UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	) Case No. 97-0853-CR-Middlebrooks
	)
v.	) Magistrate Judge Robert L. Dubé
	) (Amended order of reference dated May 7, 1998)
ATLAS IRON PROCESSORS, INC., et al.,	)
	)
	) **RESPONSE OF UNITED STATES**
Defendants.	) **TO DEFENDANT RANDY WEIL'S**
	) **SENTENCING MEMORANDUM AND**
	) **REQUEST FOR DOWNWARD**
	) **DEPARTURE AT SENTENCING**

In his Sentencing Memorandum and Request for Downward Departure at Sentencing, defendant Weil offers eight reasons why he believes he is entitled to a downward departure at sentencing. None of Weil's reasons justify a departure for the reasons described below:

I

RANDY WEIL WAS AN ORGANIZER OR LEADER IN THE CONSPIRACY

A. STANDARD FOR GRANTING A LEADER/ORGANIZER ENHANCEMENT

Pursuant to U.S.S.G. §3B1.1(a), criminal defendants may receive four-level enhancements for their role in their criminal offense, "[i]f the defendant was an organizer or leader of the criminal activity that involved five or more participants or was otherwise extensive." Application Note 4 of U.S.S.G. §3B1.1 instructs the court to

consider factors such as the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. In United States v. Yates, 990 F.2d 1179, 1181 (11th Cir. 1993), the Eleventh Circuit held, "Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." Application Note 4 of U.S.S.G. §3B1.1 also points out that more than one person may qualify as a leader or organizer of a criminal association or conspiracy.

The government has the burden of proving by a preponderance of the evidence the existence of the aggravating role. United States v. De La Rosa, 922 F.2d 675, 680 (11th Cir. 1991). A district court's determination as to a defendant's role in the offense is a finding of fact subject to a clearly erroneous standard of review. United States v. Kirkland, 985 F.2d 535, 537 (11th Cir. 1993).

B. EVIDENCE AT TRIAL SHOWED WEIL TO BE A LEADER AND ORGANIZER OF THE CONSPIRACY TO FIX PRICES AND ALLOCATE CUSTOMERS

As the United States has throughly documented in other pleadings, Weil was extensively involved in the conspiracy as a leader and organizer. He was the president

and chief executive officer of Sunshine. He had unquestioned authority to make scrap-buying decisions for Sunshine. He bought and sold all scrap. He set the company's prices for all its customers. Kovinsky described Weil's role at Sunshine as "all encompassing." Trial Transcript (Kovinsky), p. 1492-93.

The evidence showed Weil led the Sea Ranch conspiratorial meeting. Weil complained to Atlas that Sheila McConnell's prices were too high. Weil brought a price list to the meeting and used it to give Atlas the agreed-upon prices. Weil was the Sea Ranch conspirator who insisted on allocating the customers on Cairo Lane. The Sea Ranch deal was a comprehensive agreement covering specific suppliers, geographic areas and grades of scrap. This Sea Ranch deal covered almost all scrap purchased by Sunshine and Atlas in southern Florida.

Weil recruited his partner Henry Kovinsky to participate in the price fixing meeting at Sea Ranch. Weil picked Kovinsky up and drove him to Sea Ranch. After the meeting, Weil told Kovinsky the Sea Ranch agreement was worth trying. Then Weil advised the third partner, Daniel Allen, of the agreement. Weil also knew the Giordanos planned to recruit Sheila McConnell to participate in the Sea Ranch meeting. Weil acquiesced in the recruitment of McConnell.

In addition to running Sunshine and directing its employees, Weil also directed Sheila McConnell's participation in the conspiracy. At the Sea Ranch meeting, Weil agreed to call McConnell and give her pricing information for Bill Masters' accounts. To facilitate the Sea Ranch agreement, Weil also called McConnell to organize the

shipment of the Bahamian cars to Atlas. Weil supervised the conspiracy and called the Giordanos to complain about McConnell's pricing. McConnell testified that, during the conspiracy, Giordano, Jr. and David Giordano fielded complaints from Weil about the implementation of the agreement. McConnell testified that there were numerous communication between Weil and Anthony J. Giordano, Jr. and David Giordano concerning the Sea Ranch agreement.

