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July 21, 2005

Honorable Raymond J. Dearie
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Donald Deland, et. al.
Docket Number 03 Cr. 328 (RJD)

Dear Judge Dearie:

Please accept this letter memorandum submitted on behalf of our client, Donald Deland, who is scheduled to be sentenced by Your Honor on Friday, August 5, 2005, at 10:00 A.M.

I. INTRODUCTION

For reasons more specifically addressed herein, it is respectfully requested that Your Honor sentence Donald Deland to a "non-guidelines" sentence of 366 days imprisonment, to run concurrent to his sentence in Texas, after reviewing the factors enumerated in 18 U.S.C. §3553(a).

A. Plea Agreement

On October 1, 2003, pursuant to a signed plea agreement, Donald Deland entered a plea of guilty before Your Honor to Count One of the above-captioned indictment. A copy of the plea agreement is annexed hereto as "Exhibit A." The plea agreement states that Donald Deland has an **Adjusted Offense Level of 21 and a Criminal History Category of I, which carries a range of imprisonment of 37 to 46 months.** See Plea Agreement, pg. 2. The plea agreement calculates the **Adjusted Offense Level** as follows:

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Base Offense Level: (2B5.3(a))	8
Manufacture/Importation of Infringed Items: (2B5.3(b)(2))	+2
Infringement Amount (More than \$1 Million (2B1.1(b)(1)(J))	+16
Acceptance of Responsibility: (3E1.1(b))	- 3
Global Disposition (5K2.0)	<u>- 2</u>
Adjusted Offense Level:	21

See id.

Most importantly, the plea agreement recognized that the issue of valuation was still unresolved, in spite of the plea agreement. It states, "At the request of defense counsel, the government has agreed before sentencing to hear from defense counsel as to the defendant's view of the correct Guidelines calculation." See id. at 3.

B. Presentence Investigation Report

The Presentence Investigation Report ("PSI Report") prepared by the U.S. Department of Probation is in accordance with the signed plea agreement, with the exception of: a two level reduction for global plea efforts; a two point enhancement for conscious or reckless risk of bodily harm; and the infringement amount.

For reasons more specifically addressed below, it is respectfully requested that the above-listed enhancements for conscious or reckless risk of bodily harm and the infringement amount not be included when determining an appropriate sentence for the defendant, Donald Deland.

1. A Two-Level Reduction For Global Plea Efforts Is Proper.

In accordance with the "Law of the Case," as established by Your Honor at the sentencing of co-defendants Simon Moshel and Michael Moshel, it is respectfully requested that Your Honor

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recognize the two level reduction agreed upon by the Government and defense counsel for global plea disposition.

2. The Government Concedes That A Two-Level Enhancement For Reckless Risk Of Bodily Injury Is Not Appropriate.

The Government's submission dated March 10, 2005, which is attached hereto as "Exhibit B," clearly states, "***In addition, contrary to the PSR, since the government has no evidence that the specific counterfeit cigarettes in this case contained arsenic, contrary to the PSR, the government does not assign a 2 level increase for reckless risk of bodily injury, per U.S.S.G. §2B5.3(b)(4).***"

Therefore, in accordance with the "Law of the Case," as established by Your Honor at the sentencing of co-defendant's Simon Moshel and Michael Moshel, which will be more fully discussed below, and the Government's inability to prove that the cigarettes contained arsenic, it is respectfully requested that the two-point enhancement for reckless risk of bodily injury not be included when determining Donald Deland's sentence.

II. DONALD DELAND'S PERSONAL BACKGROUND

Donald Deland is currently forty-four (44) years of age, born on February 17, 1961, in Dunkirk, New York, to Cameron and Rose Deland. See PSI Report, pg. 15, ¶57. Donald Deland has five living siblings: Kathy Buckley, 46, who is married with three children and resides in Fredonia, New York; James Deland, 45, who resides in Brockton, New York, works as a mechanic and is single with no children; Janet Worth, 41, who is married with three children, works as a massage therapist and resides in Richardson, Texas; Kenneth Deland, 38, who is married with two children, manages a restaurant and resides in Tonawanda, New York; and Julie McFarland, 37, who is divorced with two children, owns an animal boarding center and resides in Fredonia, New York. See PSI Report, pg. 16, ¶58. Donald Deland also had a brother Thomas, who in 1973 died as a result of an automobile accident at the age of 10. See id.

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Donald Deland has three children: Morgan Lowry, 11, who resides with his ex-wife, an enrolled member of the Seneca Indian Nation; and Cameron (6) and Payton (5) Deland, born as a result of a romantic relationship with his fiancée, Vanessa Smith. Cameron and Payton live with Donald Deland and Vanessa Smith.

A. Donald Deland Acts As A Foster Parent.

Donald Deland and his fiancée Vanessa Smith are also the foster parents of Danielle Smith, who is seven years old. Danielle Smith is the daughter of Vanessa Smith's sister, Brandy Smith. Danielle has been raised by Donald and his fiancée since she was two years old. Danielle's mother Brandy Smith has not visited with Danielle in approximately three years. Donald and his fiancée perform all parental duties for Danielle. See PSI Report at pg. 18, ¶67.

B. Donald Deland Was A Former All-American Football Player At The University Of California And Subsequently Played Professional Football With Various NFL Teams, Including The Buffalo Bills And Dallas Cowboys.

In 1979, Donald Deland attended the University of California on a football scholarship. See PSI Report at pg.16-17, ¶60 & pg.21, ¶81. While at the University of California, he received the distinguished honor of All-American. As a result of his exceptional football skills, Donald Deland was invited to various NFL camps. Donald Deland played for various teams at the professional level, including the Buffalo Bills and Dallas Cowboys.

C. Donald Deland Was A Cadet At The California State Police Department.

While attending the University of California, Donald Deland was employed by the California State Police Department as a cadet. Donald Deland worked in this capacity until he began tryouts for various NFL teams. See PSI Report at pg.24, ¶93.

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III. THE "LAW OF THE CASE," ESTABLISHED BY YOUR HONOR AT THE SENTENCING OF CO-DEFENDANT'S SIMON MOSHEL AND MICHAEL MOSHEL, GOVERNS THE ISSUE OF VALUATION.

Under the law of the case doctrine, a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation. See In re PCH Assocs., 949 F.2d 585, 592 (2d Cir, 1991). The doctrine posits that when a court decides a rule of law, that decision should continue to govern the issues in subsequent stages in the same case. See id.

Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continual lawsuit. See id.

