IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL NO. 15-602-1**
DAVID M. DUNHAM, JR.	**:**	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR DOWNWARD DEPARTURE

On May 13, the Defendant filed a Sentencing Memorandum and Motion for Downward Departure, ECF No. 251. For the reasons stated below, the defendant's motion for downward departure should be denied.

Background

On May 1, 2019, following a jury trial, defendant David Dunham was convicted of 54 out of 55 counts in the indictment. On February 20, 2020, the final presentence investigation report ("PSR") was filed. The PSR calculated the defendant's adjusted offense level as 37. On March 6, 2020, the government filed its sentencing memorandum, which also calculated the defendant's adjusted offense level as 37. On May 13, 2020, the defendant filed his Sentencing Memorandum and Motion for Downward Departure. Notably, while the defendant seeks multiple departures, [1] he fails to provide the Court with an offense level from which he asks the Court to depart. Neither does he address the specific enhancements applied in the PSR. Instead, ignoring the guideline analysis that the Third Circuit requires, the defendant simply "incorporates his objections" to the Guideline calculation in the PSR. ECF No. 251, p. 10. But those objections

[1] The defendant likewise argues for variances under 18 U.S.C. § 3553 for many of the same reasons.

(attached to the final PSR) lack specificity, especially as they concern the amount of loss for Guidelines purposes. Despite the government's detailed loss calculation – which was shared with the defense December 12, 2019 – the defense continues to argue, erroneously, that Dunham is being charged with every gallon he claimed or sold. As explained more fully below, the government opposes the defendant's requested departures.

Seriousness of the Offense

The defendant first requests a departure because the offense level calculated by the Probation Department allegedly overstates the seriousness of the offense. Supposedly, this is because (a) the total loss amount was "erroneously calculate[d]," (b) the purchasers of the invalid RINs "suffered no pecuniary harm," and (c) "the vast majority of the funds derived from the programs at issue were put to the very purpose intended under the programs." ECF No. 251, p. 13.

Initially, the defendant asserts, without support, that the loss amount was erroneously calculated by the Probation Department. He provides no analysis of which calculations were erroneous, nor does he provide the Court with an alternative calculation.[2] Given that the government has amply made out a prima facie case for its loss calculation, it is the defendant's burden to provide the Court with evidence, not generalized arguments, why the calculation is wrong. *United States v. Fumo*, 655 F.3d 288, 310 (3d Cir. 2011) ("[A]lthough the burden of persuasion remains with the Government, once the Government makes out a prima facie case of the loss amount, the burden of production shifts to the defendant to *provide evidence* that the

[2] Given that the defendant has not made any specific objections to the loss calculation, and further, that the government has amply met its burden to show loss by a preponderance of evidence, at this time the government is not planning to call witnesses at the sentencing hearing to reiterate the basis for the loss calculation.

Government's evidence is incomplete or inaccurate.") (emphasis added). The defendant has failed to do so.[3]

Both the PSR and the Government's sentencing memorandum provide the Court with a loss estimate based upon the evidence admitted at trial. Nowhere has the defendant disputed any of these numbers. Instead, the defendant erroneously claims that "the government and the PSR take the position that every gallon of fuel sold or claimed by Mr. Dunham under any one of the three programs was tainted and consequently, should be included in the loss calculation." *Id*. at p. 39. This is simply incorrect. In its sentencing memorandum, the government explains in detail how the loss number was derived from the evidence and testimony presented at trial. ECF No. 244, pp. 6-21. The government utilizes a year-by-year analysis of which gallons were claimed under each program, and which of these gallons were fraudulent. It is not based upon a generalized assertion that no gallons qualified.[4] The government has more than met its burden to provide the Court with a reasonable estimate of the losses, U.S.S.G. § 2B1.1, app. n. 3(C), and the defendant has provided nothing to demonstrate that this calculation is erroneous.