Weil was also a key figure at the conspiratorial meeting at Don Shula's restaurant where co-conspirators, Giordano, Jr. and David Giordano, accused him of not following their collusive agreement. Weil denied Sunshine had failed to follow the agreement. In addition to leading and organizing the Sea Ranch and Shula's meetings, Weil was Sunshine's leader at two preliminary meetings — one at Charcoal's restaurant, the other at a restaurant called Casa D'Oro — which led to the Sea Ranch deal.

C. WEIL'S LEADERSHIP ROLE IS CONSISTENT WITH THOSE OF OTHERS WHO HAVE RECEIVED 4-LEVEL ADJUSTMENTS IN OTHER CASES

The Eleventh Circuit has upheld four-level enhancements for organizers and leaders on a number of occasions. For example, in United States v. Revel, 971 F.2d 656, 660 (11th Cir. 1992), the court upheld a four-level enhancement expressly because the defendant Revel "had decision-making authority, recruited . . . an accomplice, arranged meetings, acted as a financial backer, and had significant control over the operation." The same is true of Weil, of course. He was the price setter among the conspirators, recruited accomplices Kovinsky and Allen, arranged some of the

conspiratorial meetings, was a one-third owner of Sunshine, and had total control Sunshine's operation.

In United States v. Kramer, 943 F.2d 1543 (11th Cir. 1991), the Eleventh Circuit upheld a district court's decision to asses a four-level organizer/leader enhancement arising out of a prison escape. The Eleventh Circuit found the enhancement was appropriate because the defendant Kramer supervised the activities of a co-conspirator and provided him with all necessary cash, engaged in frequent coded telephone conversations with his incarcerated brother, and directed the escape operation from the outside. Kramer, 943 F.2d at 1551. In Weil's case he supervised the conspiracy's progress at Atlas by holding frequent conversations with the Giordano defendants, managed and controlled the business operations of Sunshine, and participated in clandestine meetings with his co-conspirators during which he directed the conspiracy.

In United States v. Rodriguez, 981 F.2d 1199, 1200 (11th Cir. 1993), the Eleventh Circuit upheld a four-level adjustment for a defendant on the basis that he organized "a drug transaction that extended from Columbia to Florida to Boston to New York, and which included the purchase and street distribution of 100 kilos of cocaine worth $350,000 in the wholesale market." In comparison, Weil also organized an international conspiracy that extended from Florida to the Bahamas Islands and included that purchase of approximately $1.5 million of scrap metal. As proven at trial, the conspiracy was within the flow of, and substantially affected, intrastate and foreign

commerce. The scrap purchased by Sunshine and Atlas was sold outside the State of Florida and into foreign countries.

In other cases, the Eleventh Circuit has reversed the decision to award a four-level enhancement. In United States v. Alred, 144 F.3d 1405, 1421 (11th Cir. 1998), the court found a four-level adjustment inappropriate because the defendant only bought, sold and occasionally fronted drugs. Significantly the court found only "slight evidence" that the defendant "recruited or directed the actions of his coconspirators." Id. In Weil's case, the evidence is incontrovertible that the recruited Kovinsky and Allen into the conspiracy and that, by establishing the fixed prices, he directed the actions of his coconspirators. Alred is particularly interesting because Weil relies heavily on it in his brief.

In addition to Alred, the other Eleventh Circuit upon which Weil relies heavily is United States v. Garrison, 133 F.3d 831 (11th Cir. 1998). While Garrison did involve upward adjustments, it is not particularly helpful to Weil's argument for two reasons. First, the adjustment in Garrison was a two-level adjustment. "To qualify for this enhancement, the defendant must have organized, led, managed or supervised one or more other participants." Id. at 843. In contrast, to earn a four-level enhancement, a defendant must be an organizer or leader in a criminal activity that involved five or more participants or was otherwise extensive. For Weil to argue that in some respect his actions were different than the defendant Garrison's actions proves little because Garrison may have earned his adjustment for only managing or supervising the

conspiracy, factors which are less emphasized in the determination of whether a four-level organizer or leader enhancement is appropriate. Moreover, Weil made many contributions to his criminal conspiracy — such as mastermind the price fixing agreement — which Garrison did not make.

Second, the Eleventh Circuit upheld Garrison's two-level enhancement. Had the government requested a four-level enhancement, there is no way of knowing in retrospect that the Eleventh Circuit would not have upheld that adjustment too. All one can say is that in the Eleventh Circuit's eyes Garrison earned a two-level enhancement.