In the instant case, the issue of valuation of the infringed cigarettes affected all defendants. During the sentencing of Donald Deland's co-defendants, Simon Moshel and Michael Moshel, Your Honor made a determination that the valuation of the infringed cigarettes was indecipherable. As a result of Your Honor's determination, Simon Moshel received a significant reduction in sentence from his plea agreement. His plea agreement carried a range of 46 to 57 months imprisonment, but he was subsequently sentenced to 20 months imprisonment. Additionally, Michael Moshel, pursuant to a plea agreement, had a range of 30 to 37 months imprisonment and was sentenced to one year and one day imprisonment.

Similarly, the issue of valuation of the infringed cigarettes also plays a pivotal role in the sentencing of Donald Deland, who pursuant to a plea agreement, is facing a sentence of 37 to 46 months imprisonment. It is respectfully asserted that Your Honor's decision as to valuation of the infringed cigarettes, with respect to Simon Moshel and Michael Moshel, became binding precedent and should be followed when sentencing Donald Deland in order to "maintain consistency."

Therefore, it is respectfully requested that Your Honor impose a non-guidelines sentence of 366 days imprisonment for the same reasons stated at the sentencing of co-defendant's Simon Moshel and Michael Moshel. This request is supported by the fact that Donald Deland purchased the cigarettes through the importers. For the most part the cigarettes were not saleable

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and returned by purchasers. Mr. Deland also purchased significantly less amounts than Simon Moshe, who arranged the importation of all five shipments of the counterfeit cigarettes as well as counterfeit Duracell batteries. In fact, the PSI Report states that Donald Deland was only involved in shipments two, three and five. See PSI Report, Pg.11, ¶35.

IV. DONALD DELAND'S SENTENCE IN THE INSTANT CASE IS RELATED TO HIS SENTENCE IN THE WESTERN DISTRICT OF TEXAS AND SHOULD RUN CONCURRENT.

On December 11, 2003, while the instant case was ongoing, Donald Deland was indicted in the Western District of Texas and charged with conspiracy to import counterfeit cigarettes and knowingly use a counterfeit mark on or in connection with the cigarettes, conspiracy to commit wire and mail fraud and aiding and abetting.

On January 14, 2005, Donald Deland pled guilty pursuant to a **cooperation agreement**. On April 21, 2005, he was sentenced and received a term of Twenty-Four months imprisonment.

For reasons more specifically delineated below, it is respectfully requested that Your Honor find that the previous case in the Western District of Texas is related to the instant case and impose a concurrent sentence.

A. Donald Deland Cooperated With The United States Attorney's Office In The Western District Of Texas.

Attached hereto as "Exhibit C," is a copy of the Motion for a Downward Departure pursuant to U.S.S.G. §5K1.1 filed by the Government on April 15, 2005, requesting a lower sentence for Donald Deland based on the timely and useful information he provided.

Shortly after his arrest in the Western District of Texas, Donald Deland agreed to cooperate with the Government and assist them in proving their case against the other indicted co-conspirators. Donald Deland was debriefed with Texas counsel, many times by special agents from the U.S. Immigration and Customs Enforcement and provided truthful and complete information regarding not only his participation in the charged offenses, but also relevant facts relating to his co-defendants.

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Additionally, as a result of Donald Deland's willingness to testify at trial, the lead defendant in the case agreed to plead guilty.

It is respectfully requested that Donald Deland's cooperation with the Government and subsequent willingness to testify be recognized as extraordinary acceptance of responsibility and be considered when determining the issue of a concurrent sentence.

B. Donald Deland Voluntarily Cooperated With The United States Attorney's Office For The Western District Of New York.

Upon information and belief, Donald Deland, *on his own and without counsel, subject to solicitation from Special Agent John Murnane of the ATF office out of Buffalo, New York (Western District of New York)*, agreed to be debriefed by officials of the Bureau of Alcohol, Tobacco, Firearms and Explosives and has provided them with useful information.

Attached hereto as "Exhibit D" is a letter written by Assistant U.S. Attorney Anthony M. Bruce to Assistant U.S. Attorney Stephen Garcia, verifying Donald Deland's voluntary cooperation with his office in the Western District of New York. The letter states, in relevant part:

...Mr. Deland provided information on the following subjects:

- The names of Internet cigarette sellers who had closed their sites.
- The names of internet cigarette sellers who remained open and how they proposed to get around the recent credit card ban, telling the agents that an individual with some ten (10) offshore accounts linked to U.K. porn sites would allow payments to be made to these accounts and then he would route the funds back to reservation internet sites for a fee (factoring).
- Information about a firearms trafficker on the Cattaraugus Indian Reservation.

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Special Agent Dickey told me the information Mr. Deland provided 'had value' and 'merited further investigation.'

Such actions by Donald Deland clearly show that he has accepted responsibility for his past actions and is focused on becoming a productive and law abiding citizen.

C. Donald Deland's Case In Texas And The Instant Case Are Related, As They Resulted From Offenses That Were Part Of A Single Common Scheme Or Plan.

Donald Deland's conviction in the Western District of Texas is a "prior related sentence" as defined U.S.S.G. §4A1.2(a). As a result, Donald Deland is still in Criminal History Category I and is entitled to a concurrent sentence pursuant to U.S.S.G. §5G1.3(c).

Prior convictions are "related" if they result from offenses that were part of a common scheme or plan. See U.S.S.G. §4A1.2. Appl. Note 3. The Guidelines offer no definition for "common scheme or plan." See United States v. Brothers, 316 F.3d 120 (2d Cir. 2003). However, among the relevant factors in determining whether various convictions are part of a common scheme or plan include the following: (1) the time period within which the offenses took place, see United States v. Rappaport, 999 F.2d 57 (2d Cr. 1993); (2) the participants involved, see United States v. LaBarbara, 129 F.3d 81 (2d Cir. 1997); (3) the victims targeted, see United States v. Bauers, 47 F.3d 535 (2d Cir. 1995); (4) the motive, see LaBarbara, 129 F.3d at 86; (5) the modus operandi, see Rappaport, 999 F.2d at 60; and (6) the substantive offenses committed, see LaBarbara, 129 F.3d at 86.

It is respectfully asserted that the prior conviction is "related" because the instant offense and the Texas offense occurred during the same time period. The Texas indictment charges that the acts occurred from on or about July 2000, continuing through December 2003. The instant offense charges that the offense conduct occurred from August 2000 until February 2003. The two cases also share similar participants, as Donald Deland's co-defendant's Timothy Farnham and Scott Snyder are also charged in both indictments.

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Additionally, both cases targeted the tobacco companies as victims and shared the same motive and modus operandi of buying counterfeit cigarettes at discounted prices so that they could be sold at a competitive price.

