IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-5417

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

AGOSTINO JAMES MONASTRA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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CERTIFICATE OF INTERESTED PARTIES AND

CORPORATE DISCLOSURE STATEMENT

UNITED STATES v. MONASTRA, No. 96-5417

Pursuant to U.S. Ct. of App. 11 Cir., Rule 26.1, appellee United States of America certifies that the following is a complete list of the trial judge, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party, as well as victims:

1. All purchasers of painted aluminum products from Alliance Metals, Inc., Wrisco Industries, Inc., or Charleston Industries, Inc., or any subsidiary or affiliate thereof, from January to July 1995.

2. Carlton Fields, P.A.

3. Kendall Coffey

4. John R. Hart

5. Thomas A. Hanson

6. Marion L. Jetton

7. Joel I. Klein

8. A. Douglas Melamed

9. Agostino James Monastra

10. Charles C. Murphy, Jr.

11. Justin M. Nicholson

12. John T. Orr

13. John J. Powers, III
14. The Honorable Kenneth L. Ryskamp
15. Gary R. Spratling
16. United States of America
17. Vaughan & Murphy
18. Wrisco Industries, Inc.

STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe oral argument is necessary in this case. The decisions of the courts of appeals are uniform in rejecting the legal claims raised by appellant, and appellant's factual contentions can readily be disposed of by simple reference to the text of the plea agreement at issue.

CERTIFICATE OF TYPE SIZE AND STYLE

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STATEMENT OF JURISDICTION

This case is an appeal of a sentence imposed in a criminal antitrust case. This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The district court had jurisdiction under 18 U.S.C. § 3231 and 15 U.S.C. § 1. Final judgment was entered on November 20, 1996. R1-44. Appellant filed a notice of appeal on November 25, 1996. R1-45.

STATEMENT OF ISSUES

1. Whether the district court correctly determined that the plea agreement between appellant and the United States, which clearly states that it was reached pursuant to Fed. R. Crim. P. 11(e)(1)(C), was in fact concluded under that paragraph.

2. Whether the district court correctly decided that it did not have the power to depart downward under the Sentencing

Guidelines from the sentence agreed to by the parties pursuant to the Rule 11(e)(1)(C) plea agreement.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below.

On April 18, 1996, a one-count information was filed in the Southern District of Florida charging appellant Agostino James Monastra ("Monastra") and his company, Wrisco Industries, Inc. ("Wrisco") with violating section 1 of the Sherman Act, 15 U.S.C. § 1. R1-1. On May 2, 1996, Monastra appeared before Judge Kenneth L. Ryskamp and entered a plea of guilty to the one-count information pursuant to a written plea agreement. R1-15, 1-22. He was sentenced on November 15, 1996 (R1-43), and judgment was entered November 20, 1996 (R1-44). Monastra filed a notice of appeal challenging his sentence on November 25, 1996 (R1-45).[1]

B. Statement of Facts.

Monastra pleaded guilty to participating in a conspiracy to fix the prices of certain painted aluminum products. Common examples of painted aluminum products are the canopies and signs that are painted with brand-related colors and installed at gasoline stations and convenience stores. PSI 3.[2] Monastra is

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[1] Appellant is currently free on bond, pending disposition of this appeal.

[2] "PSI" refers to the Presentence Investigation Report on file with this Court. "D.Br." refers to appellant's main brief

the sole owner and shareholder of codefendant Wrisco, one of the two largest participants in the national market for painted aluminum products. PSI 4,11. Wrisco has its corporate headquarters in Palm Beach Gardens, Florida; the company also has sales and distributing centers in Atlanta, Chicago, Dallas, and Edison, New Jersey. PSI 11-12.

Wrisco's largest competitor in the national market for painted aluminum products is Alliance Metals, Inc., a Pennsylvania-based firm owned by Bradley B. Evans ("Evans"). PSI 4. Peterson Aluminum Corporation, based in Chicago and owned during the relevant period by Maurice Peterson, also competes in the market through a wholly-owned subsidiary, Charleston Industries, Inc. Ibid.

Wrisco, Alliance Metals, and Charleston Industries operate as middlemen. They purchase painted aluminum products from aluminum mills, which normally sell only large quantities, and resell in smaller quantities to sign companies, aluminum fabricators, and service station or convenience store chains. Ibid.