For all these reasons, it is clear that Weil's actions were those of the kind which are typically punished in the Eleventh Circuit with a four-level upward adjustment for leaders and organizers.

II

THE CONSPIRACY INVOLVED FIVE OR MORE PARTICIPANTS

The United States has already addressed this issue in its *Sentencing Recommendation of the United States.* To put it mildly, it is silly to argue that the substantive rule of antitrust law established in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984), is applicable to the substantive Guidelines issue here. There were at least seven participants in this conspiracy, Anthony J. Giordano, Sr., Anthony J. Giordano, Jr., David Giordano, Sheila McConnell, Randolph J. Weil, Henry "Skip" Kovinsky, and Daniel Allen. During the trial, the defendants went to

great lengths to show the jury a redacted version of the Bill of Particulars showing that Sheila McConnell, Dan Allen and Henry Kovinsky were identified unindicted co-conspirators. Five months ago the defendants were eager to proclaim the existence of seven conspirators. They should not be allowed to forget that now.

III

THE CONSPIRACY WAS OTHERWISE EXTENSIVE

The United States briefed this issue extensively in its *Sentencing Recommendation of the United States*. Suffice it to say, the conspiracy covered virtually all grades of scrap, victimized hundreds of scrap suppliers, involved planning meetings and numerous communications between the defendants to police the conspiracy, and involved $1.5 million in commerce. The conspiracy borne of the Sea Ranch meeting was nothing if not extensive.

IV

THE VOLUME OF COMMERCE IS CORRECTLY CALCULATED

This United States briefed this issue extensively in its *Sentencing Recommendation of the United States*. During the trial, the United States introduced as trial exhibits documentation of every one of Atlas's and Sunshine's scrap purchases that were covered by the Sea Ranch agreement and occurred during the conspiracy period of October 24, 1992, to December 31, 1992. To calculate the respective volumes of commerce for Atlas and Sunshine the United States simply added the total Atlas purchases and total Sunshine purchases listed in the trial exhibits. The volume of

commerce attributable to Atlas and the Giordano defendants is $636,153.66. *Sentencing Recommendation of United States*, Attachment I. The volume commerce attributable to Sunshine and Randy Weil is $839,043.80. *Sentencing Recommendation of United States*, Attachment II. See generally *Declaration of Deborah A. Farren*. At the sentencing, the United States plans to have paralegal specialist Deborah A. Farren, who compiled the government trial exhibits which contain the documents used to calculate the volume of commerce. Ms. Farren also compiled the summaries of the volume of commerce exhibits. See *Sentencing Recommendation of United States*, Attachments I and II. Some of these summaries were introduced as government trial exhibits. Ms. Farren will testify if necessary.

V

RANDY WEIL DID NOT WITHDRAW FROM THE CONSPIRACY UNTIL JANUARY 1993

The United States briefed this issue extensively in its *Sentencing Recommendation of the United States*. Weil cites United States v. Dabbs, 134 F.3d 1071, 1083 (11th Cir. 1998), for the propositions that, in order to withdraw from a conspiracy, a defendant must make an effort to thwart to objectives of the conspiracy and take affirmative steps to demonstrate the complete repudiation of the conspiracy's objective. In this case, Randy Weil did neither of those things. When challenged at the Don Shula's meeting, Weil denied having cheated on prices. In this way he conveyed his completed adoption of the conspiracy's objective, not repudiation. Second, Weil did not try to thwart to conspiracy's objectives at all. Quite the contrary. The

government's trial exhibits show that virtually every one of Sunshine's sales for the entire time of the conspiracy were at the prices agreed to at the Sea Ranch meeting. Because Weil neither conveyed his repudiation of the conspiracy to his co-conspirators, nor made any effort to thwart the objectives of the conspiracy, he cannot claim that he withdrew from the conspiracy prior to December 31, 1992.

