IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	No. 1:15-cr-00752-002
vs.	
BRADLEY N. DAVIS	Hon. Matthew F. Kennelly

UNITED STATES' SENTENCING MEMORANDUM

For over nine years, the defendant organized and led a conspiracy that cheated hundreds of vulnerable victims, including the elderly. The defendant and his company, Brandenburger & Davis ("B&D"), were supposed to compete and try to beat their competition for the business of their customers, heirs to intestate estates. But instead of battling it out in the competitive marketplace and earning the heirs' business by offering value in ways that their competitor could not, they instead found a more lucrative, criminal alternative: reaching an illegal agreement with their competitor not to compete. The defendant and B&D deprived the heirs—many of whom were elderly and unaware of their options—of competitive choice. The defendant and B&D effectively declared that they and their coconspirators, rather than the competitive market, would dictate with whom the heirs would contract and how much they would have to pay out of their rightful inheritances. That is wrong. That is illegal. And that is the crux of the conduct for which the defendant is being sentenced.

The United States requests that the Court: (1) include a four-level

enhancement based on the defendant's role as an organizer and leader of the criminal conspiracy charged in this case; (2) otherwise accept the remaining sentencing guidelines calculations recommended in the Presentence Investigative Report ("PSR"); (3) impose a sentence of 13 months incarceration, which is 72 percent of the low end of the guidelines' incarceration range as calculated by the United States; (4) impose a criminal fine of $62,000; (5) order the defendant to pay the special assessment of $100; and (5) not order restitution. The defendant is scheduled to be sentenced on August 31, 2020, at 1:30 p.m.

I. FACTUAL BACKGROUND[1]

A. Industry Background and Overview of the Case

Heir location service providers identify heirs to estates of people who have died without a will and, in exchange for a contingency fee, develop evidence and prove-up the heirs' claims to an inheritance in probate court. The defendant entered into and engaged in a combination and conspiracy with Company 1 (identified in PSR ¶ 9) and Individual 1 (the Director of Operations and eventual Vice President/COO of Company 1, identified in PSR ¶ 10), and other individuals to suppress and eliminate competition by agreeing to allocate customers of heir location services sold in the United States. The combination and conspiracy engaged in by the defendant and his

[1] Unless otherwise noted, the factual background is based on the PSR, which includes the Government's Version of the Offense (and its exhibits) (the "GVO"); witness statements; investigative reports; the Plea Agreement in this case, and documentary evidence.

coconspirators was in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). The conspiracy began at least as early as November 2003 and continued until at least August 2012 (the "relevant period").

B. The Conspiracy's Timeline and Terms

By Fall 2003, B&D re-entered the Seattle market after having been absent from that market for many years and began monitoring estates filed there in probate court. Company 1 was likewise targeting those estates, and when Individual 1, Company 1's Director of Operations at the time, discovered that B&D was again competing for heirs of probate estates opened in Seattle, he confronted the defendant in a phone call to express his displeasure. After that call and after consulting with Individual 2 (the president of B&D, further identified in PSR ¶10), in November 2003 the defendant and Individual 1 agreed to eliminate competition between the companies and thereby prevent a reduction in price levels charged to heirs. The conspirators ultimately achieved these ends by using two tools: (1) "Call-offs": agreeing to allocate potential heirs to an estate to the first coconspirator company to contact an heir on the estate,[2] and (2) "fee-split agreements": agreeing to allocate potential heirs in a fashion similar to a call-off, but additionally having the company

[2] The "call-off" terminology is in reference to the fax or call from the first co-conspirator to the other, laying dibs to the heirs of the estate with the expectation that the coconspirator who had not made equivalent progress on the estate would back off on any effort to compete for that estate's heirs thereafter.

allocated heirs split the supra-competitive contingency fees collected from those heirs with the other conspirator company, in exchange for that other company having backed off from competing for them.

Shortly thereafter, the defendant and B&D had begun to implement the agreement. The defendant informed B&D's employees of the steps they would need to follow to implement the conspiracy with Company 1. He also authorized B&D's researchers—the salespeople who identified, directly contacted, and tried to contract with possible heirs—to issue call-offs to Company 1. The conspiracy began in the state of Washington, but quickly expanded to include estates located in every state and county across the country that both conspirator companies monitored.