Finally, both cases share the same substantive offenses of conspiracy to smuggle cigarettes into the U.S. and trafficking in contraband cigarettes/goods in violation of 18 U.S.C. §§ 371, 545, 2342(a) and 2320(a).

D. A Concurrent Sentence Pursuant To U.S.S.G. 5G1.3(c) Is Proper.

Since both offenses are "related" it is respectfully asserted that a concurrent sentence is proper, pursuant to U.S.S.G. §5G1.3(c).

Section 5G1.3(c) states that in order to achieve a reasonable punishment and avoid unwarranted disparity, the Court should consider the factors in 18 U.S.C. 3553(a) and be cognizant of: (1) the type and length of the prior undischarged sentence; (2) the time served on the undischarged sentence and the time likely to be served before release; (3) the fact that the prior undischarged sentence may have been imposed in state court rather than federal court, or at a different time before the same or different federal court; and (4) any other circumstance relevant to the determination of an appropriate sentence for the instant offense. See U.S.S.G. §5G1.3, Appl. Nl. 3.

It is respectfully requested that Your Honor, when reviewing the above-listed factors, consider Donald Deland's cooperation in both the Western District of Texas and the Western District of New York, along with his admirable history and characteristics, which include his role as a foster parent, his distinguished accomplishments as a college and professional football player, and his willingness to accept responsibility for his actions. These considerations speak volumes of Donald Deland's ability to rehabilitate and become a productive member of society.

Finally, defense counsel has been informed on numerous occasions by Rebecca Estrada, Esq., Donald Deland's attorney in Texas that the Honorable Phillip Martinez would impose a

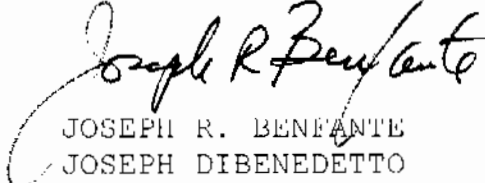
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concurrent sentence and has indicated such in Donald Deland's Judgment of Conviction.

VI. CONCLUSION

For the aforementioned reasons, it is respectfully requested that Your Honor sentence Donald Deland to a "non-guidelines" sentence of 366 days imprisonment, to run concurrent with his sentence in the Western District of Texas, after considering the guidelines and the enumerated factors in 18 U.S.C. 3553(a).

Respectfully submitted,


JOSEPH R. BENFANTE
JOSEPH DIBENEDETTO

cc: Debra D. Newman,
Assistant United States Attorney

EXHIBIT "A"

Court Exhibit
"3"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - -X

UNITED STATES OF AMERICA

PLEA AGREEMENT

- against -

03 CR 328 (RJD)

DONALD DELAND,

Defendant.

- - - - -X

Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States Attorney's Office for the Eastern District of New York (the "Office") and DONALD DELAND (the "defendant") agree to the following:

1. The defendant will plead guilty to count 1 of the above-captioned indictment, charging a violation of 18 U.S.C. §§ 371. The count carries the following statutory penalties:

- a. Maximum term of imprisonment: 5 years (18 U.S.C. § 371).
- b. Minimum term of imprisonment: 0 years (18 U.S.C. § 371).
- c. Maximum supervised release term: 3 years, to follow any term of imprisonment; if a condition of release is violated, the defendant may be sentenced to up to 2 years without credit for pre-release imprisonment or time previously served on post-release supervision (18 U.S.C. §§ 3583 (b), (e)).
- d. Maximum fine: \$250,000. (18 U.S.C. § 371).
- e. Restitution: none.

f. \$100 special assessment
(18 U.S.C. § 3013).

g. Other penalties: none

2. The defendant's sentence is governed by the United States Sentencing Guidelines. The Office will advise the Court and the Probation Department of information relevant to sentencing, including criminal activity engaged in by the defendant, and such information may be used by the Court in determining the defendant's sentence. Based on information known to the Office at this time, the Office estimates the likely adjusted offense level under the Sentencing Guidelines to be level 21, which is predicated on the following Guidelines calculation:

Base Offense Level (2B5.3(a))	8
Plus: Manufacture/importation of infringing items (2B5.3(b)(2))	+2
Infringement amount (more than \$1 million (2B1.1(b)(1)(J))	+16
Less: Acceptance of responsibility (3E1.1)	-3
Global disposition (5K2.0) (see ¶7 herein)	<u>-2</u>
Adjusted offense level	21

This level carries a range of imprisonment of 37 to 46 months, assuming that the defendant has no prior convictions.

3. The Guidelines estimate set forth in paragraph 2 is not binding on the Office, the Probation Department or the Court. If the Guidelines offense level advocated by the Office, or determined by the Probation Department or the Court, is

different from the estimate, the defendant will not be entitled to withdraw the plea. At the request of defense counsel, the government has agreed before sentencing to hear from counsel as to the defendant's view of the correct Guidelines calculation.

4. The defendant will not file an appeal or otherwise challenge the conviction or sentence in the event that the Court imposes a term of imprisonment of 46 months or below. This waiver is binding on the defendant even if the Court employs a Guidelines analysis different from that set forth in paragraph 2. The defendant waives all defenses based on the statute of limitations and venue with respect to any prosecution that is not time-barred on the date that this agreement is signed in the event that (a) the defendant's conviction is later vacated for any reason, (b) the defendant violates this agreement, or (c) the defendant's plea is later withdrawn. The defendant waives any right to additional disclosure from the government in connection with the guilty plea. The defendant agrees that with respect to all charges referred to in paragraphs 1 and 5(a) he is not a "prevailing party" within the meaning of the "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), and will not file any claim under that law. The defendant agrees to pay the special assessment by check payable to the Clerk of the Court at or before sentencing.

5. The Office agrees that:

- a. no further criminal charges will be brought against the defendant for trafficking in counterfeit cigarettes between 2000 and 2003

or failing to pay applicable tax on such cigarettes, it being understood that this agreement does not bar the use of such conduct as a predicate act or as the basis for a sentencing enhancement in a subsequent prosecution including, but not limited to, a prosecution pursuant to 18 U.S.C. §§ 1961 et seq., and at the time of sentence, it will move to dismiss open counts of the indictment and any preceding indictments with prejudice;

and, based upon information now known to the Office, it will

- b. take no position concerning where within the Guidelines range determined by the Court the sentence should fall;
- c. make no motion for an upward departure under the Sentencing Guidelines.

