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11.24.10

The Hon. Mark W. Bennett
United States District Judge
North District of Iowa
Via electronic filing system

Re: U.S. v Stewart CR10-4028-1-MWB

Your Honor:

Attached please find Kent Stewarts Sentencing Memorandum and Brief in Support of Downward Departure. I don't claim it to be a literary or legal masterpiece, but after 8 drafts it is what it is. The adage is that we actually write 3 briefs- the one we thought we would write, the one we write and the one we wish we had written. (actually said about trying cases). Good reading and look forward to refinement in the reply brief.

Sincerely,

Larry Stoller
Attorney for Kent Stewart

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA	)	
	)	DEFENDANT KENT STEWART'S
vs.	)	SENTENCING MEMORANDUM AND BRIEF
	)	IN SUPPORT OF MOTION FOR DOWNWARD
	)	DEPARTURE OR VARIANCE FROM
KENT ROBERT STEWART	)	SENTENCING GUIDELINES
a/k/a KENT STEWART	)	Docket No. CR 10-4028-1-MWB

COMES NOW, the Defendant, Kent Robert Stewart, and for his Sentencing Memorandum to the Court and his Brief in Support of previously filed Motion for Downward Departure or Variance from the sentencing guidelines respectfully states:

INTRODUCTION

"*Those people...early stricken of God, intellectually...the departmental interpreters of the laws in Washington...can always be depended on to take any reasonably good law and interpret the common sense all out of it.*" *(Mark Twain's un-mailed letter to H.C. Christians 12/18 1887).* Twain also wisely observed, "*in this topsy-turvy, crazy, illogical world, man has made laws for himself. He has fenced himself around with them, mainly with the idea of keeping of communities together, and gain for the strongest. And 9/10th of the people who are daily obeying...or fighting against...nature's laws, have no real opinion. Opinion means deduction, after weighing the matter, and deep thought upon it.*"

We seem to be a nation wholly consumed with the concept of uniformity – one size fits all – that every situation should fit neatly in a box, and that if the exception is found we of course need to build a bigger box. Such must have been the thoughts of Congress in 1984 when legislation created the United States

Sentencing Commission charged with the duty of developing uniform sentencing guidelines for nearly every imaginable crime; apparently with the thought that District Court Judges were not appropriately handing down sentences on a uniform basis. Fortunately, after hard won battles, the District Court Judges won back their discretion when the United States Supreme Court in Booker determined the sentencing guidelines to be advisory only and the Court further in its Gall decision determined that the appropriate standard of review of a District Court's sentencing decision was for abuse of discretion.

Interestingly, the very sentencing commission charged with creating a uniform system of sentencing itself acknowledged that it could not take into consideration each and every crime; that aggravating and mitigating circumstances of each crime that could not adequately be taken into consideration in formulating the guidelines. In those cases departures should be made that should result in a sentence different from that described in the guidelines. Some of these concepts are enumerated in 18 U. S.C. § 3553. The commission did provide something of a theory to the sentencing Judges in how to determine whether to depart from the advisory sentencing guidelines, to-wit: "the commission intends the sentencing Courts to treat each guideline as carving out a "heartland", a set of typical cases embodying the conduct that each guidelines describes. When the Court finds an atypical case, one to which a particular guideline linguistically applies, but where

conduct significantly differs from the norm, the Court may consider whether departure is warranted." U.S.S.G. Page 6. Throughout the guidelines the commission, by commentary, gives some guidance to the Court as to what it views as a "typical" case in violation of criminal law. It also arbitrarily seeks to avoid some considerations that the Court could consider as not being allowable. These unwarranted criteria seemed to be based upon some unnamed set of data viewed by the commission as statistically excluding the criteria as a possible reason for departure. No comment is made by the commission on any method used to achieve a confidence level in the data.

It is difficult not to draw a comparison between the Federal Sentencing Guidelines and Sections 598.21, 598.21A, and 598.21B of the Iowa Code within the state code chapter governing dissolutions of marriage. In those sections the Iowa legislature has given direction to the Court on the division of marital property, determination of child support, and determination of spousal support by providing a laundry list of considerations for the Court. It then charges the District Court to formulate an order that is fair and equitable and at the end of each section requires it to make findings of fact that supports its decision. At the risk of sounding trite both the U.S. Sentencing Guidelines and the divorce guidelines lack any specificity. Instead they seem to take the popular view applied to pornography – it is difficult to define, but you know it when you see it. In other words, the

sentencing District Court Judge is invited to consider the circumstances of each case, apply them in his sentencing decision, and then an Appellate Court will let the Judge know if he was reasonable – without the Appellate Court ever having the benefit of hearing the testimony, viewing the facts of the case, or testing the credibility of the witnesses. The appropriate applications of the guidelines are, as found by the Supreme Court, to be advisory and the District Judge should follow the wisdom of Mark Twain in using his deduction, after weighing the matter, and with deep thought upon it in handing down a sentence in a particular case.

The District Court Judge should look to the reality of the situation, with the reality being the state of things as they actually exist instead of the idealism envisioned in the sentencing guidelines, with idealism being the act or practice of envisioning things in an ideal form. In an ideal world everyone is June and Ward Cleaver. In a realistic world there are also Eddie Haskells.

The Defendant will advocate that the Court depart from the sentencing guidelines and show leniency to Kent Stewart based on the facts and circumstances of this case. The theme of the Defendant's case is that his crime does not fall within the heartland of antitrust cases and particularly that he was not motivated by greed or personal gain, but by a desire to allow this small family business to survive in the face of overwhelming competition by a large multi-national corporation.

The situation in which Kent Stewart found himself is not so different from that in which the State of Israel finds itself on a daily basis. The smaller guy vastly outnumbered and surrounded by the enemy fights when he needs to and capitulates when he is forced to. The opposing viewpoint would rest on the fable of David versus Goliath, but let's face it – biblical implications aside – David was just plain lucky.

The Defendant's advocacy for a position of leniency in sentencing is not meant to excuse or justify his conduct. It is meant instead to explain. He has accepted full responsibility for his illegal actions. The Defendant is not a person disposed towards breaking the law or ever committing another crime. Economic duress is not recognized as a justifiable excuse to commit a crime, but the Defendant is not seeking to excuse his conduct – only to explain it. Again quoting Twain, "*any man worth his salt will go to war for his home...no one goes to war for their boarding house.*"

The Court has clearly instructed counsel on the applicable law in this case and clearly expressed its concerns in sentencing. This brief will address those concerns and differentiate the Defendant's conduct from the "heartland" antitrust violation.

Rabbi Harold S. Kushner wrote a book *When Bad Things Happen to Good People,* trying to rationalize why his fourteen year old son was taken by a deadly

illness at such a young age. This Court, in viewing the actions of Kent Stewart, is not asked to consider *when bad things happen to good people*, but, instead, *why good people sometimes do bad things*.

Table of Authorities and Cites

Statutes

1. 18 U.S.C. 3553(A)(B)
2. Chapter 598 Iowa Code (2009)
3. U.S.S.G (2009)

United States Supreme Court Cases

4. U.S. v. Booker, 543 U.S. 220 (2005)
5. Gall v. United States, 128 U.S. Ct. 586 (2007)

U.S. Appellate Court Cases

6. U.S. v. Milikowsky, 65F.3d 4 (2nd Cir. 1995)
7. U.S. v. Johnson, 964F.2d 124 (2nd Cir. 1992)

District Court Cases

8. U.S. v. Miell, 2010 WL 3853155 (N.D. Iowa 2010)

Other

9. Statement of Scott D. Hammond before the Antitrust Modernization Commission Hearings on Criminal Remedies (November 3, 2005)

HISTORICAL PERSPECTIVE

Respectfully, it would be difficult for the Court to understand the present situation before it without having some historical perspective as to what brought Kent Stewart and Great Lakes Concrete to this point. Attached hereto is a glossary of terms, listing of the identity of individuals, and a time line that gives the matter some perspective. Those documents were likewise attached to the Defendant's Objections to the Presentence Investigation Report.

