarters, but no knowledge as to why. He simply voluntarily withdrew from the conspiracy.

V. SHOULD KENT STEWART BE GIVEN CONSIDERATION FOR DOWNWARD DEPARTURES FROM THE SENTENCING GUIDELINES?

Kent Stewart has complied fully with the terms of his plea agreement. He has attended each and every interview requested by the Government. He has supplied each and every document requested by the Government. He felt a very real threat to the existence of his family run company the overwhelming presence of GCC. Great Lakes Concrete, Inc., is referred to as a family operated company because despite the fact that is has other shareholders a company that Kent Stewart's father founded and that he sheparded for a great number of years was merged with Great Lakes and Kent remained in the position of having the chief responsibility for the day to day operations of the company. The company also employs on a part-time basis his wife, on a full time basis his stepson, prior to his death his brother-in-law and a host of long term employees. The Court should very well recognize that a small company functions and has a cultural much different than a large organization. The threat of extinction of that company is the threat of extinction of a way of life as opposed to merely a position and an income. It's difficult to tell employees who are also your friends and neighbors that their jobs no longer exist. Economic threat is generally not recognized by the guidelines as a reason for downward departure, but then again the guidelines don't seem to anticipate the loss of a well established company in a series of small town in northwest Iowa and the impact that that loss of jobs can have on employees, their families, their health insurance benefits, their retirement benefits, and the community as a whole as yet another business in that small community ceases to exist while a large multinational corporation controls the economic environment.

In his interviews Kent Stewart uses three terms--"keep the peace", "make some money", and "good competition". He will explain each of these terms at sentencing. Keeping the peace means not giving a giant competitor a reason to cause your demise. Making some money means making a reasonable profit to stay in business. Profits not only pay salaries, but allow for

replacement of obsolete equipment and the overall health of the business. A reasonable profit is not a dirty concept. A good competitor is one who realizes these concepts and does not take adverse actions solely to the detriment of a competitor to gain market share.

Stewart cites the court in his Sentencing Memorandum to United States v. Milikowsky, 65 F. 3d 4 (2nd Circuit. 1995) in support of a claim that a departure downward is appropriate because his business will fail without his day to day presence and unduly and harshly affect his 40 plus innocent employees. He specifically compared his circumstances to that of Milikowsky including the loss of annual payroll of $1,500,000 and insurance premiums in excess of $125,000 paid on behalf of his employees. The Government objects to the citation to Milikowsky as being a 15 year old case from the 2nd Circuit (apparently a backhanded swipe at this Court's own criticism of Government for citing an older out of circuit case on conflict of interest when an 8th Circuit case applied). The fact is that Milikowsky is still good law. The fact is that the considerations in Milikowsky still apply. The Government instead directs the court to United States vs. Morken, an 8th Circuit case which does in fact address mere business failure as usually not enough for a departure. The Government fails to advise the court that the circumstances in Morken were quite different in that Morken had already run at least one successful business into the ground and his efforts were not necessary for the operation of his existing business nor would there be a tremendous detriment if that business failed. Likewise the Government's cited case of the United State vs. Pool is distinguishable in that the allegation that Pool's business would not survive was not ever supported by evidence and to the contrary his own son indicated that he could run the business while his father was in jail, but it just wouldn't be the same.

The Government goes so far as to with no compassion imply that if Great Lakes Concrete were in fact to go out of business that there may be no societal harm and that Stewart has

implicitly admitted that the business can only survive by colluding with competition. The Government obviously doesn't recognize that the United States is in a recession, the Government in shambles, and unemployment at 10.9%. That small towns are drying up every day and that when they lose a business the workers left behind have no alternative source of employment or any opportunity generally to even sell their homes and move their equity to a new location. More importantly the Government fails to recognize that should Great Lakes Concrete fail that GCC virtually has full control of northwest Iowa unfettered by any competition. One could only guess at the consequences to the individuals of northwest Iowa and the society they have created.

The Government cites the Court to United States v. Sharapan 13 F. 3d 781, 785 (3rd Circuit 1994) for the proposition that maybe the failure of a business is good overall. In Sharapan the Court states, "assuming that all other economic conditions remain constant, the failure or loss, while presumably producing hardship for some of those closely connected with the business, might well produce corresponding benefits for existing or potential competitors and for those closely connected with those enterprises." It can only be assumed that the Government now seeks for this Court to determine that business failures are okay because they result in increased benefit and profits for the competitors of the existing businesses and that the court should overlook the hardship to those people who rely on the failed business to support their families. Given that philosophy all small business people might as well surrender and go to work for Walmart. Gone then is the system of free enterprise in the United States which fosters the growth of small business and American pride.

It is conceded that if the only way a business can survive is by colluding with its competition that perhaps something is wrong. The concept is forwarded though that the answer is not in closing the business by judicial mandate, but instead by balancing in some manner the

competitive edge enjoyed by large corporations. In this case the Court is not forced to decide that mandate, but instead has the alternative to depart downward in the sentencing of Kent Stewart in such a manner as to allow his business and his employees livelihood to survive while appropriately punishing a good person for admittedly doing a bad thing.