If information relevant to sentencing, as determined by the Office, becomes known to the Office after the date of this agreement, the Office will not be bound by paragraphs 5(b) and 5(c). Should it be judged by the Office that the defendant has violated any provision of this agreement, the defendant will not be released from the plea of guilty but this Office will be released from its obligations under this agreement, including but not limited to (a) not to oppose a downward adjustment under the Guidelines of three levels for acceptance of responsibility described in paragraph 2 above, and (b) the provisions of paragraph 5 (a)-(c).

6. This agreement does not bind any federal, state, or local prosecuting authority other than the Office, and does not prohibit the Office from initiating or prosecuting any civil or

administrative proceedings directly or indirectly involving the defendant.

7. This agreement is conditioned upon the following: all defendants charged in the above-referenced indictment ("the covered defendants") pleading guilty on or before October 1, 2003, and acceptance of those pleas by a United States District Court Judge or a recommendation by a United States Magistrate Judge that the guilty pleas be so accepted. The covered defendants are:

Simon Moshel
Michael Moshel
Donald Deland
Scott Snyder
Timothy Farnham and
Robert Berardelli.

If fewer than all of the covered defendants satisfy the conditions of this paragraph, or if any of the covered defendants subsequently seeks to withdraw his guilty plea, the Office, in its sole discretion, may elect to void any or all of the covered defendants' plea agreements and proceed to trial. The Office may also elect not to recommend any reduction under the Guidelines for a global disposition. No covered defendant will have the right to withdraw his guilty plea in any of those circumstances.

8. No promises, agreements or conditions have been entered into by the parties other than those set forth in this agreement and none will be entered into unless memorialized in writing and signed by all parties. This agreement supersedes all prior promises, agreements or conditions between the parties. To

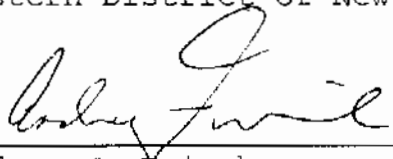
become effective, this agreement must be signed by all signatories listed below.

Dated: Brooklyn, New York

October 1, 2003

ROSLYNN R. MAUSKOPF
United States Attorney
Eastern District of New York

By:



Andrew J. Frisch
Assistant United States Attorney

Approved by:



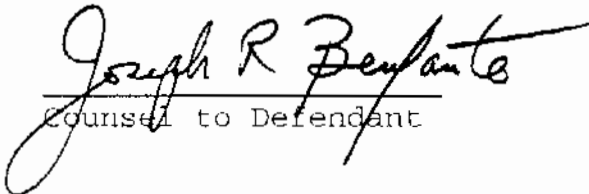
Supervising Assistant U.S. Attorney

I have read the entire agreement and discussed it with my attorney. I understand all of its terms and am entering into it knowingly and voluntarily.



Defendant

Approved by:



Counsel to Defendant

EXHIBIT "B"



U.S. Department of Justice

United States Attorney
Eastern District of New York

RTF:DDN:cc
E. # 2003R00419

One Pierrepont Plaza
Brooklyn, New York 11201

Mailing Address: 147 Pierrepont Street
Brooklyn, New York 11201

March 10, 2005

Honorable Raymond J. Dearie
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Simon Moshel
and Michael Moshel
Criminal Docket No. 03-328(RJD)

Dear Judge Dearie:

The above-referenced defendants in this counterfeit Marlboro cigarettes trafficking conspiracy case are scheduled to be sentenced by this Court on Tuesday, March 15, 2005, at 11:00 a.m. In a Pre-Sentencing Memorandum dated February 28, 2005, ("Simon Moshel Memo") the defendant Simon Moshel objects to the Offense Level calculated in his Pre-Sentence Report ("PSR"). Specifically, the defendant advances the following: (1) he should receive a 2 level downward adjustment for a global plea disposition; (2) he should not be held responsible for an 18 level upward adjustment for an infringement amount exceeding \$2.5 million, pursuant to United States Sentencing Guidelines ("U.S.S.G.") §§ 2B5.3(b) and 2B1.1(b)(1)(K); (3) he should not be held responsible for a 2 level upward adjustment for conscious or reckless risk of serious bodily injury, pursuant to U.S.S.G. § 2B5.3(4)(A); (4) he is entitled to downward departures for alleged substantial assistance to the victim cigarette company and alleged extraordinary good works and charity in the community, and (5) he should receive a "non-guidelines sentence of probation". The government agrees that the defendant should receive a 2 level downward adjustment for a global plea disposition and should not receive a 2 level upward adjustment for conscious or reckless risk of serious bodily injury. The government respectfully submits this letter in opposition to the remaining challenges of the defendant. For the reasons set forth below, the defendant Simon Moshel's adjusted offense level is 23

and a Guidelines sentence range of imprisonment of between 46 to 57 months is both reasonable and appropriate.

In a Pre-Sentence Memorandum dated January 6, 2005 ("Michael Moshel Memo") and sentencing letter dated February 28, 2005 ("Michael Moshel Let."), the defendant Michael Moshel objects to the Offense Level in his PSR. Michael Moshel argues the following: (1) he is not responsible for the 16 level upward adjustment for an infringement amount exceeding \$1 million pursuant to U.S.S.G., §§ 2B5.3(b) and 2B1.1(b)(1)(1); (2) he is entitled to downward departures for charitable contributions to his community and because the circumstances of his offense allegedly falls outside the heartland of a typical trademark infringement case, and (3) he should receive a non-guidelines sentence of "house arrest, probation and community service". The government opposes each of the challenges made by defendant Michael Moshel. In addition, contrary to the PSR, the government requests that the defendant receive a 2 level downward adjustment for a global plea disposition and not receive a 2 level upward adjustment for conscious or reckless risk of serious bodily injury. (PSR ¶ 45). For the reasons set forth below, the defendant Michael Moshel's adjusted offense level is 19 and a Guidelines sentence range of imprisonment of between 30 to 37 months is both reasonable and appropriate.