To summarize this matter historically, until the early 1960s most concrete was formulated on the job site by a contractor with small cement mixer mixing together the component parts to make concrete and then applying the concrete to the job. Technology advanced to the point that ready mixed concrete facilities were put up in stationary areas which allowed for a much larger mixing of ready mix concrete for delivery by the now well-known ready mix truck with its spinning drum. Given the time constraints between the time when ready mix concrete is batched and when it has to be poured most facilities could service only an 18 to 20 mile radius from the main facility and like the town meat locker, shoe repairman, and TV repairman, many small towns had their own ready mix facilities.

In this environment Kent Stewart's father and a partner started with an aggregate pit, an area from which rock and sand, key ingredients in concrete, could be extracted. They then purchased a small ready mix facility in Ocheyedan, Iowa, in 1964. Kent came into the business in 1982 and shortly thereafter the partner was bought out. Kent and his father built another small plant in Milford, Iowa, and were in the business of supplying aggregate and ready mixed concrete. By 1997 Kent was the principal operator of the company as his father was killed in a construction related accident. As the proprietor of a small company the evidence will show that Kent was virtually the whole management team and continues to be virtually the whole

management team with the operation wholly dependent upon his management and day-to-day participation in the business. A listing of his extensive duties will be supplied by exhibit.

Kent began noticing that many of the other independent ready mix producers in Northwest Iowa were merging into larger entities and he was concerned about the survival of his small company. After being approached several times he finally agreed to merge with Great Lakes Concrete so that the surviving company now had five facilities instead of two. He continued being in charge of overall management on a set salary. His other three shareholders were also shareholders in other ready mix facilities which were considerably larger than Great Lakes Concrete and who sold those facilities to GCC. In January of 2008 shareholder Norlyn VandeBrake sold the other facilities that directly competed with Great Lakes Concrete to G.C.C. which then called itself GCC Alliance, Inc. The facilities were sold at a tremendous profit as GCC was actively expanding both its cement and concrete facilities in the Midwest.

It was suggested to Kent by his fellow shareholders that Great Lakes Concrete be sold as well. Kent was not receptive to the idea as his motivation was not wealth, but maintenance of the family business and the continued employment of his employees and their families that relied on that business. He went so far as to hire counsel to advise him whether he could fight a takeover. Exhibits evidencing the resistance will be admitted at sentencing.

Had greed and wealth been the motivation of Kent Stewart the opportunity was certainly there in 2008 by merely taking the buyout money and running. During these same periods of time Kent and his family owned mineral and aggregate lands and allowed Great Lakes Concrete to mine the aggregate on a royalty payment basis to him and his family which resulted in Great Lakes Concrete enjoying a substantial purchasing advantage in aggregate even though Kent only owned 33% of the company. If he were interested in greed and wealth he could certainly have

charged the company for the aggregate at the same price that outsiders were charging it. It is equally important that GCC was not only in the business of producing ready mixed concrete but also built a large modern plant for the production of cement. GCC strongly encourage Great Lakes Concrete to buy its cement powder from GCC and alluded to the fact that if Great Lakes Concrete were to do so GCC would have much less incentive to use its size and wealth to put Great Lakes Concrete out of business. In the meantime, by buying cement powder from its own facilities to supply its ready mix concrete plants (which now surrounded Great Lakes Concrete) GCC enjoyed a cost savings advantage of over $10.00 per cubic yard of concrete in each yard of concrete it produced.

In this hostile environment Kent Stewart had to determined how his company could best compete and survive.

The government has given notice that it will not recommend a two level departure for acceptance of responsibility because Kent Stewart's statements are contrary to those of his co-conspirator, and further that it will not make a motion for a three level departure downward for cooperation. To assist the Court factually in determining the appropriate sentence for Kent Stewart in this matter we believe it important for the Court to understand what has taken place factually and procedurally to this point.

Great Lakes Concrete found itself to be the only small independently owned ready mix facility in Northwest Iowa. As per the press releases of GCC at the time it purchased the assets of Alliance, Alliance had 24 plants in 2007 and annual sales revenue of at least fifty million dollars per year. Great Lakes Concrete had five facilities in 2007 and ten million dollars in sales. Alliance was owned in part by Norlyn VandeBrake who also owned one-third of Great Lakes Concrete, Inc., and Alliance was operated by his son Steve VandeBrake. Alliance had been formed by the merger of two other ready mix companies and in 2007 purchased the assets of Lake Ready Mix, LLC, which directly competed with Great Lakes Concrete's five small facilities. Arguably, when the opportunity arose to buy Lake Ready Mix the opportunity should have been that of the Great Lakes corporation but it instead was seized upon by one of its shareholders in order to package the Lake Ready Mix assets with the Alliance assets for sale to GCC.

In the fall of 2007 after Alliance had purchased Lake Ready Mix Kent Stewart confronted Norlyn VandeBrake (a shareholder in both entities) about Alliance's predatory business practices and issued an idle threat that Great Lakes Concrete would engage in predatory pricing practices if its existence continued to be threatened. The threat was impractical because given the size of

Alliance in relation to Great Lakes Concrete, Great Lakes Concrete could not survive such a battle. No further discussion was had.

In January of 2008 Norlyn VandeBrake announced to Kent Stewart that Alliance had sold its assets to GCC and as a result of the sale he and the other shareholders had entered into a non-compete agreement which would not allow them to operate Great Lakes Concrete or serve as officers or directors. At that point no relationship existed between Great Lakes Concrete, Inc., and GCC Alliance, Inc., other than Kent Stewart's fear of being engulfed by this giant competitor. During the calendar year 2008 Kent Stewart had no interaction with GCC other than to hire it to haul in cement powder on its trucks which was part of its normal business.

At a time unspecified in early 2009 Kent Stewart was approached by Lee Konz, a salesman for GCC, offering to allow Great Lakes Concrete to provide the ready mix concrete for a water treatment plant in May City, Iowa, provided that GCC would be allowed a road paving project in Sanborn, Iowa. Stewart advised Konz that Sanborn was too far away for Great Lakes Concrete to bid and that was the conclusion of the conversation. Konz was shortly thereafter transferred to the quality control department of GCC. On other occasions between January and May of 2009 Kent Stewart was approached by representatives of GCC with regard to the allocation of various projects between the companies. It will be Kent Stewart's testimony that his impetus in entering into these agreements was not to inflate prices, but instead to work on projects close to his own plants. Kent Stewart will adamantly deny that any collusion or conspiracy occurred in the formulating of "price sheets" in 2009. The price sheets are the fliers given out to the general public as to the price of concrete. He will also adamantly testify that there were no agreements whatsoever between Great Lakes Concrete and GCC in the calendar year 2008.

In November of 2009 Kent Stewart was confronted at 6:15 a.m. at his home by attorneys from the Department of Justice and an F.B.I. agent who questioned him as to his activities with GCC while at the same time serving search warrants on the company's main facility in Ocheyedan, Iowa. At that interview Kent Stewart openly, voluntarily, and without seeking the assistance of counsel, answered the interviewers questions and at their request placed a phone call to Steve VandeBrake's cell phone to apparently gather more information. The phone was not answered. When Steve VandeBrake later returned the call he advised Kent Stewart to quit talking and get an attorney. Stewart did not quit talking but continued to cooperate with the government investigation, though he did seek legal counsel. He and Great Lakes Concrete both voluntarily answered subpoenas from the grand jury.

After consultation with counsel, Kent Stewart directed his counsel to approach the Department of Justice about a plea bargain and in reliance on the terms of a proposed plea bargain sent to him as well as a proffer offer in January of 2010, he traveled to Chicago to make his proffer. Kent Stewart readily accepted responsibility for projects the Department of Justice attorneys questioned him about and in reliance on his proffer protection advised the attorneys of two additional projects that he thought could have been in violation of antitrust laws. Satisfied with the interview the Department of Justice attorneys extended the plea offer to Kent Stewart and it was entered into by both the prosecution and the defense. At the time the plea offer was extended to Kent Stewart the Department of Justice had all documents from Great Lakes Concrete (including price sheets) and the opportunity to investigate any matters it deemed fit.