VI

RANDY WEIL COMPLETED ALL THE ACTS FOR
A SUCCESSFUL COMPLETION OF CONSPIRACY

Weil cites U.S.S.G. § 2X1.1(b)(2) as the basis for seeking a three-level decrease in his base offense level. This guideline provision provides for such a decrease if the defendant and his co-conspirators did not complete "all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense." Id. Weil employs tortured logic to argue it is appropriate to apply this statute. First Weil acknowledges the parties dispute the appropriate volume of commerce. Then he assumes that his lower number is correct. Then he assumes that the government's higher number is the number Weil intended to generate had the conspiracy not broken down early. Then he analogizes to cases such as United States v. Maggi, 44 F.3d 478 (7th Cir. 1995), where the court granted a three-level § 2X1.1(b)(2) departure because the defendant did not launder as much money as he originally intended to launder. Then, he reasons that because the parties dispute the appropriate volume of commerce (Weil champions a lower number than the

government), he did not profit from the conspiracy as much as he originally intended to profit and, therefore, he is entitled to a three-level § 2X1.1(b)(2) departure.

The correct analysis is much simpler. As soon as Randy Weil agreed to fix prices of scrap metal he had completed all the acts necessary for a successful conspiracy. The rule is firmly established that in a Sherman Act case the agreement itself constitutes the complete offense. Nash v. United States, 229 U.S. 373, 378 (1913); United States v. Flom, 558 F.2d 1179, 1183 (5th Cir. 1977) (In Sherman Act prosecutions, the "indictment need not allege, nor the proof show, a specific contract."); see also United States v. Brown, 936 F.2d 1042, 1045 (9th Cir. 1991). The principal difference between the Sherman Act, 15 U.S.C. § 1, and the general criminal conspiracy statute, 18 U.S.C. § 371, is that the Sherman Act does not require proof of an overt act in furtherance of the conspiracy. United States v. Dynaelectric Co., 859 F.2d 1559, 1565 n.6 (11th Cir. 1988). Once a per se unlawful agreement is proved, a complete violation is shown. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-26 n.59 (1940). See also, Flom, 558 F.2d at 1183. ("The heart of a Section One violation is the agreement to restrain; no overt act, no actual implementation of the agreement is necessary to constitute an offense . . . ."); United States v. Dynaelectric Co., 859 F.2d 1559, 1565 n.6 (11th Cir. 1988) ("We note that an overt act is not required for a §1 Sherman Act conspiracy violation.").

The *per se* rule is a substantive rule of law, not merely an evidentiary presumption, which governs those restraints that the courts have determined to be

inevitably unreasonable and anticompetitive. In reaffirming the validity of *per se* proscriptions, the Supreme Court has stated that when prices are fixed, "The character of the restraint produced by such an arrangement is considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in which the arrangement may be found." Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984). Consequently, in a case involving price fixing or volume allocation, the prosecution need not prove that the conspiracy had an anticompetitive effect on the market. Construction Aggregate Trans., Inc. v. Florida Rock Indus., Inc., 710 F.2d 752, 781 (11th Cir. 1983) ("Normally, automatic condemnation under the per se rule occurs merely upon a finding that the defendant engaged in the restrictive conduct alleged; proof of anticompetitive effect in a relevant market need not be demonstrated."); Midwestern Waffles, Inc., v. Waffle House, Inc., 734 F.2d 705, 719-20 (11th Cir. 1984) ("Generally, horizontal allocations of markets are said to be per se violations of the antitrust law, and, therefore, it is unnecessary to make any further showing of their anticompetitive effect."). In fact, it is not even necessary to prove that the agreement worked. United States v. Fischbach and Moore, Inc., 750 F.2d 1183, 1192, 1195-96 (3d Cir. 1984) (citing Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958)); Socony-Vacuum Oil Co., 310 U.S. at 220-22; United States v. Trenton Potteries, Inc., 273 U.S. 392, 396-97 (1927)).

As to Weil, the gist of the above *per se* rule in antitrust cases is this: There is only one act necessary to violate the Sherman Act. When Weil agreed to fix prices with

the Giordano defendants and Atlas, he completed all of the acts necessary to violate the law. Guideline § 2X1.1(b)(2) is simply inapplicable in conspiracy cases where an overt act is not required to complete the crime.

VII

NO MITIGATING FACTORS WARRANT DOWNWARD DEPARTURE

A. THE TOTAL OFFENSE LEVEL DOES NOT OVERSTATE THE SERIOUSNESS OF THE CONDUCT AND CULPABILITY OF RANDY WEIL

Weil's first argument is that his volume of commerce overstates the loss. Weil acknowledges in his pleadings that the Federal Sentencing Guidelines provide no support for his argument. Instead, Weil argues by analogy that the Court should rely on application notes 7(b) and 10 to § 2F1.1, the fraud and forgery guideline. These notes do provide the court with the discretion to depart downward if the loss tables overstate the actual loss. That is not this case. Thus Weil's has no foundation in the Guidelines.

