IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 03-653
	:	
ERIK NILSEN,	:	Judge R. Barclay Surrick
	:	
Defendant.	:	Filed: October 16, 2003

GOVERNMENT'S SENTENCING MEMORANDUM AND MOTION FOR A GUIDELINES DOWNWARD DEPARTURE (U.S.S.G. § 5K1.1)

The United States and Erik Nilsen have entered into a Plea Agreement, pursuant to which the defendant will waive indictment and plead guilty to the captioned Information. The one-count Information charges the defendant with a violation of the Sherman Act, 15 U.S.C. § 1. The defendant will waive indictment and plead guilty to participating in a conspiracy to suppress and eliminate competition by allocating customers, rigging bids and fixing prices for contracts of affreightment for parcel tanker shipping[1] of products to and from the United States and elsewhere beginning at least as early as August 1998 and continuing until as late as November 2002. Both the United States and the defendant request that the Court accept the plea and

[1] Parcel tanker shipping is the ocean transport of bulk liquid chemicals, edible oils, acids and other specialty liquids. Parcel tankers are deep sea vessels equipped with compartments designed to carry shipments of various sizes. The temperature and other specifications of the compartments can be regulated according to the specific requirements of the type of liquid being transported.

A contract of affreightment is a contract between a customer and a parcel tanker shipping company for the transportation of bulk liquids from one port to another. It typically covers multiple shipments during a certain time period and specifies the price, cargo, destinations and other terms and conditions.

impose sentence at the time the defendant enters his plea.

I

STATUTE VIOLATED

A. The Information

The Information charges the defendant with participating in a conspiracy to suppress and eliminate competition by allocating customers, fixing prices and rigging bids for contracts of affreightment for parcel tanker shipping of products to and from the United States and elsewhere beginning at least as early as August 1998 and continuing until as late as November 2002, in unreasonable restraint of interstate and foreign trade and commerce in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

B. 15 U.S.C. Section 1

Section One of Title 15, United States Code, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

C. Elements of the Offense (15 U.S.C. Section 1)

The elements of a Sherman Act offense, each of which the United States must prove beyond a reasonable doubt at trial, are:

(1) the conspiracy charged was formed, and it was in existence at or about the time alleged;

(2) the defendant knowingly formed or participated in that conspiracy; and

(3) the activity which was the object of the conspiracy was within the flow of, or substantially affected, interstate or foreign commerce.

D. Maximum Penalty

The statutory maximum penalty the defendant may receive upon his conviction in this case is: (a) a term of imprisonment for three years; (b) a fine in an amount equal to the greatest of: (1) $350,000; (2) twice the gross pecuniary gain derived from the crime; or (3) twice the gross pecuniary loss caused to the victims of the crime; and (c) a term of supervised release of one year following any term of imprisonment.

II

FACTUAL BASIS

During the relevant period, the defendant, a citizen of Norway, was the Vice President, Asia Pacific and Clean Petroleum Products, of Odfjell Seachem AS (hereinafter "Odfjell"), a corporation organized and existing under the laws of Norway with its principal place of business in Bergen, Norway. During the relevant period, Odfjell was a provider of parcel tanker shipping services and was engaged in parcel tanker shipping of products to and from the United States and elsewhere.

Had this case gone to trial, the United States would have proved beyond a reasonable doubt that as early as August 1998 and continuing until as late as November 2002, the defendant participated in a conspiracy among major providers of parcel tanker shipping, the substantial terms of which were to allocate customers, rig bids and fix prices for contracts of affreightment for parcel tanker shipping of products to and from the United States and elsewhere.

During the charged period and in furtherance of the conspiracy, the defendant and co-conspirators attended meetings and engaged in discussions in the United States and Europe concerning customers for contracts of affreightment and prices of parcel tanker shipping of products to and from the United States and elsewhere. The defendant and co-conspirators agreed during those meetings and discussions to allocate customers and to create and exchange customer lists in order to implement and monitor this agreement. The defendant and co-conspirators agreed during those meetings and discussions not to compete for one another's customers either by not submitting prices or bids to certain customers, or by submitting intentionally high prices or bids to certain customers. Defendant and co-conspirators discussed and exchanged prices to certain customers so as not to undercut one another's prices.

