IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. CR10-4025-MWB
	)	
vs.	)	SENTENCING MEMORANDUM
	)	
STEVEN KEITH VANDEBRAKE,	)	
	)	
Defendant.	)	

Defendant Steven Keith VandeBrake ("VandeBrake"), by counsel, submits his Sentencing Brief in response to the Court's October 21, 2010, (a copy of which is attached hereto with a name redacted for privacy purposes) letter sent to counsel for VandeBrake, the Government, and counsel for Kent Robert Stewart in the matter of *United States v. Kent Robert Stewart*, No. CR10-4028.

In its letter, the Court informed counsel for Mr. VandeBrake, Mr. Stewart and the United States that it is contemplating a substantial upward variance from the sentencing range indicated by the United States Sentencing Guidelines. The Court's letter stated four particular provisions within the Guidelines that, at this preliminary stage, it is reluctant to apply due to policy-based concerns. The Court's letter also identified seven factors which, at this preliminary time, it is considering as bases under 18 U.S.C. § 3553(a) for an upward variance.

Mr. VandeBrake would respectfully requests that the Court reconsider its tentative position that an upward variance is appropriate. Mr. VandeBrake submits that the agreement he has reached with the Government reflects the careful consideration of all pertinent circumstances by both the prosecution and the defense and should be given substantial weight. Mr. VandeBrake also respectfully disagrees with the Court's tentative position on the four Guidelines

provisions and the seven factors considered under § 3553(a). Mr. VandeBrake believes the policy concerns expressed by the Court are inconsistent with the empirical analysis conducted by the United States Sentencing Commission. Mr. VandeBrake also believes the Court's concerns are not grounded in independent analysis. For these reasons, the Court's concerns may not be entitled to the same degree of deferential review commonly applied to variances based on the particular case facts or conduct of the defendant.

I. The Sentence Recommended In The Plea Agreement Is Based Upon The Careful Analysis Of The Justice Department And Mr. VandeBrake, It Is Reasonable Under All The Circumstances.

- The recommended sentence is the result of substantial discussions and negotiations with the U.S. Department of Justice Antitrust Division beginning in August of 2009 through August of 2010.
- The recommended sentence is reasonable according to the Department of Justice which should be aware of sentences imposed in similar cases across the United States.
- The recommended sentence is reasonable to defense counsel who has particular knowledge of the circumstances of the offense and the history and characteristics of Mr. VandeBrake.
- The recommended sentence is sufficient to promote respect for the law and deterrence within the Northern District of Iowa.

II. The Court's Tentative Conclusions Regarding The Guidelines Provisions And The Sentencing Factors Should Be Reconsidered In Light Of Supreme Court Guidance.

The Supreme Court, in 2007, issued a trilogy of post-*Booker* sentencing cases. Those cases are best known for establishing the District Court's broad power under § 3553(a) to issue outside-Guidelines sentences. *Rita v. United States*, 551 U.S. 338 (2007), (outside-Guidelines sentences may not be presumed to be unreasonable); *Gall v. United States*, 552 U.S. 38 (2007) (District Court sentencing decisions, even those that vary substantially from the Guidelines range, are subject to review on a highly deferential basis); *Kimbrough v. United States*, 552 U.S. 85 (2007) (District Courts may vary from the Guidelines based on policy disagreements). These

cases also address the District Courts' appropriate use of the Guidelines in sentencing decisions. At least to the extent the Guidelines are based on empirical research, they provide a principled basis for sentencing decisions. This is particularly so in the ordinary, typical or "mine-run" case. Mr. VandeBrake submits that the Guidelines relevant here are based on empirical research and the circumstances of the case are not out of the ordinary for antitrust actions. The Guidelines appropriately should be followed and VandeBrake would respectfully ask the Court to reconsider any variance.

A. The Supreme Court Guidance Regarding Proper Use Of The Guidelines.

Rita described the intended convergence of Guidelines sentences with a sentence based on §3553(a) factors. Through §3553(a), Congress instructed the District Courts to consider specific factors in determining a "sufficient" sentence. Through the Sentencing Reform Act of 1984, Congress directed the Sentencing Commission to consider the §3553(a) factors in the Guidelines. "The upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic 3553(a) objectives." 551 U.S. at 348. Accordingly, a Guidelines sentence "usually will be reasonable". 551 U.S. at 351.

Rita also emphasized the method used by the Sentencing Commission to identify reasonable sentences. The Guidelines are based on empirical research.[1] The Commission studied tens of thousands of sentencing decisions and consulted with law enforcement experts. 551 U.S. at 351. The empirical research results in sentencing ranges that the Sentencing Commission believed to be appropriate for typical cases. See, USSG, Ch. 1, Part A, § 4(b) (Departures). *Gall* emphasized the particular information that District Judges bring to sentencing decisions while noting that their power is not plenary. The District Judge "sees and hears the

[1] There are exceptions to the research-based model for Guidelines provisions. Some are addressed below at notes 3 and 5.

evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record". 552 U.S. at 51. (citations omitted).[2] The District Court knows the "individual case and the individual defendant", 552 U.S. at 51, whereas the Sentencing Commission focuses on common characteristics within the broadest array of cases. If the District Court decides, based on its particular knowledge, to impose an outside-Guidelines sentence, it must articulate "sufficiently compelling" reasons. 552 U.S. at 50. "[A] major departure should be supported by a more significant justification than a minor one." *Id.*

Kimbrough identified the "important institutional role" of the Sentencing Commission. 552 U.S. at 108. It provides research-based analysis, a nationwide view and specific professional expertise. This is a "capacity courts lack". 552 U.S. at 108-09.[3] The Court intimated that the Sentencing Commission's special expertise should hold a prominent place in sentencing analysis. "Closer review [of sentencing decisions] may be in order when the sentencing judge varies from

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[2] The Court referred the parties to its recent opinion in *United States v. Meill*, 2010 WL 3853155 (N.D. Ia. September 27, 2010). The upward adjustments in *Meill* were based on the Court's deep familiarity with the case facts, including the Court's personal observation of the defendant's conduct. Indeed, more than 20 pages of the opinion recount, in detail, Mr. Meill's conduct, including conduct before the District Court. The upward adjustments, therefore, were based on the "institutional advantage" District Courts hold in making sentencing decisions based on the individual case and defendant. *Rita*, 552 U.S. at 51, quoting *Koon v. United States*, 518 U.S. 81, 98 (1996). Other sentencing opinions from this Court and its sister division similarly focus on facts of the case and the defendant as the basis for an upward or downward variance. *See United States v. Kruse*, 618 F.Supp.2d 981 (N.D. Ia. 2009); *United States v. Waldner*, 564 F.Supp.2d 911 (N.D. Ia. 2008); *United States v. Bradford*, 461 F.Supp.2d 904 (N.D. Ia. 2006); *United States v. Nielsen*, 427 F.Supp.2d 872 (N.D. Ia. 2006).

[3] The explicit holding in *Kimbrough* makes the corollary of this point. The Guideline at issue in *Kimbrough* was not entitled to any special consideration because it was not based on empirical research. Instead, it was based upon a Congressional conclusion that crack cocaine presented health and general societal concerns dramatically more significant than those associated with powder cocaine. The Sentencing Commission disagreed with the Congressional conclusions but persisted with a disparate Guideline for crack cocaine. 552 U.S. at 97-100, 109-110. *See also United States v. Grober*, 2010 WL 4188237 *8-*11 (3rd Cir. October 26, 2010) (sentence was reasonable in its disagreement with the Guidelines where the Sentencing Commission had not conducted research and where independent scholarly research revealed serious flaws in the Guidelines assumptions).

the Guidelines based solely on the Judge's view that the Guidelines range fails properly to reflect §3553(a) considerations even in a mine-run case." 552 U.S. at 109 (internal quotations omitted).

The Supreme Court's guidance instructs District Courts that, in the ordinary case, the Guidelines range should reflect the sentence determined from consideration of the §3553(a) factors. Of course, the District Court may vary from the Guidelines range based on policy disagreements with the Sentencing Commission findings. The District Court holds this power even when the applicable Guideline is based on empirical research. But the District Court's power is subject to limits. "Closer review" is appropriate when a variance based on a policy disagreement is issued in a mine-run case. "Closer review" also is appropriate if the variance reflects only the "Judge's view". The District Court's variance is more likely to be respected if it is supported by independent analysis. Finally, the greater the variance, the greater the justification necessary to support it.