The defendant was promoted to Vice President of B&D in 2004 and assumed responsibility for overseeing the core business of the company, while Individual 2 became even more hands-off after he had a major medical surgery that same year. Even though the defendant was Vice President, he retained some responsibility as a researcher himself, and he personally implemented call-offs and reached fee-split agreements with Company 1 in that capacity as well. Finally, the defendant worked directly with Individual 1 to smooth over conflicts when they arose between the coconspirator companies as the companies implemented the agreement.

There was no formal end of the conspiracy; rather, it dwindled as mistrust between the two companies grew. Rather than receiving a company-wide instruction that the conspiracy had ended, each B&D researcher individually stopped engaging in the anticompetitive practices (inclusive of call-offs) when their individual

frustration levels with the arrangement exceeded their tolerance thresholds.

C. Relevant Conduct – Cook County Conspiracy

In addition to the charged conspiracy in this case, the defendant has admitted that he also engaged in an additional anticompetitive conspiracy for which he was not charged, which constitutes relevant conduct. *See* PSR ¶¶ 4.i, 24-27. More specifically, B&D, Company 1, and multiple other heir location service companies engaged in a similar conspiracy to that which was charged that targeted estates in Cook County, Illinois. Like the charged conspiracy, the first coconspirator to contact an heir to a Cook County estate would immediately issue a call-off to all other Cook County conspirators, and they would thereafter refrain from competing for the heirs on the called-off estate. Unlike the charged conspiracy, this practice involved only call-offs; it was not the practice of the Cook County conspirators to take on the burden and complexities of fee-splitting agreements.

B&D, through a local contact, had gained access to the existing Cook County conspiracy in the 1990s, before Company 1 entered that market. When B&D and its local contact parted ways, B&D temporarily lost access to the conspiracy. Company 1 joined during the period of B&D's absence.

By no later than 2004, the defendant re-established B&D's relationship with its local contact and the other Cook County conspirators, which then included Individual 1 and Company 1. From that moment forward, the defendant personally maintained and controlled B&D's relationship with its local contact and managed

B&D's involvement in the Cook County conspiracy. When B&D met the criteria to call off its Cook County coconspirators, the defendant himself issued the call-off to Individual 1, and the defendant's local contact would issue the call-off to the remaining conspirators. The conspiracy continued in this fashion until one of the other major coconspirators announced its withdrawal in mid-March of 2007. That competitor began to compete for heirs instead of collusively allocating them, which soon-after resulted in the remaining conspirators also ending the collusive practice. As a result of this relevant conduct, the stipulated volume of affected commerce of at least $8,607,233 is comprised of two sums: $5,088,828.20 in commerce affected by the charged conspiracy and $3,518,395.78 in commerce affected by the Cook County conspiracy.

II. THE DEFENDANT'S PROPERLY CALCULATED GUIDELINES RANGE IS 18-24 MONTHS' IMPRISONMENT

The United States, the defendant, and the U.S. Probation office agree on all Guidelines calculations except one—the defendant's role in the offense. The government's position is that the defendant was leader or organizer, leading to a four-point enhancement in the offense level. The U.S. Probation Office agrees that a role-in-the-offense enhancement is warranted, but at a different level—manager/supervisor. And the defendant disputes application of the leader/organizer role-in-the-offense enhancement. The government's calculation of the defendant's offense level, as detailed in the GVO, is set forth in the table below and discussed in greater detail in the sections that follow.

