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

UNITED STATES OF AMERICA,	No. 1:15-cr-00752-001
vs.	Hon. Matthew F. Kennelly
BRANDENBURGER & DAVIS	

UNITED STATES' SENTENCING MEMORANDUM

For over nine years, defendant Brandenburger & Davis and its vice president, Brad Davis, engaged in a conspiracy that cheated hundreds of vulnerable victims, including the elderly. The defendant and Brad Davis 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 Brad Davis deprived the heirs—many of whom were elderly, and were unaware of their options—of competitive choice. The defendant and Brad Davis 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 defendant has pleaded guilty pursuant to a Rule 11(c)(1)(C) agreement with the government and is scheduled to be sentenced on August 31, 2020, at 1:30 p.m. At sentencing, the parties will recommend that the Court impose the sentence set forth in the Plea Agreement: (1) imposing a criminal fine in the amount of **$890,000** payable in full within 15 days of the judgment; (2) ordering Brandenburger & Davis to pay the special assessment of $400; and (3) issuing no order of restitution. (collectively, the "Recommended Sentence").

I. FACTUAL BACKGROUND

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 ¶ 8) and Individual 1 (the Director of Operations and eventual Vice President/COO of Company 1, identified in PSR ¶ 9), 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 its 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, the defendant 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 discovered that the defendant was again competing for heirs of probate estates opened in Seattle, he confronted Brad Davis in a phone call to express his displeasure. After that call, in November 2003 Brad Davis (on behalf of 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,[1] and (2) "fee-split agreements": agreeing to allocate potential heirs in a fashion similar to a call-off, but additionally having the company 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.

Later that same month, the defendant's employees, including Brad Davis, had begun to implement the agreement. The conspiracy began in the state of Washington,

[1] 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.

but quickly expanded to include estates located in every state and county across the country that both conspirator companies monitored.

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 of the defendant's researchers 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, through its employees, has admitted that it also engaged in an additional anticompetitive conspiracy for which it was not charged, which constitutes relevant conduct. *See* PSR ¶¶ 4.i, 21-23. More specifically, the defendant, Company 1, and multiple other heir location service companies had 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.

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

By no later than 2004, the defendant re-established its relationship with its local contact and the other Cook County conspirators, which then included Individual 1 and Company 1. Thereafter, when the defendant met the criteria to call off its Cook County coconspirators, Brad Davis 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. GUIDELINES CALCULATION OF THE PARTIES

The parties agree with the PSR's guidelines calculation, as set forth in the table below:

Description	**U.S.S.G. §**	**Sentencing Calculation**
Volume of Commerce	2R1.1(b)	Stipulated to be at least $8,607,233
Corporate Base Fine	8C2.4(a)–(b) applying 2R1.1(d)(1)	$1,721,446.60
Base Culpability Score	8C2.5(a)	5
10+ employees and the involvement of substantial authority personnel	8C2.5(b)(5)	+1
Clear Acceptance of Responsibility and Provision of Cooperation in the Investigation	8C2.5(g)(2)	-2
Total Culpability Score		4
Multipliers	8C2.6	.8-1.6
Corporate Guidelines Fine Range, applying Multipliers to Volume of Commerce		$1,377,157.28-$2,754,314.56
Downward departure recognizing Defendant's substantial assistance	8C4.1	-$487,157.28
Agreed-to Criminal Fine Amount		$890,000

III. THE UNITED STATES' ANTICIPATED § 8C4.1 MOTION

At sentencing, pursuant to Paragraph 10 of the defendant's plea agreement, the United States anticipates that it will move the Court pursuant to Guideline § 8C4.1 to depart from the low end of the applicable guidelines range and sentence the defendant to pay a criminal fine of $890,000, which is approximately 65 percent of the bottom of the guidelines' fine range.