The conspiracy began in January 1995, when Monastra and a Charleston Industries employee agreed to fix prices and to attempt to recruit Evans and another competitor into the scheme. Ibid. Monastra successfully recruited Evans after a series of

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in this Court. References to "U.S.S.G." are to the United States Sentencing Guidelines Manual, 1994-1995 edition, containing amendments effective November 1, 1994.

telephone conversations and a meeting with Evans but the other competitor declined to join the conspiracy. Ibid. Throughout the conspiracy, Monastra acted as the go-between between Evans and the Charleston Industries employee; Evans rarely, if ever, spoke directly to the Charleston Industries employee. Ibid. Monastra drafted and circulated, in January and February 1995, a nine-page handwritten document setting out the scope, goals, and operation of the conspiracy, as well as pricing sheets based on the document's formula. PSI 5. In February 1995, the conspirators circulated their planned price increases and worked out details, and in March and April 1995 the conspirators raised prices to the new, agreed-on levels. PSI 5-6. The conspiracy came to a halt after the FBI searched Wrisco and Alliance Metal offices and served grand jury subpoenas on all three conspirators in June 1995. PSI 6.

On April 18, 1996, a one-count information was filed in the Southern District of Florida charging Monastra and Wrisco with violating section 1 of the Sherman Act, 15 U.S.C § 1. R1-1.[3]

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[3] Evans and Alliance Metals were charged in a one-count information in the Northern District of Georgia (95-CR-429-MS). Following a guilty plea, Evans was sentenced to four years' probation, six months' home confinement, and 500 hours of community service. Alliance Metals was sentenced to 5 years' probation and a $1.15 million fine. PSI 3. Maurice Peterson, who is deceased, was not charged.

The Information was filed pursuant to a written plea agreement dated March 21, 1996, between the United States and Monastra. The plea agreement, which was the result of seven months of vigorous negotiations (R4-54), explicitly stated that it was entered into "pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C)." R1-15-1, 5. The agreement provided that Monastra would waive indictment and voluntarily plead guilty to a one-count criminal information charging him with violating 15 U.S.C. § 1. R1-15-1. Concerning the offense level to be applied, the agreement stated that the parties agreed that the volume of commerce for purposes of applying the Antitrust Guideline, U.S.S.G. § 2R1.1, is "approximately $6 million." R1-15-2. The agreement further stated that the United States had calculated an offense level of 17, citing U.S.S.G. § 2R1.1(b) (price fixing, base offense level of 10; three-point enhancement for volume of commerce of $6 million) and § 3B1.1(a) (four-point enhancement for organizer or leader of a criminal activity). Ibid. The agreement provided that, subject to Monastra's full and continuing cooperation, the United States would not oppose a 3-point downward adjustment under U.S.S.G. § 3E1.1 (acceptance of responsibility). Ibid. Further, subject to Monastra's full and continuing cooperation the United States agreed that it would move for a downward departure pursuant to U.S.S.G. § 5K1.1 (substantial assistance to authorities). Ibid.

The agreement, tracking the language of Rule 11(e)(1)(C), stated that "[t]he United States and Mr. Monastra agree that the

appropriate disposition of this case is that Mr. Monastra be sentenced at offense level twelve, with no fine." Ibid. The United States "agree[d] to recommend that Mr. Monastra's sentence be ten months[4] and to make no other specific recommendation within the range of possible sentences provided by offense level twelve." R1-15-2 to 15-3. The plea agreement permitted Monastra to "argue for any sentence provided by offense level twelve, including substitute punishment under U.S.S.G. §§ 5C1.1(d) and (e)." R1-15-3. Finally, tracking the provisions of Rule 11(e)(2)-(4) applicable to Rule 11(e)(1)(C) agreements, the agreement stated that the "United States and Mr. Monastra understand that the Court retains the complete discretion to accept or reject the recommended disposition provided for in this plea agreement. If the Court rejects the recommended disposition provided for in this plea agreement, then this entire plea agreement shall be void and, pursuant to Federal Rule of Criminal Procedure 11(e)(4), Mr Monastra will have the right to withdraw his plea of guilty." Ibid.[5]

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[4] Taking into consideration Monastra's criminal history category (I), an offense level of 12 is in Zone C of the sentencing table, providing 10-16 months of imprisonment. U.S.S.G. Ch.5, Pt.A.