Description	**U.S.S.G. §**	**Points**
Base Offense Level	2R1.1(a)	12
Volume of Commerce attributable to the defendant: $1M - $10M (stipulated to be $8,607,223.98)	2R1.1(b)(2)(B)	+2
Aggravating Factors		
Role in the Offense	3B1.1(a)	+4
Downward Adjustments		
Acceptance of responsibility	3E1.1(a)	-2
Timely notification of intention to plead guilty	3E1.1(b)	-1
Total Offense Level		**15**
Guidelines Months of Imprisonment Range, Criminal History Category I	**18-24 months**	
Individual Fine Range, 1-5% of Volume of Commerce, per 2R1.1(c)	**$86,072.24 - $430,361.20**	

A. The Defendant Served as a Leader or Organizer of the Conspiracy

Under U.S.S.G. § 3B1.1(a), a defendant's offense level is increased by four levels "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Application Note 4 to U.S.S.G. § 3B1.1 sets forth a list of factors the Court should consider in determining whether a defendant had a leadership or organizational role in the criminal activity. These factors include: (1) the exercise of decision-making authority; (2) the nature of participation in the criminal offense; (3) the recruitment of accomplices; (4) the claimed right to a larger share in the fruits of the crime; (5) the degree of participation in planning or organizing the offense; (6) the nature and scope of the illegal activity; and (7) the degree of control and authority exercised over others. The guidelines do not require that each of the factors be satisfied for § 3B1.1(a) to apply.

As a threshold matter, during the pendency of the conspiracy there were five or more participants, including at least four other participants from B&D and at least four participants from Company 1. PSR ¶¶ 21-22. Moreover, the defendant clearly satisfies most, if not all, of the factors set forth in Application Note 4.

The defendant has not disputed that his positions in the company enabled him to influence and exert operational control and make decisions over the employees located in B&D's headquarters and engage with competitor Company 1. *See* PSR ¶ 14. The defendant was promoted to B&D's vice president shortly after the inception of the conspiracy and gained a 4% ownership interest during its pendency. PSR ¶ 20. The defendant assumed management of the day-to-day business activities in the lead-up to the conspiracy. GVO at 8; *see also* PSR ¶ 14. Even though B&D employees had previously understood the defendant to have control of day-to-day activities prior to his formal promotion to vice president, the title solidified and confirmed the defendant's operational authority over all employees of the company with the exception of Individual 2. GVO at 8.

The defendant not only participated in the offense, he created and entered into the conspiracy with Individual 1. PSR ¶ 15. Once the conspiracy was in place, the defendant's efforts to oversee, enforce, and implement it were manifold:

(a) As the creator of the conspiracy with Individual 1, the defendant was recognized by the employees at Company 1 as the point-person in charge of B&D's relationship with Company 1. PSR ¶ 22. When conspiracy-related conflicts arose between the conspirator companies, the defendant directly

interceded on behalf of B&D with Company 1, or otherwise instructed his subordinates on B&D's response. PSR ¶ 19.

(b) The defendant brought others into the conspiracy when he instructed B&D researchers of the conspiracy's terms and their respective responsibilities pursuant to it so that they could implement it themselves. PSR ¶ 15.

(c) The defendant oversaw and participated in regular B&D researcher staff meetings at which developments in the conspiracy were discussed, and at which the defendant updated his subordinates of changes to the conspiracy's operations based on his ongoing communications with Company 1. PSR ¶ 16.

(d) The defendant himself issued call-offs to Company 1 and respected call-offs issued by Company 1, thereby preventing heirs to affected estates from receiving competitive offers. He likewise was the point-person for negotiating the splitting of the conspiracy's fruits with Company 1 in exchange for one party not competing. PSR ¶ 17.

(e) The defendant ensured that the payoffs owed to competitors for allocating heirs and not competing were properly made on those estates affected by such collusion. PSR ¶ 18.

The defendant does not dispute these facts. Rather, the defendant in his submission to probation raises a number of additional facts that he believes to be mitigating and supportive of a lesser role enhancement. They are not. The PSR appropriately addressed the majority of the defendant's facts and found them not to

be mitigating. See PSR ¶¶ 50, 51, 52. A few of the defendant's other facts and arguments, however, and the PSR's assessment of them, warrant additional discussion here. *See* PSR ¶ 53.