In the 8th Circuit cases cited by the Government for not allowing a downward departure the overriding theme seems to be that not enough evidence was presented as to the demise of the business if its principal was incarcerated and further that the mere good deeds of people do not excuse their bad conduct. Kent Stewart has made no claim of being an extraordinary benefactor to society, but instead only that he has been an honest and hardworking man, leading a reasonably lifestyle, benevolent to his employees, and well respected by his customers and competitors. Perhaps in today's society those factors in and of themselves are extraordinary.

VI. IS KENT STEWART ENTITLED TO VARIOUS DEPARTURES CLAIMED IN HIS MOTION AND OBJECTIONS PURSUANT TO U.S.S.G. SECTION 5K2.0 ET SEC?

Admittedly Kent Stewart agreed in his plea agreement that there were no circumstances justifying a departure pursuant to U.S.S.G. section 5K2.0. He agreed based on the fact that the sentence as structured recommended to the Court a reasonable fine and a reasonable term of imprisonment with the opportunity to argue for probation or alternatives to incarceration given that he had no previous criminal record. The balance of his argument is presented in the Sentencing Memorandum speaks for itself despite the unwarranted attack of the Government.

The Government now alleges that it was Stewart himself who initiated the anti competitive communication with VandeBrake. That is true only to the extent of one project (the Milford Fire Station) which was not based on a motive of profit, but instead as compensation for services previously performed on behalf of VandeBrake's company. The Government is hard

pressed to now claim that Stewart is the instigator of any conspiracies when it is shown by the Trial Information filed against Steve VandeBrake that VandeBrake initiated at least two other conspiracies and in a hearing before this court agreed on May 26, 2010, the Government attorneys, themselves officers of the court, agreed with presiding Judge Bennett that VandeBrake was the instigator of the conspiracies (See Transcript of Status Conference, Page 23-24, lines 13-25 and 1-6).

VII. IS THE COURT BOUND BY THE PLEA AGREEMENT STIPULATION REGARDING THE VOLUME OF COMMERCE?

No, the Court is not bound by this Stipulation as it is not bound by anything in the Plea Agreement. It is pointed out to the court that the parties stipulated to the volume of commerce as being less than $1,000,000 with no undue influence applied by either party and in fact without any negotiation. The Government inserted this stipulation as part of a prepared plea agreement and certainly was aware, or should have been aware, from its investigation of the volume of commerce involved and should now be held to its agreement.

VIII. IS KENT STEWART ENTITLED TO A THREE LEVEL DEPARTURE FOR COOPERATION?

The case law suggests that the motion for a three level departure pursuant to U.S.S.G. section 5K1.1 is one to be made by the Government. The assertion is that under a standard of good faith and fair dealing the Government should make this motion as Kent Stewart has fully rendered all of the cooperation required and requested by the Government including admitting to violations that the Government was not even aware of.

IX. IS THE DEFENDANT ENTITLED TO A TWO LEVEL ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILTY?

Again, as previously argued the Defendant has accepted responsibility from day one of this investigation. He allowed an interview in his home without the benefit of counsel, complied

with the Government's request to place a phone call to a co-conspirator and reported back on the response, admitted to the projects in which his company was involved bid rigging and was the successful bidder, or unsuccessful bidder, and despite the Government's assertion that he seeks to "justify" his actions he specifically advised this court in his Sentencing Memorandum that he does not seek to justify or excuse actions, but merely to explain them. He has acknowledged that he engaged in wrong doing and is prepared to accept a just punishment. However, as cited in the Sentencing Memorandum just punishment does not mean that the court is required to leave compassion and common sense at the door to the courtroom in sentencing. The court has been given the authority to depart when such a departure provides a sensible flexibility to ensure that the atypical case is not shoe horned into a guideline range that is formulated for only typical cases. In accepting his responsibility the Defendant does not in any way mean to express or imply to the court that his transgressions were insignificant, but certainly the court can see that the magnitude of the transgressions is nowhere near the typical case of antitrust either in volume, in commerce, extensive geographic territory effective or magnitude of the public affected.

The Government argues that this is not an atypical case of antitrust, but instead falls within the "heartland" anticipated by the advisory United States Sentencing Guidelines. It is difficult to believe, and certainly not found within the case law, another case where a large multinational corporation managed by an independently wealthy manager sought to conspire with a small local company to rig bids. The concept is something of an oxymoron. Consider further that if the advisory sentencing guidelines are applied as written Stewart is imprisoned and faces financial ruin personally and corporately for his transgression while on the other hand VandeBrake as an individual returns to his life of affluence. Consider further that with regard to his employer, GCC, it faces a fine under U.S.S.G. § 8C2.4(d) at Level 17 of $250,000 which

simply become a line item expense on the annual financial statement of a multibillion dollar corporation and it rights it off as just another expense of doing business. Certainly the advisory guidelines did not anticipate such an inequity.