B. The Circuit Court of Appeals Guidance Regarding Proper Use Of The Guidelines.

Subsequent to *Kimbrough*, the Second Circuit *en banc*, addressed the justification sufficient to support a variance based on a District Court's policy disagreement with the Guidelines. *United States v. Cavera*, 550 F.3d 180 (2nd Cir. *en banc* 2008). *Cavera* involved a firearms trafficking offense. The defendant was a Florida-based supplier who entered a conspiracy through which guns were illegally sold into New York. The district judge felt that the Guidelines underestimated the seriousness of the offense. New York had stringent laws regarding gun sales. Those laws made the cost of gun ownership in New York substantially higher than in most other jurisdictions. The higher costs provided opportunities for out-of-state traffickers to make extraordinary profits by selling guns destined for New York. Traffickers thereby were encouraged to make illegal gun sales in New York. 550 F.3d at 185-86. There was

"considerable support" for this conclusion, including scholarly articles and a text by Judge Posner. 550 F.3d at 196. The District Court relied on the research in finding that an outside-Guidelines sentence would aid in deterrence of illegal gun trafficking in New York. 550 F.3d at 186.

The *en banc* Circuit Court affirmed. The Circuit Court explained that a variance based on "local mores or feelings about a particular type of crime" would be improper. 550 F.3d at 195. But the District Court's analysis was different as it was based on independent research supporting its conclusion that the Guidelines did not provide a "sufficient" sentence. 550 F.3d at 196. *Cavera* demonstrates the significance of analysis that is independent of the District Court's personal viewpoint in policy-based variance decisions.

Counsel has not located an Eighth Circuit decision that identifies specific circumstances necessary to support a variance based upon a District Court's policy disagreement with a Guidelines provision.[4] Eighth Circuit cases do, however, make a different point that is meaningful to this Court's sentencing analysis. Notwithstanding the post-*Booker* changes in the law, District Courts may consider departure precedents, including the Guidelines themselves, as persuasive authority when considering a variance. *United States v. Johnson*, 619 F.3d 910, 922 (8th Cir. 2010) citing *Chase*, 560 F.3d at 832. Under the prior law (which this Court may consider persuasive authority), "departures" should be granted only if the case is "exceptional" and the circumstance relied on for the departure was not considered by the Sentencing Commission. *United States v. Reinke*, 283 F.3d 918, 923 (8th Cir. 2002); *See also*, 5K2.0(3) (Policy Statement). Under the prior law, this case would not be eligible for a "departure"

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[4] Eighth Circuit cases, of course, apply the general Supreme Court guidance discussed above regarding use of the Guidelines. *See e.g. United States v. Anderson*, 618 F.3d 873, 882-83 (8th Cir. 2010); *United States v. Chase*, 560 F.3d 828, 830 (8th Cir. 2009).

because it is not "exceptional" and because each of the policy reasons identified by the District Court for a possible variance was considered by the Sentencing Commission and included within the Antitrust Guidelines.

C. The Court Should Reconsider Its Tentative Conclusions Of Policy Disagreements With The Applicable Sentencing Guidelines.

Mr. VandeBrake demonstrates below that the applicable Guidelines are based on empirical research. Mr. VandeBrake believes that, by contrast, the Court's viewpoints are not based on empirical research. Also, the case against Mr. VandeBrake is an ordinary antitrust case. For these reasons, the Guidelines deserve special respect. Also below, Mr. VandeBrake evaluates the reasons stated by the Court for the possible variance. Mr. VandeBrake comments on the Court's viewpoint and notes how the viewpoint stands in contrast to the Guidelines precedents. Mr. VandeBrake respectfully requests that the Court reconsider its tentative conclusions for all these reasons.

1. The Antitrust Guidelines Are Based On Empirical Research And The Case Against Mr. VandeBrake Is A Mine-Run Antitrust Case.

The Antitrust Guidelines are based on empirical research by the Sentencing Commission and the research has consistently been refined. The empirical basis and the consistent refinements are demonstrated by the amendments to USSG 2R1.1. Amendments were issued in 1989, 1991, 2003, 2004 and 2005. *See* USSG § 2R1.1 (Historical Note). Amendments 377 and 678 revised the volume of commerce table of USSG § 2R1.1(b)(2) so as to increase the offense levels.[5] Amendments 377 and 678, respectively, also shifted and refined the Guidelines position regarding role in the offense adjustments. Further, Amendment 678 discussed similarities in the

[5] The revisions in Amendment 678 to the volume of commerce table may have resulted from Congressional direction rather than empirical research by the Sentencing Commission. *See* 150 Cong.Rec. H3654-01 (Stmt. regarding § 215) of the Anti-trust Criminal Penalties Enforcement and Reform Act of 2004.

Guidelines for antitrust offenses and certain frauds. Amendment 422 simplified calculation of organizational fines and added special provisions for organizational fines in bid-rigging cases. Amendment 422 also presented a revised background statement that discussed the Antitrust Division's Amnesty program.

This case, as it relates to Mr. VandeBrake, is a "mine-run" or ordinary antitrust case. This conclusion is demonstrated to be accurate because USSG § 2R1.1 takes into account all aspects of his offense, including those aspects on which the Court expresses reservations. The "offense of conviction" is defined as "the offense conduct charged in the count of the indictment or information of which the defendant was convicted." USSG §1B1.2(a). The crimes for which VandeBrake was charged in the information and for which he has pleaded guilty, violations of 15 U.S.C. § 1, references USSG §2R1.1 as the appropriate sentencing guideline. *See* USSG App. A. Although some crimes do not have a specific offense guideline such that the district court is instructed to "apply the most analogous offense guideline", *see* USSG §2X5.1, a violation of antitrust laws is specifically covered by a guideline. *See* USSG §2R1.1. As noted by the Sentencing Commission in USSG §2R1.1, "[t]hese guidelines apply to violations of the antitrust laws." USSG §2R1.1, comment. (backg'd.). Moreover, the Sentencing Commission explicitly provided that the statutory provisions for USSG §2R1.1 are 15 U.S.C. §§ 1, 3(b). USSG §2R1.1, comment. (statutory provisions). The Sentencing Commission has been unambiguous in its contention that USSG §2R1.1 is the guideline to be applied for a violation of 15 U.S.C. § 1. Thus, the Guidelines themselves address the financial damage caused by Mr. VandeBrake's conduct and, therefore, the seriousness of his crime (2R1.1(b)(2)); the effect of Mr. VandeBrake's non-competitive bidding (2R1.1(b)(1)); the effect of Mr. VandeBrake's participation in, and guilty plea to, multiple conspiracies (2R1.1(b)(2)); and the effect of Mr.

VandeBrake's relevant conduct (2R1.1(b)(2)). If this case was not an ordinary antitrust case, it would present circumstances the Sentencing Commission did not anticipate. Since this case is ordinary, the Guidelines sentence should reflect the Court's application of the §3553(a) factors. *Rita*, 551 U.S. at 345.

Of course, as noted earlier, the District Court may vary from the Guidelines range, based on policy disagreements, even in a "mine-run" case. *Kimbrough*, 552 U.S. at 101. But a policy disagreement requires "closer review" if it is not grounded in some independent analysis that takes the case out of the mine-run. *Kimbrough*, 552 U.S. at 109. So far as Mr. VandeBrake is aware, the policy disagreements identified in the Court's letter are not based upon independent analyses.

2. The Court's Tentative Disagreement Regarding The Base Offense Level.

The Court expresses tentative disagreement with the base offense level because antitrust crimes are fundamentally at odds with the free-enterprise system and are more difficult to uncover than other crimes. *October 21 letter* at 2. This basic tenet was also considered by the Sentencing Commission in USSG §2R1.1, "The agreements among competitors covered by this section are almost invariable covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se.*" USSG §2R1.1, comment. (backg'd.). All crimes involving financial deceit are equally at odds with the American economic system's focus on individual initiative. The business owner who understates his tax liability, the environmental manager who by-passes pollution controls to save costs and the investment adviser who sells worthless securities all consciously disregard the free-enterprise system to obtain illegal profit. Law enforcement often learns of all species of crime through a tipster. (Indeed, that is what occurred

in this case.) The Antitrust Division offers a special inducement to encourage tipsters. The Division's well-publicized amnesty program allows the tipster to avoid criminal liability notwithstanding his culpable conduct and to be shielded from substantial civil liabilities. *See* United States Department of Justice, Antitrust Division Manual, Ch. 3 § F9 (Corporate and Individual Leniency ("Amnesty")). The Antitrust Division must believe its Amnesty program is effective as it recently was enhanced. Antitrust Enforcement and Cooperation Incentives, Public Law 108-237, 118 Stat. 666 §§212-231 (June 22, 2004).

The Court compares the Guidelines calculation affecting Mr. VandeBrake with a hypothetical Guidelines calculation under USSG 2B1.1 for a fraud offense. The Sentencing Commission actually has engaged in a similar analysis. Amendment 377 was designed to make the antitrust sentence comparable to the fraud sentence. The Sentencing Commission may have felt the Amendment achieved comparability because, as the volume of commerce increases, the elicit gain that goes into the pocket of the perpetrator may decrease. *See* USSG 2R1.1 App. Note 4. Also related to comparability, the Antitrust Guidelines provide for a fine greater than the maximum fine applicable to the hypothetical Guidelines calculation in the Court's letter. *See* USSG 5E1.2(c)(3).[6] The fraud Guidelines do not reach the same result as the Antitrust Guidelines but the net differences are not as significant as they may appear and there are reasons for the differences.