Reductions under § 8C4.1 are assessed based on, among other things: (1) the significance and usefulness of the defendant's assistance; (2) the nature and extent of the defendant's assistance; and (3) the timeliness of the defendant's assistance. *See* U.S.S.G. § 8C4.1(b). These factors weigh in favor of a departure here.

The defendant provided substantial assistance in the investigation of Company 1, Individual 1, and others involved in the charged and relevant conduct. Soon after receiving a subpoena, the defendant provided information by way of attorney proffer, arranged for and financed individual counsel for subject employees, made those employees available to investigators, financed their travel to Chicago for interviews, identified hot documents to aid investigators' review, and at the request of the United States, the defendant's counsel and employees compiled additional information beyond that which would be required by a subpoena.

The information and assistance were very timely and painted a more complete picture of the conspiracy and other conspirators that were not part of the defendant's organization. The organization and its employees likewise shared what information they had about other conspiracies in the industry.

The defendant provided additional assistance, which the United States will describe with more particularity at defendant's sentencing hearing.

IV. SENTENCING CONSIDERATIONS FOR ORGANIZATIONS

The introductory comments to Chapter 8 of the Sentencing Guidelines are instructive in providing the Court the interests to be considered in sentencing an organization. Among them, the most relevant here is that the fine range for the organization should be based on the seriousness of the offense.

This crime is a serious one, striking at the very heart of free enterprise and, over nine years, victimizing hundreds of people to the tune of millions of dollars in affected commerce. 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 the content of what a coconspirator told them when that coconspirator called on them.

Furthermore, these victims, many of whom were elderly, collectively put their faith in the honesty and integrity of the defendant and its coconspirators—trusting that the heir location service providers that contacted them would not take advantage of their vulnerability and lack of knowledge. Their trust in the defendant and its coconspirators was misplaced—the conspirators made no mention to their victims of the collusive agreement that was depriving them of the benefits conferred by competition. Given the seriousness of the defendant's crime here, the recommended criminal fine of $890,000 is just and appropriate.

Other pertinent principles set forth in the guidelines for consideration of sentencing organizations include the need to remedy harm caused by the offense, to account for the culpability of the organization, and to require probation where probation is appropriate. Each is addressed in turn, below.

First, the Court should seek to impose a sentence that makes victims whole and remedies any harm the organization caused. Here, this goal is best addressed through other means, rather than through an order requiring restitution. Treble damages are available to victims as a civil remedy for antitrust violations.

Furthermore, 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* Dkt. 43 ¶ 9(b) (plea agreement provision addressing restitution).

Second, in determining the imposition of a fine, the Court should consider the culpability of the organization. According to the guidelines, some of the more pertinent organizational culpability considerations include the involvement in or tolerance of criminal activity, the violation of an order, and any obstruction of justice. U.S.S.G. § 8 Introductory Commentary. The defendant has not previously been convicted of any antitrust violation or criminal conduct even though it did engage in the previously mentioned relevant conduct, did not violate an order, and did not obstruct justice.

The guidelines set forth two factors relevant to the culpability analysis that mitigate the ultimate punishment of an organization: the existence of an effective compliance and ethics program and the self-reporting, cooperation, or acceptance of responsibility of the organization. *Id.* While the United States is unaware of the defendant having any compliance program, the defendant has been cooperative with the investigation and has accepted responsibility for its criminal conduct. The defendant also pled guilty pursuant to a plea agreement.

Finally, if this Court imposes the recommended sentence, probation is not warranted under the factors set forth in U.S.S.G. § 8D1.1(a).

For all of the above reasons, the recommended sentence provides just

punishment, adequate deterrence, and otherwise satisfies the objectives of the guidelines.

V. CONCLUSION

In conclusion, the United States respectfully recommends that the Court: (1) order the defendant to pay a criminal fine in the amount of **$890,000** payable in full within 15 days of the judgment; (2) order the defendant to pay the special assessment of $400; and (3) issue no order of restitution.

Respectfully Submitted,

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