The defendant next claims that the loss amount overstates the seriousness of his criminal conduct because the purchasers of the invalid RINs were not made to replace the RINs in question. As explained in the Government's sentencing memorandum, the RINs in question were not replaced because of the long duration between the offense and the jury's verdict. The defendant had no way of knowing at the time of his crimes that this delay would occur, which is why the value of the RINs is properly characterized as *intended* loss.[5] Such an unforeseeable fact

[3] In his objections to the PSR, the defendant stated that he "will agree that the evidence supports a loss estimate of between $3.5 - $9.5 million," *Id*. at 47, but fails to explain the basis for this lower loss figure.
[4] In its sentencing memorandum, the government did explain why it would be a reasonable estimate to include nearly every gallon claimed by the defendant in calculating loss, given the defendant's lack of legitimate sales. This was not the loss amount recommended by the government, however.
[5] In his objections to the PSR, the defendant stated that he is "perfectly fine" with the RIN losses being characterized as intended loss. *Id*. at 42.

has no bearing on the seriousness of the defendant's conduct. Indeed, this is the reason why the guidelines treat intended losses the same as actual losses: a defendant should not reap a windfall simply because an unexpected intervention or circumstance prevents some of the harm he intended by his conduct. U.S.S.G. § 2B1.1, app. n. 3(A).

Finally, the defendant argues that the loss amount overstates the seriousness of his offense because the "vast majority of the funds" he received from the government "were put to the very purpose intended under the programs." This is factually incorrect. The trial evidence showed that there were very few customers who used the defendant's product as fuel. Setting aside the other requirements and purposes of the programs, the vast majority of the defendant's output would not have fulfilled the regulatory purpose of fostering the generation and use of renewable biofuels. Ghost loads would not have fulfilled this purpose. Waste water would not have fulfilled this purpose. Feedstock sales would not have fulfilled this purpose. Double-counting would not have fulfilled this purpose. And yet, these were the bulk of the defendant's output. Accordingly, the vast majority of the defendant's output *undermined* the intended purpose of the programs, rather than fulfilling it.

Unique Mitigating Procedural Circumstances

The defendant next argues for a departure because (1) his initial counsel (John Brownlee) arguably had a conflict of interest in representing the defendant; (2) he provided "substantial information" against Ralph Tommasso; and (3) the charges related to the production capacity were dropped before trial. ECF No. 251, pp. 13-14. None of these are a mitigating circumstance, much less one so significant as to take the defendant's case outside the "heartland" envisioned by the Sentencing Commission.

First, the defendant does not explain how or why the existence of a possible conflict of interest is mitigating. He suggests that he provided "substantial cooperative efforts" while counseled by Mr. Brownlee, but fails to explain why this matters, let alone why it should be considered mitigating. Given that he is now characterizing his actions while counseled by Mr. Brownlee as "cooperative," it appears that he is no longer disavowing the proffers (which is hard to square with his disavowal of them before and during the trial). Even assuming that the defendant had started down the path of providing substantial assistance to the government while counseled by Mr. Brownlee, it simply underscores that he subsequently decided to take the opposite approach, and lie to the jury. It is not a mitigating circumstance to begin providing assistance, then elect to terminate providing such assistance, disavow your prior statements, and provide false testimony from the witness stand.

The suggestion that Mr. Tommaso's plea agreement is mitigative of the conduct engaged in by Mr. Dunham likewise misses the mark. That a cooperating co-conspirator would be treated differently than a non-cooperating co-conspirator is not anomalous. This is especially true when one considers the other circumstances that differentiate Tommaso from Dunham: Tommaso accepted responsibility, cooperated with the government, and testified truthfully from the witness stand. Dunham never accepted responsibility and engaged in obstructive conduct during and after the crimes in question, culminating in his providing multiple days of false testimony to the trial jury.

Finally, the argument that a departure is warranted because the government chose to drop certain charges pre-trial also fails. While the defendant is correct that the charges premised on the inflation of production capacity were dropped, it is entirely unclear why this would be a mitigating factor. At trial, the government offered no evidence of these acts to the jury, and the

fact that Dunham was not tried on these counts in no way exculpates him for the crimes which he was convicted of. How or why this fact could possibly mitigate a defendant's guilt, whose conviction was premised on entirely different conduct, is left unexplained. Certainly, this is not the only case where one or more charges were dropped by the government, and yet the defendant provides no rationale suggesting this somehow excuses the crimes of which he was convicted. This is not a proper basis for a departure.