[5] In other provisions of the plea agreement, Monastra agreed to cooperate with the United States; the United States

Monastra changed his plea to guilty at a hearing held on May 2, 1996. The court initially told Monastra that the promises made by the government in the plea agreement as to what it would recommend to the court "are not binding upon the Court." R3-6. The government lawyer, however, broke in and stated that "[t]his plea agreement is drafted pursuant to Rule 11[e]1C." R3-6 to -7. The court then corrected itself, stating "you agree that if I disagreed with your recommendation, he could withdraw his plea; is that what you're saying?" R3-7. The government lawyer responded "[t]hat's correct, your Honor." Ibid.

As provided in the plea agreement, and in view of Monastra's substantial assistance to the government, the government moved on July 11, 1996 for a two-point downward departure under U.S.S.G. 5K1.1. R1-31. Sentencing was held on November 15, 1996. R4. In his sentencing memorandum to the Probation Officer, Monastra reconfirmed that the plea agreement was reached pursuant to Rule 11(e)(1)(C), and stated that he was "not advocating or arguing for less than" a level-12 sentence. Letter from Charles C.

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agreed not to bring further criminal charges against him under specified statutes for specified acts; the United States agreed to advise the Probation Office and court of Monastra's cooperation; and Monastra agreed that the plea agreement does not affect civil or equitable claims. R1-15-3 to 15-5. A Joint Memorandum in Support of the Plea Agreement (R1-21) recited all these provisions, including the fact that the agreement was "pursuant to" Rule 11(e)(1)(C). R1-21-1.

Murphy, Jr., Esq. to Virginia Cataldo, U.S. Probation Officer 1, 10 (June 10, 1996).

At sentencing, Monastra again acknowledged that "[w]e do have a plea agreement under 11(e)(1)(C)" and stated that he is "not attacking the plea agreement" but "feel[s] honor bound by [it]." R4-4, 5, 62. Monastra also informed the court that "it [was] made clear in the plea hearing that [the plea] was an 11(e)(1)(C)." R4-26.[6] However, he urged the court to "exercise discretion under 18 U.S.C. 3553(b)" to impose a sentence other than the sentence Monastra had agreed to in the plea agreement. R4-5, 12, 59-60, 62. In particular, Monastra asked the court not to impose a prison sentence, so that Monastra could continue to run his business while serving his sentence. See, e.g., R4-13 to 4-14. The government responded that the (C)-type plea agreement specified a level-12 sentence, and that, at its most lenient, a level-12 sentence requires a split sentence including imprisonment. R4-55.

The court ruled that it did not have discretion to depart from the Rule 11(e)(1)(C) agreement. "I think because of the nature of the plea agreement the court could either reject the plea agreement and require a trial or accept the plea agreement, in which case the court would be obligated to accept what has

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[6] Monastra's counsel admitted that Monastra could not have prevailed at trial, since Monastra was caught with "his hand * * * in the cookie jar." R4-6.

been contracted for in the plea agreement." R4-64. The court noted, however, that if it did have discretion, it would not incarcerate Monastra because "I don't think that's a proper remedy in an antitrust case." R4-64 to 4-65. The court went on to impose a sentence at the "lower end of the guideline range * * * agreed to by the government and the defendant," for a term of 10 months' imprisonment, to be served as 5 months' incarceration and 5 months' home confinement without electronic monitoring, plus two years' supervised release. R1-44; R4-66 to 4-68. The court found that Monastra was "not capable of paying the minimum range for fines in this case" and imposed no fine. R4-66.

C. Standard of review.

1. This Court reviews district court findings as to the terms of a plea agreement (D.Br. 18-25) under a clearly erroneous standard. United States v. Caporale, 806 F.2d 1487, 1516 (11th Cir. 1986), cert. denied, 482 U.S. 917 (1987), 483 U.S. 1021 (1987); United States v. Quigley, 631 F.2d 415, 416 (5th Cir. 1980) (binding precedent for 11th Circuit under Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981)).

2. Whether departure under the Sentencing Guidelines is permitted where the parties have agreed to the sentence under Rule 11(e)(1)(C) (D.Br. 25-36) is a question of law, subject to plenary review by this Court. See, e.g., United States v. Mukai, 26 F.3d 953, 954 (9th Cir. 1994).

SUMMARY OF ARGUMENT

Notwithstanding his repeated concessions in the district court that his plea agreement was reached pursuant to Rule 11(e)(1)(C), Monastra argues that the agreement was in fact reached under Rule 11(e)(1)(B), and accordingly was not binding on the sentencing court. A simple examination of the plea agreement, however, debunks that assertion. The agreement expressly states that it is pursuant to Rule 11(e)(1)(C) and tracks the language of that rule with the parties "agree[ing] that the appropriate disposition" of this case is offense level 12. R1-15-1, 2. The plea agreement also incorporates the critical characteristics of a (C) agreement: it provides that the parties "understand that the Court retains the complete discretion to accept or reject the recommended disposition provided for in this plea agreement. If the Court rejects the recommended disposition provided for in this plea agreement, then this entire plea agreement shall be void and, pursuant to Federal Rule of Criminal Procedure 11(e)(4) [which applies to (C), but not (B) agreements], Mr. Monastra will have the right to withdraw his plea of guilty." R1-15-3.