Kent Stewart appeared in federal court on May 24, 2010, to enter his plea of guilty and await sentencing. In the time period between January of 2010 when he made his proffer and the time of his sentencing he was not asked to give any further assistance to the government or to

provide any further documentation. In July of 2010, subsequent to his entering a plea, the government requested an additional interview primarily to further discuss 2009 price sheets and a project called East Okoboji Beach. The allegation was made that Kent had not disclosed to the government an agreement with GCC to fix price sheet prices and to fix a bid on the East Okoboji Beach project and that the government had statements from co-conspirator Steve VandeBrake that these things had occurred. Kent was advised that if he did not agree to the statements of the co-conspirators that the government would withdraw its recommendation for a two level departure for acceptance of responsibility and would not make a motion for a three step departure for cooperation and assistance. Kent was unwilling to lie to preserve his plea bargain.

Again in August the government requested another interview with the threat that if it was not given, its recommendations under the plea bargain would be withdrawn and Kent agreed to another interview provided that it was recorded by a certified court reporter. Despite the government's initial objection it eventually agreed and the interview was recorded.

RELEVANT TERMS

1. Price Sheet- a listing of standard prices for various types of concrete, additives, and delivery costs which are generally made available by each ready mix producer to the general public. This pricing is generally only used for customers making very small purchases which generally require extra delivery time and overtime for weekend pouring. Most contractors receive a discount established by each ready mix producer.

2. Contractor discount-this is a discount established by each ready mix producer for its larger customers and for the customers of Great Lakes Concrete for the relevant years ranged from $4.00 to $11.00 per yard from the standard sheet price. There has been no allegation of collusion between any of the company's involved or individuals involved in establishing the discounts given to contractors. This discount is often set by the year. This discount does not appear as a deduction from standard pricing on any invoices, but instead the invoices are at the discounted price. The price also includes the cost of hauling of the concrete which may vary from company to company.

3. Prompt payment discount-this is a discount non-contractor purchasers receive as a percentage discount for payment of their bill by the 10th of the month and is deducted by those purchasers when they make payment.

4. Bid project-this is a project where concrete contractors will ask ready mix producers for a bid price to supply concrete to them for a specific project. The concrete contractor will use the bid price in figuring, amongst its other costs, overhead, and desired profit the ultimate price it will bid for a job. It was a policy of Great Lake Concrete to give the same bid to all contractors bidding on a project. It was not common for Great Lakes Concrete to give a bid price to the ultimate customer. In some instances where Great Lakes Concrete had already established a

contractor discount it did not give bids for specific projects to contractors bidding on those projects, but instead they relied on the annual discounted price they received.

5. Engineered project-this is generally a project where the specifications for the type and amount of concrete to be poured by the concrete contractor is specified by an engineer and in the bid the concrete supplier may also be asked to provide testing and various other additions at additional cost.

6. Cement-cement is a powdered form of limestone which is a major ingredient in the making of ready mix concrete. There are very few cement producers because of the tremendous cost of establishing a cement processing plant and the necessity of having a source of limestone nearby. The majority supplier of cement powder in Northwest Iowa is GCC. GCC is also in the business of transporting cement powder produced by other cement powder producers.

7. Aggregate-aggregate is a combination of stone, sand, and other ingredients that are a key part of the production of concrete along with water and other additives to form various grades, mixes, and designs of concrete.

8. Ready mix concrete-ready mixed concrete is concrete that is formulated at a ready mix concrete plant which adds cement powder, aggregate, water, and other additives to form a ready mixed concrete which is then dispatched to a construction site in a truck with a rotating drum and is often subject to regulations for the maximum amount of time the ready mix concrete can be used after it has been formulated. For this reason most ready mix concrete plants limit their territorial range to 20 miles radius from their plant. Prior to the introduction of ready mix concrete it was common that cement powder, aggregate, water, and the like would be hauled individually to a construction site and mixed by the concrete contractor in concrete mixers on site.

9. Portable ready mix plants-portable ready mix plants are transportable pieces of equipment that can be assembled on a significant job site to allow the concrete contractor to mix its own ready mix on site instead of buying from a stationary ready mix facility. Large contractors often have their own portable ready mix plants that they can transport to a job site and quickly set up in hopes of lowering their cost of ready mix concrete when opposed to buying from a local ready mix facility. In 2009 several concrete contracting companies were bidding projects in the Iowa Great Lakes Area where they were considering bringing their own portable concrete plants. Portable concrete plants are currently in operation in Northwest Iowa and do not require a significant investment.

10. Standard weight concrete-standard weight concrete is a term used to describe concrete composed of standard cement powder, aggregate, and water with strengths of 2,500 pounds, 3,000 pounds, 3,500 pounds and 4,000 pounds. This poundage refers to the strength of the concrete and not the weight per cubic yard. Other concrete mixes are known as design or specialty mixes.

11. Norlyn VandeBrake-Norlyn VandeBrake was a member of a family that owned Russell's Ready Mix which later merged with Joes' Ready Mix to become Alliance Concrete. Alliance Concrete was sold to GCC and became GCC Alliance, Inc. Norlyn VandeBrake and other partners were originally the owners of Great Lakes Concrete, Inc., which merged with Northwest Ready Mix. Norlyn VandeBrake individually, or through one of his company's, purchased Lake Ready Mix, LLC in Lake Park and Spencer, Iowa. Norlyn VandeBrake is the father of Steven VandeBrake.

12. Steven VandeBrake- Steven VandeBrake is the son of Norlyn VandeBrake and was part owner of Alliance Concrete, Inc., when it was sold to GCC and became GCC Alliance, Inc., He apparently took an upper level management position with GCC Alliance in 2008.

GLOSSARY OF TERMS, INDIVIDUALS, ENTITIES, AND TIMELINE

To fully understand the transactions between Great Lakes Concrete, Inc., and GCC Alliance, Inc., it is important to understand the following terms and timelines:

1. 1962-1964: According to the records of the Iowa Secretary of State Russell's Concrete was formed by the VandeBrake family in 1962: Joe's Ready Mix by the Sandbolt family in 1963 and Rehms-Stewart Concrete by Mr. Rehms and Kent Stewart's father in 1964.

2. 1987-Great Lakes Concrete, Inc., was incorporated and to the best of our knowledge the shareholders were Norlyn VandeBrake, Dennis Rode and Bryan Bosshart. Bosshart and Rode also owned Bosshart Concrete in Minnesota which was an unrelated company. Great Lakes Concrete was unrelated to Joe's and Russell's.

3. 2000-2004-Norlyn VandeBrake on several occasion approached Kent Stewart about merging the former Rehms-Stewart (now known as Northwest Ready Mix) into Great Lakes Concrete and Stewart was disinterested until 2004 when he realized that his two small plants in Ocheyedan, Iowa, and Milford, Iowa, would have difficulty surviving as independents in an age of merger. On July 1, 2004, Great Lakes Concrete with facilities in Spirit Lake, Spencer, and Estherville, merged with Northwest Ready Mix and the surviving company became Great Lakes Concrete with five facilities owned one-third by Kent Stewart, one-third by Norlyn VandeBrake, one-sixth by Dennis Rode, and one-sixth by Bryan Bosshart.

4. 2003-Ryan Lake forms Lake Ready Mix, LLC in Lake Park, Iowa, and later potentially with partners, forms Lake Ready Mix of Spencer.

5. March 30, 2005-VandeBrake and Sandbolt form Northwest Ready Mix Holding which shortly thereafter changes its name to V.S. Holdings and on January 1, 2007 changes its name to Alliance Concrete, Inc.

6. September 2007-Alliance Concrete purchases Lake Ready Mix and changes the name of its facilities to Alliance of Lake Park and Alliance of Spencer.