Post-Offense Rehabilitation

The defendant next seeks a departure based on post-offense rehabilitation. The fact that the defendant went to trial alone is nearly dispositive of this issue. The one case cited by the defendant for the proposition that he could still receive such a benefit, *United States v. Chapman*, held that "truly exceptional rehabilitation alone can, in rare cases, support a downward departure even when the defendant does not accept responsibility… holding the government to its burden of proving the defendant's factual guilt presents a near absolute bar to a defendant receiving a reduction under this section." 356 F.3d 843, 847-48 (8th Cir. 2004). The fact that the defendant not only went to trial, but testified falsely for over two days, should remove the possibility for this benefit altogether.

In any event, the "rehabilitation" documented by the defendant falls far short of this showing. In essence, his "rehabilitation" seems to be premised on two factors: his continuing to operate Smarter Fuels, and his willingness to hire employees who have been convicted of a crime. The fact that the defendant continues to operate his business does not demonstrate post-offense rehabilitation, much less to such a degree as to take it outside the "heartland" of cases, as directed by the Commission. Regarding the defendant's decision to hire convicted felons, this is

to be commended. However, this single act alone is not nearly sufficient to place the defendant in the category of "truly exceptional" individuals deserving of "rare" concessions. *Id*. In addition, the evidence suggests he only began this practice recently, after he would have had an incentive to do so. *See United States v. Clay*, 483 F.3d 739, 746 (11th Cir. 2007) (emphasizing that a defendant's rehabilitation began "before [he] had any inkling that we would face a prison sentence" and thus was not a "jailhouse conversion.").

Civic and Charitable Works

As the defendant acknowledges, civic and charitable works are ordinarily not a valid basis for departure. U.S.S.G. § 5H1.1. The government agrees that this is a fact-intensive inquiry, which looks not just to whether or not the defendant is charitable, or has done laudable actions, but whether the contributions and activities were exceptional. *United States v. Serafini*, 233 F.3d 758, 771-77 (3d Cir. 2000). The breadth and scope of the activities undertaken by the defendant in *Serafini* were indeed exceptional. Such an exceptional pattern of behavior is not evinced in any of the materials provided by the defendant. Indeed, the defendant fails to specify exactly what conduct he believes places him into this "exceptional" category (beyond pointing to the "character type letters" submitted with his sentencing memorandum). Although these letters make clear that the defendant has contributed time and money to the Boy Scouts, supported his brother during a very difficult time, and maintains friendship and admiration from a great many people, they fail to demonstrate anything close to the sort of rare behavior described in *Serafini*.

Combination Departure

The defendant finally seeks a "combination departure" should his individual requests fall short. Such a departure is warranted only where the characteristics or circumstances at issue, taken together, "make the case an exceptional one" *and* each characteristic or other circumstance "is present to a substantial degree." U.S.S.G. § 5K2.0(c). None of the characteristics and circumstances highlighted by the defendant make his case exceptional, nor are any of them—the "mitigating procedural circumstances," the post-offense rehabilitation, or the charitable works—present to a substantial degree. The request for a combination departure should be denied.

IV. CONCLUSION

For the reasons outlined in this Response, the United States respectfully requests that defendant's motions for departure be denied.

JEAN E. WILLIAMS
Deputy Assistant Attorney General

__/s Adam C. Cullman_____
ADAM C. CULLMAN (KY 93912)
Trial Attorney
U.S. Department of Justice

WILLIAM M. McSWAIN
United States Attorney

s/ Mary E. Crawley
MARY E. CRAWLEY
Assistant United States Attorney

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the Government's Response to Defendant's Motion for Downward Departure was filed electronically through the District Court Electronic Case System and served upon:

Mark Cedrone, Esq.
Cedrone & Mancano, LLC

Caroline Cinquanto, Esq.

/s/ James Donnelly
JAMES DONNELLY
Legal Assistant, United States Attorney's Office

Date: June 25, 2020