The comparison of the Antitrust Guidelines with fraud Guidelines is a circumstance taken into consideration by the Sentencing Commission. The Court's comparison does not demonstrate that Mr. VandeBrake's case is exceptional among antitrust cases. Therefore, if the

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[6] The Sentencing Commission considered that fines are important to its goal of deterrence as it wrote that "substantial fines are an essential part of the sentence" in an Antitrust case. USSG 2R1.1 Background.

Court considers the Guidelines Policy Statement as persuasive authority, as allowed by Eighth Circuit law, the Guidelines sentence should be imposed.

3. The Court's Tentative Disagreement Regarding Non-Competitive Bidding.

The Court expresses tentative disagreement with the specific offense characteristic regarding non-competitive bidding particularly if it "took place in three separate conspiracies". *October 21 letter* at 3. Mr. VandeBrake pled guilty to non-competitive bidding in only two conspiracies, so the Court's letter may include an error. Also, the Court's general concern regarding the seriousness of non-competitive bidding was expressly addressed by Specific Offense Characteristic 2R1.1(b)(1). The Sentencing Commission considered bid rigging to be a special type of horizontal price fixing deserving of enhanced punishment and, therefore, the Court's concern may have been adequately taken into account. Therefore, if the Court considers the Guidelines Policy Statement as persuasive authority, the Guidelines sentence, should be imposed.

4. The Court's Tentative Disagreement Regarding Relevant Conduct.

The Court expresses tentative disagreement with the specific offense characteristic regarding volume of commerce based on its difference from USSG 1B1.3 regarding relevant conduct. *October 21 letter* at 4. The Court states that Mr. VandeBrake and Mr. Stewart avoid responsibility on projects "their co-conspirators won". This statement may be in error. To be clear, there is no plea regarding other conspirators in the agreement that involves Mr. VandeBrake and Mr. Stewart. It is true that in connection with their two-person conspiracy, the Guidelines do not assign "relevant conduct" points to Mr. VandeBrake for the bid-rigging jobs obtained by Mr. Stewart. However, the specific offense characteristic regarding bid rigging penalizes Mr. VandeBrake whether he personally profited from the bid rigging or not. At page 5

of Mr. Hammond's statement, he comments on the background commentary to the antitrust guideline. "The antitrust guideline imposes incarceration and significant fines for these offenses with the goal of general deterrence, and the Department supports the approach of §2R1.1 as entirely appropriate." Since the Sentencing Commission explicitly considered the concept of relevant conduct within the Antitrust Guidelines and Mr. VandeBrake's conduct did not present relevant conduct issues to a degree substantially greater than in other antitrust case, the Court may consider the Guidelines Policy Statement as persuasive authority and impose the Guidelines sentence.

5. The Court's Tentative Disagreement Regarding Multiple Counts.

The Court expresses tentative disagreement with the specific offense characteristic regarding volume of commerce based on its difference from USSG §3D1.3(b) which pertains to multiple counts. The Sentencing Commission explicitly considered multiple count convictions by referencing the Antitrust Guidelines in USSG §3D1.2(d). That Guideline demonstrates the common approach of focusing on total harm to establish the penalty rather than on a calculation involving multiple counts. Section §3D1.2(d) lists thirty-five Guidelines that rely on the total harm approach. Clearly, the Commission determined that total harm focuses on the scope of the offense without the obscuring effect that can result from counting repeated conduct as a series of unrelated events. For example, in Mr. VandeBrake's case, the total harm approach takes into account all of his conduct which was essentially one basic scheme, conducted with a few different participants.

The Court also should note that this is a small antitrust case. Even if the volume of commerce allegedly affected by the three conspiracies is added together, Mr. VandeBrake's conduct affects substantially less than $10 million. The volume of commerce table in 2R1.1(b)(2) considers violations with a starting point of up to $1,500,000,000, more than 100

times the volume of commerce at issue in this case. The comments made by Mr. Hammond to the Congressional Committee (attached to the Court's October 21 letter) further demonstrate this is a small case. Mr. Hammond refers to investigations involving affected commerce greater than $1 billion in cases involving international cartels. Since the Sentencing Commission expressly considered multiple counts and Mr. VandeBrake's conduct did not involve violating the antitrust laws to a degree substantially greater than in other antitrust cases, the Court may consider the Guidelines as persuasive authority and impose the Guidelines sentence.

D. The Court Should Reconsider Its Tentative Conclusions Regarding A Variance.

Mr. VandeBrake presents the following comments in response to the Court's statement of seven issues it is considering in connection with a possible variance. *October 21 Letter* at 5. Issues 1 and 2 relate to the length of the conspiracies. Mr. VandeBrake notes that government counsel advised the Court "the conspiracies [presented through Mr. VandeBrake's plea] were short-lived in comparison with other conspiracies that the antitrust division's dealt with." *Transcript of Hearing, May 26, 2010,* p. 10. The Court has noted that Mr. VandeBrake's conduct ended due to information from a tipster. *October 21 Letter* at 5. In Part C 2 above, Mr. VandeBrake described the Antitrust Division's amnesty program which Mr. VandeBrake believes to be the incentive for the tipster in this case.

Issue 3 relates to the methods used by Mr. VandeBrake. He has pled guilty to horizontal price-fixing and bid-rigging. The Guidelines refer to bid-rigging as a form of horizontal price-fixing. USSG §2R1.1 Background. Criminal antitrust cases that involve other than horizontal conduct are rarely prosecuted. *Id.* Accordingly, it appears that the methods of Mr. VandeBrake are not unusual in antitrust cases. The Court also noted in its comparison between VandeBrake's antitrust offense with the Fraud guidelines that when addressing Specific Offense Characteristics,

"the use of sophisticated means enhancement under U.S.S.G. §2B1.1(b)(9) was a stretch, Defendant Vandebrake fixed prices with three competitors in his region. From the prosecutor's offense Conduct Statement, it seems he met with his competitors, compared price lists, and then agreed to higher bids". *October 21 Letter* at 2.

Issue 4 relates to Mr. VandeBrake's role as the instigator and creator of the conspiracy. With all respect, Mr. VandeBrake believes that the Guidelines adjustment for his role in the offense fairly takes into account his role as the instigator. Not to minimize his involvement but to diminish his role as instigator, VandeBrake would point out that in his Objections and Responses to Presentence Investigation Report Filed 08/27/10 at paragraphs 3 and 4 VandeBrake clarifies his discussions with CW-1 and CW-2 by stating that not all conversations would have been initiated by him. It also should be noted that out of approximately 13 to 15 projects that were involved in the Count 1 bid-rigging conspiracy, G.C.C. Alliance would have won only two projects as compared to 11 to 13 projects won by Siouxland Concrete. As it relates to his conduct in Count II, at paragraph 48 of VandeBrake's Presentence Investigation Report, it states that it was Stewart (not defendant) who admitted during his initial proffer that he initiated the anticompetitive communications with VandeBrake when he proposed to the defendant that each company stay within its local territory. As it relates to Count II bid-rigging, out of 18 to 20 projects that were involved only 4 projects were won by GCC Alliance. It was because of this role in the offense that the parties reached an agreement as to a level 3 Role in the Offense pursuant to U.S.S.G. §3B1.1(b).

Issues 5 and 6 deal with restitution. Client has directed that $500,000 be deposited in his counsel's trust account earmarked "restitution funds" to be distributed pursuant to the Court's instructions, to the extent that victims are identified and claims are determined in the civil anti-

trust suit consolidated under No. 5:10-CV-04038-MWB. The issue of restitution has been an ongoing consideration with Defendant VandeBrake but identification of victims and distribution of payments has been problematic since there were no Declaration of Victims Losses submitted by the Probation Office. To the extent public contracts were affected by Mr. VandeBrake's conduct, the State of Iowa may seek damages and has in fact contacted VandeBrakes counsel seeking information regarding the pending civil litigation and has followed up with an Antitrust Civil Investigation Demand.

Issue 7 pertains to USSG §1B1.8. Mr. VandeBrake notes that the Court's calculation of the amount of commerce affected by application of §1B1.8 is less than 7% of the total volume of commerce. *October 21 Letter* at 4 (Table). Moreover, the commerce affected by application USSG §1B1.8 would not affect Mr. VandeBrake's Guidelines score.

E. *United States v. Miell* is distinguishable due to the nature of the crimes committed.

In its letter the Court referenced a white collar fraud case wherein this Court recently issued a sentencing opinion (*i.e.*, *United States v. Miell*, No. CR 07-101-MWB, 2010 WL 3853155 (N.D. Iowa Sept. 27, 2010)). In the interests of making a complete record, VandeBrake takes this opportunity to distinguish *Miell*. As is readily evident, the facts of the two cases are manifestly disparate. The defendant in *Miell* had been convicted of mail fraud, perjury, and filing false tax returns and moved for a downward departure at sentencing. Contrastingly, VandeBrake has been forthright, provided beneficial information and has accepted responsibility for his actions and has pleaded guilty to antitrust violations exclusively and is not requesting a downward departure. VandeBrake merely requests that the Court sentence him within the recommended guideline range.

