No. 11-1390

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STEVEN KEITH VANDEBRAKE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

CORRECTED BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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SUMMARY OF THE CASE

Steven VandeBrake, who pled guilty to three counts of conspiring to fix prices and rig bids in the ready-mix concrete industry, appeals his 48-month prison sentence and $829,715.85 fine. His guilty plea originally was entered pursuant to a Fed. R. Crim. P. 11(c)(1)(C) plea agreement that proposed a sentence within the applicable antitrust guideline range. After the court announced it likely would reject the binding agreement because it believed the proposed sentence was too lenient, VandeBrake voluntarily converted his "C" agreement to a non-binding "B" agreement. Subsequently, in a 108-page opinion that includes an extensive evaluation of the 18 U.S.C. § 3553(a) factors, the court explained at length why it believed the sentencing range recommended by the antitrust guideline was not commensurate with the specific facts and circumstances of VandeBrake's crimes. VandeBrake claims his above-guidelines sentence was the result of the court's wholesale rejection of the antitrust guideline based on a policy disagreement with that guideline. But this cannot be correct because the court sentenced one of VandeBrake's co-conspirators to a within-guidelines sentence in the same opinion in which it sentenced VandeBrake to an above-guidelines sentence.

The district court followed proper sentencing procedure and its sentence is reasonable. Oral argument is unnecessary. If oral argument is granted, the government requests the same 15 minutes that VandeBrake requests.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND RULES

MISCELLANEOUS

STATEMENT OF JURISDICTION

The District Court's jurisdiction rested on 18 U.S.C. § 3231. This Court's jurisdiction rests on 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUES

I. Did the district court abuse its discretion when it rejected a Fed. R. Crim. P. 11(c)(1)(C) plea agreement because the sentence proposed in the agreement was too lenient?

United States v. LeMay, 952 F.2d 995 (8th Cir. 1991)
United States v. Walker, 927 F.2d 389 (8th Cir. 1991)
United States v. Rivera, 209 F. App'x 618 (8th Cir. 2006)

II. Did the district court abuse its discretion or otherwise err when it concluded that the 18 U.S.C. § 3553(a) factors required an upward variance from the advisory sentence recommended by the antitrust sentencing guideline because the specific facts and circumstances of appellant's offenses did not fit the contours of that guideline?

Kimbrough v. United States, 552 U.S. 85 (2007)
United States v. Kane, 639 F.3d 1121 (8th Cir. 2011)
United States v. Lone Fight, 625 F.3d 523 (8th Cir. 2010)
United States v. Hill, 552 F.3d 686 (8th Cir. 2009)

STATEMENT OF THE CASE

On April 26, 2010, the United States, pursuant to a Fed. R. Crim. P. 11(c)(1)(C) plea agreement, charged appellant, Steven Keith VandeBrake, by Information with three separate, two-company conspiracies to suppress

competition for sales of ready-mix concrete in northwest Iowa.[1] App. 55.[2] The plea agreement provided for a sentence of 19 months' imprisonment and a $100,000 fine. App. 69. After VandeBrake pled guilty to all three counts on May 4, 2010, the court entered an order on May 20, 2010, announcing its intention not "to be bound to the plea agreement's limitations on the court's discretion regarding the length of sentence and the amount of the fine." Add. 1.

The court held a Rule 11(c)(5) hearing on May 26, 2010. At the hearing the court advised the parties that it was willing to conduct a sentencing hearing and "make up my mind after I've heard all of the evidence." Add. 33-34. VandeBrake, however, "decided to . . . stay with the same plea agreement, but . . . have that plea agreement be pursuant to 11(c)(1)(B)." Add. 36. The court therefore rejected the (c)(1)(C) agreement and accepted the (c)(1)(B) agreement. Add. 41-42.

The court conducted a sentencing hearing for VandeBrake and a co-conspirator in one of his three conspiracies, Kent Stewart, on December 7, 8, and 15, 2010. On February 8, 2011, the court sentenced VandeBrake to 48 months imprisonment on each count, to be served concurrently, followed by 3 years supervised release, and a fine of $829,715.85. Alternatively, the court sentenced

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[1] Ready-mix concrete is a cement product used in construction projects. Presentence Report ("PSR") ¶ 8.

[2] "App." refers to appellant's Appendix, "Add." refers to appellant's Addendum, and "Gov.-App." refers to Government's Appendix.

VandeBrake to 27 months' imprisonment on each count, with 15 months on Count 1, 6 months on Count 2, and 27 months on Count 3 to run consecutively, for a total of 48 months' imprisonment, and the $829,715.85 fine. Add. 154-55. After the court entered judgment on February 10, 2011 (Add. 157), VandeBrake filed a timely notice of appeal on February 17, 2011.

STATEMENT OF FACTS

I. THE CONSPIRACIES

From January 2006 to January 2008, VandeBrake was the co-owner and President of Alliance Concrete, Inc. ("Alliance"), a ready-mix company with its principal place of business in Orange City, Iowa. VandeBrake managed Alliance's business operations including its pricing decisions. PSR ¶¶ 25, 115.[3] Alliance began operating as GCC Alliance Concrete, Inc. ("GCC Alliance") when Grupo Cememtos de Chihuahua purchased Alliance Concrete in January 2008. At that time VandeBrake became sales manager of GCC Alliance. *Id*. ¶¶ 25, 38.

Beginning in early 2006 and continuing into August 2009, VandeBrake and Chad Van Zee, the president of Tri-State Ready Mix, Inc. ("Tri-State"), reached yearly agreements on the prices they would charge for sales of their "standard mix"

[3] As VandeBrake notes in his brief (Br. 3), "[t]he facts of his offenses are undisputed [and] he does not challenge those facts." Because there were no objections to the PSR (sealed Doc. No. 39), in its opinion (Add. 49-156) the district court explained that many of its findings were drawn from the uncontested facts in the PSR. Add. 58, 82. *See* Fed R. Crim. P. 32(i)(3)(A). This brief similarly relies on the PSR.

concrete between Rock Valley and Sioux Center, Iowa.[4] VandeBrake initiated these price-fixing discussions. The GCC Alliance – Tri-State conspiracy, charged as Count 3, ended in August 2009. *Id*. ¶¶ 59-62. For sentencing guidelines purposes, VandeBrake's volume of commerce for this nearly 4-year-long price-fixing conspiracy was $4.98 million.[5] *Id*. ¶¶ 59, 69.

After fixing prices with Van Zee for two years, VandeBrake decided in either late 2007 or January 2008 to rig bids and fix prices with Kent Stewart, president of Great Lakes Concrete, Inc. ("Great Lakes"), for ready-mix sales in and around Dickinson County, Iowa.[6] Over the next 18 months Stewart and VandeBrake agreed to submit rigged bids on approximately 12-15 projects. They also agreed to fix the prices in their 2009 annual price lists. The GCC Alliance – Great Lakes conspiracy, charged as Count 2, ended in August 2009 and

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[4] Standard mixes of concrete are the commonly sold mixes, as opposed to "special" or "custom" mixes. PSR ¶ 62 & n.7.

[5] Under the antitrust guideline, U.S.S.G. § 2R1.1(b)(2), the defendant's offense level increases with his volume of commerce.

[6] Stewart was separately charged with conspiring with VandeBrake (Crim. Docket No. 10-4028), also pled guilty, and the court consolidated the two cases for sentencing.

VandeBrake's affected volume of commerce for this conspiracy was $95,000.[7] PSR ¶¶ 47-48, 56-58.

After conspiring with Van Zee for nearly two and a half years, and Stewart for at least six months, VandeBrake initiated a third conspiracy, charged as Count 1, in June 2008, this time with CW-1 and CW-2 of another ready-mix competitor ("the company"). The conspiracy covered ready-mix sales in the Sioux City area. In this conspiracy VandeBrake and CW-1 and CW-2 agreed to fix their respective 2009 prices, and also to submit rigged bids on 15 to 18 projects. The conspiracy ended in March 2009 when the company decided to self-report its antitrust violations to the U.S. Department of Justice, which initiated the investigation that uncovered VandeBrake's additional conspiracies with Great Lakes and Tri-State. PSR ¶¶ 39-40, 52-55. VandeBrake's affected volume of commerce for this conspiracy was $591,000. *Id*. ¶¶ 53-55.

In sum, VandeBrake's three conspiracies affected ready-mix sales for a significant portion of northwest Iowa – from Sioux City to Rock Valley to Spirit Lake. VandeBrake's total volume of commerce for all three conspiracies was $5.66 million. *Id*. ¶¶ 51, 70.

[7] Over $400,000 of VandeBrake's commerce affected by his conspiracy with Stewart was not counted against VandeBrake pursuant to U.S.S.G. § 1B1.8. PSR ¶¶ 88, 95.

II. THE PLEA AGREEMENT

On April 8, 2010, VandeBrake entered into a plea agreement ("Agreement"), pursuant to Fed. R. Crim. P. 11(c)(1)(C), in which he agreed to plead guilty to the three above-described conspiracies. App. 63. VandeBrake's offense level was calculated using the sentencing guideline for antitrust offenses, U.S.S.G. § 2R1.1, and in the Agreement the parties stipulated that VandeBrake's offense level totaled 15. App. 68-69. For a level 15 offense and VandeBrake's criminal history Category I, the guidelines recommended a term of imprisonment of 18 to 24 months. U.S.S.G. § 5A (Table). Additionally, § 2R1.1(c)(1) recommended a fine between $56,600 and $283,000.[8]

The parties stipulated to an in-guidelines sentence of 19 months imprisonment and a $100,000 fine. App. 69. In the Agreement, VandeBrake expressly acknowledged that his statutory maximum penalty was 10 years imprisonment and a $1 million fine (App. 67); that the sentencing guidelines "are advisory, not mandatory" and that "the Court is not ultimately bound to impose a sentence within the applicable Guidelines range" (App. 68); and "that the Court retains complete discretion to accept or reject the [parties'] recommended sentence." App. 70.