First, the mere fact that the call-off practice had for decades been used by other *colluding* heir location firms to eliminate competition does not mitigate the defendant's own role in initiating and leading such a conspiracy at B&D. PSR ¶ 50 (finding the same). Beyond that, even though the call-off form of collusion was well understood in the industry, the defendant and Individual 1 nevertheless had to establish a framework for using call-offs that would serve their own respective companies, employees, and one another. Additionally, the conspiracy they created went beyond the "traditional collusion" in the industry with an innovation—including a means to share the conspiracy's fruits on some estates by splitting fees for not competing. This tactic was not a part of the traditional call-off formulation and required follow-up with the coconspirator over the life of affected estates. Furthermore, any planning and organizing efficiencies secured by the defendant and Individual 1 resulting from their decision to travel a well-worn criminal path does nothing to reduce the defendant's *relative* culpability among the conspirators participating thereafter—the remainder of whom had not established the overarching criminal conduct in the first instance.

Second, the employees that the defendant recruited into the conspiracy he created are still cognizable as recruits, irrespective of the fact that they happened to also be established employees at B&D who had otherwise been engaged in legitimate

work for that company at the time. *See, e.g.*, *United States v. Massey*, 48 F.3d 1560, 1572 (10th Cir. 1995) ("[The defendant]] implemented JRE's European Loan Program and could thus be considered a recruiter insofar as he enlisted the JRE employees to participate in the scheme"); *United States v. Sidhu*, 130 F.3d 644, 655 (5th Cir. 1997) (affirming a leader or organizer role enhancement and noting that a defendant "recruited numerous office employees to provide billing and collection support for his fraudulent practices."); *United States v. Freeman*, 664 Fed. App. 583, 584-587 (7th Cir. 2016) (affirming district court's application of leader/organizer enhancement which had been based, in part, on evidence of recruited employees). Their positions at B&D made them particularly valuable targets for enlistment as coconspirators, and all of the B&D employees who became participants in the conspiracy (e.g., by sending and honoring call-offs, transmitting and collecting fee-splits) only did so as a result of the defendant's efforts, influence, and instruction.

Third, by virtue of his minority ownership stake in B&D during the conspiracy, the defendant was entitled to a greater share of the conspiracy's fruits.[3] The guidelines analysis should clearly recognize that fact as an aggravating one favoring the leader/organizer enhancement. *See, e.g.*, *United States v. Reissig*, 186 F.3d 617 (5th Cir. 1999) (affirming leader or organizer enhancement "where defendant was part owner of a business, which entitled him to a larger share of the fruits of the

[3] In his submission to probation, the defendant questioned whether the conspiracy yielded any fruits. That issue is addressed in section IV.A.2, below.

crime"). The guidelines do not, in fact, require that there be evidence that a defendant-owner in this context was explicitly allocated a disproportionate share of the fruits in order to meet the disproportionate share criteria relative to other non-owners. In *United States v. Ahmad*, 208 U.S. Dist. Lexis 6584, *11 (E.D. PA, Jan. 30, 2008), for example, a district court acknowledged that, as is the case here, there was no direct evidence that the defendant received or was intended to receive a larger share of the fruits of the charged crime (tax fraud); nevertheless, the district court recognized that for role in the offense purposes, "as one of the owners of [his business], … , Ahmed stood to benefit from the widespread under-reporting of taxable payroll more than the individual rank-and-file employees, who would receive a comparatively small tax benefit." Similarly, the defendant stood to benefit disproportionately from his own ownership interest in the ongoing conspiracy, whenever and however that interest was acquired during the conspiracy's pendency. Accordingly, any analysis of the defendant's role in the offense in this case should similarly recognize that he was entitled to a larger share of this financial crime's fruits than others at B&D by virtue of his ownership stake in B&D.