A. Background

The facts surrounding this counterfeit Marlboro cigarette trafficking case are set forth in the PSR and Complaint. In summary, in or about and between August 2000 and February 2003, the defendant Simon Moshel arranged to smuggle five shipping containers of counterfeit Marlboro cigarettes ("Marlboros") from China to the United States. (Complaint ¶ 2). On November 27, 2000 the first container of Marlboros arrived from China into the Port of Newark, New Jersey. (Complaint ¶ 16). Inspection of the container by the Customs Service revealed that it contained 360 cases (boxes) of Marlboro cigarettes concealed by 20 cartons of kitchenware. The shipping manifest falsely identified the contents of the container as 455 cartons of plastic kitchen pots. (Complaint ¶ 16). Custom Service inspection further revealed that each case of Marlboros contained 100 retail-sized cartons of Marlboros. Each carton contained 10 packs of Marlboros. (Id.) The Marlboros were packaged with the Marlboro trademark as if they were genuine Marlboros. Id. Customs agents proceeded to conduct a controlled delivery of the shipment. After the controlled delivery of the first shipment, an undercover Customs agent was introduced into the smuggling scheme as a corrupt owner of a Brooklyn trucking business. The

additional four shipping containers of Marlboros were again monitored by Customs after the shipments arrived in the United States from China. Upon arrival in the United States, the shipping containers were taken to an undercover Customs warehouse. (Complaint ¶ 4). As the undercover investigation progressed, two conspirators who participated in the smuggling scheme were arrested and began to cooperate. Defendant Simon Moshel was identified as the individual who arranged for the shipments. Undercover videotaped and audio taped conversations of Simon Moshel confirmed his role in the Marlboro smuggling scheme. In addition, Simon Moshel was recorded discussing his business of smuggling counterfeit Duracell batteries. (Complaint ¶¶ 31, 32).

Simon Moshel's brother, the defendant Michael Moshel, assisted in the smuggling and trafficking of the counterfeit Marlboros. (Complaint ¶ 9). During undercover tape-recorded conversations, Michael Moshel discussed arrangements for the fourth and fifth shipments of Marlboros and reviewed the false shipping invoices for those two shipments with the cooperating coconspirator. (Complaint ¶ 42). In addition to confirming delivery of the fourth and fifth shipments of Marlboros with the cooperator, Michael Moshel personally supervised the collection of the Marlboros contained in the fourth shipment. (Complaint ¶¶ 44-50).

The undercover investigation also disclosed the identities of other individuals who ultimately received, for sale to the public, most of the other quantities of Marlboros contained in the five shipments. Co-defendants Doland, Snyder and Faruham received the Marlboros for resale through entities located on the Seneca Indian Nation Cattaraugus Reservation, including the "Double D Smokeshop" located on the Reservation and a website known as "Smokemcheap.com" through which Marlboro cigarettes were sold on the Internet. (Complaint ¶¶ 12, 40).

Simon Moshel

- B. A Guidelines Sentence Range of Imprisonment of Between 46 to 57 Months is Both Reasonable and Appropriate For Defendant Simon Moshel

While the Guidelines are now advisory to the sentencing court rather than mandatory, the sentencing court must continue to take the Guidelines into account. Booker v. United States, 125 S.Ct. 738, 757, 764-65 (Jan. 12, 2005). As the Second Circuit held, "sentencing judges remain under a duty with respect to the Guidelines not the previously imposed duty to apply the

Guidelines, but the continuing duty to 'consider' them, along with other factors listed in section 3553 (a)." United States v. Crosby, 397 F.3d 103, 111 (2d Cir. 2005). "In order to fulfill this statutory duty to 'consider' the Guidelines, a sentencing judge will normally have to determine the applicable Guidelines range." Id. Crosby further specified that the sentencing court must consider the specific Guidelines range applicable to the defendant, "including departure authority." Id. at 112. Thus, "[T]he applicable Guidelines range is normally to be determined in the same manner as before Booker/Fanfan." Id.

Contrary to Simon Moshel's claim that Booker requires the sentencing court to employ a different standard of proof and determine the Guidelines range based upon proof of facts "beyond a reasonable doubt." (Simon Moshel Memo p. 29), as stated above, the Crosby Court held that the Guidelines range is to be determined "in the same manner as before Booker/Fanfan." Id. (emphasis added). The Second Circuit further specified that "the traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth Amendment objection." Id.

1. Simon Moshel is Accountable For an Infringement Amount of More than \$2.5 Million

Simon Moshel objects to the PSR's calculation of an 18 level adjustment for an infringement amount of more than \$2.5 Million, pursuant to U.S.S.G. §§ 2B5.3(b) and 2B1.1(b)(1)(K). (PSR ¶¶ 31, 43) (Simon Moshel Memo p. 29).

Moshel recognizes that pursuant to U.S.S.G. § 2B5.3, Commentary Application Note 2(A), the infringement amount is the retail value of the infringed item (genuine trademarked Marlboros), multiplied by the number of infringing items (counterfeit Marlboros) in any case, "where the infringing item is or appears to a reasonably informed purchaser to be identical or substantially equivalent to the infringed item." (Simon Moshel Memo p. 32). However, Moshel claims that the counterfeit Marlboros in this case were "unmistakenly inferior" to the genuine Marlboros. Id. at 30. Moshel claims that "there was simply no similarity of packaging." Id. He also argues that "the boxes were lacking the requisite tax stamp showing that state and local exercise taxes had been collected." (Id. at 40-41).

The counterfeit Marlboros in this case were packaged as genuine Marlboros. These shipments were inspected by Customs during this undercover operation. Photographs of the counterfeit

Marlboros reveal that they were packaged as genuine Marlboros. (See Exhibit 1). Sample cartons and packs of the seized counterfeit Marlboros are provided to the Court as Exhibit 2.¹ In an attempt to avoid the similarity of the packaging in this case, Moshel clings to an excerpt from the tape-recorded conversation pertaining to a small portion of the Fifth Shipment. As set forth in the Complaint, when Deland opened and inspected a few cartons in some of the 200 boxes he collected on October 31, 2002, Deland complained that some of the cigarettes were not packaged in Marlboro "boxes." The cigarettes were packaged in Marlboro packs and Marlboro cartons. Deland's complaint pertained only to a small portion of the "boxes" containing the cartons and packs of cigarettes. Moreover, as Deland also stated, even that minor complaint would be cured allowing for his resale of the cigarettes as genuine Marlboros. Deland immediately stated that he had genuine boxes of Marlboros to use as substitutes, "but I got Philip Morris boxes." (Complaint ¶ 55). Also unavailing is Moshel's current complaint concerning the absence of tax stamps. In this case, the bulk of these counterfeit cigarettes were to be sold in stores and through discount websites operating from Native American Reservations, where the absence of tax stamps would not deter sale to the public as genuine Marlboros. See e.g. Warren v. Pataki, 2002 WL 450056*2 (W.D.N.Y. 2002) (the effect of New York State Executive Orders "is that cigarette retailers located on Indian reservations can sell an unrestricted number of untaxed cigarettes without keeping records or reporting to the Department of Taxation and Finance."). Indeed, Deland boasted that he sold the Marlboros on his store shelves. (Complaint ¶ 56). Deland also sold Marlboros through his website "Smokencheap". A February 2003 printout of the retail price list for Deland's website reveals that Deland sold Marlboros for \$19 and \$21 per carton (duty free) and \$28 per carton (regular). (Exhibit 3). A printout of other discount websites selling Marlboros reveals that the retail internet price ranged from \$26.50 per carton to \$29.99 per carton. (See 2003 printout of "Cigarettes Tax Free.com" and "e.Smokes.com". Exhibits 4 & 5).