Even if one were to accept Weil's argument that the court should apply by analogy the fraud and forgery Sentencing Guidelines to this antitrust case, he is still not entitled to a downward departure. In United States v. Tatum, 138 F.3d 1344 (11th Cir. 1998), the Eleventh Circuit examined a set of facts which might qualify as one where the loss is overstated. The Court held:

> [A] defendant may understate his debts to a limited degree to obtain a loan (e.g., to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforseen event (e.g., an embargo imposed on

> grain exports) which would have caused a default in any event. In such a case, the loss determined above may overstate the seriousness of the defendant's conduct.

Tatum, 138 F.3d at 1346-47.

What is remarkable about the Court's hypothetical is that the defendant did not intend to cause a loss to the victim. Indeed, but for unforeseen circumstances, the defendant would not have caused any loss to the victim. This case is inapposite to Weil's situation. He intended to underpay all of his suppliers with whom he did business the prices agreed upon at Sea Ranch, even though he knew their full expectation was that they would receive a competitive price for their scrap. Moreover, Weil's plan was successful. Not only did he intend to pay less than a competitive price for scrap metal, for more than two months he actually did pay less than a competitive price. Sunshine's volume of commerce in no way understates the actual loss. In fact, the opposite is true. Because this was a buying conspiracy where buyers collude to reduce prices, Sunshine's volume of commerce was less than it would have been in a competitive market. In the typical selling conspiracy — the type the Sentencing Guidelines appear to contemplate — sellers conspire to raise prices and are punished for based on a volume of commerce that is larger than it would have been in a competitive market.

B. THE FACTS RELATING TO WEIL'S OTHER BEHAVIORS DO NOT SUPPORT DOWNWARD DEPARTURE

Weil's second argument in favor of downward departure is that his educational background, employment record, family ties and responsibilities, and community ties

justify a downward departure.[1] In support of these arguments he mentions that he has been a "good husband" for 31 years. That he has fathered two daughters. That he has worked for more than 30 years since his college graduation. That he supports his wife financially and checks up on his parents two or three times a week. He admits, however, that if he is in prison, his wife will "gladly accept the responsibility" of tending to his parents.

A brief review of the cases in this area show that Weil's case is far from that "unique or extraordinary" case, United States v. Cacho, 951 F.2d 308, 311 (11th Cir. 1992), that warrants a downward departure from the guidelines. For example in Cacho, the Eleventh Circuit held the district court properly concluded that the defendant's status as the mother of four small children did not provide a basis for a downward departure the Guidelines. Cacho, 951 F.2d 311. In United States v. Matthews, 168 F.3d 1234 (11th Cir. 1999), the defendant presented evidence that he had consistently worked as a truck driver and had a seven-year old son to whom he contributed support. The Eleventh Circuit held, "These facts do not, however, distinguish him significantly from the rest of the general population and the district court did not err in denying this departure." Matthews, 168 F.3d at 1248.

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[1] Weil does not argue in his brief that his act was "aberrant," thus providing a basis for a downward departure. To foreclose him from raising the argument during sentencing, the United States points out that a crime such as a price fixing conspiracy which requires considerable planning and monitoring can never be deemed "aberrant." United States v. Pickering, No. 96-5464, 1999 WL 425891, at *3 (11th Cir. June 25, 1999).

In United States v. Mogel, 956 F.2d 1555 (11th Cir. 1992), in a case involving a defendant who certainly had more responsibility than does Weil, the Eleventh Circuit held:

> That appellee has two minor children to support, and a mother that lives with her suggests neither that the factor of family ties and responsibilities is present to a degree substantially in excess of that which ordinarily is involved in the offense . . . nor that appellee's family ties and responsibilities are of a degree exceptional enough to warrant a departure in light of the explicit instruction that such ties and responsibilities "are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range," U.S.S.G. § 5H1.6.

Mogel, 956 F.2d at 1564 (some internal citations and quotations omitted).