In sum, it is difficult to overstate the nature and degree of the defendant's role in the charged offense because he stands as the person most responsible for B&D's entry into, and sustained participation in, a successful and prolonged criminal conspiracy affecting hundreds of victims nationwide and millions of dollars in affected commerce. From the conspiracy's inception, B&D's president and majority owner was not involved at all in the goings-on of the business' core functions. It was the

defendant who used the authority given to him, both in title and in practice, to lead B&D and its employees through the conspiracy's development and evolution. Even if Individual 2 was the company's majority owner and president, the defendant was understood to be acting on behalf of B&D and to have full authority to negotiate on its behalf when he worked with Individual 1 to conspire instead of compete. The degree of planning, organization and tailoring that the defendant undertook to follow through on this illegal conduct is evidenced by his entering into fee-splitting agreements that even exceed the requirements for traditional call-offs. He monitored the conspiracy's effectiveness through staff meetings he organized and led, and updated those employee-participants he had recruited on changes to logistics. He took the lead on working with Company 1 to iron out differences as they arose. Finally, the defendant allowed the conspiracy to continue for years after the defendant himself became part-owner of B&D, thus ensuring that he would be entitled to a greater share of the conspiracy's spoils.

For the foregoing reasons, the United States submits that a four-level leader/organizer enhancement under U.S.S.G. § 3B1.1(a) is appropriate in this case.

III. THE DEFENDANT QUALIFIES FOR A SENTENCE THAT IS 72% OF THE BOTTOM OF THE GUIDEILNES RANGE

At sentencing, the United States anticipates that it will move the Court pursuant to Guideline § 5K1.1 to depart from the guidelines and sentence the defendant to a term of imprisonment and a fine amounting to 72 percent of the bottom

of each guideline's range—13 months' imprisonment under the government's Guidelines calculations.

Reductions under § 5K1.1 are assessed based on, among other things: (1) the significance and usefulness of the defendant's assistance; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; and (4) the timeliness of defendant's assistance. *See* U.S.S.G. § 5K1.1(a). These factors weigh in favor of a departure here.

The defendant provided substantial assistance in the prosecution of others. Soon after the FBI initially visited him, the defendant implicated himself and other coconspirators in the charged offense and relevant conduct. He likewise very quickly offered and provided timely and extensive assistance in identifying, compiling, and providing narrative context to understand incriminating B&D documents and historical events—many of which did not directly involve his own personal conduct. He likewise fully and completely shared his limited knowledge about other conspiratorial conduct and participants in the industry. And he agreed to plead guilty on an expedited timeframe to maximize pressure on other conspirators. The defendant provided additional assistance, which the United States will describe with more particularity at defendant's sentencing hearing.

IV. SENTENCING RECOMMENDATION

A. Sentence of 13-Months' Imprisonment and a $62,000 Criminal Fine

A sentence should reflect the seriousness of the offense, promote respect for

law, provide just punishment for the offense, afford adequate deterrence, and account for a defendant's history and characteristics. Title 18, United States Code, Section 3553(a) sets forth the factors to consider when determining a sentence that is sufficient, but not more than necessary, to comply with these aims.

Given the sheer number of victims that were harmed by the defendant's crime, the vulnerable and unknowing nature of those victims, the millions of dollars of the victims' inheritances affected by the conspiracy, and the duration of time during which the victims were subject to the conspiracy, a just punishment here calls for the imposition of a term of incarceration and a criminal fine of approximately 72 percent of the low end of the defendant's respective guideline incarceration and fine ranges. A sentence that includes these terms is sufficient, but not greater than necessary, to comply with the principles set forth in 18 U.S.C. § 3553(a). The follow factors support this conclusion:

1. The Nature and Circumstances of the Offense Warrant the Recommended Sentence

a. The Defendant Undermined the Protections that the Sherman Act Affords

The defendant's crime is a serious one, striking at the very heart of free enterprise and, for more than nine years, he victimized hundreds to the tune of millions of dollars in affected commerce. The United States Supreme Court has offered the following explanation of the policies underlying the Sherman Act:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained

> interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 104 n. 27 (1984) (quoting *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958)).

The defendant corrupted the competitive processes in order to protect and otherwise enhance his own interests in an effort to avoid the pro-consumer struggle of competition, all to the detriment of his victims. The victims here had no way to know that they had been deprived of competing offers, lower prices, or superior services that actual competition might have brought them. They had no reason to know the extent to which this market *could* otherwise be competitive, or what alternative options (including nearly-free options) might otherwise have been available to them. Rather, their very understanding of their need for the services offered was itself often limited to what a coconspirator told them.