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[8] Section 2R1.1(c)(1) recommends a fine for individuals from one to five percent of the defendant's volume of commerce. As noted above, VandeBrake's volume of commerce was $5.66 million.

After notifying the parties that it did not intend to be bound by the parties' recommended sentence (Add. 1), the court held a Rule 11(c)(5) hearing on May 26, 2010.[9] At the hearing the court explained:

> I'm very concerned about in multi-defendant cases like this you have to know all the information about all the defendants in order to try and make sure that the most culpable defendants receive the most appropriate sentence and that the least culpable defendants receive the most appropriate sentence. . . . The 3553(a) factors can vary so widely when you have two, three, four, or five defendants.
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> And in order for me to perform that judicial function [under 18 U.S.C. 3553(a)(6)], I need to have all the information on all the defendants.

Add. 20-21. The court therefore expressed reluctance to accept the recommended sentence "before I've even seen the PSRs and the offense conduct statement for the other defendants." Add. 22.

The court also expressed concern with the parties' "agree[ment] to a 3B1.1(b) [3-level] role enhancement rather than a 3B1.1(a) [4-level] role enhancement" because "based on [the government's] offense conduct statement which I think would support a four-level increase, I'm not sure [the parties] properly scored the guidelines."[10] Add. 24, 26.

VandeBrake's counsel then assured the court:

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[9] If a district court accepts an 11(c)(1)(C) agreement, the sentence recommended in the agreement "binds the court." Fed. R. Crim. P. 11(c)(1)(C).

[10] The Agreement provided for a 3-level enhancement for VandeBrake's role in the offense. App. 68. Ultimately the PSR recommended a 4-level enhancement (PSR ¶ 80), and the court adopted that recommendation without objection. *See* Br. 2 n.2.

> I also told my client at the time we entered into this agreement that this is totally discretionary with the Court and that the Court could look at this and say, "I'm not going to agree to it." And so he understands that this is totally within your discretion.

Add. 27; *accord* Add. 30 ("we knew that . . . we'd be coming before you and that you could very easily reject this plea."). The court then offered the parties the option of "actually going through the entire sentencing including the allocution" before deciding whether to accept or reject the Agreement, because then the court would "have all the information [it] would ever have" and could therefore make "a much more informed judgment about whether to accept the [Agreement]." Add. 33. However, the court cautioned the parties that "there's probably less than a 10 percent chance" that it would accept the Agreement even after a sentencing hearing, because it had "a very, very strong belief that the sentence should be substantially different than what the parties propose." Add. 34. VandeBrake's counsel nonetheless informed the court that "what we've decided to do is that we would like to stay with the same plea agreement, but we would like to have that plea agreement be [non-binding on the court] pursuant to 11(c)(1)(B), and if the Court would approve that, we would file that plea agreement with the Court today." Add. 36.

After the court cautioned the parties to consider whether they had reached a meeting of the minds on the scope of any appeal waiver in the plea agreement (Add. 37-38), the proceedings were recessed to allow the parties to confer and

amend the new 11(c)(1)(B) agreement to clarify the scope of that waiver. Add. 39; App. 75. The court then rejected the 11(c)(1)(C) agreement and accepted the 11(c)(1)(B) agreement. Add. 41-43. The court asked the government to try to schedule all of its ready-mix investigation sentencings "in the same week" so that the court could compare all of the presentence reports. Add. 44.

III. THE SENTENCING HEARING

On October 21, 2010, the court sent the parties a 6-page letter stating that it was considering a substantial upward variance for both VandeBrake and Stewart, whose consolidated sentencing hearing was set for December 7, 2010. App. 104. Among other things, the court noted its concern (App. 107-08) that the antitrust sentencing guideline does not hold a defendant accountable for the losses caused by his co-conspirators or otherwise expressly punish him for engaging in multiple conspiracies as the guidelines do for fraud and other violations. *Compare* U.S.S.G. § 2R1.1(b), *with* §§ 1B1.3(a), 2C1.1(b)(1).

At the hearing, VandeBrake explained that as an adult he had worked only for the family business which his father eventually gave him.[11] App. 221. He also acknowledged that he was aware of the government's ready-mix prosecutions in Indiana when he began fixing prices in 2006 and had a net worth of at least $2

[11] VandeBrake's grandfather founded Russell's Ready-Mix in 1954. His grandfather passed the company to VandeBrake's father, who in turn gave the company to VandeBrake in 1994. PSR ¶¶ 25, 38, 115.

million, but that knowledge was not a "sufficient deterrent" because he did not think he would get caught. App. 209-10, 219-20. He admitted that when he sold the company in 2008 he was wealthier than he ever thought he would be, yet he could not explain why he continued his anti-competitive conduct nonetheless.[12] App. 212, 228-30. He continually denied ever acting out of greed (App. 211, 213-14), and insisted that he was just trying to get a "decent" or "fair" price for his product. App. 209, 213-15 ("I think [my customers] got a great product for a good price.").

When the court asked if he had ever realized he was stealing from his customers VandeBrake replied no, explaining that "[t]hey were getting a product, a good product . . . . it's not like they didn't have anything." App. 214-17. VandeBrake also said his price-fixing was "a little thing" (App. 222), that he was merely being "competitive" (App. 214), "[t]rying to get along, be good competition" (App. 213, 225) by "not being cutthroat" (App. 225-26), because being "good competition" is "setting a . . . good price." App. 226.

IV. THE DISTRICT COURT'S DECISION

The court sentenced VandeBrake and Stewart on February 8, 2011. At that time the court explained: "I have given . . . the two sentences in this case, more thought than I have any other sentence that I've imposed, over 2,600 sentences."

[12] At the time of the hearing VandeBrake had a net worth over $10 million, much of which came from the sale of Alliance in January 2008. App. 210-11. Also, as sales manager for GCC Alliance VandeBrake was paid a fixed salary. PSR ¶ 115.

Gov.-App. 15. With respect to Stewart, whose advisory sentencing guidelines range was 12 to 18 months (Gov.-App.18), the court concluded that "a sentence within the guideline range meets the overarching objective of Title 18, 3553(a), and . . . is sufficient but not greater than necessary to achieve all of the sentencing purposes." Gov.-App.19. The court therefore sentenced Stewart to a term of imprisonment at the bottom of the guideline range, 12 months and 1 day (*id.*), and a fine at the top of the guideline range, five percent of his volume of commerce.[13] Gov.-App. 21-22; Add. 153.

When sentencing VandeBrake, the court told him "that because you're involved in multiple conspiracies your case is substantially different than Mr. Stewart's." Gov.-App. 26. The court concluded that VandeBrake's crimes "were crimes of pure greed" (Gov.-App. 27), noting that VandeBrake had instigated at least two and possibly all three of his conspiracies (Gov.-App. 25-26), that he was wealthy without committing the crimes (Gov.-App. 27), and that after he sold his company he continued to violate the law purely for "sport" and was "ruthless . . . because you could, because you developed a cartel and you were going to take advantage of it." Gov.-App. 28. The court also told VandeBrake that he was not "the least bit remorseful other than remorse for being caught" (*id.*), that he would still be violating the law if his co-conspirators had not turned him in (Gov.-App.

[13] *See supra* note 8.

25), and that he had "taken, taken, taken and given absolutely nothing back" to his community.[14] Gov.-App. 27-28.

The court also filed a 108-page opinion explaining its sentences in detail. Add. 49-156. After the court computed VandeBrake's offense level as 16, it concluded that VandeBrake's advisory guidelines range was 21-27 months imprisonment.[15] Add. 98-99. The court concluded that VandeBrake was not sufficiently outside the heartland of guidelines cases to warrant a departure. Add. 102. It therefore turned to an evaluation of the 18 U.S.C. § 3553(a) factors and concluded: "After balancing the § 3553(a) factors, the court finds that a guidelines sentence of 21 to 27 months for VandeBrake is woefully inadequate and not 'sufficient, but not greater than necessary' to accomplish the goals of sentencing. 18 U.S.C. § 3553(a)." Add. 116. Indeed, the court found that most of the § 3553(a) factors supported an upward variance.

The court first considered the nature of the offense and the need for the sentence imposed, *see* 18 U.S.C. § 3553(a)(1)-(2), and concluded there were several factors that supported an upward variance. The court initially noted differences between the antitrust and fraud guidelines that it questioned were

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[14] The court told VandeBrake that the record contained "not one single shred of evidence that you did anything for anybody other than you and your family. There's not a shred of evidence that you were ever involved in any community activities . . . . civic activities . . . . [or] charitable activities." Gov.-App. 27.

[15] *See supra* note 10.

justified. Specifically, while the court believed that price-fixing and bid-rigging are similar to fraud, it was surprised that antitrust offenses generally are less severely punished than fraud offenses. Add. 119. It also found surprising that, unlike other conspiracies, antitrust conspirators are not held accountable for the conduct of their co-conspirators.[16] Add. 121-22. The court therefore concluded that the antitrust guideline "is deserving of less deference." Add. 123.

With respect to VandeBrake's conduct, the court listed several factors that it believed made strict application of § 2R1.1 to his crimes less appropriate. Add. 123. Ready-mix concrete is a necessity product used in most construction projects. Moreover, ready-mix has only a twenty-five mile delivery radius.[17] The court therefore concluded that by entering into three conspiracies in northwest Iowa, VandeBrake "effectively created his own concrete cartel" and, when using that cartel to rig bids on local government projects, robbed local communities "who had little or no choice but to accept VandeBrake or his co-conspirator's rigged bids for

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[16] The statutory maximum sentence for antitrust offenses is 10 years, 15 U.S.C. § 1, while the statutory maximum for fraud is 20 to 30 years depending on the type of fraud committed. 18 U.S.C. §§ 1341, 1343, 1344. Also, as the court explained, although the base offense level under the guidelines is similar for both fraud and antitrust offenses, the offense level for fraud increases rapidly as the amount of the loss caused increases. In contrast, offense levels under the antitrust guideline are based on the relevant volume of commerce. While offense levels increase as the volume of commerce rises, the increase is not as rapid as under the fraud guideline. Add. 126-27.