In United States v. Allen, 87 F.3d 1224 (11th Cir. 1996), the Eleventh Circuit vacated a district court's decision to grant a downward departure on facts that resemble those in Weil's case. In Allen, the defendant Allen was the primary caretaker of her 70-year-old father who suffered from both Alzheimer's and Parkinson's diseases. Allen, 87 F.3d at 1225. The Court found that Allen's "family responsibilities, though difficult, are not extraordinary." Id. It went on to conclude that "Allen has shown nothing more than that which innumerable defendants could no doubt establish: namely, that the imposition of prison sentences normally disrupts familial relationships." Id. at 1226 (internal quotations omitted).

The state of the law is clear. Even if Randy Weil had to financially support his daughters, which he does not; even if Randy Weil were the only person who could check up on his parents, which he is not; even if Randy Weil's wife were incapable of finding a new job, which she is not; none of these factors would provide this Court with the basis

to depart from the Sentencing Guidelines. Weil's arguments prove no more than did the defendant in Allen: the imposition of prison sentences normally disrupts familial relationships. Or, as the Eighth Circuit explained in United States v. Shortt, 919 F.2d 1325, 1328 (8th Cir. 1990), "All families suffer when one of their members goes to prison."

Weil also makes much of his civic and business community ties. In Mogel, the Eleventh Circuit held that a court may consider vocational skills, employment record, and community ties as sentencing factors "only if that factor is present to a degree substantially in excess of that which is ordinarily involved in the offense." Mogel, 956 F.2d 1564. Far from extraordinary, Randy Weil's community ties are almost exactly those one would expect a price fixer to possess. Most business owners make it a point to be active in their community, to be members of the local chamber of commerce, to make small contributions to local charitable and civic organizations. If Weil did all of these things, he is to be commended. Nonetheless, his extracurricular activities are merely par for the price fixer's course, and because they are not "substantially in excess of that which is ordinarily involved in the offense," they do not constitute the basis for this Court granting a downward departure.

Finally, Weil argues that, even if none of these factors individually constitute the basis for a downward departure, collectively they provide that basis. He includes as one of the factors, his alleged withdrawal from the conspiracy. The Eleventh Circuit recently reviewed this issue of multiple mitigating factors providing the basis for a

downward departure. In United States v. Pickering, No. 96-5464, 1999 WL 425891 (11th Cir. June 25, 1999), the Circuit reviewed a case where the district court had relied on three grounds collectively as the basis for a downward departure. The Court expressed its understanding that only the truly exceptional case might qualify for such treatment. The Circuit held,

> We recognize that the Sentencing Commission has not foreclose[d] the possibility of an extraordinary case that, because of a combination of . . . characteristics or circumstances that are not ordinarily relevant to a departure from the applicable guideline range, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.

Pickering, 1999 WL 425891 at *3-*4.

The personal mitigating factors that Weil proposes to justify a downward departure are, if anything, less compelling than those of the average defendants. Combining these underwhelming factors with his alleged claim of withdrawal does nothing to make his case a more appropriate candidate for a downward departure. As has been discussed in this memorandum and in other government pleadings, Weil did not withdraw from the conspiracy. See, e.g., *Sentencing Recommendation of the United States,* pp. 30-31. Sunshine purchased scrap at prices which match exactly the prices decided upon at the Sea Ranch meeting. This "withdrawal" factor adds nothing to Weil's request for a downward departure and certainly does not place his case with those "extremely rare" cases which, given the totality of the circumstances, qualify for a downward departure.

VIII

RANDY WEIL HAS THE ABILITY TO PAY A FINE

Finally, Randy Weil argues that he does not have the ability to pay a fine. The Sentencing Guidelines require courts to "impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E1.2(a). "It is clear from section 5E1.2 that the burden is on the defendant to prove an inability to pay the fine." United States v. Hernandez, 160 F.3d 661, 665 (11th Cir. 1998). In support of his claim Weil argues that neither he nor his wife is currently employed. This alone cannot be enough be enough to meet his burden and avoid his legal responsibility. For its part, the United States intends to have financial expert Mary Schaffer in Miami ready to testify at the sentencing. Schaffer has studied Weil's presentence investigation report and has concluded that Weil does have the ability to pay a fine within the Guideline range. See *Declaration of Mary Schaffer*.

IX

CONCLUSION

For the foregoing reasons, the United States requests that this Court deny defendant Weil's request for a downward departure at sentencing.

Respectfully submitted,

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