In addition, given the fact that Deland had a practice of "sampling" the counterfeit Marlboros before purchasing them and was a repeat purchaser, spending hundreds of thousands of dollars per shipment, it strains reason to suggest that the Marlboros were of "obviously inferior quality" as now claimed by Moshel. (See Complaint ¶¶ 39 and 40).

¹ This exhibit is available for inspection by the defendants, upon request.

As we show below, the government and Probation Department's calculation of the total infringement amount as \$4,112,500 based upon an average of 35,000 cartons of counterfeit Marlboros per shipment valued at \$23.00 per carton is conservative given the much higher number cartons of counterfeit Marlboros contained in the shipments.

Since these counterfeit cigarettes were seized by Customs during the undercover investigation, Customs counted the counterfeit Marlboros in each of the five shipments. Customs kept track of how many boxes of counterfeit Marlboros Moshel smuggled into the country and how many boxes were collected by the defendants during the controlled deliveries. See, Complaint ¶¶ 16, 20, 26, 27, 43, 47, 51 and 57). There were 100 cartons of Marlboros per box in the First, Second and Third Deliveries. (Complaint ¶ 16). In the Fourth and Fifth Deliveries, there were 60 cartons of Marlboros per box. The retail price per carton of Marlboros, during the time of this offense, was conservatively calculated by the government, as \$23.50 per carton. On July 22, 2002, during an undercover tape-recorded conversation, co-conspirator Berardelli stated that "before taxes the legitimate price is \$23.75" per carton of Marlboros. Philip Morris, in its victim impact statement, stated the wholesale price in 2000 was \$23.87 per carton. Using a conservative retail price of \$23.50 per carton (since "wholesale" was even slightly higher) the infringement amount would be as follows, based upon the actual amount of Marlboros that were smuggled into the country.

First Delivery:	360 boxes x 100 cartons = 36,000 cartons @23.50 per carton = \$846,000
Second Delivery:	400 boxes x 100 cartons = 40,000 cartons @23.50 per carton = \$940,000
Third Delivery:	372 boxes x 100 cartons = 37,200 cartons @23.50 per carton = \$874,200
Fourth Delivery:	740 boxes x 60 cartons = 44,400 cartons @23.50 per carton = \$1,043,400
Fifth Delivery:	759 boxes x 60 cartons = 45,540 cartons @23.50 per carton = \$1,070,190
Total Boxes:	2,631

Total Cartons: 203,140 @23.50 per carton = Total
Infringement Amount: \$4,773,790²

In reference to the number of cartons, even if there were only 50 cartons per box, in each of the five deliveries, the total infringement value would be \$3,091,425. In reference to the retail value, even if the value of the counterfeit Marlboros were measured by the lowest price per carton (\$19.00) Deland offered on his website, the infringement value would be \$3,859,660. Thus, under any conceivable conservative calculation, the infringement value exceeded \$2.5 Million in this case against Simon Moshel.

2. Simon Moshel's Guidelines Calculation

The government submits that Simon Moshel's Guidelines adjusted offense level is 23, based upon the following Guidelines calculation:

Base Offense Level (2B5.3(a))	8
Plus: Manufacture/importation of infringing items (2B5.3(b)(2))	+2
Infringement amount (more than \$2.5 million (2B1.1(b)(1)(K))	+18
Less: Acceptance of responsibility (3E1.1)	-3
Global disposition (5K2.0)	<u>-2</u>
Adjusted offense level	23

This level carries a range of imprisonment of 46 to 57 months, since the defendant is in Criminal History Category I.

The government agrees with the defendant's claim that he is entitled to a 2 level reduction for a global plea disposition. In addition, contrary to the PSR, since the government has no evidence that the specific counterfeit cigarettes in this case contained arsenic, contrary to the PSR,

² The number of boxes set forth in the Complaint were listed as approximate. The actual count listed above reflects a "29" box difference, which has no effect on the Guidelines calculation.

The government does not assign a 2 level increase for reckless risk of bodily injury, per U.S.S.G. § 2B5.3(b)(4)(4) (PSR ¶¶ 3, 45).

The PSR assigns a 2 level increase for obstruction of justice, since the defendant told his co-conspirators that he planned to kill one of the cooperating co-conspirators. Since the government has no evidence of what actions the defendant may have taken in regard to that threat, the government does not seek the enhancement. However, the fact that this defendant announced to his co-conspirators his plan to kill a witness should be taken into account by the Court when determining where within the Guideline range, as calculated above, the defendant's sentence should fall.

3. Downward Departure Is Not Warranted

Simon Moshel seeks a downward departure based upon alleged extraordinary acceptance of responsibility. (Simon Moshel Memo pp. 47-49). He claims that his "full cooperation" with Philip Morris qualifies for such a departure. The Court should reject this claim.

Moshel's reliance upon United States v. Mickens, 926 F.2d 1323 (2d Cir. 1991) and United States v. Rogers, 972 F.2d 489 (2d Cir. 1992) in support of a downward departure for alleged extraordinary acceptance of responsibility is misplaced. As the Court stated in Rogers "[T]he rationale of Mickens is that a defendant who realizes his wrongdoing and acts quickly to accept culpability for his crime may deserve more favorable treatment than one who only agrees to plead guilty in the face of a forcible arrest and federal prosecution." Id. at 493. In Rogers, the defendant had committed a bank robbery while high on crack and voluntarily turned himself in the next day, in hopes that prison drug rehabilitation would cure his addiction. Here, Moshel was forcibly arrested and his response was to threaten the life of a government witness. Moshel is clearly not deserving of such a departure. Moshel's alleged cooperation with Philip Morris is of no import. Philip Morris is not a law enforcement agency. Moreover, Moshel never provided sufficiently detailed or useful information to Philip Morris regarding counterfeit cigarette smuggling. Moshel's general statements concerning the extent of counterfeit cigarette manufacturing in China were not significant. He did not identify traffickers in this country and claimed he only knew the alias' of his confederates in China. When asked about British Customs surveillance of his brother Michael Moshel meeting with suspected cigarette smugglers in

Europe, Moshel did not respond.³ (Moshel Deposition pp. 42-43, Exhibit K to Simon Moshel Memo).