Consideration of 18 U.S.C.A. § 3553(a) Factors

This Court's sentencing decision should be steered by the Sentencing Reform Act's "overarching provision" that instructs the court to impose a sentence "sufficient, but not greater than necessary, "to fulfill the purposes of sentencing. *Kimbrough, 128 S. St. at 570.* Several of these factors including the need for the sentence imposed have been addressed in this sentencing memorandum and VandeBrake's sentencing PSR, however, VandeBrake would like to comment on the factors dealing with history and characteristics of the defendant.

Defendant Vandebrake has been employed in the family business all of his adult life beginning in 1988 when he started working for Russell's Ready Mix hauling concrete. His grandfather Russell VandeBrake started Russell's Ready Mix in 1954. The Company was passed down to Norlyn VandeBrake, defendant's father and in 1994 the defendant took over the daily operation of the Company. In 2005 the Russell's Ready Mix merged with Joe's Ready Mix and in 2006 the Company became Alliance Concrete Inc. Corn Corner Acquisition, Inc. (later renamed GCC Alliance Concrete, Inc.) purchased the assets of Alliance Concrete, Inc. on January 14, 2008. The defendant no longer has an ownership interest in the company. He was given a position in GCC Alliance Concrete, Inc. as sales manager for the northwest Iowa region. In September of 2009 he resigned his position with the company. The Court can consider the defendant's long work history under 3553(a) factors. The defendant has resided in Orange City, Iowa his entire life except when he resided in Missouri and Arizona while attending college. He has a close relationship with his parents and sister. The defendant has been the sole provider for his family. His wife Mary is a homemaker. He has three daughters ages 7, 10 and 13. He was baptized and is a lifelong member of the First Reformed Church in Orange City. Attached hereto

marked as Exhibit A are 8 letters from family members, friends and his counselor. These people want the court to know that defendant is a hard worker and has always been the sole provider for his wife and children. He is described as a dedicated husband and father and an unselfish and caring individual. He has been married for 16 years and his wife Mary has told the court about his positive attributes. The letter from his counselor Dale Ellens speaks to his acceptance of responsibility and remorse over his criminal conduct.

The Court can also consider the good faith cooperation of defendant in dealing with the Department Of Justice. Defendant believes that the Government will tell the court about his good faith efforts and cooperation. In addition the court should take into consideration how VandeBrake's testimony may impact the courts findings regarding Mr. Stewart's relevant conduct. *October 21 Letter* at 5. The defendant has also directed that $500,000 be deposited in his attorney's trust account earmarked as "restitution funds" to be distributed pursuant to the Court's instructions. Restitution is a factor not only under the U.S. Sentencing Guidelines but it is also a factor under 18 U.S.C. § 3553(a)(7). The defendant has not only shown remorse but has taken full responsibility for his wrong doing.

III. Conclusion

Wherefore, VandeBrake respectfully requests that the Court consider these points and reconsider its tentative conclusion to vary from the Guidelines sentence and sentence VandeBrake pursuant to USSG §2R1.1 in accord with the recommendations made by the Government and VandeBrake in the Federal Rule of Criminal Procedure 11(c)(1)(B) plea agreement. Additionally, VandeBrake respectfully requests that the Court not deviate upward from the recommended sentence.

Respectfully submitted,
/s/ Francis L. Goodwin

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CERTIFICATE OF SERVICE

*

The undersigned hereby certifies that on the 24th day of November, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to counsel of record by operation of the Court's electronic filing system and by email.

/s/Francis L. Goodwin
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"The arc of the moral universe is long but it bends towards justice"

- MLK, Jr.

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RE: Sentencings in *United States v. Steven Keith Vandebrake* (10cr4025) & *United States v. Kent Robert Stewart* (10cr4028)

Dear Counsel:

I begin by noting that, under well-established, prevailing law in this circuit, I am not required to give notice pursuant to Rule 32(h) of the Federal Rules of Criminal Procedure of my intent to consider an upward variance. *See United States v. Foy*, ---F.3d---, 2010 WL 3271234, at *3 (8th Cir. August 20, 2010); *United States v. Wiley*, 509 F.3d 474, 476 (8th Cir. 2007); *United States v. Levine*, 477 F.3d 596, 606 (8th Cir. 2007); *United States v. Sitting Bear*, 436 F.3d 929, 932-33 (8th Cir. 2006); *United States v. Long Soldier*, 431 F.3d 1120, 1122 (8th Cir. 2005); *United States v. Egenberger*, 424 F.3d 803, 805 (8th Cir. 2005). Nevertheless, in the interests of justice and fairness, I wanted to alert you to the following.

I am considering the below factors as I study whether or not to vary upward substantially in these cases, possibly up to the statutory maximums for both fine and imprisonment.

Policy disagreements with the following United States Sentencing Guidelines that apply

to this case:

1. The Base Offense Level: § 2R1.1
2. Specific Offense Characteristic: § 2R1.1(b)(1)
3. Specific Offense Characteristic: § 2R1.1(b)(2)
4. The Grouping Guideline: § 3D1.3(b)

I am studying whether the Base Offense Level accurately reflects the seriousness of this crime because it seems to me that this crime goes to the heart of our economic free enterprise system. Also, this crime is much more difficult to discover than other types of fraud like bank, check, or credit card fraud. So, for example, if Vanderbrake's conduct would be analyzed under the Fraud Guidelines his calculations would likely be:

Review of U.S.S.G. §2B1.1 with Vandebrake's Antitrust offense conduct

When I compared Volume of Commerce, as referenced in § 2R1.1, with Loss, as referenced in §2B1.1, I considered Loss equal to ten percent of the affected Volume of Commerce. The ten percent figure comes from U.S.S.G. § 2R1.1, cmt. n.3, and page seven of the Statement of Scott D. Hammond, dated November 3, 2005, attached to this letter.

Base Offense Level: U.S.S.G. § 2B1.1(a)(2) provides a Base Offense Level of six when the statutory maximum term of imprisonment is less than 20 years or more. 6

Specific Offense Characteristic: The Volume of Commerce in this case, as agreed by the parties, is $5,666,439.61. Ten percent of the affected Volume of Commerce in this case is $566,634. U.S.S.G. § 2B1.1(b)(1)(H) directs to apply a 14-level increase when the loss amount is more than $400,000 but less than $1,000,000. +14

Specific Offense Characteristic: U.S.S.G. § 2B1.1(b)(2)(A)(i) directs if the offense involved 10 or more victims, increase by 2 levels. A review of the list of civil cases filed against defendant Vandebrake reflects 13 plaintiffs. There may be more victims not reflected as plaintiffs on the civil docket. +2

Specific Offense Characteristic: The use of a sophisticated means enhancement at U.S.S.G. § 2B1.1(b)(9) is a stretch. Defendant Vandebrake fixed prices with three competitors in his region. From the prosecutor's Offense Conduct Statement, it seems he met with his competitors, compared price lists, and then agreed to higher bids. 0

Victim-Related Adjustments: None 0

Role in the Offense: U.S.S.G. §3B1.1(a) directs that, if the defendant was an

organizer or a leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by four levels. Defendant Vandebrake initiated separate anti-competitive conversations with VanZee of Tri-State and CW-1 and CW-2 of Siouxland regarding the price lists in their companies' overlapping territories. Defendant Vandebrake further directed GCC sales reps, David Bierman, Ryan Lake, and Lee Konz to abide by the price lists agreed to by himself and other concrete companies when dealing with GCC customers. +4

Obstruction of Justice and Related Adjustments: None 0

Adjusted Offense Level (Subtotal): 26

Acceptance of Responsibility: As previously noted, the two-level reduction for Acceptance of Responsibility is recommended. U.S.S.G. § 3E1.1(a). -2

Assuming Mr. Geverola [1]makes the motion, an additional one-level reduction for Acceptance of Responsibility is recommended. U.S.S.G. § 3E1.1(b). -1

Adjusted Offense Level: 23

Chapter Four Enhancements: None 0

Total Offense Level: 23

A Total Offense Level 23 and Criminal History Category I establishes an advisory guidelines range of 46 to 57 months. I have not yet done a similar guidelines calculation for defendant Stewart.

I have tentative, serious reservations whether Specific Offense Characteristic 2R1.1(b)(1) is sufficient to reflect the seriousness of non-competitive bidding and whether this is an even more serious problem where this took place in three separate conspiracies.

I have tentative serious reservations whether Specific Offense Characteristic 2R1.1(b)(2) relating to Volume of Commerce sufficiently reflects the seriousness of the crime due to its special treatment of relevant conduct. This is especially true in light of defendant Vandebrake's starring role in creating the conspiracy.

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[1] Although there are four attorneys listed on the docket on behalf of the United States, I am assuming, in this letter, that Mr. Geverola will be making the arguments at the sentencing hearing on behalf of the prosecution.

