

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 03-654
	:	
ODFJELL SEACHEM AS,	:	Judge R. Barclay Surrick
	:	
Defendant.	:	Filed: October 16, 2003

GOVERNMENT’S SENTENCING MEMORANDUM
AND MOTION FOR A GUIDELINES DOWNWARD
DEPARTURE (U.S.S.G. § 8C4.1)

The United States and Odfjell Seachem AS (“Odfjell”) have entered into a Plea Agreement, pursuant to which Odfjell will waive indictment and plead guilty to the captioned Information. The one-count Information charges Odfjell with a violation of the Sherman Act, 15 U.S.C. § 1. Odfjell 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 shipping¹ 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 Odfjell request that the Court accept the plea and impose sentence at the time Odfjell enters its plea.

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.

STATUTE VIOLATED

A. The Offense Charged

The Information charges Odfjell 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 maximum penalty Odfjell may receive upon its conviction in this case is a fine in an amount equal to the largest of: (a) \$10 million; (b) twice the gross pecuniary gain derived from the crime; or (c) twice the gross pecuniary loss caused to the victims of the crime.

II

FACTUAL BASIS

Odfjell is a corporation organized and existing under the laws of Norway with its principal place of business in Bergen, Norway. During the relevant period, the defendant was a provider of parcel tanker shipping services and was engaged in parcel tanker shipping of products worldwide, including to and from the United States.

Had this case gone to trial, the United States would have proved beyond a reasonable doubt that there was 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 which began at least as early as August 1998 and continued until as late as November 2002. The United States also would have proved that the defendant knowingly joined the conspiracy and that defendant's agents, officers and employees attended meetings and engaged in discussions with co-conspirators 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 its 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 its 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 its 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 the defendant, 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

Odfjell's guilty plea to the Information will be entered pursuant to the Plea Agreement between Odfjell and the United States. The Plea Agreement provides that Odfjell 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 Odfjell agree to jointly recommend that the Court impose a sentence requiring Odfjell to pay a fine to the United States in the amount of \$42.5 million as the appropriate disposition of the case. The fine is payable in the following six installments over a period of five years:

- (1) Within ninety (90) days of imposition of sentence – \$4.3 Million

- (2) At the one-year anniversary of imposition of sentence – \$4.3 Million
- (3) At the two-year anniversary of imposition of sentence – \$8.6 Million
- (4) At the three-year anniversary of imposition of sentence – \$8.6 Million
- (5) At the four-year anniversary of imposition of sentence – \$8.6 Million
- (6) At the five-year anniversary of imposition of sentence – \$8.1 Million

Odfjell has also agreed to accept the imposition of a period of probation that coincides with the fine payment schedule set forth above.

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

Odfjell and its parent, subsidiaries and its parent's subsidiaries which are engaged in parcel tanker shipping (collectively, "related entities") have 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 Odfjell and its related entities and securing the cooperation of its officers, directors and employees.

The United States has also filed two related Informations charging Bjorn Sjaastad, Chairman of the defendant, and Erik Nilsen, Vice President of the defendant, 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.

Under the additional terms of the Plea Agreement in this case, the United States agrees, upon entry and acceptance of the guilty pleas of Bjorn Sjaastad and Erik Nilsen, and subject to the continuing full cooperation of Odfjell and its related entities, not to bring further criminal proceedings against Odfjell or its related entities for any act or offense committed prior to December 2002 that was undertaken in furtherance of an antitrust conspiracy involving parcel tanker shipping. Subject to their continuing cooperation, certain current or former directors, officers, and employees of Odfjell and its related entities identified by the United States will receive the same non-prosecution protection.

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

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.

International cartels often involve large volumes of commerce and, thus, the most severe penalties under the Antitrust Sentencing Guidelines. Faced with such significant penalties, defendants such as Odfjell 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 Odfjell’s fine range under the Sentencing Guidelines as follows:

A. Base Fine

Volume of affected commerce (Odfjell’s COA shipments to and from the United States and billed to a U.S. customer 8/98-2/02) ³	\$216,967,000
20% of volume of affected commerce [U.S.S.G. §§ 2R1.1(d)(1) and 8C2.4(b)]	\$43,393,400

³ The Government has agreed that, pursuant to U.S.S.G. § 1B1.8, self-incriminating information that Odfjell 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 Odfjell cooperated and provided evidence concerning the full scope of the conspiracy, the Government could not prove the conspiracy continued after March 2002.