7. January 8, 2008-Corn Corner Acquisitions, Inc., is formed as an Iowa limited liability company and on January 17, 2008, changes its names to GCC Alliance, Inc., and announces the purchase of the assets of Alliance Concrete which according to GCC's press releases at the time Alliance had sales at the end of 2007 of $52,000,000 per year in comparison to sales of Great Lakes Concrete at the end of 2007 of $12,500,000. Please note that GCC Alliance, Inc., is the subsidiary of GCC (Grupo Cementos De Chihuahua) which is a multinational company with assets in the billions of dollars. GCC also purchased the assets of Bosshart Concrete in Minnesota and in the previous year 2006 had purchased substantial other assets in the Midwest and mid southern United States in addition to establishing a state of the art cement plant in Pueblo, Colorado.

8. March 2008-Norlyn VandeBrake advised Kent Stewart of his desire to sell the assets of Great Lakes Concrete to GCC and Kent Stewart hired attorney Larry Stoller to investigate whether as a shareholder he could block the sale and preserve his family business. The reported, but unverified purchase price of VandeBrake's and Sandbolt's interest in Alliance by GCC was said to be $75,000,000 paid to members of the VandeBrake and Sandbolt families. The purchase for the Bosshart/Rode interest is unknown. However, Norlyn VandeBrake, Bosshart, and Rode entered into non compete provisions which did not allow them to operate, hold officer status, or be on the Board of Directors of Great Lakes Concrete. In January of 2008, Steve VandeBrake and Ryan Lake went to work for GCC Alliance.

SUMMARY OF DEFENDANT KENT STEWART'S POSITION ON SENTENCING

Throughout this Sentencing Memorandum and Brief the Defendant, Kent Stewart, will substantiate his argument to the Court that the appropriate sentence for Kent Stewart should be a downward departure from the sentencing guidelines with no incarceration and, in lieu thereof, probation or house detention. The Defendant's position on sentencing is summarized for the Court's convenience as follows:

1. The Defendant entered into a plea agreement with the United States that was bargained for at arm's length and should be accepted by the Court.

2. The Defendant should not be incarcerated because his incarceration would unfairly harm his business and its innocent employees, he is a first-time offender not likely to offend again, and the monetary fines proposed against him, and his corporation, adequately punish his conduct.

3. The Defendant has accepted responsibility for his actions and should be allowed a two step downward departure from the sentencing guidelines.

4. The Defendant has rendered substantial assistance to the Government and should be allowed a three step departure downward from the sentencing guidelines.

5. The value of commerce attributed to the Defendant is improperly calculated by the United States and improperly accepted in the Presentence Report.

6. The Government is now attempting to charge the Defendant with crimes not charged in the Trial Information, nor has the Trial Information been amended. To allow the United States to do so would be allowing it to prove crimes by a preponderance of the evidence instead of the correct standard of "beyond a reasonable doubt".

7. The Government is relying on the testimony of unreliable witnesses.

8. The Defendant's participation in this antitrust violation does not fall within the heartland or typical antitrust violation and mitigating circumstances should allow a downward departure from the guidelines set forth in the United States Sentencing Guidelines (2009) as per 18 U.S.C. 3553(b).

ARGUMENT I

WITH REGARD TO KENT STEWART THE USSG, §18 USC 3553(A), THE SENTENCING COURT'S OWN CONCERNS, THE SUPPORTING CASE LAW, THE CONCEPT OF DETERMINING A "HEARTLAND", AND THE MITIGATING CIRCUMSTANCES OF THE CASE DO NOT WARRANT AN UPWARD DEPARTURE IN SENTENCING, BUT A DOWNWARD DEPARTURE IN FROM THE GUIDELINES IN THE SENTENCING OF KENT STEWART.

Even prior to the United State Supreme Court's decision in Booker when the sentencing guidelines were deemed to be mandatory the sentencing commission recognized that a sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. (U.S.S.G. page 3). Following the wisdom of Mark Twain the commission apparently realized that even those laws formulated with good intention could be so interpreted as to take away all of the common sense that when into formulating them. The commission also apparently recognized the wisdom of Twain in that man has a desire to fence himself around with laws, but that 9/10ths of the people who are obeying them or fighting against them really don't have an opinion and that the appropriate opinion can come only after proper deduction, weighing the matter, and deep thought upon it-as to the typical and atypical circumstances of each case. The Supreme Court wisely adopted this philosophy in Booker in 2005 in acknowledgement that the District Court is in the best position to understand the circumstances of each case and

fashion punishment accordingly. Both Booker and Gall gave the District Court Judges the ability to properly consider all of the facts and circumstances of each individual case, yet assured the goals of congress by establishing a basis for uniformity and in requiring clear statement on the record for appellate review when uniformity wasn't applied by the sentencing Judge.

In keeping with this theme the Defendant suggests to the Court that the advisory standards of the United States Sentencing Commission could be very favorably compared with Chapter 598 of Iowa's Code regarding Dissolution of Marriage in giving the Court a laundry list of considerations for formulating a fair and equitable decision (respectfully the equivalent of a "heartland" decision) while requiring the Court to make a clear statement on the record for its departure from the norm to give appellate Courts a basis for review.

The sentencing commission acknowledges the evolution of the sentencing guidelines and of their role under Booker and Gall as well as the Supreme Court's directive that the sentencing Judge still start with a procedural determination of the sentencing levels applicable to a crime under the sentencing guidelines and then a clear statement justifying any departure.

The base sentencing level for anti-trust violation and suggested variations there from are found at §2R1.1 of the U.S.S.G. (2009). The Court in its letter of October 21, 2010, to counsel has initially questioned the policy behind these

established offense levels. The Defendant, Kent Robert Stewart, in response to the Court's query respectfully submits the offense levels as established by the United States Sentencing Commission are applicable to the particular circumstances of his offense without making comment as to whether they are applicable to the circumstances of co-Defendant Steven VandeBrake. The Defendant justifies his argument based on the following:

A. The base offense level of 12 has increased from an initial base level of 9 over the years and the adjustments to a base level offense in terms of volume of commerce have gone up dramatically. Arguably the guidelines have already taken into consideration the seriousness of the offense of anti-trust and for the most part answered the Court's questions on policy as set forth in its letter of October 21, 2010.

More importantly the Court should take into context the climate in which the base offense and enhancements have increased as aptly pointed out in the statement of Scott D. Hammond of November 3, 2005, to the Anti-Trust Modernization Commission in its hearing on criminal remedies. That document was attached to the letter from the Court of October 21, 2010. Mr. Hammond predicates his statements and conclusion on the fact that the deterrence of criminal cartels has been the highest priority of the anti-trust division and that appropriate remedies are vital to achieving its desired results. Particularly, the anti-trust

division has placed a strong emphasis on combating international cartels that target US markets because of the breath and magnitude of the harm they inflict on American businesses and consumers. He cites anti-trust cartels engaged in massive volumes of commerce including one of more than one billion and roughly three quarters of the international investigations of the volume of commerce affecting more than $100,000,000 per transaction. He concludes by arguing that stiffer monetary penalties are the best form of deterrence to future conduct, not necessarily of the present offender, but of others similarly situatuated and that the value of commerce standard for determining fines is an appropriate one.

Either by arguing that the cases that Mr. Hammond refers to are not within the defined heartland or typical anti-trust violation or by arguing that the "heartland" of anti-trust has shifted from that originally envisioned by the sentencing commission it is certainly clear that the anti-trust violations engaged in by Kent Stewart and Great Lakes Concrete are not envisioned in the now heartland of anti-trust cases based on several distinguishing characteristics: (1) The volume of commerce is substantially lower. (2) The anti-trust violations occurred arguably within only an eight month period of time. (3) The violations did not involve an effort by an international cartel to dominate free American enterprise unless the Court considers that GCC is an international cartel seeking to dominate the concrete industry in the United States and to do so by engulfing small existing

United States companies. (4) The anti-trust activity was not wide spread throughout the United States, but isolated to Northwest Iowa-an area with a small population and a relatively small volume of commerce. (5) That there was not a clearly defined plan in place. (6) That Kent Stewart and Great Lakes Concrete did not decide to engage in the anti-trust violations at an arm's length position to negotiate with co-conspirators.