The fact that the plea agreement also permitted the parties to make recommendations within the level-12 range does not render the agreement a (B) agreement. Type-(C) agreements can provide for either a specific sentence or encompass a range. If the court had disagreed that a level-12 sentence was appropriate, Monastra could have withdrawn his plea under the terms of the

agreement, a result that is the essence of a (C) agreement, but totally inconsistent with a (B) agreement.

Alternatively, Monastra argues that a court has the discretion to depart downward under 18 U.S.C. § 3553(b) and U.S.S.G. § 5K2.0 from the sentence agreed to by the parties under Rule 11(e)(1)(C). No court has agreed with this argument and this Court should also reject it. The terms of Rule 11(e)(3) require the judgment and sentence to "embody" the disposition contained in a (C) plea agreement, not some other disposition arrived at by the district court by whatever means. Further, the legislative history of Rule 11(e) confirms that a court may not sentence to a disposition more favorable to the defendant than that provided in the (C) agreement. And, there is no question as to whether Rule 11 or the Sentencing Guidelines govern plea bargains; the Sentencing Guidelines expressly provide that Rule 11(e), not the Guidelines, governs acceptance or rejection of plea agreements. The Sentencing Guidelines contemplate that the parties may agree to a sentence that reflects a departure from the applicable guideline range and that the sentencing court will review the appropriateness of such a departure before accepting the plea agreement. But the court may not depart from the sentence agreed on by the parties if it accepts the (C) agreement. In short, Monastra bargained for a level-12 sentence under Rule 11(e)(1)(C), and he is not permitted now unilaterally to improve on his bargain.

ARGUMENT

I. THE PLEA AGREEMENT IN THIS CASE WAS REACHED PURSUANT TO RULE 11(e)(1)(C), AND WAS BINDING ON THE COURT

After repeatedly stating in the district court that the plea agreement in this case was a Rule 11(e)(1)(C) agreement, Monastra now asserts (D.Br. 18-25) that the plea agreement was reached under Rule 11(e)(1)(B) and, accordingly, was not binding on the district court. Even assuming that Monastra's argument is not precluded by his numerous concessions in the district court that the plea agreement was a (C) agreement, the argument ignores the express language of both Rule 11 and the plea agreement.

1. Fed. R. Crim. P. 11(e)(1) provides for three types of plea agreements. A Rule 11(e)(1)(A) agreement is an agreement that requires the government to move for dismissal of other charges against the defendant. Under Rule 11(e)(1)(B), the government promises to "make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court." Finally, in a Rule 11(e)(1)(C) agreement, the government "agree[s] that a specific sentence is the appropriate disposition of the case."

With a (B) agreement, the court must "advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea." Fed. R. Crim. P. 11(e)(2). However, with respect to (A) or (C) agreements, the court may either accept or reject the agreement

(or may defer its decision to accept or reject until it considers the presentence report). Ibid. If the court rejects an (A) or (C) agreement, the court must inform the parties of this fact and advise the defendant "that the court is not bound by the plea agreement" and afford the defendant an opportunity to then withdraw the plea. Fed. R. Crim. P. 11(e)(4). If the court accepts the (A) or (C) agreement, the court "shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement." Rule 11(e)(3).

Thus, the "critical" characteristic of an (A) or (C) agreement is that "the defendant receive the contemplated charge dismissal or agreed-to sentence. Consequently, there must ultimately be an acceptance or rejection by the court of a type (A) or (C) agreement so that it may be determined whether the defendant shall receive the bargained-for concessions or shall instead be afforded an opportunity to withdraw his plea." Fed. R. Crim. P. 11 (1979 Advisory Committee Notes). A (B) agreement, by contrast, is discharged when the prosecutor makes the recommendation he agreed to make, and neither subdivision (e)(3) nor (e)(4) (providing for acceptance or rejection of the plea) is applicable, in light of the "nonbinding character of the recommendation." Ibid.