Neither is Moshel entitled to a downward departure for alleged extraordinary good works and acts of charity. (Simon Moshel Memo p. 49). Under the 2002 Guidelines used in this case, charitable and prior good works are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. U.S.S.G. § 5H1.6. Moshel's alleged good works should not be deemed extraordinary. Moshel's claim that he should benefit from an alleged extraordinary life he has lived, ignores his history of pervasive counterfeit goods trafficking. While Moshel now claims he was enticed into this smuggling operation by a co-conspirator, during Moshel's undercover tape-recorded conversations, he stated to that co-conspirator and the undercover agent, "I'm the boss." (Complaint ¶¶ 32 and 33). When Moshel was detained by German authorities in April 2002, he possessed additional shipping documents alleging transportation of kitchen-ware from China. (Complaint ¶ 8 and shipping documents Exhibit 9). Moshel had told the cooperating coconspirator that he smuggled counterfeit cigarettes in Europe, including Germany. Moshel also admitted his history of smuggling counterfeit batteries. (Complaint ¶¶ 31 and 32). Moreover, Moshel is a defendant who readily engaged others into his criminal activities, including his brother.

In sum, Moshel is not entitled to a downward departure.

4. A Guidelines Sentence of Imprisonment
Between 46 to 57 Months Is Reasonable

In his final argument for reduction in sentence, Simon Moshel claims that the factors in 18 U.S.C. § 3553(a) support a non-guidelines, non-incarceratory sentence. (Simon Moshel Memo p. 51). This argument is without merit. In light of the factors set forth in 18 U.S.C. § 3553(a), a Guidelines sentence of 46 to 57 months incarceration is reasonable.

Under U.S.C. § 3553(a), the sentence imposed in a particular case must, among other things, reflect the seriousness of the offense, promote respect for the law, provide just punishment, and prevent unwarranted sentencing disparities. Here, given the extensive scope of the defendant's counterfeit

³ The 2003 Guidelines prohibit departures based upon extraordinary acceptance of responsibility. U.S.S.G. § 5K2.0(d) (2).

cigarette smuggling offense, his additional counterfeit batteries trafficking; and the need to prevent unwarranted sentencing disparities, the above-referenced Guidelines sentence is reasonable.

C. A Guidelines Sentence Range of Imprisonment of Between 30 and 37 Months is Both Reasonable and Appropriate for Defendant Michael Moshel

As we show below, Michael Moshel's applicable Guideline adjusted offense level is 19 which carries a range of imprisonment of 30 to 37 months, since Michael Moshel is in Criminal History Category I.

1. Michael Moshel Is Accountable For an Infringement Amount of More Than \$1 Million

Michael Moshel objects to the PSR's calculation of a 16 level adjustment for an infringement amount of more than \$1 Million, pursuant to U.S.S.G. §§ 2B5.3(b) and 2B1.1(b)(1)(K). (PSR ¶¶ 31, 43) (Michael Moshel Memo pp. 18-39).

Michael Moshel claims he is only responsible for the Fourth Delivery not both Fourth and Fifth Deliveries as calculated in his PSR. Here, the defendant claims "although he was aware of the fifth delivery, such knowledge does not itself suffice to hold Michael criminally accountable for the goods delivered in the shipment." (Michael Moshel Memo p. 19). He claims that he "had absolutely" no role in arranging for or executing the Fifth Shipment and was "unaware of the source of the cigarettes". (Michael Moshel Memo p. 25). Michael Moshel's criminal involvement with the Fifth Delivery surpassed mere knowledge. On October 4, 2002, he and his brother met with the cooperating coconspirator and made arrangements for both the Fourth and Fifth Shipments. (Complaint ¶ 42). During that videotaped meeting, Michael Moshel reviewed the false shipping documents for both shipments cooperator. Those documents falsely identified the shipments as "Kitchen Plastic Containers". (Exhibits 6 and 7). Initially, both shipments were expected to arrive within three or four days of each other. Michael Moshel reviewed the documents and confirmed the expected delivery dates for both counterfeit shipments. He is appropriately accountable for both shipments.

Next, Michael Moshel argues, as does his brother, that the counterfeit Marlboros in this case were "inferior to the genuine goods" and as such, the infringement calculation should

not be based upon the retail value of genuine Marlboros. (Michael Moshel Memo p. 27-39). As the government established above, this argument lacks merit. Accordingly, as set forth above, Michael Moshel is appropriately accountable for an infringement amount of \$2,113,590 based upon a calculation of the number of cartons of Marlboros per shipment valued at \$23.50 per carton. In reference to the value of the cartons, even if the value is based on what Michael Moshel stated was the street value per carton (\$15.00) (See Michael Moshel Deposition p. 8), the infringement amount would be \$1,349,100.

2. Michael Moshel's Guidelines Calculation

The government submits that Michael Moshel's Guidelines adjusted offense level is 19, based upon the following Guidelines calculation:

Base Offense Level (2B5.3(a))	8
Plus: Manufacture/importation of Infringement items (2B5.3(b)(2))	+2
Infringement amount (more than \$1 million (2B1.1(b)(1)(J))	+16
Less: Acceptance of responsibility (3E1.1)	-3
Mitigating role (3B1.2(b))	-2
Global disposition (5K2.0) (See ¶ 7 herein)	<u>-2</u>
Adjusted offense level	19

This level carries a range of imprisonment of 30 to 37 months, since the defendant is in Criminal History Category I.

Contrary to the PSR, the government believes that the defendant is entitled to a 2 level reduction for a global plea disposition. Also contrary to the PSR, the government would not assign a 2 level increase for reckless risk of bodily injury, since the government has no evidence that the specific counterfeit cigarettes in this case contained arsenic. (PSR ¶ 45).

3. A Downward Departure Is Not Warranted

Michael Moshel seeks a downward departure based upon

alleged exceptional contributions to his community, his alleged atypical conduct in this offense and the infringement amount allegedly overstates the degree of harm. (Michael Moshel's Memo p. 40).

As shown above, the 2002 Guidelines deem prior good works as a discouraged basis for departure. U.S.S.G. § 5H1.11.⁴ Michael Moshel's good works with immigrants and his community, while commendable, should not be deemed extraordinary. Moreover, his conduct of smuggling counterfeit goods into this Country is not conduct which would portray him as a role model for immigrants. To the contrary, such conduct sends a harmful message to immigrants concerning corrupt business practices.