In summary and conclusion it is respectfully submitted to the Court that no upward departure in the basic theory of the guidelines is warranted with regard to Kent Stewart and Great Lakes Concrete.

B. The Court's second and third stated concerns fall under §2R1.1(b)(1) and (2). The Defendant interprets the Court's concern as asking if because the Defendant participated in agreement to submit noncompetitive bids should the offense level be increased by only one level? Further- is the of commerce attributable to each Defendant the appropriate measure of volume of commerce of the conspiracy or should the volumes of commerce between the two Defendants in totality be the appropriate measure?

The commentary following § 2R1.1 and the applicable case law gives us very little insight into the drafter's decision that the value of commerce attributable to an individual participant is limited to his goods and services affected by the violation and why the combined value of commerce of the conspiracy should not

be taken into account in each individual sentence. It can only be surmised that the value of commerce is a legal fiction created by the United States Sentencing Commission as a basis for adopting fines which does not require the government to go to the intricate detail of proving any actual gain by either participant from the conspiracy. The fiction recognizes that between or amongst co-conspirators each may have profited differently-or not at all. It also envisions that with regard to any one co-conspirator, for instance VandeBrake, he may be engaged in the conspiracies unrelated to another co-Defendant and where would the justice department find the starting and stopping point between one conspiracy and the other? The sentencing guidelines do allow for a single conspirator, involved in multiple conspiracies with unrelated Defendants, to have the fine determined on a grouping guideline as per §3D1.3(b) of the sentencing guidelines. Further, the value of commerce is only one consideration in the overall sentencing matrix and such other criteria as leadership are defined by the commission as being as more measureable guidelines of culpability.

C. The Court expresses its concern about the application of § 3D1.3(b) involving the grouping of related conduct in determining the offense level applicable to a group of related offenses. It is respectfully submitted that the this section is not applicable to Kent Stewart as the evidence is quite clear from the offense conduct statements presented by the Department of Justice and from Kent

Stewart's own testimony that his actions were solely limited to activities with GCC and Steve VandeBrake and not with any other company.

D. The Court justifiably comments that this type of crime (anti-trust) goes to the heart of our economic free enterprise system. It is difficult to dispute that the Court is correct on a moral and philosophical basis, but in the present case involving Kent Stewart this philosophical inquiry is not applicable for the following reasons:

(1) Free enterprise is an ideal-not a reality. Free enterprise as I think most of us understand it means that everyone given the opportunity and willing to work hard can equally and successfully compete in a capitalistic society. The reality is that more and more the little guy has difficulty in competing and prospering in a worldwide economy dominated by large national and multinational companies. Consider on facts unrelated to this case how difficult it must be for a sole proprietor with one or two products to even get an interview with Wal-Mart? Consider that as companies become larger they have better economies of scale and the ability to purchase raw materials at a better price and sell them at a lower margin. Consider that powerful special interests with lobbyists that are able to sway contracts to their clients because of such simple things as the criteria for bidding. Consider that many franchise operations have set an individual's required net worth so high as a requirement for obtaining a franchise that the average person

will never be able to purchase a franchise. Consider, finally, the continuing decrease in the number of small farmers and young farmers.

As related to this case consider that Great Lakes Concrete, with the exception of one other company in far western Iowa, is the only locally owned and independently operated ready mix concrete facility in all of Northwest Iowa. Consider the probability that with Kent Stewart incarcerated and no one left to run the company combined with the possible outcome of the civil litigation in this case that the five small facilities of Great Lakes Concrete will fail and be absorbed by GCC and GCC will be given a virtual monopoly on the products and sale of ready mix concrete in Northwest Iowa. Testimony will be presented that the same thing has already happened in the asphalt paving industry. Consider finally that our legal system, while the best on earth, is so slow and so expensive that a small company like Great Lakes Concrete complaining of the unfair practices of a giant multinational corporation would soon exhaust its resources in litigation and as per previous analogy to the State of Israel must pick its battles carefully and make its agreements when it can simply for the purpose of survival. Free enterprise as we know is not threatened by the illegal activities of Kent Stewart and Great Lakes Concrete, but instead by multinational cartels as referenced by Scott D. Hammond.

E. The Court in its letter of October 21, 2010, questions whether several factors under § 18 U.S.C. 3553 (a) should be used to increase Defendant

VandeBrake's sentence from the advisory guideline range. The Court also questions whether any of these factors may be applicable to the Defendant Kent Stewart. Without commenting on the applicability to the Defendant VandeBrake it is certainly appropriate to comment and advocate with regard to the Defendant Kent Stewart as follows:

1. Length of conspiracy-Kent Stewart pled guilty to one count of conspiracy commencing as early January 2008 and running through August of 2009. In later analysis he stated on reflection the conspiracy only occurred from January 2009 through May 15, 2009. Simply stated that was the period of time in which various projects were agreed upon. He adamantly denies any price fixing on price sheets-a topic which will be discussed later in this brief. He pled guilty to the time period charged simply for the fact that it was on the plea bargain offered and he wished to take advantage of the Government's offer of a two step departure for acceptance of responsibility and a three step motion for downward departure for rendering valuable assistance. It was made clear to him that these would not be offered unless the plea bargain was accepted. The truth of the matter is that this conspiracy had no specific starting date, no specific methodology, and no specific ending date.

2. The conspiracy as to Kent Stewart and Great Lakes Concrete would not have continued indefinitely as by the Government's own admission it had

already ended by August 2009 and by the statements of Kent Stewart he had no desire to be involved in the first place. More importantly, the government can snow no bid rigging on a project after May 15, 2010.

3. The number of different means and methods used was limited to allocation of specific projects in areas closer to one producing than another. The evidence will further show that Kent Stewart and Great Lakes Concrete did not take advantage of this agreement to raise their prices on these projects, but instead bid their standard discount prices. The actions of Kent Stewart then were to attempt to protect his company's traditional area of commerce-not to generate unfair projects.

4. It is agreed that the Defendant VandeBrake was the instigator and creator of the scheme (so acknowledged by the Court at the VandeBrake hearing and agreed to by the government) and no such scheme was ever initiated by Kent Stewart. Kent Stewart did have a heated discussion with a former owner of Alliance, Inc., about unfair pricing , but it was at a time not related to the present conspiracy or to the present company.

5. Kent Stewart will testify that he has given consideration to voluntary restitution efforts, but is confused by the state of the law as to who should receive restitution given that the law seems to provide for damages only to direct purchasers. As noted in the Presentence Report no direct purchasers have sought

restitution nor have any of them joined in the class action suit. It will also be demonstrated that the bids given by Kent Stewart and Great Lakes Concrete were at the prices that would have normally been bid absent any collusion.

6. It will be demonstrated by evidence that there was no impact on the public from any bids on projects won by Great Lakes Concrete as the bids were at normal prices to contractors and the contractors figured in several other items in determining their price to be charged to the third party public projects for a square yard of concrete. The contractors ultimate bids for the laying of concrete varied in price – even though the prices given to each bidder by Great Lakes were the same for the project.

7. The § 1B1.8 protection given to Kent Stewart resulted him disclosing two other projects which did not have significant value in commerce. Kent Stewart did not ask for that protection prior to giving his proffer, but it was offered by the Government. More importantly the Court should consider that prior to Kent Stewart offering to plea bargain and to make a proffer at an early stage in the proceedings the Government had possession by way of search warrant and answers to Grand Jury Subpoenas of all documentation, including price sheets of Great Lakes Concrete and each of the projects on which it had bid on 2008 and 2009. Given this volume of information and the voluntary statements of Kent Stewart it offered him a plea bargain which he accepted. The Government now alleges that

he was untruthful with regard to his testimony about price sheets and about one specific project called the East Okoboji Beach project. It is simply not fathomable that given § 1B1.8 protection that Kent Stewart would withhold any information and risk the loss of downward departures available to him. It is highly suspicious that these two matters became questions of concern not in the period from his proffer on January 13, 2010, through his plea taking on May 24, 2010, but only after Steve VandeBrake's plea agreement was rejected by this Court and he chose to enter into a new plea agreement giving the Court wider discretion in sentencing. It was only then apparently in June and July of 2010 that VandeBrake had new revelations regarding price sheets and the East Okoboji Beach project which appear to be very self serving at the expense of Kent Stewart who from day one was cooperative with the Government.