2. In this case, the district court correctly determined that the agreement was a (C) agreement (R4-26, 64). Monastra's contention that the district court thought that the agreement was "unclear" (D.Br. 24) simply ignores what the judge plainly said

(R4-64; see also R4-26), the express language of the agreement, and Monastra's numerous admissions in the district court that the agreement was a (C) agreement.

The best evidence concerning the nature of the plea agreement is the express language of the agreement that Monastra signed. That plea agreement plainly states that the parties "hereby enter into this plea agreement pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C)." R1-15-1. Moreover, the agreement tracks precisely the language of Rule 11(e)(1)(C), stating that the parties "agree that the appropriate disposition of this case" is that Monastra be sentenced at offense level twelve, with no fine. R1-15-2. The plea agreement then recites the facts that are critical to a (C) agreement: the parties "understand that the Court retains the complete discretion to accept or reject the recommended disposition provided for in this plea agreement. If the Court rejects the recommended disposition provided for in this plea agreement, then this entire plea agreement shall be void, and pursuant to Federal Rule of Criminal Procedure 11(e)(4), Mr. Monastra will have the right to withdraw his plea of guilty."[7] R1-15-3. See United States v. Eppinger, 49 F.3d 1244, 1249-1250 (7th Cir. 1995)(where language of plea

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[7] Rule 11(e)(4) applies to (C), but not (B) agreements. Fed. R. Crim. P. 11(1979 Advisory Committee Notes). This is additional internal evidence that the plea agreement is type-(C).

agreement tracked language of Rule 11(e)(1)(B), plea agreement was a (B) agreement).

In addition to this forthright description of the consequences of a (C) agreement, the plea agreement provided that "Mr. Monastra may argue for any sentence provided by offense level twelve" (R1-15-3). By implication, Monastra was bound not to argue for any sentence other than offense level twelve, but rather to support the parties' agreement that "the appropriate disposition of this case is that Mr. Monastra be sentenced at offense level twelve" (R1-15-2).

In addition to signing a plea agreement that was expressly labeled a (C) agreement, Monastra also signed a Joint Memorandum In Support of Plea Agreement that states that the plea agreement is "pursuant to" Rule 11(e)(1)(C). R1-21-1. And at the guilty plea hearing, Monastra did not object when government counsel correctly told the district court that the agreement was a (C) agreement. R3-6 to 3-7. Moreover, in his presentencing letter to the Probation Officer, Monastra stated that he and his company had "reached plea agreements with the Government under Fed. R. Crim. P. 11(e)(1)(C), pursuant to which the parties have agreed upon particular sentences as the appropriate disposition of the case." Letter from Charles C. Murphy, Jr., Esq. to Virginia Cataldo, U.S. Probation Officer 1 (June 10, 1996). Finally, at sentencing, Monastra's attorney agreed that the agreement was reached under Rule 11(e)(1)(C), stating "[w]e do have a plea agreement under 11(e)(1)C)." R4-4, 5. He also confirmed that

"it [was] made clear in the plea hearing that this was an 11(e)(1)(C)[.]" R4-26.[8]

Monastra claims (D. Br. 22) that because the government agreed to "recommend" that the sentence should be 10 months, a sentence within the level 12 sentence agreed to by the parties, the agreement was really a non-binding (B) agreement. But the law is clear that a (C) agreement can involve an agreement either to a specific sentence, or, as in this case, to a sentencing range. See, e.g., United States v. Veri, 108 F.3d 1311, 1313-1314 (10th Cir. 1997)(sentence range of 21 to 27 months did not remove agreement from Rule 11(e)(1)(C); no cases support such a proposition); United States v. Nutter, 61 F.3d 10, 12 (2d Cir. 1995)(sentencing range of 151 to 188 months is sufficiently specific for (C) agreement); United States v. Mukai, 26 F.3d 953, 954-955 (9th Cir. 1994)(plea agreement with range of 5 to 7 years

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[8] In its Memorandum in Support of Departure, the United States stated that the plea agreement was concluded under Rule 11(e)(1)(C), and stated that it was filing the memorandum to meet its obligations under the (C) agreement. R1-33-1 to 33-2. The Presentence Investigation Report also stated that "[t]he plea agreement was formulated pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C)." PSI 3. See also Letter from Justin M. Nicholson, Esq., U.S. Department of Justice, to Virginia Cataldo, U.S. Probation Officer 6 (May 22, 1996)(plea agreement is a (C) agreement).

was (C) agreement); United States v. Lambey, 974 F.2d 1389, 1394, 1396 (4th Cir. 1992) (Rule 11(e)(1)(C) plea allows "sentence range"), cert. denied, 513 U.S. 1060 (1994); United States v. Kemper, 908 F.2d 33, 36 (6th Cir. 1990)(finding (C) agreement, although a sentence in exact number of months not set).