Over four hundred individual heirs were victimized as a result of the conspiracy to which the defendant has pled guilty—an immense number of people. PSR ¶ 30. These victims, many of whom were elderly, put their faith in the honesty and integrity of the defendant and his coconspirators—trusting that the heir location service providers that contacted them would not take advantage of their vulnerability and lack of knowledge. But their trust in the defendant and his coconspirators was misplaced—the conspirators made no mention to their victims of the collusive

agreement specifically designed to deprive them of the benefits conferred by competition.

A victim with initials MNP submitted a victim impact statement and is one example of such a victim. Heartbroken and distraught after the death of a close family member who died intestate, she ultimately signed up with B&D, not realizing or appreciating its collusive and anticompetitive conduct. Now that she is aware, she expressed feelings of having been manipulated and taken advantage of.

2. The Conspirators not only Deprived their Victims of Choice, but also Signed them at Supra-Competitive Rates

The conspiracy was entered into, in no small part, to generate a financial windfall for the conspirators at the expense of victims such as MNP. *See supra* n. 12; *see also* Dkt. 1 ¶ 10(g) (Charging Information). The defendant admitted in multiple interviews with investigators that at the time he entered into the conspiracy, he was concerned about how competition with Company 1 could negatively impact B&D's profitability should Company 1 live up to its reputation as a fierce competitor—while collusion, by way of comparison, could result in more money for B&D. Furthermore, contrary to the defendant's contention that absence of a restitution request suggests there may not be any fruits, there are substantial additional reasons to believe it more likely than not that the conspiracy was successful. First, the parties' position on restitution was not itself based on any conclusions reached about the fruits of the crime. *See* PSR ¶ 33 (explaining the position). Second, the sentencing commission assumes for guideline calculation purposes that financial fruits exist in the absence

of evidence to the contrary. Recognizing the time and expense that would be required for a court to calculate actual gain or loss, the sentencing commission, through the antitrust guideline, instructs us to use twenty percent of the volume of affected commerce as a proxy for pecuniary loss. U.S.S.G. § 2R1.1 app. n.3. Third, consistent with the defendant's admissions to investigators, anticompetitive heir allocation agreements are white-collar financial crimes intended to enhance profit. The Tenth Circuit in *United States v. Kemp & Associates*, 907 F.3d 1264, 1271 (10th Cir. 2018), directly acknowledged this very point by noting that "[t]he alleged customer allocation was not an end unto itself, but rather a means of reducing overhead and increasing profit, particularly by giving the conspirators power to charge higher contingency fees unhindered by the competition that allegedly ensues when two Heir Location Services firms contact the same heir." Finally, it would make no logical sense for B&D and Company 1 to have engaged in this conspiracy for over nine years had there been no financial benefit to doing so.

The only reasonable conclusion from the interviews of the defendant and others, the available documents, the recognition of harm expressed by the victims who now appreciate their victimization, and the length of the conspiracy, is that customers of heir location services benefitted from the Sherman Act's protections until the defendant reached an agreement with his competitor to not compete. The harm to victims may have been extensive, even if the information in hand is insufficient to calculate such harm with a sufficient degree of accuracy and reliability to calculate restitution.

3. The Scope of the Conspiracy was Pervasive

The defendant's crime was extensive in scope because it applied to *all* cases in which B&D and Company 1 theoretically *could have* competed. The conspiracy evolved to the point that the conspirators' collusive agreement was triggered and a call-off was issued whenever either B&D or Company 1 first contacted an heir to an estate discovered in a probate court known to be also monitored by the other coconspirator company. Estates filed in probate courts in which a coconspirator was not known to operate would not put the conspiracy in play. Put another way, only when there was an opportunity for heirs to benefit from competition between B&D and Company 1 did the conspiracy act to snuff out that opportunity. The defendant and his coconspirators utilized the conspiracy when it served them best, and they reaped its benefits at the expense of their victims.