X. BUT FOR KENT STEWART'S ACCEPTANCE OF RESPONSBILITY COULD THE GOVERNMENT COULD HAVE PROVED ITS CASE?

A Defendant gives up his 6th Amendment Rights hopefully only after consultation with competent counsel and careful deliberation of the burden that the prosecution must meet in proving the offense beyond reasonable doubt. Some Defendants probably look at that decision as making a determination as to whether they can "get away with it". That was not Kent Stewart's decision. He was advised by counsel that the evidence against him may only be the statements of co-conspirators which may not be admissible and that the credibility of other witnesses may very well be called into question. Despite those considerations he voluntarily elected to accept responsibility for his actions and to cooperate fully with the Government. In the ensuing year he has run his business, tended to his family, and lived his life with a great uncertainty as to his future. It's difficult to imagine the mental and physical punishment that must place on an otherwise honest and hardworking person.

The Government also suggests at page 17 of its Sentencing Memorandum that Steve VandeBrake has told others that he either owned or controlled his father's shares of stock in Great Lakes Concrete. That is certainly shocking news to Kent Stewart and to the company's accountant. Evidence will be presented as to the company's tax returns and to the K-1 documents issued to each individual shareholder. VandeBrake's statements do not provide a basis for the Government to assert that Stewart and VandeBrake had an interest in promoting Great Lakes Concrete for their mutual benefit, but instead proof that VandeBrake is an unreliable and untrustworthy witness without credibility and whose statements can't be believed. The

Government's unsupported theory that Stewart and VandeBrake had a common interest in promoting the profits of Great Lakes Concrete certainly fails to explain why VandeBrake engaged in long running conspiracies with two other competitors where there has been no evidence or suggestion that he stood to profit personally from those conspiracies. The testimony of Ryan Lake and Lee in various interviews state to the contrary that Steve VandeBrake and Kent Stewart didn't even get along nor did Stewart and VandeBrake's father the interviews of Lee make the same allegations. It is not the right of Kent Stewart to suggest the punishment that Steve VandeBrake, but certainly VandeBrake's lies and self serving statements at least border on obstruction of justice and possibly fraud towards the other shareholders of Great Lakes Concrete.

SUMMARY

Simply the Court finds before it a 50 year old man who has run small business to the best of his ability, raised a family, treated his employees fairly, and enjoyed a good reputation amongst his competitors and customers. This good man has made a bad decision for which the court now has to punish him. He certainly isn't the king pin in a major racketeering operation nor a high placed white collar executive with motives of greed or personal wealth. He certainly doesn't consider any fines, incarceration, or civil liability to be merely a "cost of doing business".

When all of the case law has been analyzed and all of the testimony heard the court will see before it an honest person whose made one mistake and has already punished himself for that mistake. Respectfully it is prayed that the Court show leniency in deciding just punishment in accordance with the discretion given it by the United States Supreme Court and in the Court's own good conscious.

Dated this 1st day of Dec, 2010.

Respectfully submitted,

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Attorney for Kent Robert Stewart

CERTFICATE OF SERVICE

I hereby certify that on Dec 1, 2010, a copy of the foregoing document was filed electronically in accordance with the instructions provided. Notice of this filing will be sent to the counsel of, the U.S. Probation Office, and Presiding Judge by operation of the Court's electronic filing system.

Larry Stoller

Exhibit A to Steward Brief 10-4028

Great Lakes Concrete, Inc.

Spencer Ready Mix
PO Box 219
Spencer, IA 51301
712-262-5690

Northwest Ready Mix
6340 180th Street
Ocheyedan, IA 51354
712-758-3729
Milford, IA 51338
712-338-2404

Spirit Lake Ready Mix
PO Box F
Spirit Lake, IA 51360
712-336-2142

Estherville Ready Mix
PO Box 343
Estherville, IA 51334
712-362-3531

STANDARD QUOTE AND CONTRACT FORM

CONTRACT SUBMITTED TO:
All Bidders

PROJECT:
City of Milford
New Fire Station

Ready Mix Concrete:

4000#		3500#
$ 96.00	Concrete	$94.00
(3.00)	Discount	(3.00)
$ 93.00	Net	$91.00

Note:
Add $4.00 per cubic yard for 2010 price increase.
Add $4.00 per cubic yard for a no ash mix.
Add $4.00 per cubic yard for limestone.
Add $7.00 per cubic yard for fibermesh.
Add $7.00 per cubic yard for NCA.
Add $6.50 per cubic yard for superplastizer.
Add $8.00 per cubic yard for hot water.

Terms:

Prices includes delivery. Payment is due on the 10th of the month following delivery. Prices good through 12/31/10.

02/10/09
Great Lakes Concrete Inc.

By _____

ACCEPTANCE OF CONTRACT

The above prices, specifications, and terms are satisfactory and are hereby accepted. You are authorized to do the work as specified.

Date _____ By _____