F. Kent Stewart in good faith entered into a plea agreement with the Department of Justice knowing that there was no guarantee it would be accepted by the Court, but assuming that it was entered into in good faith by both parties and has performed each and everyone of his obligations under the plea agreement. The Department of Justice has breached the plea agreement by not recommending a three level downward departure for substantial assistance to the Government and by revoking its recommendation of a two level departure for acceptance of responsibility without good cause. A plea agreement is contractual in nature and if

the Court determines that Kent Stewart has met the terms of the contract he should be entitled to the five step downward departures bargained for in the plea agreement, subject of course to the Court's own approval.

G. What is the "heartland" of anti-trust cases and how should it be applied in this case?

The United States Sentencing Commission at Chapter 1 Part A(4)(b)(departures) advises, "the commission intends the sentencing Courts to treat each guideline as carving out a "heartland" a set of typical cases embodying the conduct that each guideline describes. When a Court finds an atypical case, one to which a particular guideline linguistically applies, but where the conduct significantly differs from the norm, the Court may consider whether a departure is warranted." Guidelines page 6. The Court in U.S. v. Milikowsky, 65 F. 3d 4 (2nd Circuit 1995) likewise discusses a "heartland" as a typical set of cases. Id page 7. The Court goes on to say, "this Court has taken this firmly to heart in recent years, making clear that a District Court not only can, but must, consider the possibility of downward or upward departure when there are compelling considerations that take the case out of the heartland factors which upon which the guidelines rest." Id page 7. "The authority to depart provides a "sensible flexibility" to ensure that atypical cases are not shoe-horned into a guidelines range that is formulated only for typical cases." Id page 7.

In the commentary following § 2R1.1 of the guidelines the commission gives some insight into the "heartland" anti-trust case including:

1. The extent of the Defendant's participation in the offense.

2. The Defendant's role and degree to which the Defendant personally profited from the offense including salary, bonuses, and career enhancement. Id. at numbered paragraph 2.

3. Another consideration in setting the fine is that the average level of mark up due to price fixing may tend to decline with the volume of commerce involved. Id. paragraph 4.

4. 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 anti-competitive that they have been recognized as illegal per se, i.e. without any inquiry and individual cases as to their actual competitive effect. Id. paragraph 7.

5. Scott D. Hammond's discussion in his paper of November 3, 2005, concerns itself primarily with the proliferation of international cartel anti-trust and the billions of dollars involved. He acknowledges that only stiff finds will deter such conduct.

It logically flows that if these are the criteria for a heartland anti-trust case and the Defendant, Kent Stewart, can differentiate his conduct from the typical

case that the Court should look to the atypical circumstance of the matter in determining his sentence and arguably in this case departing substantially downward from the sentencing guidelines. The atypical circumstances will be thoroughly discussed in the next argument.

THE DEFENDANT, KENT STEWART , UNDERSTANDS THAT THE COURT WILL FOLLOW THE GENERAL APPLICATION PRINCIPALS OF SENTENCING SET OUT AT § 1B1.1 (A-I) OF THE U.S.S.G. (NOVEMBER 2009) IN DETERMINING THE DEFENDANT'S SENTENCE AND ARTICULATING THE SUBSTANTIAL REASONABLENESS OF THAT SENTENCE. THE DEFENDANT WILL ADVOCATE UNDER ALL OF THE GENERALLY APPLICABLE PRINCIPALS THE COURT IS JUSTIFIED IN SUSBTANTIALLY CONCLUDING THAT THE DEFENDANT IS ENTITLED TO A DOWNWARD DEPARTURE FROM THE ADVISORY GUIDELINES.

Chapter 1 of the U.S.S.G (2009) introduces the general theory and principal of sentencing under the United States Sentencing Guidelines. It provides initially that the Sentencing Reform Act of 1984 attempted to provide for the development of guidelines that will further the basic purposes of criminal punishment, deterrence, incapacitation, just punishment, and rehabilitation. (U.S.S.G. page 1). The introduction further provides that originally the sentencing Court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the act allows the Court to depart from the guidelines and sentence outside the proscribed range. In that case the Court must specify the reasons for departure pursuant to 18 U.S.C. § 3553(b). (U.S.S.G. page 2).

In 2005 the United States Supreme Court in United States v. Booker, 543 U.S. 220 (2005) effectively rendered the guidelines advisory in nature and not mandatory. The Supreme Court did not abrogate the sentencing guidelines as it found that an advisory guideline system would continue to improve sentencing and Congress' preferred direction while maintaining flexibility sufficient to individual sentences where necessary. The advisory guidelines system would also continue to assure transparency by requiring the sentences be based on our articulated reasons stated in open Court that are subject to appellate review. The United States Supreme Court in 2007 in Gall v. United States, 128 S. Ct. 586 (2007) further clarified that District Courts would be required to properly calculate and consider the guidelines when sentencing, even in an advisory guideline system. The Court's decision placed further emphasis on 18 U.S.C. 3553(a) determining the guidelines should be a starting point and initial benchmark and the standard of review by appellate Courts of a District Court's sentence would first be to determine that it was procedurally correct under the guidelines calculations and secondly that the substantial reasonableness of the sentence imposed would be reviewed under an abuse of discretion standard taking into account the totality of the circumstances including the extent of any variance from the guidelines range. Gall page 597. The requirement is that the Court articulates in open Court the substantial reasons for its departures so that the appellate Court will have a record before it to review.

It is likewise worthy to note that the guidelines are to reflect the general appropriateness of imposing sentence other than imprisonment in cases in which the Defendant is a first offender who has not been convicted of a crime or otherwise serious offense...28 U.S.C. § 994 (J). The commission, however, noted that under pre-guideline sentencing practice Courts sentenced to probation an appropriately high percentage of offenders guilty of certain economic crimes, such as the theft, tax evasion, anti-trust offenses, insider trading, fraud, and embezzlement that in the commission views as "serious". (U.S.S.G. page 8). The commission in the same commentary concludes that at least a short sentence of imprisonment is warranted in most cases to serve as a particular deterrent. The Defendant will argue to the Court that in this particular case imprisonment is not warranted as a deterrent, but instead imprisonment, even for a short period of time would have such a disproportionately negative and unduly harsh effect on the Defendant's family businesses and his innocent employees and that imprisonment should be avoided by the Court in favor of sentence crafted by the Court to better accomplish the needs of justice.

In an effort to present a concise detail of the present factors and mitigating circumstances the Defendant will attempt to argue to the Court through this brief and through oral and documentary evidence at sentencing that imprisonment is not warranted in this case. The Defendant is mindful that the Court has clearly

communicated to the Defendants in this matter and their respective attorneys its concerns in formulating appropriate sentences for both of the co-Defendants and will provide justification to the Court for the leniency requested on behalf of the Defendant Kent Stewart. It would be presumptuous for Kent Stewart to advise, or even suggest to the Court, the factors the Court should consider in sentencing Steven VandeBrake and no references will be made to sentencing considerations for VandeBrake, except as his conduct contrast with the Defendant Kent Robert Stewart.

Section 2R1.1 et sec. of the U.S.S.G. sets forth the offense levels established by the United States Sentencing Commission for various anti-trust offenses. Without now arguing the applicability of the sentencing commission's predetermined offense levels it is respectfully submitted that the Court should find that:

1. The base offense level under section 2R1.1(a) is 12.
2. That the Defendant participated in an agreement to submit non-competitive bids which would increase the offense level by 1 to a total of 13.
3. That pursuant to section 2R1.1. the value of commerce is less than $1,000,000 and an no adjustment should be made based on the volume of commerce.
4. That based upon the guideline fine range of 1 to 5% of the volume of commerce, but not less than $20,000 the appropriate fine level should be $20,000 as agreed upon in the plea agreement.