[17] *See* PSR ¶ 64 n.9.

the concrete required for their respective projects." Add. 124-25. The court decided that under those circumstances the antitrust guideline's 1-level increase for submitting non-competitive bids, *see* § 2R1.1(b)(1), did not correlate to the harm VandeBrake inflicted on his victims. These factors, the court determined, weighed in favor of an upward variance. Add. 124-25.

The court also noted that VandeBrake's volume of commerce adjustment for all three conspiracies under § 2R1.1(b)(2), two levels for being more than $1 million but less than $10 million, would be the same if VandeBrake were convicted only on Count 3, which had a volume of commerce of $4.98 million. And it explained that because VandeBrake's price-fixing conspiracies involved setting per cubic yard prices on their annual price lists for ready-mix concrete, the guideline's assumption that "on the average, the level of mark up from an antitrust violation may tend to decline with the volume of commerce involved," *see* U.S.S.G. app. C, Amend. 377,[18] did not apply to VandeBrake's price-fixing. App. 126. Finally, the court noted that in estimating the loss caused by VandeBrake at $566,634, the antitrust guideline provided a 2-level increase but that the fraud guideline, § 2B1.1(b)(1)(H), would require a 14-level increase for a comparable

[18] This is the reason the Sentencing Commission gave for its decision to increase an antitrust defendant's offense level less rapidly than a fraud defendant's, given comparable amounts of losses caused. *See* U.S.S.G. app. C, Amend. 377.

amount of loss.[19] Add. 127. The court concluded that these factors all weighed in favor of an upward variance. *Id*.

The court also put substantial weight on VandeBrake's history and characteristics. *See* 18 U.S.C. § 3553(a)(1). The court found "most disquieting" that "VandeBrake was already wealthy when he embarked on and engaged in the charged conspiracies." Add. 128. It found "disturbing . . . the fact that VandeBrake fails to believe that he was motivated by greed."[20] *Id*. The court noted that "VandeBrake continues to justify and rationalize his conduct . . . . reasoning that he gave GCC's customers a 'great product for a good price.'" Add. 134-35 (citation omitted). And it concluded that VandeBrake's "rationalizations reflect a total lack of remorse." Add. 135. The court also noted that VandeBrake initiated at least two of his three conspiracies,[21] and that "[t]here is no record

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[19] The Sentencing Commission estimates that the loss caused by antitrust violations is at least 10 percent of the volume of commerce. *See* U.S.S.G. § 2R1.1 cmt. 3.

[20] The court quoted at length (Add. 128-34) its colloquy with VandeBrake in which Vandebrake repeatedly insisted he was not acting out of greed but merely trying to get a "fair" price for his concrete.

[21] The court explained that it "didn't find the evidence sufficient" to decide whether VandeBrake or Stewart initiated the third conspiracy, although it opined that it would "be surprised if [VandeBrake] didn't instigate the third conspiracy." Gov.-App. 25-26. The court also told VandeBrake that a major distinction between Stewart and him was that "Mr. Stewart was greedy, but he had an ill-advised but perhaps good-faith belief, that you were going to try and drive him out of business. You were just greedy." Gov.-App. 27, s*ee* Add. 108 (explaining that Stewart claimed "that his involvement in the conspiracy with VandeBrake was

evidence of even a single good deed done by VandeBrake for anyone other than his family." *Id*. The court therefore concluded that "VandeBrake's history and characteristics warrant more significant punishment than the advisory guidelines might mete out." *Id*.

In evaluating the kinds of sentences available pursuant to § 3553(a)(3), the court compared VandeBrake's advisory antitrust guideline sentence of 21 to 27 months to what it would be under U.S.S.G. § 2B1.1 if he had been convicted of a comparable fraud, which would be 46 to 57 months. Add. 135-36. The court concluded that because the policy goals of preventing antitrust violations and fraud are similar, this discrepancy in advisory sentences supported an upward variance. App. 136.

Ultimately, the court concluded that, on balance, the § 3553(a) factors required an upward variance for VandeBrake's sentence to 48 months.[22] Add 143. Although the court recognized that its sentence created a disparity with those previously sentenced for antitrust violations, it concluded that the disparity was not

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designed to avoid the greater harm of [Stewart's company] being run out of the concrete business by [VandeBrake] and the resulting loss of over forty good paying jobs in northwest Iowa.").

[22] In similarly evaluating the § 3553(a) factors when sentencing Stewart, the court concluded that although some of those factors weighed in favor of a variance others did not, and, on balance, a variance was not warranted. Add. 145-54.

unwarranted at least in part due to its disagreement in this case with the antitrust guideline policy.[23] Add. 139-40.

The court then addressed the antitrust guideline's advisory fine of between one to five percent of VandeBrake's $5.66 million volume of commerce and concluded that it was "woefully inadequate." Add. 141. The court also noted that the guidelines provide that an upward departure may be appropriate where, as here, twice the loss caused by the defendant is greater than the statutory maximum

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[23] When sentencing Stewart to a within-guidelines sentence, the court explained that VandeBrake's above-guidelines sentence was appropriate when compared to Stewart's because of "significant differences between VandeBrake and Stewart." Add. 151. The court elaborated:

> Stewart was only involved with VandeBrake in a single conspiracy concerning two concrete companies while VandeBrake was involved in three conspiracies embroiling four concrete companies throughout northwest Iowa. Thus, VandeBrake was the puppet master of a wide ranging concrete cartel he created and organized. Significantly, the court finds that VandeBrake's criminal actions were ones of pure greed, not necessitated in the least by either need or circumstances, and viewed as a means to obtain material goods and provide an opulent lifestyle. Stewart's motivations were not purely monetary. Albeit seriously misguided, Stewart sought to ensure his company's continued profitability as a means to benefit not only himself, but the jobs and livelihood of his employees in the face of what Stewart viewed was the unfair competition posed by VandeBrake and GCC. Moreover, the volume of commerce affected by VandeBrake, $5,666,348.61, is over three times the level affected by Stewart's actions, $1,668,541.90. Finally, VandeBrake initiated two of the three conspiracies in which he was involved and may well have initiated the conspiracy with Stewart.

Id.

fine.[24] Add. 141 (citing U.S.S.G. § 5E1.2 cmt. 4). The court determined that a fine equal to fifteen percent of VandeBrake's volume of commerce, or $829,715.85, was necessary and appropriate given VandeBrake's wealth, income, and the losses he caused "to properly reflect the gravity of his offenses" and to be "punitive." Add. 142-43.

The court then summarized: "In light of its analysis of the § 3553(a) factors above, the court finds that a sentence of 48 months of imprisonment and a fine of $829,715.85 is appropriate and, therefore, is sufficient, but not greater than necessary, to accomplish the goals of sentencing." Add. 143. In the alternative, with respect to the term of imprisonment the court found that, based on its evaluation of the § 3553(a) factors, a maximum guideline sentence of 27 months on each count was appropriate, with 15 months on Count 1, 6 months on Count 2, and 27 months on Count 3 to run consecutively, for a total of 48 months' confinement. Add. 144-45.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion when it first rejected the original "C" plea agreement in this case and then, after carefully considering all the relevant 18 U.S.C. § 3553(a) factors, imposed a 48-month term of imprisonment and an $829,715.85 fine that reflects an upward variance from the sentence agreed

[24] Here, twice the estimated loss caused by VandeBrake is at least $1.1 million (Add. 141-42), while the statutory maximum fine is $1 million. 15 U.S.C. § 1.

to in the Agreement or that would have been imposed under the antitrust guideline. To be sure, the government had agreed to both a "C" agreement and a subsequent "B" agreement that provided for a more lenient sentence. At the time it entered into those agreements the government believed, and continues to believe, that those agreements, including the agreed-on sentence contained in them, reflected a reasonable disposition of the charges pending against VandeBrake. The district court, however, was not required to accept those agreements or impose the sentence agreed to by the parties. That the parties had previously agreed to a more lenient sentence does not make the sentence imposed by the district court unreasonable. Rather, because the court carefully exercised its discretion and fully explained why it decided to vary upwards from the guideline in this case, the sentence it imposed should be affirmed.

1. The district court did not abuse its discretion when it rejected the parties' Rule 11(c)(1)(C) agreement. In fact, VandeBrake waived this claim when he substituted his "B" agreement for the original "C" agreement. In any event, based on its evaluation of the antitrust guideline, VandeBrake's offense conduct statement, and the parties' plea agreement, the court concluded that the sentence proposed in that agreement was too lenient. That was a valid reason to reject the agreement.

2. The court did not abuse its discretion in varying upward from the antitrust guideline's advisory range of 21 to 27 months. Contrary to VandeBrake's

claim, the court did not categorically reject the antitrust guideline and apply the fraud guideline instead. Rather, in conducting a thorough § 3553(a) analysis, the court concluded that at least two facts made application of a sentence within the antitrust guideline range ill-suited in this case: first, the Commission's reason for increasing the offense level in antitrust cases more slowly than in fraud cases with similar amounts of loss did not apply to VandeBrake and, second, the antitrust guideline did not adequately address either the totality of VandeBrake's bid-rigging or his perpetration of three simultaneous conspiracies. And the court further found that numerous facts of VandeBrake's history and characteristics also supported an upward variance. Because each of the court's findings is grounded in record evidence, and because the court fully explained its decision to vary upward, the court did not abuse its discretion by sentencing VandeBrake to 48 months' confinement.