Finally, the United States would have proved that the parcel tanker shipping services affected by this conspiracy were within the flow of, and substantially affected, interstate and foreign trade and commerce because products shipped by Odfjell, and parcel tanker shipping vessels, equipment and supplies necessary to providing such parcel tanker shipping, as well as payments for such parcel tanker shipping, traveled in interstate and foreign commerce.

III

PLEA AGREEMENT

The defendant's guilty plea to the Information will be entered pursuant to the Plea Agreement between the defendant and the United States. The Plea Agreement provides that the defendant will enter a plea of guilty pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure.

Also pursuant to the Plea Agreement, the United States and the defendant agree to

recommend jointly that the Court impose a sentence requiring the defendant to pay a fine to the United States in the amount of $25,000 and serve a period of incarceration of three months with no period of supervised release as the appropriate disposition of the case. The fine is payable in full before the fifteenth day after the date of imposition of sentence. The United States also agrees that it will not object to the defendant's request that the Court make a recommendation to the Bureau of Prisons that the Bureau of Prisons designate that the defendant be assigned to a Federal Minimum Security Camp, if possible at FPC Eglin, Eglin Air Force Base, Eglin, Florida, to serve his sentence of imprisonment and that the defendant be released following the imposition of sentence to allow him to self-surrender to the assigned correctional facility on a specified date on or after January 12, 2004.

The United States and the defendant also will jointly request that the Court accept the defendant's guilty plea and immediately impose sentence on the day of arraignment. Should the Court reject the agreed-upon disposition of the case, the defendant will be free to withdraw his plea.

The defendant has agreed to cooperate fully with the United States in the conduct of the present investigation of the parcel tanker shipping industry and any litigation or other proceedings resulting therefrom to which the United States is a party. Such cooperation includes, but is not limited to, the production of relevant documents under the control of the defendant and making himself available in the United States for interviews and testimony in connection with any proceeding resulting from the present investigation of the parcel tanker shipping industry to which the United States is a party.

The United States has also filed two related Informations charging Odfjell and Bjorn

Sjaastad, Odfjell's Chairman, with participating in a conspiracy to allocate customers, rig bids and fix prices for contracts of affreightment for parcel tanker shipping of products to and from the United States and elsewhere. They have each entered into Plea Agreements in which they have agreed to plead guilty to those charges.

Pursuant to the Plea Agreement in this case, the United States agrees, subject to the continuing full cooperation of the defendant, not to bring further criminal proceedings against the defendant for any act or offense committed prior to December 2002 that was undertaken in furtherance of an antitrust conspiracy involving parcel tanker shipping.

IV

RULE 11(c)(1)(C) AGREEMENT

The Plea Agreement presented to the Court was entered into pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) which provides that the Government may "agree that a specific sentence is the appropriate disposition of the case" and that the defendant may withdraw its plea if the agreement is not accepted by the Court. Such plea agreements, which limit the sentencing discretion of the Court, are used by the Antitrust Division in unusual circumstances where certainty surrounding sentencing is a critical issue in reaching any plea agreement at all. Type "C" plea agreements have been used widely by the Division in international cartel cases and have been accepted by the courts.[2]

International cartels often involve large volumes of commerce and, thus, the most severe

[2] Type "C" agreements have become prevalent in international cases largely because the United States lacks jurisdiction over many of the defendants. The willingness of a foreign defendant to submit to jurisdiction is conditioned on the certainty of the sentence he or she will receive.

penalties under the Antitrust Sentencing Guidelines. Faced with such significant penalties, defendants such as Erik Nilsen will not waive their right to trial without the certainty of a "C" agreement. The prosecution of international cartels also presents other factors warranting the use of "C" agreements. Such trials require the United States to assemble witnesses from around the globe, creating risk in the ability of the Government to present effectively its case at trial. In addition, prosecution of international cartels can place huge demands on court and government resources. For these reasons, the Government has agreed to the Rule 11(c)(1)(C) agreement which is presented to the Court.