In summary then the Court should start with an offense level attributable to Kent Stewart of 13 and adjust downward in accordance with the mitigating circumstances allowable under the guidelines, applicable case law, 18 U.S.C.§ 3553 and the totality of the circumstances of this case such that, as a first time offender, Kent Stewart should be at a level 8 in zone A and qualify for probation or house detention in lieu of incarceration.

ARGUMENT II

THE ACTIONS OF KENT STEWART DO NOT FALL WITHIN THE "HEARTLAND" OF ANTITRUST CASES AND THE COURT SHOULD FIND SUBSTANTIAL REASONS FOR A DOWNWARD DEPARTURE FROM THE SENTENCING GUIDELINES IN THE SENTENCING OF KENT STEWART.

The Court has expressed to counsel in its correspondence and in status hearings its concerns as to whether the offense levels for antitrust violations, as stated in the U.S.S.G., sufficiently take into consideration the seriousness of the crime or whether the Court should depart upward from the sentencing guidelines in its sentencing decision. The Court makes comparison to other white-collar fraud cases and opines that the crime of antitrust goes to the heart of the American free enterprise system and is a difficult crime to discover. Particularly, the Court cites counsel to its decision in U.S. v. Miell where it departed significantly upward from the sentencing guidelines, 2010 WL 3853155 (N.D. Iowa September 27, 2010).

Counsel for Kent Stewart has no standing nor a sufficient knowledge of the facts of the VandeBrake case to argue the thoughts of the Court as applicable to VandeBrake, but is able to distinguish Miell from the Stewart case and present argument to the Court as to why the sentencing guidelines are appropriate in the Stewart case, as well as why Stewart should receive a downward departure from the sentencing guidelines.

In the U.S.S.G. commentary following Section 2R1.1 at numbered paragraph 7 the commission states, "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 are so plainly anticompetitive that they have been recognized as illegal per ser, i.e., without any inquiry in individual cases as to their actual competitive effect."

The commission in the same commentary at numbered paragraph 2 also suggests to the Court considerations in setting fines for individuals. In doing so it states, "in setting the fine for individuals, the Court should consider the extent of the Defendant's participation in the offense, the Defendant's role, and the degree to which the Defendant personally profited from the offense, including salary, bonuses, and career enhancement."

In applying this commentary to Kent Stewart this Court should recognize that his conduct, absent the mitigating factors that will later be discussed, fell squarely within the typical conduct in an antitrust case with no extraneous factors that would lead the Court to consider a comparison to other white-collar crimes. It will be argued to the Court that Kent Stewart's activities were not designed to restrict output and raise prices, nor did he personally gain from his role in the offense by way of increased salary, bonuses, or career enhancement. It is admitted, however, that the offenses were per se illegal under the Sherman Act.

In contrasting Kent Stewart's situation to that of the Defendant in Miell the contrasting factual situation is blatant. Miell was an incredibly wealthy individual who engaged in a long-term fraud directed at individuals that he knew did not have sufficient monetary resources to contest his actions – and if they did he had actually created a sham company to assist in perpetuating the fraud. He also engaged in mail fraud and tax evasion for no apparent purpose other than to further enrich himself. The course of conduct took place over many years.

In comparison Kent Stewart is not a wealthy individual, did not prey on the financially disadvantaged, did not assume a leadership role in perpetuating the antitrust crime, did not formulate a complicated conspiracy, and the conspiracy was short lived.

It is respectfully submitted to the Court that no reason exists for an upward departure from the sentencing guidelines in the sentencing of Kent Stewart, but instead, significant reasons exist for a downward departure. The seminal case is not Miell, but instead U.S. v. Milikowsky 65F.3d4 (2nd Circuit 1995). Milikowsky was a principal in several steel related businesses which engaged in a price fixing conspiracy for the pricing of new steel drums in the eastern United States from May 1987 through April 1990. He was indisputably a leader in a well-coordinated conspiracy amongst several companies to control pricing in an extensive geographical area. In arguing at sentencing for a downward departure from the sentencing guidelines to avoid incarceration Milikowsky successfully argued to the sentencing Court that his continuing management of his companies was instrumental to their survival and that his incarceration would have an extraordinary impact on not only his companies, but his innocent employees. The sentencing Court, over the objections of the government, departed downward accordingly, and the 2nd Circuit Court of Appeals affirmed the District Court's actions. The District Court, as affirmed by the Court of Appeals, found that a downward departure was warranted where imprisonment would impose extraordinary hardship on the employees of the business and that such a hardship was not adequately taken into consideration by the sentencing commission. The factors cited by the Court for its decision to allow a downward departure included: (1) Milikowsky was the only person with knowledge, skill, experience, and relationships necessary to run the companies. (2) Milikowsky's circumstances differed from those of other high-level business people. (3) The loss of Milikowsky's daily guidance would extraordinarily impact the persons employed by him. (4) There was a need to reduce the destructive affect the incarceration of Milikowsky would have on innocent third parties. Particularly, the Court cited letters and testimonies from family members, employees, and business associates as to Milikowsky's

importance to the business including the fact that he was the sole buyer of the steel necessary to manufacture the steel drums, was the company's most successful seller, and the person who dealt daily with customers and suppliers. Admittedly the Court also found the companies to be in dire financial straits and the lender's desire to have Milikowsky at the helm. Fortunately Great Lakes Concrete is not yet in that position.

The Court of Appeals specifically found that, "the sentencing reform act provides that a Court may impose a sentence outside the guideline range when it finds a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the sentencing commission in formulating the guidelines." Id. at page 7 and further citing 18 U.S.C. Section 3553(b). The Court of Appeals also made reference to the commission's comments about carving out a "heartland" and the ability of a sentencing Court when it finds an atypical case that significantly differs from the norm to consider whether a departure is warranted. Id. at page 7. The Court of Appeals further summarized that, "the authority to depart provides a sensible flexibility to ensure that atypical cases are not shoe-horned into a guidelines range that is formulated only for typical cases." Id. at page 7. Further, that among the permissible justifications for downward departure we have held is the need given appropriate circumstances, to reduce the destructive affect that incarceration of the Defendant may have on innocent third parties." Id. at page 7. The Appellate Court acknowledges that certainly the commission could hardly have overlooked the affect that imprisonment of offenders would have on small businesses that are likely to be heavily dependent upon those very offenders for their continuing success. However, the commission did not thereby take into account the affect imprisonment would have in "extraordinary circumstances". Such circumstances as we explained in Johnson, United States v. Johnson 964F.2d 124 (2nd Circuit 1992), are by their nature not capable of adequate consideration. Id. at

page 8. Finally the Court concluded that the sentencing guidelines do not require a judge to leave compassion and common sense at the door to the Courtroom. Id. at page 8.

Many of the reasons cited by the Court in Milikowsky for a downward departure from the sentencing guidelines to allow Milikowsky probation instead of incarceration are comparable to the situation of Kent Stewart. Particularly: (1) Kent Stewart is the heart and soul of Great Lakes Concrete, Inc., and simply the business will not function without him. The evidence at sentencing will show a laundry list of daily functions performed by Kent Stewart that no one else in the company has the experience, knowledge, training, or skills to perform, including the purchasing of raw materials, day to day relationships with major customers, bidding and the knowledge required for bidding on major products that are the lifeblood of the company, allocation of equipment and supplies, and coordination of the output and deliveries from each facility to each project, and daily interaction with a majority of the company's customers. The plant managers are primarily responsible for only the physical operations of their facilities and allocation of employees. (2) Kent Stewart is not the classic "high level business person". He does not sit in an office directing policy and looking at the broad picture in the industry, but instead is intimately involved in the detailed daily operations of the business. (3) The loss of Kent Stewart and his guidance would extraordinarily impact the 40+ persons employed by the company and their families. The evidence at sentencing will show that the company consistently, including the calendar year 2009, had a payroll in excess of $1,500,000.00 in addition to paying medical insurance premiums for its employees in excess of $125,000.00 to provide the employees and their families with adequate medical insurance. In the current economy and in the small towns in which Great Lakes Concrete operates these jobs would be difficult to replace.