Difference between U.S.S.G. § 1B1.3 (relevant conduct) and § 2R1.1.

U.S.S.G. § 2R1.1 has a special instruction at § 2R1.1(b)(2) that trumps relevant conduct as instructed by §1B1.3.

U.S.S.G. § 2R1.1(b)(2) states, "[f]or purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation."

U.S.S.G. § 1B1.3(a)(1)(A)-(B) direct the Court to, ***"unless otherwise specified,"*** apply Chapters 2 and 3 based on "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant;" ***and*** in the case of jointly undertaken criminal activity, "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity."

Because § 2R1.1 otherwise specifies, defendants Vandebrake and Stewart are not held accountable for the total Volume of Commerce attributed to the entire conspiracy. They are only held accountable for the fixed projects each of them won. For example, in Fraud, Drug, Child Porn, and Firearm conspiracies, the defendant would generally be held accountable for the actions of the co-conspirators – for example, the total drug quantity of the conspiracy that was reasonably foreseeable. Here, if not given special treatment by the Guidelines, defendants Vandebrake and Stewart would be held accountable, under relevant conduct, for the Volume of Commerce attributed to the projects each of them won and the Volume of Commerce for projects they agreed to overbid or not bid on, which their co-conspirators won.

Volume of Commerce for Vandebrake:		Volume of Commerce for Stewart:	
Count 1:	$ 591,000	Count 2:	$ 2,454,852
Count 2:	$ 95,000	1B1.8:	$92,946
Count 3:	$ 4,980,349	**TOTAL:**	**$2,557,798**
§ 1B1.8:	$ 425,147		
TOTAL:	**$ 6,091,496**		

The combined affected Volume of Commerce for the conspiracy involving Stewart and Vandebrake is **$ 8,649,294.**

At this time, there is no information available regarding the Volume of Commerce affected by Siouxland Concrete Co. (Count 1) or [redacted] (Count 3). So, the total Volume of Commerce for the entire conspiracy is not known, but it is highly likely that it would exceed $ 10,0000.00

I have tentative, serious reservations whether § 3D1.3(b) gives sufficient weight to the fact that defendant Vandebrake has plead guilty to there separate counts of conspiracy. In my tentative view, Counts 1 and 2 add no incremental punishment – unless, of course, I run the sentences for all three or a combination of the three consecutive.

I am tentatively questioning whether the following factors may/should be used to increase defendant Vandebrake's sentence from the advisory guidelined range pursuant to 18 U.S.C. 3553(a):

(1) The length of the conspiracy
(2) The fact that, but for concerns of one of the co-conspirators, this would have likely continued indefinitely
(3) The number of different means and methods used
(4) Defendant Vandebrake's apparent role as instigator and creator of the scheme as distinguished from his role enhancement
(5) The total lack of voluntary restitution efforts given the defendant Vandebrake's dramatic personal wealth
(6) The impact on the public given that not all the illegal antitrust projects involved the private sector
(7) Whether I should consider the defendant Vandebrake's conduct that has been given § 1B1.8 protection to enhance his sentence – given that thousands of defendants over the last 15 years in our district have been sentenced to thousands of years of additional prison time because they were not given similar protection

Some of the above factors may also apply to Defendant Stewart.

I am also considering the fine range and whether an increase from what the parties have agreed to up to and including the maximum fine would be appropriate and whether the fine should be consecutive on each count.

I will also look carefully at any "mitigating" factors that I find or that the parties would like to argue that are supported by evidence in the sentencing record. I would also look at any "aggravating" factors that the Mr. Geverola believes are supported by the sentencing record. In this regard, it appears I will need to resolve the truthfulness of Mr. Stewart's claims regarding his relevant conduct. Depending on my findings, this could impact defendant s' 3553 (a) factors. For example, if I credit Mr. Vanderbrake's information on Mr. Stewart's relevant conduct, and disbelieve Mr. Stewart's version, that could potentially help defendant Vandebrake and hurt defendant Stewart and vice versa.

If I consider any additional factors to increase the defendants' sentences from the advisory guidelines range, I will try, but do not promise, to give you additional notice. As I understand

the state of the law, as mentioned in the opening paragraph, no notice of an intent to consider an upward variance is required – so my intention is not to create an entitlement simply because I am going above and beyond what the law requires by writing this letter and giving you substantial advance notice and considerable detail.

I recently entered a lengthy opinion in another white-collar fraud case that may be of interest to you. You will find it at *United States v. Miell*, ---F. Supp.2d---, 2010 WL 3853155 (N.D. Iowa Sept. 27, 2010). You will also need to let my Judicial Assistant, Jen, know if we have enough time scheduled to complete the sentencing hearing. It is currently scheduled to run 6 hours with a break for lunch.

Sincerely,

Mark W. Bennett

Mark W. Bennett
U.S. District Court Judge

cc: Shane Moore, USPO

STATEMENT OF SCOTT D. HAMMOND
ON BEHALF OF
THE UNITED STATES DEPARTMENT OF JUSTICE

ANTITRUST MODERNIZATION COMMISSION
HEARINGS ON CRIMINAL REMEDIES

NOVEMBER 3, 2005

I. INTRODUCTION

Thank you for giving the Department of Justice the opportunity to present its views concerning the issues the Antitrust Modernization Commission has identified for study in the area of Criminal Remedies. The detection, prosecution, and deterrence of criminal cartels is the highest priority of the Antitrust Division, and appropriate remedies are vital to achieving this result.

In recent years the Division has placed a particular emphasis on combating international cartels that target U.S. markets because of the breadth and magnitude of harm that they inflict on American businesses and consumers. This enforcement strategy has succeeded in cracking dozens of international cartels, securing convictions and jail sentences against culpable executives, and obtaining record-breaking corporate fines. For example:

- During fiscal years 2001-2005, 81 individuals have served, or are currently serving, prison sentences in cases prosecuted by the Antitrust Division. The 11 longest jail sentences in the Division's history have all been imposed during this time period.
- Since FY 1997, nearly $3 billion in criminal fines have been obtained in Division cases, well over 90 percent of this total were obtained in connection with the prosecution of international cartel activity. In FY 2005, $338 million

in criminal fines were obtained against 13 corporations and 20 individuals.

Given that the criminal remedies topics selected for discussion today all relate to corporate fines, I would like to provide the Commission with a little more background in that area. As I noted, from the beginning of FY 1997 through FY 2005, nearly $3 billion in criminal fines have been obtained in Division cases. This total includes 51 corporate fines of $10 million or more, nine fines of $100 million or more, and one fine of $500 million–the largest criminal fine ever imposed in the United States under any federal criminal statute.

International cartels affect massive volumes of commerce. In some matters which the Division currently has under investigation the volume of commerce affected by the suspected conspiracy is more than $1 billion, and in roughly three-quarters of our international investigations the volume of commerce affected is more than $100 million. Because international cartels affect such a large volume of U.S. commerce and the U.S. Sentencing Guidelines fines are based in large part on the amount of commerce affected by the cartel, fines obtained by the Division have increased dramatically since FY 1997.

In the 10 years prior to FY 1997, the Division obtained, on average, $29 million in criminal fines annually. Between FY 1997 and 2004, the Division obtained more than $204 million, $265 million, $1.1 billion, $150 million,

$280 million, $75 million, $107 million, and $350 million in criminal fines respectively. In the recently concluded FY 2005, the Division obtained more than $338 million in criminal fines, including four corporate fines of $10 million or more.

Approximately 16 months ago, Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("2004 Act").[1] This Act substantially increased the Sherman Act's maximum term of imprisonment and fines. The 2004 Act increased the maximum Sherman Act corporate fine from $10 million to $100 million, the maximum individual fine from $350,000 to $1 million, and the maximum Sherman Act jail term from 3 years to 10 years.

With respect to corporate fines, Congress was reacting to the dramatic increase in fines being obtained by the Division in excess of the then $10 million Sherman Act maximum and the potential that imposing such fines could involve the Division in time- and resource-consuming litigation over gain or loss in order to take advantage of the alternative maximum fine provision in 18 U.S.C. § 3571(d). As the House Judiciary Committee's legislative history of the 2004 Act states, "the increases in the Sherman Act statutory maximum fines are intended to permit courts to impose fines for antitrust violations at current Guidelines levels without the need

[1] Pub. L. No. 108-237, 118 Stat. 665.

to engage in damages litigation during the criminal sentencing process."[2]

The United States Sentencing Commission responded to the 2004 Act earlier this year by revising the antitrust guideline–§2R1.1–to increase terms of imprisonment for antitrust violations while leaving the methodology for calculating corporate fines unchanged, quite appropriately since Congress had just increased the Sherman Act maximum corporate fine tenfold given the substantial fines called for by the existing antitrust guideline.

It is against this background that I would now like to address the specific criminal remedies questions posed by the Commission.