V

THE SENTENCING GUIDELINES

The United States calculates the defendant's Sentencing Guidelines as follows:

A. Guideline Fine Range

Volume of Commerce (Odfjell's COA shipments to and from U.S. and billed to a U.S. listed customer 8/98-2/02)[3]	$216,967,000
Guideline Fine Range 1% - 5% of Volume of Commerce [§ 2R1.1(c)]	$2,169,700 - $10,848,350

B. Maximum Fine Calculation - Alternative Fine Statute

As set forth above, the maximum fine for a defendant under the Sherman Act is the

[3] The Government has agreed that, pursuant to U.S.S.G. § 1B1.8, self-incriminating information that Mr. Nilsen provides pursuant to the Plea Agreement will not be used to increase the volume of commerce attributable to the defendant or in determining the defendant's applicable guideline range except to the extent provided in U.S.S.G. § 1B1.8(b). Accordingly, the Government has excluded Odfjell's commerce for the period from March 2002 through the end of the charged conspiracy. Until Mr. Nilsen cooperated and provided evidence concerning the full scope of the conspiracy, the Government could not prove the conspiracy continued after March 2002.

greater of $350,000, twice the gross gain derived by the conspirators or twice the gross loss suffered by the victims of the offense. See 18 U.S.C. §§ 3571 (c) and (d). The Government has not concluded its investigation in this matter and is not in a position to state with precision the exact amount of overcharges (gain) derived by the defendant and his co-conspirators, but believes the volume of commerce for the charged conspiracy from all conspirators is at least $600,000,000. Accordingly, for the purposes of sentencing in this case the Government and the defendant have agreed that twice the gain or loss would exceed the agreed-upon fine of $25,000.

Under the terms of the Plea Agreement, the United States will move for a downward departure from the minimum guidelines fine to the agreed-upon fine of $25,000.

C. Offense Level

Base Offense Level [§2R1.1(a)]	+ 10
Conduct Involves Non-Competitive Bids [§ 2R1.1 (b)(1)]	+ 1
Volume of Commerce Exceeds $100,000,000 [§ 2R1.1(b)(2)(G)]	+ 7
	18
Acceptance of Responsibility [§ 3E1.1]	– 3
Total Offense Level	15

D. Criminal History

No Known Prior Criminal Record [§ 4B1.1] Level I

E. Imprisonment Range

18 - 24 months

Under the terms of the Plea Agreement, the United States will move for a downward departure from the Guidelines imprisonment range to the agreed upon period of incarceration of

three months, with no period of supervised release.

F. Restitution

Because the contracts of affreightment that were the subject of the charged conspiracy are complex agreements which often contain many different prices and pricing formulas for different products and different ports, determining with precision any overcharge caused by the conspiracy would be both difficult and time consuming. Moreover, this case and the Government's ongoing investigation have been the subject of considerable publicity, both in trade publications and the Wall Street Journal. As a result, a number of civil suits already have been filed by potential victims against Odfjell and other parcel tanker shipping companies. In light of the pending civil actions and because of the complicated nature and large number of contracts involved, the Government respectfully submits that determining the amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process. See U.S.S.G. § 8B1.1(b)(2)(B). Accordingly, the Government is not seeking a restitution order in this case.

VI

GOVERNMENT'S MOTION TO DEPART FROM THE GUIDELINES PURSUANT TO U.S.S.G.§ 5K1.1

The United States hereby moves for a downward departure from the Guidelines sentence set forth above based on the defendant's substantial assistance in the continuing investigation of Sherman Act violations by other companies and individuals involved in this matter. The Government respectfully submits that the following factors enumerated in Section 5K1.1(a) of the Guidelines warrant downward departure. See United States v. Torres, 251 F.3d 138, 145-46

(3d Cir. 2001) (when considering departure below the sentencing range pursuant to Section 5K1.1, court must conduct a qualitative, case-by-case analysis which includes examination of enumerated and other relevant factors).