Unlike Milikowsky, Kent Stewart was not the instigator of the conspiracy, the conspiracy took place over a short period of time, involved a relatively small geographical area, Kent was not the typical white-collar offender, and he did not engage in the antitrust violation for personal gain.

It is respectfully submitted that this Court has clear justification and can state reasonable grounds on the record for departing from the sentencing guidelines in this atypical case to reduce the destructive affect that incarceration of the Defendant would have on innocent third parties given extraordinary circumstances falling outside the heartland envisioned by the antitrust guidelines and use its sensible flexibility to ensure that this atypical case is not shoe-horned into a guideline range that is formulated only for typical cases.

ARGUMENT III

THE VOLUME OF COMMERCE THAT THE GOVERNMENT SEEKS TO ATTRIBUTE TO KENT STEWART IS IMPROPERLY CALCULATED, BASED ON INCORRECT MATHMATICAL ASSUMPTIONS, AND FURTHER IMPROPERLY BASED ON AN ALLEGATION OF CONSPIRACY WHICH HAS NOT BEEN CHARGED AND BY WHICH THE GOVERNMENT SEEKS TO ENHANCE KENT STEWART'S SENTENCE IN VIOLATION OF THE SIXTH AMENDMENT.

In the plea agreement entered into by the United States and Kent Stewart it was stipulated by the parties that the volume of commerce was less than $1,000,000.00. (Plea Agreement Section 8(b)). In the rough draft of the Presentence Report the investigator reports that the parties have agreed to six specific projects having a volume of commerce of approximately $743,001.95. The parties dispute a project called Spencer/Lincoln School 2009 with a value in commerce of $101,773.00, which the investigator has agreed to omit based upon an Affidavit by the contractor that no bid was placed by Great Lakes Concrete on this project. The Presentence Report also refers to the Court $92,946.00 for which the Defendant was afforded protection under Section 1B1.8 of the Sentencing Guidelines giving a total value of $937,720.95 in the worst case and within the $1,000,000.00 stipulated by the parties.

After further discussions with Defendant Steve VandeBrake after the acceptance by the Court of his Plea Agreement, the Government has sought to add a value in commerce for a project called East Okoboji Beach with a value of $694,537.50 despite the fact that Kent Stewart was extensively interviewed with regard to this project in his proffer of January 13, 2010, and Steve VandeBrake did not raise any suspicions about the project until June or July of 2010. Further, despite the fact that the presentence investigator notes that Great Lakes' bid on this project was $85.00 per cubic yard which was well below its normal biddings and $17.00 per cubic yard below the eventual bid of GCC further noting that in the other conspiracies the bids were always very close. In essence, the Government seeks to tack on an additional value in

commerce of almost $700,000.00 without a single piece of evidence evidencing a conspiracy, other than the self-serving statements of a co-conspirator, which arguable would not be allowed under the rules of evidence in a criminal case, but which the Government seeks to slip into the sentencing proceedings under a theory of preponderance of the evidence. This violates the Defendant's Sixth Amendment rights to have the allegations against him proven beyond a reasonable doubt by a jury of his peers.

Likewise, a substantial issue has arisen as to what the parties referred to as "price sheets" which are the fliers handed out to the general public on the pricing of concrete and other materials from various companies. Again, all of these price sheets were readily available at the time of the Defendant's proffer and were discussed with him. Again, no mention is made of these price sheets until after VandeBrake's ultimate plea was accepted and then he initially recalls that the Defendant Kent Stewart contacted him with regard to setting prices for the price sheets, but then retracts that statement and alleges that he contacted Stewart. Further evidence in the way of the Government's own interview of GCC employees will show that the price increases taken by GCC were directed from the corporate level and not an agreement with Great Lakes Concrete. Again, the only evidence of any conspiracy will be the tainted testimony of Steve VandeBrake, a co-conspirator. The Government again seeks to circumvent its burden to prove the allegations beyond a reasonable doubt in favor of trying to convince the Court by a preponderance of the evidence at sentencing that this value of commerce should be considered.

Most importantly the Government's argument and allegations failed to take into account that there has been no allegation whatsoever that any conspiracy between Great Lakes Concrete and GCC Alliance extended to fixing the discounts normally given to contractors from the public prices shown on the price sheets. Absent some allegation of this component of price fixing, it

can be demonstrated by evidence that Great Lakes Concrete had several levels and criteria for discounts on not only standard weight concretes but over 100 other designed mixes which were independently set due to the circumstances of each project or customer and never discussed or agreed upon with GCC or any other competitor.

The Government's analysis in determining the value in commerce is also flawed. It asked Great Lakes Concrete's representatives to provide it with an estimate of the percentage of the company's total sales in standard weight concrete and was provided with a figure of 30%. The Government then arbitrarily determined that 30% of the standard weight concrete sales were at a rigged price and further made an arbitrary adjustment where there was no overlap amongst the competing plants. These calculations have no basis in reality and are simply a red herring.

SUMMARY AND CONCLUSION

The summary of this matter is somewhat simple. If I haven't conveyed it properly then apparently my advocacy skills are lacking. It is simply that the actions of Kent Stewart in committing a violation of the United States antitrust laws far fall outside the "heartland" or typical antitrust case.

Absent from his motivation was greed or personal gain. Present was a desire to preserve his small family owned business and the livelihood it represented to his 40+ employees and their families. His opportunity for great wealth came in 2008 when he could have followed his fellow shareholders and sold the company for an amount that would have made him ridiculously wealthy-- far wealthier than continuing to run his business on an even financial keel and enjoy an annual salary and 1/3 of the distributed profits. Far wealthier than violating the law for financial gain.

A look at Kent's lifestyle affirms the truth of these statements. He lives comfortably with his wife and extended family- not lavishly. He works from a small office and a pickup and involves himself in all the daily operations of the company. He even sells his family owned aggregate to Great Lakes Concrete, a company in which he only owns a 1/3 interest, at a discount instead of at full price to assure its financial success-- a success enjoyed 66% by his other shareholders.

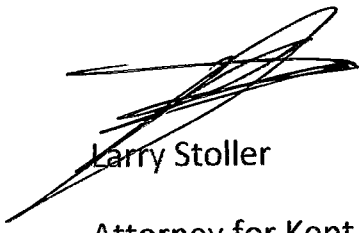
Kent admitted his wrong-doings. He didn't excuse them, just explained them. To incarcerate Kent would be the death knell of his family business and the monopolization of the ready-mix concrete industry in Northwest Iowa by a giant multi-national company which has expressed its desire to do just that. Soon we will be a country of employees and not entrepreneurs.

What message would a downward departure in sentencing send? The message that good people sometimes do bad things, but for the right reason, and when they do so they must be punished, but punished by a court system that is flexible enough to take into consideration the unique circumstances of each individual and each situation and show compassion where compassion is warranted and the

offender has learned by his offense, duly punished himself, and is not likely to be a repeat offender.

If the court should determine to incarcerate Kent Stewart it is respectfully requested that he be incarcerated in the federal facility in Yankton, South Dakota, and that his incarceration be delayed for a sufficient time to allow him to attempt to teach his managers and employees the skills necessary to try to operate Great Lakes Concrete in his absence.

Respectfully submitted,



Larry Stoller

Attorney for Kent Stewart

CERTIFICATE OF SERVICE

I certify that on the 24th day of November, 2010, the foregoing Sentencing Memorandum and Brief was filed electronically and to the best of my knowledge, information, and belief counsel for the United States be notified through the Electronic Case Filing System.

DATED: November 24, 2010, at Spirit Lake, IA

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