3. VandeBrake's 48-month sentence does not create "unwarranted" disparity. As the court correctly explained, because it validly determined not to imposed a sentence within the applicable antitrust guideline range in VandeBrake's case, its sentence necessarily creates a disparity with prior defendants who were sentenced within that guideline's recommendations. But because district court's have discretion to disagree with the applicability of the advisory guidelines in an appropriate case such as this, any disparity created by such a disagreement is not unwarranted.

4. For the same reasons that VandeBrake's contentions fail to show any procedural error in the court's sentence, they similarly fail to show that the court's defendant-specific determinations resulted in a sentence outside the range of reasonable sentences available to it.

5. VandeBrake similarly is wrong to assert that the court's § 3553(a) analysis does not support its alternative imposition of consecutive sentences. Indeed, in claiming that the court categorically rejected the antitrust guideline, he largely ignores the court's circumstance-specific § 3553(a) analysis. For example, the court's findings on VandeBrake's unsatiated greed and total lack of remorse alone justify consecutive sentences in this case.

6. Finally, the court did not fail to consider the § 3553(a) factors when it imposed VandeBrake's fine. VandeBrake's argument to the contrary conveniently ignores that the court's analysis of VandeBrake's fine is completely contained within the court's lengthy § 3553(a) analysis of VandeBrake's sentence, and § 3553(a) is expressly referenced in its ultimate ruling on VandeBrake's entire sentence. Because it is clear from the context of the court's opinion that it considered the § 3553(a) factors in deciding to vary upward on VandeBrake's fine, the fact that it did not expressly cite § 3553(a) as the statutory basis for finding the guideline range inadequate is of no moment.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT REJECTED THE FED. R. CRIM. P. 11(C)(1)(C) AGREEMENT

VandeBrake's claim that the court abused its discretion when it rejected the parties' Rule 11(c)(1)(C) agreement (Br. 14-22) is without merit. VandeBrake waived this argument because he voluntarily changed his agreement from a Rule 11(c)(1)(C) agreement to a "B" agreement. Moreover, his claim is based on a misreading of both record and extra-record facts.

A. Standard of Review

A district court's decision to reject a plea agreement "is reviewed for an abuse of discretion." *United States v. Rivera*, 209 F. App'x 618, 620 (8th Cir. 2006) (citing *United States v. Nicholson*, 231 F.3d 445, 451 (8th Cir. 2000)). An argument not raised in the district court is waived on appeal. *E.g., United States v. Murphy*, 248 F.3d 777, 779 (8th Cir. 2001).

B. VandeBrake Has Waived His Claim

VandeBrake knew from the plea negotiations that the court could reject the proposed agreement. The Agreement expressly made this point (App. 70), and VandeBrake's counsel told the court at the May 26, 2010, Rule 11(c)(5) hearing that whether to accept the Agreement "is totally within your discretion" (Add. 27) and that the court "could very easily reject this plea." Add. 30. While the court indicated that it was inclined to reject the Agreement, it nonetheless offered

VandeBrake the option of waiting until after a sentencing hearing before deciding whether to accept or reject it, though the court stated that it was not likely to change its mind as a result of that hearing. Add. 33-34; *see* pp. 7-9, *supra*.

Rather than accept the court's offer, VandeBrake instead decided to convert the binding "C" agreement into a non-binding Rule 11(c)(1)(B) agreement "with a full understanding of the possible consequences," *Rivera*, 209 F. App'x at 620-21, including the possibility that the court could impose a harsher sentence than the sentence recommended in the new "B" agreement. Add. 36, 42. When the parties presented the new "B" agreement to the court, the court not surprisingly then formally rejected the now superseded "C" agreement. Add. 41.

Since Vandebrake knew the court could reject the "C" agreement, never objected when the court indicated that it would likely do so, and instead entered into a new "B" agreement that was presented to and accepted by the court, he cannot complain at this late date that the court erred in rejecting the original "C" agreement. *Rivera*, 209 F. App'x at 621; *United States v. Walker*, 927 F.2d 389, 391-92 (8th Cir. 1991) ("entering into a new plea agreement cured any potential prejudice"). Accordingly, VandeBrake's complaints about the court's rejection of the original "C" agreement have been waived.

C. The Court Rejected The Plea Agreement Because It Believed The Proposed Sentence Was Too Lenient

Even assuming VandeBrake has not waived his argument that the court erred in rejecting the "C" agreement, his claims that the court rejected the Agreement either because of the court's perception of the lead prosecutor's inexperience (Br. 18-19), or "undisclosed evidence" from the *Pickhinke* case (Br. 20-22), is wrong.[25] In fact, the court rejected the original "C" agreement because it believed the sentence that would have to be imposed pursuant to that agreement was too lenient.

1. The district court plainly stated its view that based on its examination of the record, the sentence that it would have to impose pursuant to the original "C" agreement was too lenient. In reaching that conclusion, the court noted that it "had the advantage" of having read the offense conduct statement, a statement it believed was "the best offense conduct statement" the court had "seen in 16 1/2 years and in sentencing over 2,600 defendants." Add. 6, 34. The court had also had "a lengthy discussion" with probation about both "the parties' guideline

[25] To the extent VandeBrake's argument is based on "[t]he district court's comments to the government's lead counsel at the [May 26, 2010] hearing" (Br. 19), VandeBrake waived that claim because he personally witnessed those comments but never raised any objection to them below. To the extent VandeBrake relies on the sentencing transcript in *Pickhinke* (App. 1-54), *see* Br. 20-22, VandeBrake has waived that argument because he fails to claim that he was unaware of that transcript prior to his sentencing. Rather, VandeBrake waited until he filed his brief in this Court to raise his objection.

calculations"[26] and its view of the antitrust guideline "particularly as it relates analytically to the fraud guideline,"[27] before it concluded that "it's fairly unlikely [it] would adopt the parties' position" because it had "a very, very strong belief that the sentence should be substantially different." Add. 34. Thus, the court's decision to reject the original "C" agreement reflected the court's belief that the agreed-on sentence in that agreement was too lenient.

As this Court explained in *United States v. LeMay*, 952 F.2d 995 (8th Cir. 1991), a court may properly reject a plea agreement when it believes the defendant would receive "too light a sentence." 952 F.2d at 997; *accord United States v. Miner*, 544 F.3d 930, 932 (8th Cir. 2008). *In re Morgan*, 506 F.3d 705 (9th Cir. 2007), relied on by VandeBrake (Br. 14, 17-21), is fully consistent with this Court's decisions. Indeed, in *Morgan*, the Ninth Circuit stated that "a district court properly exercises its discretion when it rejects a plea agreement calling for a sentence the court believes 'is too lenient or otherwise not in the public interest' in light of the factual circumstances specific to the case." 506 F.3d at 712 (quoting

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[26] For example, the court questioned whether VandeBrake's conduct justified a 4-level enhancement for his role in the offense rather than the 3-level enhancement proposed in the Agreement. *See supra* note 10.

[27] *See supra* pp. 9, 12-14. The court's comment that "I don't know of a single reason why I'd want to accept an 11(c)(1)(C) agreement in a white-collar price-fixing case" (Add. 24, quoted in Br. 6), is consistent with its view that the antitrust guideline is too lenient. In fact, the court is not categorically opposed to 11(c)(1)(C) agreements and regularly accepts them "[b]ut almost always they're in drug cases." Add. 23-24.

Ellis v. United States District Court, 356 F.3d 1198, 1209 (9th Cir. 2004) (en banc)).

In any event, VandeBrake's reliance on *Morgan* is misplaced for the additional reason that in *Morgan*, the district court categorically rejected an 11(c)(1)(C) agreement "as being unreasonable as a matter of law." 506 F.3d at 708. Contrary to VandeBrake's claims (Br. 16-18), that is not the case here. Thus, while the court below did state that "I'm unwilling *in this case* to cede my discretion to the executive branch" (Add. 31) (emphasis added), it did so because it believed the parties' proposed sentence was too lenient based on its assessment of the offense conduct statement and its concern that, at least in VandeBrake's case, application of the antitrust guideline might be too lenient.

2. VandeBrake's selective quotations of remarks the court made about the prosecutor do not change the fact that the court rejected the original "C" agreement because it was too lenient. Indeed, the court had never met the prosecutor before issuing its May 20, 2010, order indicating its unwillingness to be bound by that agreement's proposed sentence. And although the court opined during the Rule 11(c)(5) hearing that the lead prosecutor in this case had "virtually no real-world experience" (Add. 11), it explained that it was "open to the possibility that despite your lack of experience that you and your office are specialists and have far greater knowledge about price-fixing cases around the country than I would have. And I want that input . . . . that's very important to me . . . . so I'm not trying to minimize

your expertise." Add. 23. The court also told the prosecutor that "you're an excellent lawyer, so I'm not criticizing you at all."[28] Add. 31. The Rule 11(c)(5) hearing record, therefore, completely refutes VandeBrake's claim that the court rejected the Agreement because of the prosecutor's inexperience.

Nor is there anything in that hearing record to support VandeBrake's additional claim that the court rejected the Agreement because "VandeBrake threatened and coerced another company to fix prices." Br. 20. The *Pickhinke* transcript on which VandeBrake relies (Br. 22) does not support his claim. Indeed, five pages before mentioning the coercion allegation, the court described VandeBrake's case to the prosecutor in the *Pickhinke* case and asked him to justify the large discrepancy in the guidelines ranges of the two cases.[29] In doing so, the court emphasized that both cases involved "millions of dollars in loss" and therefore, that *VandeBrake* was "very comparable to this case."[30] App. 20; *accord* App. 21 ("I don't think these two cases are that dissimilar.").

