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

RESPONSE TO DEFENDANT KENT ROBERT STEWART'S SENTENCING MEMORANDUM AND BRIEF IN SUPPORT OF MOTION FOR DOWNWARD DEPARTURE OR VARIANCE FROM SENTENCING GUIDELINES

The United States hereby submits its Response to Defendant Kent Robert Stewart's Sentencing Memorandum and Brief in Support of Motion for Downward Departure or Variance from Sentencing Guidelines (Stewart Doc. 39, hereinafter "Memorandum").

I. INTRODUCTION

The government's Response addresses the following issues raised in Defendant Stewart's Memorandum:

A. Whether a regional conspiracy should be treated more leniently than an international cartel.

B. Whether Relevant Conduct can be considered under a preponderance of the evidence standard.

C. Whether Defendant Stewart was the initiator of the conspiracy involving him and Defendant Steven Keith Vandebrake.

D. Whether the Court should follow the Second Circuit decision in *United States v. Milikowsky* and impose a departure based on collateral consequences relating to Defendant Stewart's business.

II. ARGUMENT

A. This conspiracy should not be treated with additional leniency.

Defendant Stewart argues in his Memorandum that a downward departure is appropriate in his case because, rather than participating in an international cartel, he participated only in a conspiracy "isolated to Northwest Iowa—an area with a *small population* and a relatively *small volume of commerce*." (Memorandum at 27 (emphasis added).) The antitrust laws are designed to protect free markets, whether large or small, from conspiracies that "are so plainly anticompetitive that they are illegal per se, i.e., without any inquiry in individual cases as to their actual competitive effect." (*See* U.S.S.G. § 2R1.1 cmt. (backg'd) (emphasis in original).)[1] Accordingly, the government disagrees with Stewart's departure argument and the two bases cited to distinguish this conspiracy from international cartels.

First, to the extent that Stewart is asking the Court to apply a special departure for conspiracies that are "isolated" to regions "with a small population," the government strongly disagrees with the premise that antitrust conspiracies affecting small markets are entitled to less

[1] In his Memorandum, Defendant Stewart also questions whether free enterprise exists. (Memorandum at 29.) The government believes that, under the relevant law (holding that bid-rigging and price-fixing are illegal *per se*), this dispute is outside the scope of issues to be decided at sentencing.

punishment than conspiracies affecting larger markets. Rather, one could argue that conspiracies targeting smaller markets may be more—not less—pernicious. Because such areas are less populated, there often are fewer options for customers who wish to purchase certain goods, such as concrete, that are critical to homes, farms, and businesses. Conspiracies designed to eliminate the already limited competition in these areas prey on their customers' lack of available options—in other words, they prey on the vulnerabilities of small markets. The government believes that small markets are entitled to no less protection than large markets, and asks the Court to categorically reject Stewart's attempt to use Northwest Iowa as a mitigating factor to his culpability.

Second, the Guidelines already take into account differences between conspiracies involving large volumes of commerce—such as international cartels—and those involving smaller volumes of commerce. As the Court knows, the punishment imposed by U.S.S.G. § 2R1.1 is calibrated to the volume of commerce affected by the crime. As a result, conspiracies involving large amounts of commerce almost always result in higher Offense Levels for their participants, with the punishment apportioned based on the commerce attributable to each defendant. (*See* U.S.S.G. § 2R1.1(b)((2).) Accordingly, the "small volume of commerce" (relative to international cartels) involved in Stewart's crime is already taken into account; there is no need for a special departure.

B. Under binding Eighth Circuit law, this Court is permitted to review and account for Relevant Conduct under a preponderance of the evidence standard.

Defendant Stewart argues in his Memorandum that, by presenting evidence of (1) additional bids rigged pursuant to his conspiracy with Defendant VandeBrake and (2) uncharged price-fixing conduct discovered after his guilty plea, the government "seeks to circumvent its

burden to prove the allegations beyond a reasonable doubt. . . ." (Memorandum at 49-50.) This argument is in contravention of federal sentencing law, which permits consideration of a broad range of acts (including relevant uncharged conduct) under a preponderance of the evidence standard. (*See* U.S.S.G. § 1B1.3(a)(2) (requiring consideration, in applying the Guidelines, of "all acts and omissions. . . that were part of the same course of conduct or common scheme or plan as the offense of conviction"); § 1B1.3 cmt. 9 (explaining the meanings of "same course of conduct" and "common scheme or plan"); *see also United States v. Miell*, No. CR 07-101-MWB, 2010 U.S. Dist. LEXIS 101986 at *4 - *10 (N.D. Iowa Sept. 27, 2010) (discussing and applying law concerning information to be considered at sentencing and the standard of proof applicable to such information).)