Monastra also argues (D.Br. 22-23) that the use of the term "recommended disposition" in paragraph 6 of the agreement (which explains that the court must either accept or reject the agreement) makes this a (B) agreement. R1-15-3. But a (C) agreement does constitute a recommendation, in the sense that the court has the option of rejecting the agreement entirely. Further, a (B) agreement requires "an understanding that such recommendation or request shall not be binding upon the court." Fed. R. Crim. P. 11(e)(1)(B).[9] In this case, the plea agreement expressly stated that the level-12 range was binding on the court and that, if the court was not satisfied with sentencing at level twelve, the court would have to reject the agreement and permit Monastra to withdraw his guilty plea. The fact that the

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[9] The fact that the government filed a 5K1.1 departure motion to document how the government and Monastra arrived at level 12 is irrelevant. R4-55 to 4-58. See also, e.g., Mukai, 26 F.3d at 956 (U.S.S.G. § 5K1.1 motion does not give court discretion to depart below sentence agreed to under Rule 11(e)(1)(C)); United States v. Cunavelis, 969 F.2d 1419, 1421-1423 (2d Cir. 1992)(same).

agreement also provided what the parties could argue to the court within this range -- including the government's promise to recommend 10 months, and the defendant's retained right to argue for a split sentence -- does not detract from the fact that the parties, in the language of Rule 11(e)(1)(C), agreed that "a specific sentence [i.e., level 12] is the appropriate disposition of the case." See, e.g., Kemper, 908 F.2d at 36 (claim that plea agreement was a (B) agreement rejected because parties had agreed on minimum sentence and "there was no understanding that the recommended sentence would not be binding on" court).

Monastra's reliance on United States v. Dean, 80 F.3d 1535, 1538-1539 (11th Cir.), modified, 87 F.3d 1212 (11th Cir. 1996) (see D.Br. 21), is misplaced. In that case, a plea agreement providing "that the government would recommend to the court that Dean be sentenced at the lower end of the guideline" was found by this Court to be a (B) agreement. 80 F.3d at 1539. The Court contrasted the plea agreement at issue in Dean to an agreement that specified "that a specific sentence was the appropriate disposition of the case -- an agreement the district court could only accept or reject." Ibid. In contrast to the agreement at issue in Dean, the agreement in this case falls in the latter category, since, by its terms, the parties agreed that level 12 was the "appropriate disposition of this case," and stated that the court would have either to accept or reject the agreement. Likewise, United States v. Newsome, 894 F.2d 852, 855 (6th Cir. 1990) (see D.Br. 21-22) is inapposite. The sentencing agreement

in that case, a cap of 57 months, produced a range too large to constitute agreement on a sentence (see Veri, 108 F.3d at 1313); further, it provided for a cap, not a range (see Nutter, 61 F.3d at 12). The Newsome agreement thus bears no resemblance to the modest six-month range agreed to in this case.

Accordingly, the district court correctly determined that the parties in this case had entered into a (C) agreement.

II. THE SENTENCING COURT CORRECTLY DECIDED THAT IT COULD NOT DEPART FROM THE RANGE SPECIFIED IN THE (C) AGREEMENT

Monastra alternatively argues (D.Br. 25-36) that, even if the plea agreement in this case was concluded under Rule 11(e)(1)(C), the court retained discretion to depart from the agreed-on guidelines range if the court determined that the case fell outside the "heartland" of antitrust cases. This argument has been considered in other circuits and uniformly rejected. See United States v. Veri, 108 F.3d at 1314-1315. Indeed, Monastra cites no decision that holds that a departure under the Sentencing Guidelines (18 U.S.C. § 3553(b) and U.S.S.G. § 5K2.0) is permitted from a sentence agreed to pursuant to Rule 11(e)(1)(C). See D.Br. 33.[10]

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[10] Monastra relies heavily on Koon v. United States, 116 S. Ct. 2035 (1996) concerning the extent of district court discretion to depart under the Sentencing Guidelines, but that case involved sentencing after trial, not a (C) plea agreement and a guilty plea.