II. DO THE GUIDELINES ADEQUATELY DISTINGUISH THE SEVERITY OF CRIMINAL ANTITRUST VIOLATIONS?

The first discussion topic is whether the Sentencing Guidelines adequately distinguish between antitrust violations with differing degrees of culpability. The Department has always understood that the antitrust guideline applies only to *per se* unlawful, horizontal cartel violations. The antitrust guideline is entitled: "§2R1.1 Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors." The Background Commentary to the antitrust guideline explains that:

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[2] 150 Cong. Rec. H3658 (daily ed. June 2, 2004).

> there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm. There is no consensus, however, about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.
>
> The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to, and serve no purpose other than to, restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal per se.

Per se horizontal cartel violations are intentional crimes committed for profit, with no cognizable social or economic benefits. The antitrust guideline imposes incarceration and significant fines for these offenses with the goal of general deterrence, and the Department supports the approach of §2R1.1 as entirely appropriate.

III. IS VOLUME OF COMMERCE AN APPROPRIATE MEASURE OF HARM?

The next topic raised by the Commission is whether the volume of commerce affected by the violation provides an adequate measure for distinguishing the severity of antitrust offenses. Use of volume of commerce to compute corporate

antitrust fines has been part of the antitrust guideline since its inception in 1987, and the 20-percent proxy found in §2R1.1(d)(1) has been in place since Chapter Eight was adopted in 1991.

For almost two decades there has been unswerving support by the Department of Justice, the U.S. Sentencing Commission, and Congress for substantial corporate antitrust fines based on a company's volume of commerce affected by the violation. There are few issues in the area of antitrust criminal remedies more firmly settled than that volume of commerce is the most appropriate method for distinguishing the severity of criminal antitrust violations.

All corporate fines under the Sentencing Guidelines are calculated according to Chapter Eight. The one way in which the Guidelines calculation of corporate fines for antitrust violations differs from that for other federal crimes is that "20 percent of the volume of affected commerce" is substituted for pecuniary loss caused by the organization when computing the base fine amount.

The reason that the Sentencing Commission chose volume of affected commerce as the measure of economic harm for antitrust offenses is set out in the Commentary and Background to §2R1.1. Since there is relatively little recidivism among corporate antitrust offenders, yet *per se* unlawful activity affecting U.S. commerce persists, the controlling factor underlying the antitrust guideline is

general deterrence. The Commission concluded that punishment for antitrust violations did not need to be based on precise calculations of actual gain or loss. This is because it is difficult and time consuming to establish gain or loss in antitrust cases and because general deterrence does not require an exact correlation between harm and punishment. "The volume of commerce is an acceptable and more readily measurable substitute. The limited empirical data available as to pre-guidelines practice showed that fines increased with the volume of commerce and the term of imprisonment probably did as well."[3]

In 1990, Congress raised the maximum corporate fine for Sherman Act violations tenfold, from $1 million to $10 million, as part of the Antitrust Amendments Act of 1990.[4] Treating the Antitrust Amendments Act as a congressional endorsement of the existing Guidelines methodology for calculating corporate antitrust fines, the Commission determined to continue using volume of commerce to measure economic harm.

The Commission in 1987 estimated average price-fixing overcharges in criminal antitrust violations to be 10 percent of the volume of affected commerce based on empirical data then available. Since fines needed to be higher than

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[3] USSG §2R1.1, comment. (backg'd).

[4] Pub. L. No. 101-588, 104 Stat. 2879.

overcharges to achieve general deterrence, the Commission initially set antitrust corporate fines at 20 to 50 percent of the volume of commerce affected by the violation.

When the Commission moved the calculation of corporate antitrust fines from the antitrust guideline to the new organizational sentencing provisions of Chapter Eight in 1991, it set the base fine amount at 20 percent of the affected volume of commerce, reflecting the fact that losses from antitrust offenses exceed overcharges.[5]

In 2004, Congress again revisited the issue of antitrust criminal penalties, in part in response to the Division's aggressive pursuit of international price-fixing cartels affecting very substantial amounts of U.S. commerce–billions of dollars in some instances. Once again, the response was a tenfold increase in the maximum corporate fine, this time to $100 million, along with an increase in maximum fines for individuals to $1 million and the maximum period of incarceration to 10 years. The House Judiciary Committee's legislative history of the 2004 Act states:

> Congress does not intend for the Commission to revisit the current presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy. The presumption is sufficiently precise to satisfy the

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[5] USSG § 2R1.1, comment (n.3).

> interests of justice, and promotes efficient and predictable imposition of penalties for criminal antitrust violations.[6]

Understandably, when the Sentencing Commission revised the antitrust guideline earlier this year to implement the provisions of the 2004 Act, it left the 20-percent presumption unchanged.

Several recent empirical studies show that the Commission's original estimate of a 10-percent overcharge, which supports the 20 percent volume of commerce calculation, may in fact be too low.[7] Moreover, based on studies estimating overcharges in various of the Division's international cartel cases of between 11 and 34 percent,[8] it does not appear that the percentage overcharge becomes smaller

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[6] 150 Cong. Rec. H3658 (daily ed. June 2, 2004).

[7] Jeffery H. Howard & David Kaserman, *Proof of Damages in Construction Industry Bid-Rigging Cases*, 34 Antitrust Bull. 359 (1989); Lance E. Brannman & J. Douglas Klein, *The Effectiveness and Stability of Highway Bid-Rigging, in* Empirical Studies in Industrial Organization: Essays in Honor of Leonard W. Weiss 61 (David B. Audretsch & John J. Siegfried, eds. 1992); Luke M. Froeb, Robert A. Koyak & Gregory J. Werden, *What is the Effect of Bid-Rigging on Prices?*, 42 Econ. Letters 419 (1993); Jon P. Nelson, *Comparative Antitrust Damages in Bid-Rigging Cases: Some Findings from a Used Vehicle Auction*, 38 Antitrust Bull. 369 (1993); John E. Kwoka, Jr., *The Price Effect of Bidding Conspiracies: Evidence from Real Estate "Knockouts,"* 42 Antitrust Bull. 503, 515 (1997); Robert H. Porter & J. Douglas Zona, *Ohio School Milk Markets: An Analysis of Bidding*, 30 RAND J. Econ. 263, 283-87 (1999); Martin Pesendorfer, *A Study of Collusion in First Price Auctions*, 67 Rev. Econ. Stud. 381, 405 (2000).

[8] B. Adair Morse & Jeffery Hyde, Estimation of Cartel Overcharges: The Case of Archer Daniels Midland and the Market for Lysine (Staff Paper 00-8, Dep't of Agricultural Economics, Purdue University)(Oct. 2000); John M. Connor, Global Price Fixing: Our Customers are the Enemies 264 (2001); John M. Connor & Robert

(continued...)

as the volume of affected commerce becomes larger.

IV. IS THE GAIN OR LOSS IN 18 U.S.C. § 3571(d) THE GAIN OR LOSS FROM THE OFFENSE AS A WHOLE?

The next discussion topic involves the application of the alternative maximum criminal fine provision found in 18 U.S.C. § 3571(d) to antitrust violations. This provision reads:

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

The plain language of § 3571(d) is strongly suggestive that the gross gain or loss is that of the violation as a whole and not the gain or loss attributable to individual participants. The "gain" in § 3571(d) is pecuniary gain derived by "any person" from the offense. In any conspiracy case this would include the other members of the conspiracy, and so gross gain in an antitrust conspiracy must mean the gross gain by all coconspirators combined. The "loss" language in § 3571(d) is as broad as the language regarding gain, and is most easily understood to mean the

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[8](...continued)
H. Lande, *How High Do Cartels Raise Prices*, Tulane L. R. (forthcoming 2006).

cumulative loss to all the victims of a conspiracy caused by all the coconspirators.

The legislative history supports the plain language conclusion. It notes that § 3571(d) was being amended from the earlier alternative fine provision found in 18 U.S.C. § 3623(c)(1) specifically to cover not only gain derived by the defendant from the offense but also gain to any person that the defendant "knows or intends that his conduct will benefit."[9]

Furthermore, 18 U.S.C. § 3571(d) is a general criminal fine statute that applies to individuals as well as companies and to antitrust violations in the same manner that it applies to all other federal crimes. That is, it applies equally to all types of criminal conspiracies–to bank robbery as well as price fixing–and to all types of pecuniary gains and losses, not just those resulting from commercial transactions. The legislative history of the nearly identical alternative fine predecessor to 18 U.S.C. § 3571(d)–18 U.S.C. § 3263(c)(1)–enacted as part of the Criminal Fine Enforcement Act of 1984,[10] supports this proposition.

> The fine authorized by section 3623(c) can be applied not only in white collar crimes (e.g., tax law violations), but also in other crimes. For example, someone convicted of

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[9] H.R. Rep. No 100-390, at 6 (1987), *as reprinted in* 1987 U.S.C.C.A.N. 2137, 2142. *Cf.* United States v. Andreas, 1999 WL 116218 (N.D. Ill.) ("Congress amended subsection (d) to ensure that criminal defendants like Andreas would be liable for their conduct even if they intended to enrich a third party like ADM.").