A. Nature and Extent of Assistance

Section 5K1.1(a)(3) lists as a relevant factor "the nature and extent of the defendant's assistance." Mr. Nilsen had been designated to be Odfjell's main contact for conspiratorial communications with competitors. As such, he was in a position to greatly advance this investigation in its earliest stages, and in fact, he did so. Mr. Nilsen has provided information concerning the ongoing operations of the conspiracy from its inception in 1998 until its end in late 2002. Mr. Nilsen has volunteered information and offered clarifying explanations which have enabled the Government to better understand the industry, its participants and the operation of the charged conspiracy. Mr. Nilsen also has identified key conspirators, including numerous executives more culpable than he, as well as the objects of the conspiracy and various critical events that occurred over the life of the conspiracy.

Prior to obtaining Mr. Nilsen's cooperation, the Government believed that the conspiracy ended in March 2002, the time a co-conspirator claimed it had withdrawn from the conspiracy. Through his cooperation, Mr. Nilsen provided evidence of the true duration of the conspiracy, the commerce affected by the conspiracy and the relative culpability of some of the major conspirators.

B. Reliability

Section 5K1.1(a)(2) lists as a relevant factor "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant." The Government has

found Mr. Nilsen at all times to be truthful and candid. The Government believes that Mr. Nilsen has provided full and complete cooperation. Mr. Nilsen's information has been corroborated by documents and other evidence supplied by Mr. Nilsen or his employer or through independent sources.

C. Timeliness

Section 5K1.1(a)(5) lists as a relevant factor "the timeliness of the defendant's assistance." In this case, the defendant's offer of cooperation came virtually within days of the service of the grand jury subpoena on his employer, Odfjell.

D. Government's Evaluation of Assistance Rendered

Section 5K1.1(a)(1) lists as a relevant factor "the Government's evaluation of the assistance rendered" by the defendant. As noted above, Mr. Nilsen's information has been corroborated by documents and other evidence supplied by Mr. Nilsen or his employer or through independent sources. This has resulted in substantial, credible evidence against a number of co-conspirators who are subjects of the Government's investigation. Mr. Nilsen's cooperation will be critical as the investigation continues.

International conspiracies whose participants include foreign-based defendants can be very difficult to prove unless the government obtains the testimony of co-conspirators who are willing to submit to the jurisdiction of the United States. As a Norwegian citizen who resides outside the Untied States, Mr. Nilsen easily could have refused to cooperate in our investigation and remained outside the United States. He opted, however, to assist the Government early in its investigation. By so doing, Mr. Nilsen has provided highly significant and useful assistance to the Government's investigation.

In the Government's opinion, the cooperation Mr. Nilsen has tendered and promised merits a downward departure as contemplated by Section 5K1.1.

E. The Government's Sentencing Recommendation

As agreed to by the United States in its Plea Agreement with Erik Nilsen, and for the reasons set forth above, the United States recommends that the Court impose a sentence requiring the defendant to pay a fine to the United States in the amount of $25,000 and serve a period of incarceration of three months with no period of supervised release as the appropriate disposition of the case. The fine is to be paid in full before the fifteenth day after the date of imposition of sentence.

VII

CONCLUSION

Because the agreement presented to the Court for its consideration is a Rule 11(c)(1)(C) agreement which the Court must either accept or reject, the defendant and the Government have agreed to waive a pre-sentence report. This memorandum is provided in support of our joint request to have sentence imposed on the day of arraignment and to support the Government's motion for a Section 5K1.1 departure from the Sentencing Guidelines.

The Government will, of course, provide any additional information or answer any questions the Court may have either prior to or at the arraignment scheduled for October 22, 2003.

Respectfully submitted,

_____/S/_____
ROBERT E. CONNOLLY
Chief

____/S/ _____
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Dated: October 15, 2003

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UNITED STATES OF AMERICA	)	
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v.	)	Criminal No. 03-653
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ERIK NILSEN,	)	Judge R. Barclay Surrick
	)	
Defendant.	)	Filed: October 16, 2003
	)	

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of October 2003, a copy of the Government's Sentencing Memorandum and Motion for a Guidelines Downward Departure (U.S.S.G. § 5K1.1) has been sent via telefax to counsel of record for the defendant as follows:

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