B. Culpability Score

Base Offense Level [U.S.S.G. § 8C2.5(a)]	5
Over 1000 employees and high level personnel involved [U.S.S.G § 8.C2.5(b)(2)]	+ 4
Lack of Effective Antitrust Program [U.S.S.G. § 8C2.5(f)]	0
Acceptance of Responsibility and Full Cooperation [U.S.S.G. § 8.C2.5(g)(2)]	<u>- 2</u>
<u>Total Culpability Score</u> [U.S.S.G. § 8C2.5]	+ 7
C. <u>Minimum and Maximum Multipliers</u> [U.S.S.G. § 8C2.6]	1.4 - 2.8
D. <u>Guidelines Fine Range</u> [U.S.S.G. § 8C2.7]	\$60,750,760 - \$121,501,520
E. <u>Maximum Fine Calculation - Alternative Fine Statute</u>	

As set forth above, the maximum fine for a corporation under the Sherman Act is the greater of \$10 million, 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 its 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 Odfjell have agreed that double the gain or loss would exceed the agreed-upon fine of \$42.5 million.

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.

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 \$42.5 million.

VI

GOVERNMENT'S MOTION TO DEPART FROM THE GUIDELINES PURSUANT TO U.S.S.G. § 8C4.1

The United States hereby moves for a downward departure from the Guidelines sentence set forth above based on Odfjell'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 8C4.1(b) 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 8C4.1(b)(2) of the Guidelines lists as a relevant factor the nature and extent of the organization's assistance. Since it has begun cooperating, Odfjell and its related entities have produced more than 55 boxes of their corporate records to the Government. Moreover, they have provided the Government with numerous highly relevant documents that were located in Norway and, thus, outside the reach of the grand jury. In addition, Odfjell has obtained the cooperation of five of its executives, including Bjorn Sjaastad, its Chairman, and Erik Nilsen, its Vice President, both of whom have agreed to plead guilty and serve sentences of incarceration.⁴ All of the executives are Norwegian citizens and live outside the United States and, thus, are outside the jurisdictional reach of the grand jury. Odfjell has made these executives available at its expense outside of Norway for interviews by the Government. Odfjell has also identified other employees who may have information useful to the ongoing investigation.

Odfjell is committed to continuing its cooperation by, among other things, providing documents and making its executives available to come to the United States to be interviewed, testify before the grand jury, or at any trial that may result from the investigation.

B. Timeliness

Section 8C4.1(b)(3) lists as a relevant factor the timeliness of the organization's assistance. In this case, Odfjell's offer of cooperation in this investigation came as soon as it became aware of the Government's investigation.

⁴ The Plea Agreement between the United States and Odfjell is conditioned in part upon the entry and acceptance of the guilty pleas of Bjorn Sjaastad and Erik Nilsen.

C. Government's Evaluation of the Assistance

Section 8C4.1(b)(1) lists as a relevant factor the Government's evaluation of the assistance rendered by the organization. The Government believes that Odfjell has provided full and substantial cooperation which has been of significant and useful assistance to its ongoing investigation. Odfjell's cooperation has provided the Government with extensive, credible information against both corporate and individual co-conspirators which advanced this investigation at its earliest stages.

Prior to obtaining Odfjell'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 its cooperation, Odfjell 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.

International conspiracies which are formed and carried out by conspirators located in various countries are difficult to prove absent the testimony of co-conspirators who are willing to submit to the jurisdiction of the United States. As a foreign corporation with headquarters outside the United States, Odfjell could have retained highly relevant documents at its Norwegian offices and refused to cooperate and obtain the cooperation of its executives in this investigation. It chose, however, to assist the Government early in its investigation in a highly significant and useful way.

In the Government's opinion, the cooperation tendered and promised by Odfjell merits a downward departure as contemplated by Section 8C4.1.

D. The Government's Sentencing Recommendation

As agreed to by the United States in its Plea Agreement with Odfjell and for the reasons set forth above, the United States recommends the Court impose a fine of \$42.5 Million. The United States further recommends, in the interest of justice pursuant to 18 U.S.C. § 3572(d)(1), that the fine be paid in the following six (6) installments over a period of five (5) years:

- (1) within ninety (90) days of imposition of sentence - \$4.3 Million
- (2) at the one-year anniversary of the imposition of sentence - \$4.3 Million
- (3) at the two-year anniversary of the imposition of sentence - \$8.6 Million
- (4) at the three-year anniversary of the imposition of sentence - \$8.6 Million
- (5) at the four-year anniversary of the imposition of sentence - \$8.6 Million
- (6) at the five-year anniversary of the imposition of sentence - \$8.1 Million

Finally, the United States recommends that the Court impose a five-year period of probation, to coincide with the fine payment schedule.

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 8C4.1 departure from the Sentencing Guidelines.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA)	
)	Criminal No. 03-654
)	
v.)	Judge R. Barclay Surrick
)	
ODFJELL SEACHEM AS,)	
)	Filed: October 16, 2003
Defendant.)	
_____)	

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. § 8C4.1) has been sent via telefax to counsel of record for the defendant as follows:

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