[10] Pub. L. No. 98-596, 98 Stat. 3134.

> conspiracy to distribute could be fined up to twice the amount gained by the drug dealing. This provision should take some of the economic incentive out of such offenses.[11]

There is no indication that Congress intended gross gain or gross loss to have different meanings for different crimes.

Under the common law, "a conspiracy is a partnership in crime; and an 'overt act of one partner may be the act of all . . . .'"[12] Put even more succinctly, "so long as they share a common purpose, conspirators are liable for the acts of their co-conspirators."[13] Against this background, it is unlikely that Congress would have limited a conspirator's maximum fine to twice the gain to, or loss caused by, the conspirator alone when he, she, or it is legally liable for the actions of all the members of the conspiracy, at least not without using specific legislative language to that effect. Such language is not hard to draft. It can be found, for example, in USSG §8C2.4, where the Sentencing Commission uses "the pecuniary gain to the organization from the offense" and "the pecuniary loss from the offense caused by the organization" in computing a corporation's base fine amount.

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[11] H.R. Rep. No. 98-906, at 17 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 5433, 5450.

[12] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 253-54 (1940).

[13] Salinas v. United States, 522 U.S. 52, 64 (1997).

This conclusion does not mean that a judge would impose the same fine on all the members of a price-fixing conspiracy, only that the maximum possible fine would be the same for all. The actual fine would be determined according to the Sentencing Guidelines and would be based on the defendant's own conduct. But that is a *completely separate* issue from the determination of the alternative maximum fine under 18 U.S.C. § 3571(d).

V. THE 20 PERCENT PROXY AND 3571(d)

The final topic for discussion is whether the "20 percent of the volume of affected commerce" proxy set out in §2R1.1(d)(1) should be used if it would result in a fine greater than the Sherman Act statutory maximum.

I can see no connection between the Guidelines methodology used to calculate corporate antitrust fines and whether the maximum fine in any particular case is based on the Sherman Act or § 3571(d). I have already discussed at length the reasons why the 20-percent proxy is the most appropriate basis on which to calculate corporate antitrust fines–a methodology that received congressional approval as recently as last year and Sentencing Commission approval just this year. Empirical studies have shown that the 10-percent overcharge presumption that underlies the 20-percent proxy does not decline with very large volumes of

affected commerce – even those high enough to support criminal fines above $100 million. Thus, the appropriateness of the proxy is independent of the size of the resulting fine, let alone whether the resulting fine is arbitrarily more or less than the Sherman Act maximum.

Obviously, this does not mean that whether a Guidelines antitrust fine is more or less than the Sherman Act maximum is of no importance. After the Supreme Court's decision in *United States v. Booker*,[14] it is clear that we are able to prove volume of affected commerce under §2R1.1 to a judge at sentencing by a preponderance of the evidence, while post-*Blakely* we have to prove gross gain or loss under § 3571(d) to a jury at trial beyond a reasonable doubt. So, if use of the 20-percent proxy results in a fine in excess of $100 million and a defendant will not agree that imposition of the fine is appropriate under § 3571(d), we must be prepared to prove to a jury that the conspiracy resulted in sufficient gross pecuniary gain or loss to justify the Guidelines fine.

Establishing a conspiracy's gross pecuniary gain or loss is quite different, however, from establishing a particular antitrust defendant's appropriate base fine amount – a figure that the Sentencing Commission determined should not be based directly on pecuniary gain or loss but should also account for the dead-weight loss

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[14] 125 S. Ct. 738 (2005).

that results from antitrust violations. The need to invoke § 3571(d) to establish an appropriate maximum fine amount provides no reason to either question or change the method of arriving at a correct corporate fine for any specific defendant under the antitrust guideline.

The Honorable Mark W. Bennett
United States District Court
Northern District of Iowa

November 14, 2010

Dear Judge Bennett,

I, Nancy Rosendahl, am writing to you on behalf of my niece's husband, Steve VandeBrake. He faced and plea bargained to the charge of price-fixing in the ready mix concrete products business he managed in an executive position.

I first met Steve when he was dating my niece, Mary, 21 years ago. At that time, our family loved him for his bright, spirited and energetic personality. He was also interesting, well educated and level headed and we were happy to see our niece married to him. In the years following, we have found him to be a wonderful father and family man, in addition to the other qualities we observed. He is clearly a guiding presence for the beautiful family he and Mary have nurtured. He adores his children and they adore him. He and his family attend the First Reform Church in Orange City, a church he has attended since his own childhood. With this background, he is a disciplinarian, but only in the best sense of the word, wanting only the best for his girls. We have tremendous respect for him as a father, businessman and human being. He has spoken of regret for the disappointment he has placed upon his family and friends. He is a good man. Thank you for taking the time to read this letter.

Sincerely,

Nancy Rosendahl

Nancy Rosendahl
4511 Lakeshore Drive
Okoboji, IA 51355
Age 64, retired

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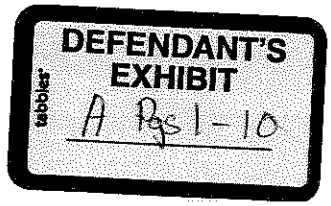

November 15, 2010

The Honorable Judge Mark Bennett
U.S. Federal Courthouse
Sioux City, IA 51101

Re: Steve Vande Brake

Dear Judge Bennett:

I am writing this letter to you on behalf of my friend, Steve Vande Brake.

I reside in Orange City, Iowa. I am currently the elementary and middle school principal at Kingsley-Pierson Community Schools. I have been in education now for almost 19 years. I am blessed with a wonderful wife and four children.

Steve and I have been good friends for over eight years. In that time period, I have seen Steve full of compassion, laughter, kindness and generosity to everyone that is part of his life. He is a good father to his three daughters and a loving husband to his wife, Mary. He has been very active in his children's school involvement including their school activities and school conferences. I have always thought of Steve as a dedicated family man. I only wish that we had more parents who were as involved in their children's school education as Steve and Mary.

In the past year, I have seen how remorseful Steve is over all that has happened to him. I also know how his being incarcerated will affect his children. That being said, I also understand that Steve's conduct is what caused his being placed in this situation and that punishment is part of the price he will have to pay. I can only tell you what I see and know about Steve. I see and know from the bottom of my heart that he is a good man. I know that Steve has learned from his mistakes. I would hope and pray that you will take this into consideration at the time of Steve's sentencing.

Sincerely,

Rob Wiese

November 15, 2010

The Honorable Mark W. Bennett
United States District Court
Northern District of Iowa

Dear Judge Bennett:

Steve Vande Brake is my son-in-law and I am writing to you regarding his upcoming sentencing. I have known Steve since he and my daughter started dating in 1989. I have experienced many happy family times with them since their wedding in 1994 including the births of their three daughters April, 13, Kyra, 10, and Nora 7. It has been heartwarming for me to witness the love Steve has always shown for my daughter and to see that love extended to his growing family.

Steve has always treated me with respect and he has taught his daughters to be respectful. He will remind them, "Listen, your grandmother is speaking now." He disciplines them in their best interest and reminds them to be kind to each other. He is involved in their activities and proud of their accomplishments, but has the insight not to pressure them. Just this month I accompanied Steve and his family to the Dance Competition for National Qualifications in Omaha. Steve has been supportive of April and now Kyra, watching them compete and praising them for their efforts. He told me at the last competition, "I'm really enjoying this," which meant sitting through 118 dance routines while the Hawkeyes were playing. I saw his tears of joy when April was born almost 14 years ago and tears were in his eyes while he watched his beautiful daughter perform her dance solo.

The family attends church regularly together and Steve encourages the girls in their church related activities. This spring his daughter Kyra bought a bracelet for her mother at her school's carnival. The inscription on the bracelet is "Patience" and Mary has worn it since Kyra gave it to her in May. It is symbolic of the patience the family has exercised while waiting for the results of Steve's sentencing. The delay had the positive aspect of giving them time together last summer. Steve has said to me from the start, "I am so sorry to have put Mary and the family through this."

For Steve's birthday on April 23 I gave him a book entitled, "Focus on the Good Stuff." A main focus of the author is the importance of appreciation and gratitude. Steve believes in these qualities and just this month told me, "I have so much to be thankful for."

I am a retired language arts teacher of 30 years and coached debate and mock trial teams. It was my pleasure to serve on the Iowa Supreme Court Commission of Continuing Legal Education from 1991-1997. I have a great respect for the law. Thank you for reading my letter.

Sincerely,

Dianne W. Elton

Dianne W. Elton
15626 Furman Road
Spirit Lake, IA 51360

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November 15, 2010

Honorable Judge Mark W. Bennett
U.S. Federal Courthouse
Sioux City, IA 51101

Re: Steve Vande Brake

Dear Judge Bennett:

I am writing this in regard to my friend, Steve Vande Brake.