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[28] On the final day of sentencing the court again noted: "I did want to again compliment the government lawyers. . . . I just thought you did an excellent job." Gov.-App. 34-35; *accord* Br. 19 ("the government's lawyering is this case was both careful and zealous.").

[29] *Pickhinke* was a $4 million bank fraud case where the defendant was facing a guidelines sentence of 97 to 121 months. App. 3, 38-39. The judge in *VandeBrake* also presided over *Pickhinke*.

[30] At that time the court mistakenly believed that VandeBrake's $5.66 million volume of commerce was the loss caused by VandeBrake. App. 20. The court recognized its mistake before it sentenced Stewart and VandeBrake. App. 237.

The court then expressly told the *Pickhinke* prosecutor that it rejected the Agreement in *VandeBrake* because it thought the proposed sentence was too lenient:

> I've had the opportunity to read the offense conduct statement that the antitrust division submitted in that [VandeBrake] case. And . . . I see the conduct in the VandeBrake case much more egregious than the conduct in this case which is precisely why I rejected flat out the plea agreement. . . . And I made it very clear that . . . I thought [the sentencing recommendations] grossly underweighed the criminal conduct in the case."

App. 20-21; *see also* App. 23.[31] Therefore, if there was any doubt about why the court rejected the original "C" Agreement in this case – and there should not be given what the court said at the *VandeBrake* Rule 11(c)(5) hearing – that doubt was removed by the court's comments in *Pickhinke*. Finally, when the court later mentioned the alleged coercion that VandeBrake relies on (Br. 20, 22), it did so only in passing, and there is nothing to support the conclusion that the allegation caused the court to reject VandeBrake's (c)(1)(C) agreement.[32]

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[31] In *Pickhinke* the court noted that "while I wasn't impressed with the antitrust lawyer from the Department of Justice in terms of his experience, I told him on the record that this was the best offense conduct statement I've ever seen." App. 35.

[32] The court told the *Pickhinke* prosecutor: "I've told you the essential facts of the [*VandeBrake*] case . . . . There's not much more to it than that other than there is one allegation that with regard to one of the companies—*and I don't know if this is true or not. It will come out at sentencing*, but [VandeBrake] said if you don't participate in the Sherman Act antitrust scheme we'll put you out of business." App. 24-25 (emphasis added).

In short, the court did not abuse its discretion when it rejected the Rule 11(c)(1)(C) agreement.

II. THE COURT DID NOT ERR WHEN IT VARIED UPWARD FROM THE ADVISORY SENTENCING GUIDELINE RANGE

There is no merit to VandeBrake's claims that the court committed procedural and substantive errors when it sentenced VandeBrake to 48 months' imprisonment. The court's decision is not based on a categorical rejection of the antitrust guideline on policy grounds (Br. 24-42), nor did the court create unwarranted disparity with its sentence (Br. 52-57). Rather, the court's decision is based on a thorough § 3553(a) analysis, only part of which concerned the court's policy disagreement with U.S.S.G. § 2R1.1. Because the court appropriately explained its policy disagreement and because its § 3553(a) analysis was sound, the court neither abused its discretion nor ventured into the realm of unreasonableness when it sentenced VandeBrake.

A. The Agreement Does Not Preclude The Government From Defending VandeBrake's Sentence On Appeal

In a footnote of his brief, relying on a phrase in the Agreement that the parties agree "not to seek or support any sentence outside of the Guidelines range" (Br. 23 n.7, quoting App. 80), VandeBrake makes a one-sentence assertion that "[t]he government cannot, without breaching this agreement, defend the district court's above-Guidelines sentence in this appeal." *Id.* But this Court "regularly decline[s] to consider cursory or summary arguments that are unsupported by

citations to legal authorities." *United States v. Stuckey*, 255 F.3d 528, 531 (8th Cir. 2001); *accord United States v. McAdory*, 501 F.3d 868, 870 n.3 (8th Cir. 2007) ("undeveloped issues perfunctorily averted to in an appellate brief are waived") (citation omitted). There is no reason to make an exception to that policy in this case.

In any event, nothing in the Agreement prohibits the government from defending VandeBrake's sentence on appeal. *United States v. Winters*, 411 F.3d 967 (8th Cir. 2005), is instructive. The defendant in *Winters* pled guilty to separate indictments. The plea agreements provided that the sentences imposed in the two cases should run concurrently, but the court imposed them consecutively. Defendant contended that the government was precluded from defending the consecutive sentences on appeal because it had agreed to concurrent sentences. 411 F.3d at 969, 974-75. This Court explained, however, that, as in this case, the only provisions in the plea agreements discussing appeals were the provisions stating the conditions under which the defendant could appeal. *Id*. at 975. The Court therefore concluded "the plea agreements did not limit the government's response to issues on appeal." *Id*. (citing *United States v. Colon*, 220 F.3d 48, 51-53 (2d Cir. 2000)). Similarly, in *United States v. Howard*, 894 F.2d 1085, 1091 (9th Cir. 1990), the Ninth Circuit explained that a plea agreement must expressly indicate the parties' intent to bar the government from participating on appeal:

> We hesitate to imply in a plea agreement a condition barring the government from contesting an appeal. To imply such a condition may well be contrary to the parties' intentions. It would also leave us without the benefit of full briefing on both sides of an issue. Therefore, we will not bar the government from participating in an appeal when the plea agreement fails to indicate that the parties clearly intended such a result.

Id. at 1091.

Here nothing in the Agreement demonstrates the parties' intention to bar the government from VandeBrake's appeal. Indeed, the actions of the parties below show the opposite. At the Rule 11(c)(5) hearing, the parties took a recess specifically to address VandeBrake's right to appeal his sentence under the new 11(c)(1)(B) agreement, a right that he had waived in the original (c)(1)(C) agreement. *See* Add. 38-39; App. 74-75. Because the parties amended the Agreement to clarify that VandeBrake had the right to appeal an above-guidelines sentence without mentioning any limitation on the government's ability to participate in such an appeal, the Agreement cannot reasonably be read to prohibit the government from contesting VandeBrake's appeal. *Winters*, *supra*; *Howard*, *supra*.

Finally, VandeBrake's reliance on the words will "not . . . support" (Br. 23 n.7) is unavailing. That language was contained in the original (c)(1)(C) agreement under which VandeBrake had no right to appeal his sentence. App. 63-64, 69-70. As such, those words must be read as restricting the government only in

the district court. Moreover, that sentence provides that the parties would "not support any sentence . . . for any reason that is not set forth in this Plea Agreement." App. 80. But the Agreement provides "that the Sentencing Guidelines determinations will be made by the Court"; that "the Court is not ultimately bound to impose a sentence within the applicable Guidelines range"; that the court's "sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a)" (App. 79); and that "the Court retains complete discretion to accept or reject the recommended sentence." App. 81. Thus the Agreement expressly allows the government to argue on appeal that the court did not abuse its discretion or otherwise impose an unreasonable sentence.

B. Standard of Review

This Court reviews the imposition of any sentence under "a deferential abuse-of-discretion standard." *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc) (citation omitted). The Court first ensures that the sentencing court made no significant procedural error such as failing to consider the § 3553(a) factors, basing its sentence on a clearly erroneous fact, or failing adequately to explain any deviation from the applicable advisory guidelines range. *Id*. (citing *Gall v. United States*, 552 U.S. 38, 51 (2007)). A sentencing court "abuses it discretion when it (1) 'fails to consider a relevant factor that should have received significant weight'; (2) 'gives significant weight to an improper or irrelevant

factor'; or (3) 'considers only the appropriate factors but in weighing those factors commits a clear error of judgment.'" *Feemster*, 572 F.3d at 461 (citation omitted). When no procedural error is found, the Court considers the substantive reasonableness of the sentence, taking into account the totality of the circumstances and giving due deference to the sentencing court's conclusion that the § 3553(a) factors justify any departure from the guidelines range. *Id.* at 461-62. Because this substantive review is narrow and deferential it is a rare case where this Court would find a sentence to be substantively unreasonable. *Id.* at 464.

C. The Court Did Not Procedurally Err In Imposing VandeBrake's Sentence

VandeBrake's claims of procedural error are based on two incorrect assertions: the court concluded that the fraud guideline should be used in place of the antitrust guideline (Br. 29, 35), and VandeBrake's sentence created "unwarranted disparity." Br. 42-52. First, the court did not jettison the antitrust guideline. Rather, the court's disagreement with the antitrust guideline in this case was just one factor that it weighed when it sentenced Stewart to an in-guidelines sentence and VandeBrake to an above-guidelines sentence. Second, the court expressly addressed the disparity issue and concluded that any disparity was not unwarranted. It accurately noted that because its sentence was based in part on a policy disagreement with the antitrust guideline, it necessarily would create

disparity with earlier within-guidelines sentences. But the court correctly reasoned that the disparity was a permissible result of a district court's discretion to disagree with the guidelines for policy reasons.

1. The Court Adequately Justified Its Variance

VandeBrake wrongly claims that the court categorically rejected the antitrust guideline and concluded "that the fraud guideline should be used in lieu of the antitrust guideline." Br. 29. In *Spears v. United States*, 555 U.S. 261, 129 S. Ct. 840 (2009) (per curiam), the Supreme Court held that a district court may vary from a guideline simply because it believes the advisory sentence is too harsh – or, as in this case, too lenient. S*ee* 129 S. Ct. at 843-44. In this case, however, as noted above (*see supra* pp. 12-17), the court varied primarily on circumstances specific to VandeBrake's case, including its view that the sentence provided in both the original "C" agreement and the subsequent "B" agreement, which was based on the antitrust guideline, was too lenient given the totality of VandeBrake's conduct. Its decision to give less weight to the antitrust guideline's range of 21 to 27 months was just part of its § 3553(a) analysis. *See Gall,* 552 U.S. at 59 ("the Guidelines are only one of the factors to be considered when imposing sentence"); *United States v. Shy*, 538 F.3d 933, 937 (8th Cir. 2008) (same); § 3553(a)(4) (listing guidelines "sentencing range" as one factor to be considered).