4. The Real-World Impact of the Conspiracy was Self Evident

The defendant knew of, and appreciated, the real-world repercussions of his crime. Over the nine years of the conspiracy's existence, he saw first-hand the conspiracy's harmful effects on its victims. He knew that heirs like MNP were being deprived of the freedom to choose between the conspirators or to leverage offers between them. His concern about the effects of competition at the time that he entered into the conspiracy reflects a clear knowledge that the collusive fees charged to affected heirs would be higher than if B&D and Company 1 otherwise competed.

The sheer wrongness of this conduct does not turn on some esoteric nuance of arcane law, capable only of being appreciated by academics in ivory towers. The

defendant did not need a law degree to know that cheating his customers out of better pricing and fair competition was improper. The harm and injury to the conspiracy's victims was evident on its face—even if the defendant chose to disregard it.

5. The Charged Conduct was not a Single Isolated Event, but Part of a Pervasive Pattern of Anticompetitive Criminal Behavior

As note in section I.C above, the defendant also served as the point-person at B&D in a Cook County conspiracy that the Probation Office has concluded constitutes relevant conduct for sentencing purposes. This second conspiracy likewise affected a multitude of heirs and millions of dollars in additional commerce. The defendant's demonstrated pattern of criminal behavior should appropriately be considered an aggravating factor that lends further support for the United States' recommended sentence.

B. History and Characteristics of the Defendant

1. A Sentence of a Criminal Fine and No Incarceration Likely Would Have Little Impact on the Defendant and is not Merited

The defendant's net worth approaches one million dollars.[4] Additionally, his current annual income approaches $190,000, and his historical annual income over each the last five years has ranged between $105,109 to $327,358. PSR ¶ 99. As a result of his income-generating potential and assets, incarceration is likely to have a far greater impact on him than a monetary fine alone.

[4] The defendant's counsel has notified the United States that PSR ¶ 99 overstates the value of the defendant's primary residence by $2,682,000. The $1M in net worth referenced above corrects for this error.

Additionally, based on the information submitted by the defendant to probation, the defendant appears to have enjoyed a relatively normal childhood and young adulthood, obtained a college education, and had a history of stable employment. There were no unusual hardships occurring in his life at the time of his offense that might serve as a mitigating factor. That the defendant otherwise has engaged in lawful economic activity and has been a productive member of society but for the period of his employment at B&D also does not merit favorable treatment. "Criminals who have the education and training that enables people to make a decent living without resorting to crime are more rather than less culpable than their desperately poor and deprived brethren in crime." *United States v. Stefonek*, 179 F.3d 1030, 1038 (7th Cr. 1999). A sentence that includes a term of imprisonment and a criminal fine that is 72 percent of the low end of each respective guideline range accounts for the lack of mitigating factors and the aggravating circumstances of the defendant's history and characteristics.

C. Other U.S.C. § 3553(a) Factors Likewise Support the Recommended Sentence

The recommended sentence of a term of imprisonment paired with a criminal fine amounting to 72 percent of the bottom of each respective guideline range collectively reflects the seriousness of the offense that harmed hundreds of victims nationwide to the tune of millions of dollars in affected commerce, provides just punishment, promotes respect for the law, and affords adequate deterrence (both specific and general) while at the same time recognizing the defendant's guilty plea.

Part of a just punishment is to leave no doubt in the mind of the defendant, the victims such as MNP, and third-party observers that the Court has fully considered the gravity of the criminal conduct, and responded accordingly.

1. The Defendant's Conduct Harmed Numerous Victims and Society at Large

The United States respectfully urges this Court, and the defendant himself, to remember that his conduct affected hundreds of victims during the course of the over nine-year long illegal conspiracy. Moreover, the specific victims of the charged conspiracy are not alone when adjudging the impact of the defendant's crime:

> No less important a consideration is that the victims of crime are not necessarily just the people who suffer direct losses by reason of an offense. There is a dimension of crime that diminishes the rule of law and the social order as a whole, and that if not properly recognized for what it is when the perpetrator is convicted, disregards the interest of society in effective law enforcement and effective administration of justice.