I have known Steve for approximately twenty years. I have always respected him as a good person, loving father and dedicated husband to his family and a good friend. He always appeared to be a conscientious and strong businessman.

I know that Steve is handling this legal issue the very best he can but I also know from our conversations that he is disgusted with himself for violating the trust that people have placed in him and how his actions have affected so many people including his family, friends and the business community. I know from our talks that he is truly remorseful for his conduct and wants to move on with his life. Steve understands that he needs to be punished for his conduct but I feel that incarcerating Steve for a long period of time would be damaging to not only him, but his young family. In my opinion, Steve has learned a good and hard lesson.

Judge, I hope that you will take a long, hard look at the period of time you intend to incarcerate him and give him any benefits that you feel he is entitled to and an opportunity to prove to society that he is a good man and sorry for whatever harm he has caused.

Respectfully,

Jerry Stockdale

November 17, 2010

United States District Court
Honorable Judge Mark Bennett

Your Honor,

I am Mary Vande Brake, the wife of Steven Vande Brake who has an upcoming sentencing. I have been married to Steve for 16 years and have known him for over 21 years. Throughout this time I've known Steve to be a loving, kind, honest, generous man. We have three daughters ages 13, 10 and 7. He loves his girls more than anything in this world and they love him and think the world of him. I know the hardest part of his going away will be being away from his family. We will have a very difficult time being away from him as well. I will miss him immensely. He is a wonderful parent and has helped me raise the girls to be respectful, intelligent, well-rounded children. He has been a member of First Reformed Church his whole life and has raised his daughters to have a strong faith in God. With Steve's help we have tried to do what is best for them. It will be very difficult not having him around to help me parent. I will truly miss his support in parenting our girls.

I have known Steve to be a hardworking, honest businessman who tried his best to treat everyone fairly, from his employees to his customers. He took their feelings and well being into consideration when making decisions that would affect them. He wanted what was best for everyone.

From the beginning Steve has accepted responsibility for the crimes that he has committed. I believe that he is truly remorseful for what he has done. I can see it in his eyes and face and I can hear it in his words. Prior to his being charged with any crimes he told me that he did something that he was very ashamed of and that his conduct would affect our future. He did not make excuses nor did he try to minimize what he did. He asked me for forgiveness. I do forgive him but I am shocked and hurt that he would do such a thing because of how his actions will impact his family. This choice he made is so not what he is all about. He told me that he felt like a hypocrite and was ashamed since we have taught our girls to make good choices and to be responsible for your actions. Steve has talked with them about his need to accept responsibility in this situation. Steve has told his daughters that Dad has made a terrible mistake and because of his mistake he must be punished for what he has done. He has told them that saying you are sorry is not always enough and that when you do something bad you also have to be punished for your actions. He has told them that even when he is away he will always love them and that they need to be strong and to always make good choices in life and to mind and respect their mother. Steve and I have talked with a counselor and are trying to prepare our children for his being absent from the family.

I know that at every sentencing you have to deal with how your decision will impact families and I also know that it is the individual's fault that he is facing

you for a sentence. I just hope that you will take into consideration what I have tried to set out in my letter knowing that I have lived with Steve for 16 years and that he is truly a good person. I could not ask for a better husband for me and our children. I pray that you will give him every benefit of the doubt and treat him fairly. Thank you for your time in reading this letter.

Sincerely,

Mary Vande Brake

Mary Vande Brake

VRIEZELAAR, TIGGES, EDGINGTON, BOTTARO, BODEN & ROSS, L.L.P.

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November 22, 2010

The Honorable Judge Mark Bennett
U.S. Federal Courthouse
Sioux City, JA 51101

Re: Steve Vande Brake

Dear Judge Bennett:

I am writing this letter to you on behalf of Steve Vande Brake.

I have been practicing law in Sioux City, Iowa since 1980. I have known the Vande Brake family since 1990. This includes Steve, his mother and father, Sandy and Norly Vande Brake, and his sister Gail. I have represented the Vande Brake family on a variety of issues involving their various business interests from 1990 through the current date.

During that time, I have watched Steve grow from a young single man driving a cement truck to a responsible and competent man running a family business while also becoming a loving and compassionate husband and father. Like all of us, he has made mistakes. However, Steve has always accepted responsibility for his mistakes and has always moved on to become a better person committed to learning from his mistakes.

I have had numerous conferences with Steve since the criminal investigation started over 15 months ago. I have seen his confidence deteriorate as he understands the errors he made. I have seen his regret for the problems he has caused. I have seen him cry from the pain he has caused, not the pain he has caused himself as he accepts his responsibility for what he has done, but the pain he is causing not only his wife and children but those who may have been damaged by his conduct. His remorse is sincere.

Steve has made mistakes. His accepts his responsibility for what he has done. He will move onto become a better person committed to learning from his mistakes.

Thank you for taking the time to read my reflections on Steve. I respectfully request your consideration of these reflections and the needs of his young family in your deliberations.

Very truly yours,

Dale C. Tigges

Dale C. Tigges

The Honorable Mark W. Bennett

United States District Court Judge

Northern District of Iowa

Dear Honorable Mark W. Bennett;

I am writing you in regard to Steven Vande Brake's upcoming sentencing. I have known the Vande Brake Family since June of 1997, throughout the last thirteen years; the Vande Brake family has become my extended family. Steve has encouraged me, given me hope, offered honest advice, provided a shoulder to cry on, and has been a confident role model to me throughout my relationship with him.

Steve is a devoted father and an exceptional husband to Mary. Steve and Mary have raised his daughters in a manner that they know that they can turn to either parent in a time of need. I have observed Steve to be playful yet authoritative. Steve's children are well rounded and excel in extra curricular activities such as dance, orchestra, and band. Their grades are exceptional; for example, all three girls have marvelous reading skills and comprehension which could be attributed to positive parental participation in their life. Steve has been an active member of his church and community. Steve has long lasting relationships and friendships with people who are positive influences.

Last night as I conversing with April, Steve's 13-year-old daughter, about life as a teenager, she expressed that she is a "daddy's girl." At that moment I realized that there is a possibility that there will be a period of time that Aprils dad will not be a part her daily life due to the mistakes he has made, which is disheartening. These children need their father, not only April but also Kyra, and Nora.

Steve and I have had conversations throughout this legal process. He is remorseful and recognizes the impact that his choices are going to have on his family. He has not denied his actions in conversation and has taken ownership for his actions.

It is unfortunate that negative choices have led to have such an impact on his family and those who he may have affected by his conduct. However, I can assure that bad choices do not make Steve a bad person, but they just make for unfortunate circumstances.

Rochelle DeGroot

401 S Euclid Ave

Sioux Falls, SD 57104

Sanford Children's Hospital Social Worker

November 23, 2010

Letter Re. Mr. Steve Vande Brake

TO WHOM IT MAY CONCERN:

Mr. Steve Vande Brake presented in our clinic on May 12, 2010 for outpatient psychotherapy along with his wife. I was assigned as his therapist. Mr. Vande Brake self admitted for treatment. His reason for coming to our sessions was motivated by his anticipated incarceration for past criminal activity. Both he and his wife stated, in his initial session, that they were concerned, among other things, about the emotional wellbeing of his daughters as he was approaching his impending incarceration. Mr. Vande Brake consistently expressed feelings of remorse, guilt, and sorrow over the pain he was bringing on his wife and children.

The focus of our sessions was on how he, in his role as husband and father, could best prepare his family members for his absence. He was concerned about how to talk to his children about his anticipated absence, how to help them emotionally with any teasing at school, and how to contribute best to their emotional stability through his separation from the family. We also discussed such details as how his wife would function emotionally and practically in his absence. Also a topic of discussion was how the family could maintain as "normal" a routine as possible without the father and husband in the home. Finally, our latest planned session will focus on the normal stressors that families go through when the separated spouse eventually returns home and attempts to re-establish his roles in the family after a protracted absence.

Throughout our sessions Mr. Vande Brake consistently displayed appropriate remorse for the crime he had committed. At every opportunity he took full responsibility for his wrongdoing and did not slip into any blaming or displacing behaviors. Such self-awareness and self-accountability on the part of the client, generally, is a hopeful sign that the client has learned a valuable lesson from his pain; and, is at low risk of re-offending.

From a clinical observation Mr. Vande Brake is experiencing normal moods associated with an anticipated prolonged absence from his family. His psychological state is similar to one going through the anticipated grief of a soldier deploying. The family dynamics are also similar. It is my professional opinion that Mr. Vande Brake and his family will adjust relatively well through this trying time because of his level of psychological health and his sustaining religious faith. Likewise, his wife and children, though they will suffer unavoidable emotional wounds from this experience, will manage relatively well through this experience because of their extended social network of support and their Christian faith tenets.

I hope this letter is able to shed some helpful light on the mental and behavioral disposition of Mr. Vande Brake. If I can be of any further assistance please feel free to contact me.

Sincerely,
Dale D. Ellens, MS, LMFT, LPC
Executive Director, Bethesda Christian Counseling