That the sentence imposed on VandeBrake was based on the court's careful consideration of all of the relevant § 3553(a) factors and was not based simply on a

wholesale rejection of the antitrust guideline is apparent from how it sentenced Stewart. While the court also expressed dissatisfaction with the antitrust guideline when it sentenced Stewart,[33] it nonetheless concluded that given the facts of Stewart's case an in-guidelines sentence was appropriate. Indeed, as the court observed, the sentence for a comparable fraud under § 2B1.1 would have been between 21 to 27 months, not the 12 months Stewart received under § 2R1.1.[34] Add. 145, 149.

In any event, in discussing its policy concerns with the antitrust guideline in it's § 3553(a) analysis,[35] the court largely agreed with the Sentencing Commission. Thus, the court reasoned that "[t]he social utility of the Sherman Act in preventing price-fixing agreements would . . . appear to be at least as great, if not greater, than the protections offered by fraud statutes." Add. 123, *accord* Add. 136. This is not

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[33] *See* Add. 145-47 (concluding "there is no basis in Stewart's case for the base offense level for his antitrust violations to increase less rapidly than the offense level for comparative fraud violations."), 148-49 (concluding that a comparison of Stewart's sentencing ranges under the antitrust and fraud guidelines "slightly support an upward variance in Stewart's sentence").

[34] More recently in Van Zee's case, the court sentenced him to a below antitrust guidelines sentence of 45 days' imprisonment. *See* Judgment, Crim. No. 10-4108 (N.D. Iowa June 22, 2011) ECF No. 41.

[35] The court discussed its policy concerns when it considered "the nature and circumstances of the offense," *see* 18 U.S.C. § 3553(a)(1), "the need for the sentence imposed . . . to reflect the seriousness of the offense . . . and to provide just punishment for the offense," *id*. at § (a)(2)(A), and the kinds of sentences available under the guidelines, *id*. at § (a)(4). *See* Add. 116-123, 135-36.

surprising since the Sentencing Commission has the same view. When explaining its 1991 amendment to the antitrust guideline the Commission noted:

> This amendment increases the offense levels for antitrust violations to make them more comparable to the offense levels for fraud with similar amounts of loss. The base offense level for antitrust violations starts higher than the base offense level for fraud violations *to reflect the serious nature of* and the difficulty of detecting *such violations* . . . .

U.S.S.G. app. C, Amend. 377 (emphasis added); *accord id*. at Amend. 678 ("recogniz[ing] congressional concern about the inherent seriousness of antitrust offenses").[36]

The court's disagreement with the Commission was mostly focused on the Commission's stated reason for increasing the offense level for antitrust violations less rapidly than for fraud. For this reason, VandeBrake's lengthy discussion (Br. 30-34) of "[s]everal policy justifications [to] validate the Commission's different treatment of fraud and antitrust offenders" (Br. 30) is largely beside the point, because the court did not categorically reject the antitrust guideline and because the Commission never relied on any of those reasons. Rather, as the court noted, the Commission has explained that the offense level for antitrust violations "increases less rapidly than the offense level for fraud violations 'in part, because,

[36] Since the Commission has explained that punishment for antitrust offenses should be "comparable" or "proportionate" to punishment for fraud, Amends. 377 & 678, *supra*, VandeBrake's claim that the court erred when it reached that same conclusion (Br. 35-36) is simply wrong.

on the average, the level of mark-up from an antitrust violation *may* tend to decline with the volume of commerce involved.'" Add. 126 (quoting U.S.S.G. app. C, Amend. 377) (emphasis added). The court concluded that, "given the facts of VandeBrake's case," the Commission's stated reason was inapplicable. Add. 126. That conclusion is not unreasonable.

As an initial matter, VandeBrake chides the court for "referring to the Commission's *judgment* as an 'assumption,'" claiming that the court thereby "failed to respect the Commission's 'important institutional role.'" Br. 32 n.9 (quoting *Kimbrough v. United States*, 552 U.S. 85, 109 (2007)) (emphasis added). But the Commission's own choice of language – "on the average . . . may tend" – reflects nothing more than an assumption. And the government is aware of no "empirical data" or "national experience," *Kimbrough,* 552 U.S. at 109, and VandeBrake cites none, to support the Commission's assumption. Indeed, there appears to be no way to verify whether "antitrust offenses impose diminishing marginal harm as they increase in size" or that the Commission actually "determined" that they do, much less whether any such determination was "based on [the Commission's] 'knowledge [and] experience'" as VandeBrake claims. Br. 32 (quoting *United States v. Higdon*, 531 F.3d 561, 562 (7th Cir. 2008)). Under these circumstances, the district court gave "'respectful consideration' to the now-advisory Guidelines." *Pepper v. United States*, 131 S. Ct. 1229, 1247 (2011) (quoting *Kimbrough*); *accord Kimbrough*, 552 U.S. at 109 (Commission does not

act in its "characteristic institutional role" when it does "not take account of 'empirical data and national experience.'") (citation omitted).

Additionally, VandeBrake wrongly contends that the court's finding that the Commission's assumption does not apply in his case was based "on a factual premise directly contradicted by the evidence." Br. 41-42. VandeBrake does not dispute that he "would establish a price list in January for a given year and then stick to that price list for the remainder of the year" and that the "price list was based on a per cubic yard price." Add. 126. Rather, VandeBrake claims that the court's conclusion "depends on [VandeBrake] making significant sales directly from [his] price sheets" and that most sales received a "discount." Br. 41. But VandeBrake and Van Zee's annual price list agreements – which accounted for the vast majority of VandeBrake's volume of commerce – fixed their discounted prices. Gov.-App. 9-10.

Moreover, the court fully appreciated that most sales were made at discounted prices. For example, it explained that "the final price for all of [Stewart's] standard-mix concrete sales began with the sheet price [and] even though many [of Stewart's] customers were accorded discounts . . . the discounted price was always calculated by subtracting the customer's particular discount from [Stewart's] 2009 sheet price." Add. 33 n.22. And those "customer[] particular discounts" were "standard" – *i.e.*, *X* dollars per yard subtracted from the price sheet "list price" depending on the "type of entity" purchasing the concrete – *e.g.*, $8 per

yard for a "concrete contractor" from Stewart (Gov.-App. 8) or $11 per yard for an "agricultural" customer from VandeBrake (Gov.-App. 11). *See* Gov.-App. 2-11. Thus, whether setting the discounted price per cubic yard at an artificially high level, or the list price from which the standard per cubic yard discounts were given at an artificially high level, VandeBrake was able to ensure that his profits were also standard and artificially high for each "type of entity" he sold his over-priced concrete to. *See Plymouth Dealers' Ass'n of N. Cal. v. United States*, 279 F.2d 128, 133 (9th Cir. 1960).

In addition, the court gave two other factual reasons for giving "less deference" to the antitrust guideline in this case. First, the court believed that the circumstances of VandeBrake's bid-rigging justified more than the simple 1-level enhancement the guideline provides, *see* § 2R1.1(b)(1), and second, it concluded that VandeBrake's creation of a northwest Iowa cartel through formation of three simultaneous conspiracies was not sufficiently accounted for by the guideline's volume of commerce calculation. Add. 125. Neither conclusion is unreasonable.

While discussing the nature of VandeBrake's offense and the need for the sentence to reflect the seriousness of that offense, the court pointed to several factors it believed revealed the "truly serious nature" of VandeBrake's offenses. Add. 123. The court explained that VandeBrake's crimes involved a "necessity product" with a limited delivery radius for which VandeBrake effectively created a northwest Iowa "concrete cartel" by forming three simultaneous conspiracies.

VandeBrake then used that cartel to rig bids on public projects and thereby "robbed" local governments of money they could have used to better their communities. Add. 123-24. Yet VandeBrake's greed "was unsatiated" so he "double-cross[ed]" a co-conspirator by agreeing to submit a complementary high bid but then actually submitting a bid that "undercut" that co-conspirator. Add. 124-25.

VandeBrake parses the court's analysis and claims that because each factor the court discussed is "ordinary" for an antitrust case, his was a "mine-run" case. Br. 36-42. But that was not the court's point. Rather, the court was supporting its conclusion that the antitrust guideline's 1-level increase for engaging in bid-rigging, *see* § 2R1.1(b)(1), was not commensurate with the truly serious nature of VandeBrake's bid-rigging. Thus, after discussing these factors the court expressly concluded:

> Under the circumstances of VandeBrake's case, the 1-level enhancement of VandeBrake's advisory guidelines sentence pursuant to U.S.S.G. § 2R1.1(b)(1) for participating in an agreement to submit non-competitive bids does not even begin to correlate to the nature and extent of the harm that VandeBrake's schemes inflicted on the people and businesses in northwest Iowa who had little or no choice but to accept VandeBrake or his co-conspirator's rigged bids for the concrete required for their respective projects. *See United States v. White*, 506 F.3d at 635, 645 (8th Cir. 2007) (the court may vary upward on the basis of factors already taken into account in the formulation of the guidelines).

Add. 125. Simply put, Vandebrake has failed to show that the court was not justified in concluding that the totality of his bid-rigging conduct required greater punishment than the antitrust guideline provided. *See*, *e.g.*, *United States v. Hill*, 552 F.3d 686, 692 (8th Cir. 2009) (sentencing court is best positioned to evaluate the facts and "judge their import under § 3553(a)").