United States v. Regensberg, 635 F.Supp. 2d. 306, 311 (S.D. NY 2009). The defendant's criminal conduct did not occur in a vacuum, and its impact had far-reaching effects on society as whole. The recommended sentence appropriately reflects the seriousness of his conduct and recognizes its impact on those directly and indirectly put in harm's way.

2. The Recommended Sentence Provides Appropriate Deterrence

The defendant is now a convicted felon, and the underlying conduct involves taking advantage of his clients. It is therefore unlikely that he will ever hold a position of trust in which he has significant decision-making authority. There is

therefore little need to protect the public from future crimes of the same sort by defendant. Although the United States does not believe there is a need for specific deterrence in this case, there is a substantial need for the defendant's sentence to promote general deterrence.

When it comes to the issue of general deterrence, we have as our guide the sentencing guidelines. It is the sentencing structure approved by Congress based upon empirical studies and advancements in the knowledge of human behavior. The Tenth Circuit in *United States v. Walker*, 844 F.3d 1253, 1258 (10th Cir. 2017), explained that the purpose of deterrence becomes particularly important when the district court varies substantially from the sentencing guidelines.

Additionally, victims of antitrust crimes are often incapable of independently appreciating that they had been victimized. This distinguishing fact makes detection of antitrust crimes more difficult than many forms of fraud or theft and makes a more substantial sentence of increased importance for general deterrence purposes. As the Seventh Circuit has acknowledged on this point, "[c]onsiderations of (general) deterrence argue for punishing more heavily those offenses that are either lucrative or are difficult to detect and punish, since both attributes go to increase the expected benefits of a crime and hence the punishment required to deter it." *United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994); *see also United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) ("Because economic and fraud-based crimes are 'more rational, cool, and calculated than sudden crimes of passion or opportunity,'

these crimes are 'prime candidate[s] for general deterrence.'") (internal citation omitted).

Antitrust offenders need to know that if they engage in these kinds of crimes, whether in the Northern District of Illinois or elsewhere, they will be severely punished—and cannot merely throw money at the problem to make it go away.

D. Pertinent Policy Statements recommend the Imposition of a Sentence of Incarceration

The fifth 18 U.S.C. § 3553(a) factor would have the court consider any pertinent policy statement issued by the Sentencing Commission that is in effect. The Sentencing Commission's view is that incarceration is deemed the most effective deterrent for antitrust violations because such sentences reflect both the seriousness of the violation and the difficulty posed by its detection. *See* U.S.S.G. § 2R1.1 cmt. background (stating that "in very few cases will the guidelines not require that some confinement be imposed"); U.S.S.G. Ch. 1 Pt. A(4)(G) ("[T]he definite prospect of prison [for economic crime], even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm"); Amendments to the Sentencing Guidelines for United States Courts, 56 Fed. Reg. 22,762, 22,775 (May 16, 1991). Similarly, "[s]ubstantial fines are [considered by the Sentencing Commission to be] an essential part of the sentence." *See* U.S.S.G. § 2R1.1 cmt. background. Accordingly, the pertinent policy statements weigh in favor of the defendant being sentenced to a period of incarceration and a substantial criminal fine.

E. Restitution is Discretionary

Restitution is discretionary for this offense and the parties have agreed not to recommend that the defendant's sentence include an order of restitution. PSR ¶ 115. This is due to the availability of treble damages in civil actions, and because complex issues of fact relating to the determination of restitution would complicate or prolong the sentencing process to a degree that the need to provide restitution is outweighed by the burden on the sentencing process. *See* PSR ¶ 33.

V. CONCLUSION

The United States respectfully requests that the Court: (1) include a four-level enhancement based on the defendant's role as an organizer and leader of the criminal conspiracy charged in this case; (2) otherwise accept the remaining sentencing guidelines calculations recommended in the PSR; (3) impose a sentence that includes a term of incarceration of 13 months' imprisonment, which is 72 percent of the low end of the guidelines' incarceration range; (4) order the defendant to pay a criminal fine in the amount of $62,000—also 72 percent of the low end of the guidelines' fine range, payable in full within 15 days of the judgment; (5) order the defendant to pay the special assessment of $100; and (5) not order restitution.

Respectfully Submitted,

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