To be clear, Stewart was charged with (and pleaded guilty to) an antitrust conspiracy effectuated through the rigging of bids; he was not charged with price-fixing relating to price sheets. Consequently, while additional projects affected by the bid-rigging scheme are included within the offense of conviction, the conduct relating to price sheets is uncharged conduct that was part of the same course of conduct or common scheme or plan as the offense of conviction. This distinction does not result in a practical difference, however; as set forth above, both types of conduct can be considered in determining the defendant's sentence. (*See* U.S.S.G. § 1B1.3.)

C. Defendant Stewart was the initiator of the conspiracy between him and Defendant Vandebrake.

Defendant Stewart claims in his Memorandum that "it is agreed that the Defendant VandeBrake was the instigator and creator of the scheme. . . and no such scheme was ever initiated by Kent Stewart." (Memorandum at 33.) This contention flies in the face of the evidence in this case. The evidence will show that in an interview with federal investigators, Stewart admitted that (1) in 2007 he initially reached out to Norlyn VandeBrake (a co-owner of

Company C and Defendant VandeBrake's father) to tell him to keep Defendant VandeBrake out of Company C's area, and, (2) when Norlyn VandeBrake reacted negatively to this proposal, at least one month later Stewart met directly with Defendant VandeBrake to discuss having their companies stay within their own areas.

In a later interview, Defendant Stewart continued to admit the discussion with Norlyn VandeBrake but claimed to no longer recall the subsequent meeting in 2007 with Defendant VandeBrake. (Government Exhibit C, Transcript of Defendant Stewart Interview, Sept. 8, 2010, at 5-11.) In this interview, Stewart claimed that the initial communications with VandeBrake transpired in early 2009. (*Id.* at 13.) However, even under his more limited recollection at this interview, Defendant Stewart nevertheless stated that it was he who first reached out to Defendant VandeBrake to rig bids. (*Id.* at 13, 15.) Accordingly, because of his own prior admissions, the government respectfully disagrees with Stewart's contention that he did not initiate the scheme. Indeed, this contention is further evidence that Stewart may not have accepted responsibility for his actions.

D. The Court should not impose a downward departure based on collateral consequences relating to Defendant Stewart's business.

Defendant Stewart argues in his Memorandum that this Court should follow *United States v. Milikowsky*, 65 F.3d 4 (2d Cir. 1995), and sentence him to probation based on the collateral effects that imprisonment would cause to his business. (Memorandum at 45-46.) As set forth in Section II.E.2. of the government's Sentencing Memorandum (Stewart Doc. 38), this argument is inconsistent with Eighth Circuit law on this issue. *See United States v. Morken*, 133 F.3d 628, 630 (8th Cir. 1998); *United States v. Pool*, 474 F.3d 1127, 1129 (8th Cir. 2007). Moreover, other Circuits have rejected this argument. *See United States v. Lawrence*, Nos. 97-4006, 97-4007, 1997 U.S. App. LEXIS 23849 at *8 - *9 & note 2 (4th Cir. Sept. 11, 1997)

(rejecting departure based on collateral effects on business, and noting that the Third and Sixth Circuits also have done the same).

In addition, Stewart fails to point out that, at the time of *Milikowsky*'s sentencing, the statutory maximum for a Sherman Act Offense was three (rather than ten) years, and the applicable Guidelines offense level was also lower. *See* 15 U.S.C. § 1 (amended June 22, 2004 raising statutory maximum term of imprisonment from three to ten years); *compare Milikowsky*, 65 F.3d at 6 (applying base offense level of nine based on then-existing Guidelines) *with* U.S.S.G. § 2R1.1 (setting forth base offense level of twelve). In short, fifteen years ago antitrust crimes were punished less severely then they are today, and sentences not involving incarceration were far more common. (*See* Criminal Enforcement Fine and Jail Charts 2000 – 2010, available at http://www.justice.gov/atr/public/criminal/264101.html (showing the average prison time imposed in Antitrust Division[2] cases to be 30 months in 2010, while the average was 8 months in the 1990s; also showing that 78% of defendants were sentenced to imprisonment in 2010, while only 37% were sentenced to imprisonment in the 1990s).) Since the 1990s, Congress has raised the statutory maximum applicable to antitrust offenses; likewise, the Sentencing Commission has raised the Guidelines offense level for such offenses. Accordingly, the outdated legal authority that Stewart proffers serves as a poor guide to determining a sentence under the laws as they exist today.

III. CONCLUSION

As set forth in the government's Sentencing Memorandum, the government strongly believes that imprisonment is warranted in this case; however, the government otherwise defers to the Court's determination of the appropriate term of imprisonment.

[2] Note that, while the Antitrust Division prosecutes primarily Sherman Act cases, the Division also prosecutes some Title 18 cases. The referenced sentences include both Sherman Act and Title 18 cases.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 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: December 1, 2010 at Chicago, IL

/s/
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