The court also concluded that the antitrust guideline insufficiently accounted for VandeBrake's multiple conspiracies in two respects. First, in setting a defendant's offense level, § 2R1.1 only considers the defendant's volume of commerce and not his co-conspirators', as in other types of fraud. Add. 121-22; *see supra* note 8. Second, because VandeBrake's volume of commerce caused a 2-level increase for Count 3 alone, and the same 2-level increase for Counts 1, 2 and 3 combined, VandeBrake received no additional penalty for instigating multiple, simultaneous conspiracies. Add. 125-26.

VandeBrake again misses the point when he claims the "court's concern about multiple conspiracies is *misplaced*." Br. 40. First, VandeBrake is wrong that the court was "*mistaken*" that § 2R1.1 did not take account of his multiple conspiracies "because [VandeBrake's] Guidelines range *was* increased by the inclusion of Counts I and II" with "the [1-level] upward bid-rigging adjustment in § 2R1.1(b)(1)." *Id*. As noted above, the court fully recognized that VandeBrake was subject to § 2R1.1's 1-level adjustment for bid-rigging. Rather, the court's point about VandeBrake's multiple conspiracies was that because they allowed

him to cartelize northwest Iowa, and because § 2R1.1(b)(2) sets the offense level for a cumulative volume of commerce, the guideline did not, in the court's view, adequately address "VandeBrake's perpetration of these three conspiracies, which inflicted harm across northwest Iowa." Add. 125-26.

VandeBrake argues that "participating in three small antitrust conspiracies is not inherently worse than participating in one larger conspiracy," because it is "counterintuitive" that taking the "extra step" of bringing all the conspirators under one umbrella would make VandeBrake "less culpable." Br. 41 (quoting App. 239). While the court "did not address this argument in its Sentencing Memorandum" (Br. 41), it did address it during the colloquy cited by VandeBrake. Thus, the court explained that "there might have been a reason not to do that, and that . . . there's a greater likelihood of detection . . . if everybody knows what everybody's doing." Add. 239. The prosecutor responded: "I agree your honor. The more members you have in a conspiracy, I think generally speaking the greater risk there is that one of those members will report on the others." *Id*.

Moreover, given the limited delivery radius for ready-mix and the limited number of ready-mix companies in a given overlapping rural area as in this case, VandeBrake's deliberate creation of his northwest Iowa cartel through individual conspiracies in those overlapping areas of competition made more sense than creating a larger conspiracy. The court was certainly allowed to focus on the scale of VandeBrake's offenses as an aggravating factor.

The court also found that VandeBrake's history and characteristics "warrant more significant punishment than the advisory guidelines might mete out." Add. 135. This conclusion was soundly based on VandeBrake's greed and total lack of remorse.[37] Add. 128-135; *see supra* pp. 9-12, 15-16. VandeBrake's two-point response is unpersuasive. First, the court agreed that "VandeBrake is a committed father and husband." Br. 55. *See* Add. 82, 128. But that does not negate his greed or lack of remorse. Second, the court was not required to find that VandeBrake's singular "I am truly sorry" (Br. 56) outweighed pages of VandeBrake's rationalizations. Add. 128-35.

In choosing VandeBrake's sentence the court also drew on its vast experience in sentencing over 2,600 defendants. For example, the court noted that while it has "sentenced other greedy defendants" VandeBrake stood out because of his total lack of charitable or community involvement (Gov.-App. 27-28), and that VandeBrake's "disregard for the consequences to others" was not unlike that of a drug-dealer "who could easily face a mandatory *minimum* statutory sentence" equal to VandeBrake's statutory maximum.[38] Add. 125. Finally, the court compared VandeBrake's sentencing ranges under the fraud and antitrust

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[37] For example, when comparing Stewart to VandeBrake the court found that "Stewart, unlike VandeBrake, does not have ostentatious spending habits or an extravagant life style." Add. 86; *see* Add. 83 (noting that VandeBrake owns three houses, two luxury SUVs worth $120,000, and spends $3,000 a month on clothes).

[38] The Court noted that it sees "a significant number" of drug cases. Add. 24.

guidelines, finding that comparable conduct under the fraud guideline would produce a range of 46 to 57 months. Add. 136.

The court was fully justified in making these comparisons.[39] As this Court has explained, a "district court [is] not required to sentence [a defendant] in a vacuum or disregard its substantial sentencing experience." *Hill*, 552 F.3d at 692. Rather, that experience places a sentencing judge in a "superior position" to evaluate the facts, judge their significance under § 3553(a), and make credibility determinations "because district courts 'see so many more Guidelines sentences than appellate courts do.'" *Id*. at 690, 692 (quoting *Gall*, 552 U.S. at 52). In *Hill*, for example, when affirming Hill's 51-month sentence this Court found no error in the sentencing court comparing the criminal conduct in a Mann Act prosecution that produced a guidelines range of 15 to 21 months, to the crimes and sentencing ranges for child pornography as an example of harsher punishment, and a "credit card scam" as an example of a 15 to 21-month-type crime. 552 F.3d at 689, 691-92. Thus here, because the court justified its conclusion that there is no basis for VandeBrake's offense level "to increase less rapidly than the offense level for comparative fraud violations" (Add. 127), and otherwise found that virtually all of

[39] As previously noted, the Sentencing Commission believes that in appropriate cases antitrust and fraud punishment should be "comparable." *See supra* note 36.

the § 3553(a) factors weighed in favor of an upward variance,[40] the court's imposition of a sentence within the range for a comparable fraud, but 6 years less than the 10-year statutory maximum, was similarly not unreasonable.

In short, the district court did not base its decision to vary from the antitrust guideline on any clearly erroneous fact and sufficiently explained why its upward variance to 48 months was warranted under the facts of VandeBrake's case.

2. The Court Properly Considered Sentencing Disparity[41]

When addressing "the need to avoid unwarranted sentence disparities" under § 3553(a)(6), the court fully recognized that its 48-month sentence created disparity "between the defendants here and those sentenced previously," but concluded that the disparity was a natural result, and thus not unwarranted, of its conclusion that the antitrust guideline did not fit VandeBrake's offensive conduct in this case.[42] Add. 140. VandeBrake argues that the court "flouted" the directive in § 3553(a)(6). Br. 43. But *Kimbrough* expressly rejected that claim.

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[40] The court found "the need to provide restitution," § 3553(a)(7), "neutral." Add. 140.

[41] In making his "disparity" argument on brief, VandeBrake relies on numerous statistical studies, reports and tables that, he claims, demonstrate the district court's error. Br. 44-52, 60-61. In addition to being largely irrelevant, *see infra* note 42, VandeBrake presented none of that data or argument to the district court. Thus, neither can demonstrate an abuse of discretion. *United States v. Robinson*, 516 F.3d 716, 719 (8th Cir. 2008).

[42] The court also sought "to avoid *unwarranted similarities* among defendants who are *not* similarly situated." Add. 140 (citing *Gall*, 552 U.S. at 55). The court

In *Kimbrough*, the government argued that permitting sentencing judges to disagree with guideline policy would result in "defendants with identical real conduct . . . receiv[ing] markedly different sentences, depending on nothing more than the particular judge drawn for sentencing." 552 U.S. at 107 (quoting Brief for United States at 40). In rejecting that argument the Court explained that "our opinion in *Booker* recognized that some departures from uniformity were a necessary cost of the remedy we adopted." 552 U.S. at 107-08; *accord United States v. Gardellini*, 545 F.3d 1089, 1096 (D.C. Cir. 2008) ("This new sentencing regime inevitably will lead to sentencing disparities and inequities that can be explained by little more than the identities of the sentencing judges.").

Since then, this Court has recognized that "*Kimbrough* and *Spears* do not hold that a district court *must* disagree with any sentencing guideline, whether it reflects a policy judgment of Congress or the Commission's 'characteristic' empirical approach." *United States v. Barron*, 557 F.3d 866, 871 (8th Cir. 2009); *accord United States v. Davis*, 583 F.3d 1081, 1099 (8th Cir. 2009) ("While the

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recognized that trying to compare VandeBrake to previous antitrust offenders is like trying to compare apples to oranges given the recent changes in statutory maximums, the dearth of reported decisions, and the fact that many antitrust offenders are also convicted of other offenses such as wire or mail fraud. Add. 138-40. For example, here the court gave great weight to the facts that VandeBrake was involved in three simultaneous conspiracies, that he initiated two and probably all three of them, that he acted purely out of greed, completely lacked remorse, and had not performed even a single good deed for his community. Add. 125, 128-35. Thus, it is virtually impossible to compare VandeBrake to any of the vast statistics VandeBrake provides in his brief. Br. 42-52, 60-61.

district court would have been within its discretion to consider the [100-to-1] crack versus powder cocaine disparity in sentencing Davis, the district court certainly was not *required* to vary downward on this basis."). Thus, two crack offenders with similar offenses and histories could be sentenced on the same day in adjoining court rooms by different judges – one who rejected the 100-to-1 ratio and applied a 20-to-1 ratio,[43] and another that accepted and applied the 100-to-1 ratio.[44] Notwithstanding the different sentences that would result, any disparity would not be unwarranted.[45] In short, because the court justified its decision not to apply the antitrust guideline to the specific facts and circumstances of VandeBrake's case, as demonstrated above, the disparity caused by VandeBrake's 48-month sentence is not unwarranted.

D. VandeBrake's Sentence Is Not Substantively Unreasonable

In *United States v. Kane*, 639 F.3d 1121 (8th Cir. 2011), this Court held that the district court's 90-month variance from the bottom of Kane's sentencing range of 210 months, to a sentence of 120 months, was substantively unreasonable. In

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[43] *See*, *e.g.*, *Spears*, 129 S. Ct. at 842.

[44] In August 2010, Congress reduced the 100-to-1 ratio to 18-to-1. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372.