That a court cannot depart from a sentence in a (C) agreement that it accepts is obvious from the text of Rule 11(e)(3) (emphasis added): "If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement." The Rules requires "the disposition provided for in the [(C)] plea agreement" -- and not some other disposition arrived at by the court, by whatever means -- to be embodied in the judgment and sentence, in order to give the parties the benefit of their bargain. As the 1979 Advisory Committee Notes to Rule 11 state, "critical to a type * * * (C) agreement is that the defendant receive the * * * agreed-to sentence." Thus "Rule 11(e)(3) prohibits a district court from sentencing a defendant to a sentence less severe than that provided for in the plea agreement accepted by the court." United States v. Semler, 883 F.2d 832, 833 (9th Cir. 1989). See also Veri, 108 F.3d at 1314-1315 (rejecting argument that court may depart downward under (C) plea agreement); United States v. Barnes, 83 F.3d 934, 941 (7th Cir.)(court does not have the power to "retain the plea and discard the agreed-upon sentence"), cert. denied, 117 S. Ct. 156 (1996); United States v. Kaye, 65 F.3d 240, 243 n.3 (2d Cir. 1995)(in a (C) agreement, defendant waives right to request a downward departure); Mukai, 26 F.3d at 955-956 (district court erred in concluding "exceptional circumstances" might justify disregarding terms of (C) plea agreement it had accepted); United States v. Carrozza, 4 F.3d 70, 87 (1st Cir.

1993)(time for evaluating departures is prior to accepting (C) agreement), cert. denied, 511 U.S. 1069 (1994); United States v. Johnson, 979 F.2d 396, 398 (6th Cir. 1992)(Rule 11(e)(3) "prohibits a district court from sentencing a defendant to a sentence more favorable than that provided in the plea agreement and accepted by the court");[11] United States v. Cunavelis, 969 F.2d 1419, 1421-1423 (2d Cir. 1992)(district court properly refused to depart lower than sentence agreed to in (C) agreement; "district court may accept or reject an (A) or (C) plea, but it may not modify it"); United States v. Schaechter, 891 F. Supp. 247, 251-252 (D.Md. 1995)(court may not accept (C) agreement and then depart downward). See also Dean, 80 F.3d at 1541 ("[w]ith a 'C' plea, acceptance of the agreement is identical to imposition of punishment"; contrasting (C) and (B) pleas).

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[11] Appellant cites (D.Br. 25) an earlier Sixth Circuit case, United States v. Pickett, 941 F.2d 411, 417-418 (6th Cir. 1991), involving a (C) agreement, in which the district court concluded that the "district court acted properly in not departing downward" for several reasons, without mentioning that departure is not permitted if the court accepts a (C) agreement. In view of Johnson, appellant's suggestion that the Sixth Circuit permits departure from (C) agreements is not supportable.

The legislative history of Rule 11(e)(3) confirms that (C) agreements preclude departure under the Sentencing Guidelines. That history:

> "shows that Congress wished to preclude a district court from accepting a plea agreement which provides for a specific sentence and then imposing a more lenient sentence than that provided for in the plea agreement. The version of 11(e)(3) proposed by the Supreme Court in 1974 stated that 'the court shall inform the defendant that it will embody in the . . . sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement.' The House Judiciary Committee then deleted the language 'or another disposition more favorable to the defendant than that provided for in the plea agreement,' and the House affirmed the committee's action by rejecting on the floor an amendment offered to restore the Supreme Court's version of the rule. The Senate accepted the House's version of the rule. See 121 Cong.Rec. 23322 (July 17, 1975)(discussion of legislative history of the rule).

Cunavelis, 969 F.2d at 1422 (quoting Semler, 883 F.2d at 833-834). See also H.R. Rep. 94-247 at 22 (1975)(showing deleted Supreme Court language); 121 Cong. Rec. 19538-39 (1975)(House rejection of floor amendment). "'By deleting the Supreme Court's 'more favorable to the defendant' language, Congress evidenced its intent to require a district court to sentence a defendant in accordance with the plea agreement.'" Cunavelis, 969 F.2d at 1422 (quoting Semler, 883 F.2d at 834). See also Mukai, 26 F.3d at 956.

While Rule 11(e)(3) predates the Sentencing Guidelines, the Guidelines make clear that "[t]he rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of [plea] agreements" even after inauguration of the Guidelines. U.S.S.G. Ch.1, Pt.A, intro. comment. 4(c); Mukai, 26 F.3d at 956;

Cunavelis, 969 F.2d at 1422.[12] The Guidelines were expected to "create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or reject a [(C)] plea agreement" (U.S.S.G. Ch.1, Pt.A, intro. comment. 4(c)), but they were not intended to override parties' (C) agreements once accepted.