[45] For example in *Spears*, the guidelines' 100-to-1 ratio yielded a sentencing range of 324 to 405 months, but a 20-to-1 ratio yielded a range of 210 to 262 months. The difference between the top of the lower range and the bottom of the higher range is more than five years. 129 S. Ct. at 841-42.

doing so, the Court noted that "this is the first case in which this court has held a sentence substantively unreasonable" since the Supreme Court decided *Spears*, and that "[t]he Supreme Court has yet to hold a sentence to be substantively unreasonable after *Gall*." *Id*. at 1135. And even under the extreme circumstances in *Kane*,[46] reasonable minds still differed as to the substantive reasonableness of the sentence. *See id*. at 1137-38 (Murphy, J., dissenting). That is not surprising since a variance "cannot be calculated with 'mathematical precision"' and there is "a range of reasonableness" available to the sentencing court. *United States v. Saenz*, 428 F.3d 1159, 1164-65 (8th Cir. 2005). As the District of Columbia Circuit recently explained:

> [T]he § 3553(a) factors that district courts must consider at sentencing are vague, open-ended, and conflicting; different district courts may have distinct sentencing philosophies and may emphasize and weight the individual § 3553(a) factors differently; and every sentencing decision involves its own set of facts and circumstances regarding the offense and the offender.

Gardellini, 545 F.3d at 1093. Thus, this Court will not find a sentence unreasonable "merely because [it] would have decided that another one is more appropriate." *Kane*, 639 F.3d at 1135 (citation omitted).

[46] The "horrific" facts in *Kane* were that Kane sold her nine-year-old daughter to a pedophile more than 200 times, charging $20 each time. 639 F.3d at 1136. The majority noted in part that "[e]ven if Kane were to serve every day of her 120-month sentence, she would spend less than three weeks in prison for each violation of her daughter." *Id*.

VandeBrake's claim of substantive unreasonableness is largely a rehash of his claim of procedural error. Thus, he claims the court "should not have placed *any* weight on its policy disagreement with § 2R1.1." Br. 54. But as explained above, the court did not vary from § 2R1.1 simply because it believed the guideline was too lenient in general. Rather, the court expressly found that VandeBrake's specific culpability did not fit within the contours of the antitrust guideline. *See supra* pp. 35-45. Similarly, VandeBrake's claims that his personal history and characteristics were given insufficient weight (Br. 55-56), and that his sentence causes "unwarranted" disparity (Br. 57), are fully addressed above. *See supra* pp. 43, 46-47.

Thus, VandeBrake's rehash of his procedural attack fails to show that if the court's decision is procedurally correct it is nonetheless substantively unreasonable. But even if VandeBrake were to serve his entire 48-month sentence, he would serve less than two months for each project on which he rigged bids, [47] even without considering his price-fixing. Given the court's finding that numerous § 3553(a) factors support a variance, a sentence of 48 months, which was near the bottom of the guideline range for a comparable fraud and 6 years below the statutory maximum, certainly was within the range of reasonable sentences

[47] VandeBrake admitted he rigged bids on 30 to 33 projects. *See supra* pp. 4-5.

available to the court. *See Feemster*, 572 F.3d at 464 (no abuse of discretion when sentence is based on "defendant-specific determinations").

III. THE COURT'S ALTERNATIVE IMPOSITION OF CONSECUTIVE SENTENCES WAS REASONABLE

A. Standard Of Review

A district court "has broad statutory authority . . . to impose consecutive terms," and its decision to do so is reviewed for reasonableness under "a deferential abuse-of-discretion standard." *United States v. Lone Fight*, 625 F.3d 523, 525-26 (8th Cir. 2010); *accord United States v. Jarvis*, 606 F.3d 552, 553 (8th Cir. 2010). Before imposing consecutive sentences the court must consider the § 3553(a) factors. *Jarvis*, 606 F.3d at 554.

B. Consecutive Sentences Are Reasonable Under The Facts Of VandeBrake's Case

As an alternative to 48 months on each count to run concurrently, the court imposed the maximum sentence authorized by the antitrust guideline on each count, with 15 months on Count 1, 6 months on Count 2, and 27 months on Count 3 to run consecutively, for a total of 48 months' imprisonment. Add. 143. The court justified this alternative "[i]n light of its analysis of the § 3553(a) factors." *Id*. VandeBrake's entire argument on his alternative sentence is that because "procedural and substantive errors pervaded" the court's § 3553(a) analysis, that analysis "can no more support consecutive sentences totaling 48 months than it can support a single sentence of that length." Br. 58. VandeBrake is wrong.

As noted above, VandeBrake's procedural attack on the court's decision to vary from the antitrust guideline is largely based on his erroneous view that the court simply categorically disagreed with the guideline. But that was not the case. Instead, the court found that numerous § 3553(a) factors in VandeBrake's case supported an upward variance from § 2R1.1. *See supra* pp. 9-17, 35-45.

Perhaps most significant were the court's findings on VandeBrake's history and characteristics. As noted above, VandeBrake was wealthy before he began price-fixing, was not deterred by the knowledge of other antitrust prosecutions in his industry, continued his criminal behavior long after he had become extremely wealthy, returned none of his ill-gotten gains to charity or his community, and showed a total lack of remorse. *See supra* pp. 9-12, 15-16. These facts led the court to conclude that VandeBrake "warrant[ed] more significant punishment" than § 2R1.1 provided. Add. 135. Indeed, the court told VandeBrake during sentencing: "but for one of your co-conspirators getting cold feet . . . you'd still be out there violating the antitrust laws" (Gov.-App. 25); "your crimes were crimes of pure greed" (Gov.-app. 27); "other greedy defendants . . . had very strong community involvement . . . had been very charitable . . . . [y]ou didn't even do that" (*id*.); "[y]ou . . . have taken, taken, taken and given absolutely nothing back" (Gov.-App. 27-28); "it was just sport for you" (Gov.-App. 28); and "you were [not] the least bit remorseful." *Id*.

In short, even disregarding the district court's view of the antitrust guideline in general, the factual circumstances in VandeBrake's case demonstrate the reasonableness of the court's conclusion that the § 3553(a) factors justify consecutive sentences to reflect the seriousness of VandeBrake's offenses. *See Lone Fight*, 625 F.3d at 526; *Jarvis*, 606 F.3d at 554.

IV. THE COURT DID NOT PROCEDURALLY ERR IN SETTING VANDEBRAKE'S FINE

On page 67 of its opinion (Add. 115), the court began its § 3553(a) analysis under the heading: "*F. Do § 3553(a) Considerations Justify A Variance?*" On the next page after listing the § 3553(a) factors under heading F.1., the court began its discussion of VandeBrake under heading *"F.2. Defendant VandeBrake."* Add. 116. Twenty-four pages later, after examining at length the numerous § 3553(a) factors in VandeBrake's case in subsections F.2.a. through 2.f., the court began section "*F.2.g. Fine*." Add. 140. By that point, the court had concluded that most of the § 3553(a) factors weighed in favor of a variance. However, the court had not yet announced either a fine or a term of imprisonment for VandeBrake.

In section F.2.g. the court concluded that the guideline fine of one to five percent of VandeBrake's volume of commerce "is woefully inadequate." Add. 141. After considering U.S.S.G. § 5E1.2 and 18 U.S.C. §§ 3571, 3572, the court determined that a fine of fifteen percent of VandeBrake's volume of commerce, *i.e.*, $829,715.85, was necessary and appropriate given VandeBrake's wealth,

income and the losses he caused.[48] Add. 142-43. In the next section of its opinion, "*F.2.h. Summary*," the court concluded:

> *In light of its analysis of the § 3553(a) factors above, the court finds that* a sentence of 48 months of imprisonment and *a fine of $829,715.85 is appropriate* and, therefore, is sufficient, but not greater than necessary, to accomplish the goals of sentencing.

Add. 143 (emphasis added).

VandeBrake does not challenge the reasonableness of his fine. Rather, he raises only one claim of error regarding the fine: the court committed "procedural error by failing to consider the § 3553(a) factors" before imposing it. Br. ix, 13, 60, 62. Because the court's analysis of VandeBrake's fine was conducted within its larger § 3553(a) analysis of VandeBrake's entire sentence, however, VandeBrake's claim of error must be rejected. This Court repeatedly has held that a sentencing court is not required "to provide a mechanical recitation of the § 3553(a) factors" so long as it is "clear from the record that the district court actually considered the § 3553(a) factors in determining the sentence." *Feemster*, 572 F.3d at 461 (quotation marks and citation omitted). Although the court did not

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[48] *See United States v. Koestner*, 628 F.3d 978, 980 (8th Cir. 2010) (explaining court must consider U.S.S.G. § 5E1.2 and 18 U.S.C. § 3572 when setting a fine). VandeBrake is wrong that § 5E1.2 is "an irrelevant Guideline" and "has no application to this case." Br. 59-60. Thus, while the one to five percent of the volume of commerce fine provision in the antitrust guideline, § 2R1.1(c), supplants the fine table in U.S.S.G. § 5E1.2(c), the rest of § 5E1.2 applies in this case. *See* § 5E1.2(b) (if the guideline for the offense at issue "provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) [the fine table] of this section").

expressly cite § 3553(a) "as the statutory basis for its action" when it found the guideline's fine range inadequate, the court's opinion leaves no doubt that its variance on the fine was an integral part of its overall § 3553(a) analysis. *Lone Fight*, 622 F.3d at 526. Thus, the court committed no procedural error.

CONCLUSION

For the foregoing reasons the Court should affirm VandeBrake's sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This corrected brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 11,237 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This corrected brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point Times New Roman font.

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July 8, 2011

/s/ John P. Fonte
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CERTIFICATE OF SERVICE

I, John P. Fonte, hereby certify that on this 8th day of July, 2011, I electronically filed the foregoing Corrected Brief for Appellee United States of America with the Clerk of the Court of the United States Court of Appeals for the Eighth Circuit by using the CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

July 8, 2011

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