The Sentencing Guidelines' policy statement concerning standards for acceptance of (C) agreements confirms that the sentencing court may not depart from the sentence contained in a (C) agreement. Specifically, the statement assumes that, if any departure is made, it will be incorporated in the (C) agreement by the parties, and then this agreement (reflecting any agreed-on departures) will be reviewed by the sentencing court. Thus U.S.S.G. § 6B1.2(c) states that "[i]n the case of a plea agreement that includes a specific sentence [Rule 11(e)(1)(C)], the court may accept the agreement if the court is satisfied either that: (1) the agreed sentence is within the applicable guideline range; or (2) the agreed sentence departs from the

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[12] Contrary to Monastra's contention, there is no need for this Court to "reconcile[]" Rule 11 and the Sentencing Guidelines (D.Br. 32-35). The Sentencing Guidelines already make it clear that "Rule 11 -- not [the Guidelines] -- controls." Cunavelis, 969 F.2d at 1422. See also Mukai, 26 F.3d at 956.

applicable guideline range for justifiable reasons."[13] If the court does not agree with the departure agreed to by the parties, it may disapprove the (C) agreement,[14] but it is not authorized independently to depart if the parties have not agreed to a particular departure.[15]

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[13] The corresponding commentary states (U.S.S.G. § 6B1.2, comment.):

> Similarly the court should accept * * * a plea agreement requiring imposition of a specific sentence only if the court is satisfied either that such sentence is an appropriate sentence within the applicable guideline range or, if not, that the sentence departs from the applicable guideline range for justifiable reasons (i.e., that such departure is authorized by 18 U.S.C. § 3553(b)).

[14] As this Court said in Dean, 80 F.3d at 1541, "if the court does not consider the [C] agreement fair, it simply rejects the entire plea agreement."

[15] Monastra complains that the district court failed to "reconcile[]" the antitrust laws' competitive goals (which he claims would be undermined if his business failed while he was incarcerated) with Rule 11 and the Sentencing Guidelines (D.Br. 32-35). Setting aside his claims about his role in the competitive process, if the court below had believed that the level 12 sentence should have been reduced to reflect special circumstances, it could have rejected the plea agreement and allowed Monastra to withdraw his plea. Mukai, 26 F.3d at 955

In short, every relevant authority requires the conclusion that a Rule 11(e)(1)(C) agreement, if accepted by the court, binds the court, and that the court may not depart under the Sentencing Guidelines to impose a sentence more lenient (or stricter) than that agreed to by the parties. Indeed, if a party could agree to a guideline range, but then was free to argue to the court that it should depart above or below that level, (C) agreements would become hard to distinguish from (B) agreements, and would lose their particular value of providing predictability

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("time for the court to evaluate whether the impact of exceptional circumstances renders the agreement inappropriate is prior to acceptance"). However, Monastra was categorical in stating that he did not want the court to reject the plea (which accorded him negotiated benefits), and so he cannot criticize the court for not pursuing this avenue.

for the parties.[16] Accordingly, the district court correctly concluded that it could not depart in this case.

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[16] In any event, notwithstanding the district court's comments, none of Monastra's arguments would have warranted a departure in this case. See U.S.S.G. § 2R1.1, comment. (backg'd.)("[t]he Commission believes that the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines. The controlling consideration underlying this guideline is general deterrence. Under the guidelines, prison terms for these offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice. * * * [I]n very few cases will the guidelines not require that some confinement be imposed."); U.S.S.G. § 3B1.1 (offense level should be increased for a leadership role in the offense); United States v. Mogel, 956 F.2d 1555, 1557, 1563-1565 (11th Cir.)(fact that defendant's business might fail does not warrant departure), cert. denied, 506 U.S. 857 (1992); United States v. Allen, 87 F.3d 1224, 1225-1226 (11th Cir. 1996) (aging, ill parent not extraordinary circumstance warranting departure; incarceration normally disrupts personal relationships).

CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted.

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I hereby certify that on May 1, 1997, I caused two copies of the foregoing BRIEF OF APPELLEE UNITED STATES OF AMERICA to be served by overnight courier upon:

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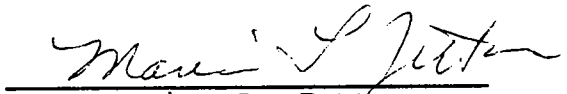

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