Also, unavailing is Michael Moshel's claim that his "conduct in this transaction differed substantially from the typical trademark counterfeiter". (Michael Moshel's Memo p. 86). On October 4, 2002, Michael Moshel was recorded discussing the operation's use of the criminal services of the undercover agent who had posed as a corrupt trucking warehouse owner. Michael Moshel voiced no concern about the conspiracy's use of such corrupt services. He merely complained that the individual was charging too much money for his unlawful services. This defendant knew that his smuggling and trafficking operation involved the corruption and criminal participation of numerous co-conspirators both inside and outside of this Country. Obviously, he knew the goods were being smuggled into the United States, as he reviewed the false invoices on October 4, 2002. Moreover, he exercised extremely "hands on" conduct during commission of his offense. He supervised the collection of the Fourth Delivery; used confederates to assist him in his collection of the delivery; verified the number of counterfeit cigarettes he received; and paid the cooperator for her purported corrupt services. See Complaint ¶¶ 43-50. Thus, Michael Moshel's conduct was typical of a corrupt counterfeit goods smuggler and trafficker. He is not entitled to a downward departure for alleged atypical behavior or conduct falling outside the "heartland" of counterfeit trafficking cases.

⁴ In 2003, the Guidelines further cautioned against such a basis for a departure by emphasizing that it should occur only in "exceptional cases" and only if the circumstance is present to an "exceptional degree". U.S.S.G. § 5K2.0, comment. (n.3(c)).

4. A Guidelines Sentence of Imprisonment of
Between 30 to 37 Months Is Reasonable

Michael Moshel argues that the "unique traits of the defendant and the offense" justifies a non-guidelines non-custodial sentence. (Michael Moshel Letter). He also points to his good work in the community and alleged cooperation with Philip Morris in support of his request for a non-guidelines sentence.

As shown above, Michael Moshel engaged in a series of typical counterfeit smuggling and trafficking conduct during his participation in this offense. In regard to his alleged cooperation with Philip Morris, Michael Moshel claimed in his disposition that when he purchased the counterfeit cigarettes, he "didn't know where to sell it"; "happen[ed]" to meet a man "in the park" who trafficked in cigarettes so Michael Moshel gave this man (whose name he could not remember) 120 cases of cigarettes without receiving money in advance and this unnamed man stole the counterfeit Marlboros from him. (Michael Moshel Deposition pp. 4-11 attached hereto as Exhibit 8). Clearly, his thin version of events could be of no import to Philip Morris.

Moreover, his alleged naivety is in stark contrast to his conduct captured during this undercover investigation. As shown above, Michael Moshel supervised the collection of the Fourth Delivery. He used the services of an associate to conduct counter-surveillance during his collection of the cigarettes and he even quickly noticed that out of 578 cases he collected, 14 cases were missing. He directed the undercover agent to deliver the 14 cases that same day. (Complaint ¶¶ 45-49).

As shown above, in light of the facts set forth in 18 U.S.C. § 3553(a), a Guidelines sentence of 30 to 36 months incarceration is reasonable.

Conclusion

The government submits that the Guidelines sentences set forth above are reasonable for defendants Simon Moshel and Michael Moshel.

Respectfully submitted,

ROSLYNN R. MAUSKOPF
United States Attorney

By: _____
Debra D. Newman
Assistant U.S. Attorney
(718) 254 6193

cc: All Counsel
U.S. Probation

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FILED
2005 APR 15 AM 10:25
CLERK, US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
DEPUTY

UNITED STATES OF AMERICA,

Plaintiff,

v.

DONALD DELAND,

True Name:

DONALD CAMERON DELAND,

Defendant.

2005 APR 15 10 25 AM '05

CAUSE NO.: EP-03-CR-2294 PRM (13)

MOTION FOR DOWNWARD DEPARTURE

Comes now the United States of America, by and through the United States Attorney and the undersigned Assistant United States Attorney for the Western District of Texas, and moves this Court for a downward departure from the applicable sentencing guideline range pursuant to Section 5K1.1 of the United States Sentencing Guidelines as well as Title 18, United States Code, Section 3553(e), in the above entitled and numbered cause. As grounds for such motion, the government states as follows:

1. On January 14, 2005, Defendant Donald Deland plead guilty to Count One of the indictment currently pending against him in the above entitled and numbered cause, charging him with a violation of Title 18, United States Code, §§ 371, 545, 2342(a) & 2320(a), namely: Conspiracy to: Smuggle Cigarettes into U.S., Traffic in Contraband Cigarettes and Traffic in Counterfeit Goods.

2. Defendant Donald Deland agreed to cooperate with the Government and with special agents from the U.S. Immigration and Customs Enforcement (ICE). Defendant Donald Deland has been debriefed by ICE special agents.

3. Defendant Donald Deland provided a truthful and complete statement to law enforcement agents, and fully cooperated and has agreed to continue to fully cooperate in the government's investigation.

4. Defendant Donald Deland provided, in good faith, such information relating to the

USA v. Donald Deland
Cause No.: EP-03-CR-2294 PRM (13)
Motion for Downward Departure
Page 2

circumstances surrounding his participation in the crime. Additionally, Defendant Donald Deland provided information about his co-defendants, including Jorge Abraham. Further, numerous co-defendants, including Defendant Donald Deland, cooperated with and assisted the Government, and as a result of these numerous co-defendants', including Defendant Donald Deland's, willingness to testify against Jorge Abraham, Jorge Abraham expressed his interest to enter a guilty plea in the charges pending against him and did enter a plea of guilty on December 15, 2004, in the above entitled and numbered cause.

5. Defendant Donald Deland's assistance was timely in that it occurred at a time that was still useful to the government.

6. In exchange for Defendant Donald Deland's assistance and cooperation the government has filed this Motion.

The Government, based on the foregoing, recommends to the Court that Defendant Donald Deland be awarded a two (2) level downward departure for his substantial assistance.

WHEREFORE, the Government respectfully requests that the Court find that Defendant Donald Deland has made a good faith effort to provide substantial assistance in the investigation and prosecution of the case and depart downward from the applicable sentencing guideline range.

Respectfully submitted,

JOHNNY SUTTON
United States Attorney

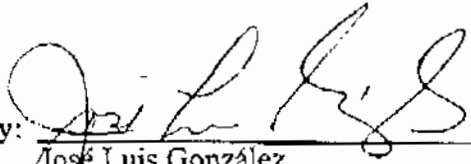
By: 

Jose Luis Gonzalez
Assistant U.S. Attorney
U.S. Attorney's Office
Texas Bar No. 08129200
700 E. San Antonio, Suite 200
El Paso, Texas 79901

USA v. Donald Deland
Cause No.: EP-03-CR-2294 PRM (13)
Motion for Downward Departure
Page 3

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2005, a copy of the foregoing was delivered to Ms. Rebecca Estrada, 521 Texas, El Paso, Texas, 79901 at Facsimile Number: (915) 533-5835, and to Ms. Angelica Vega, U.S. Probation Officer, U.S. Probation Office, Federal Building, 5th Floor, El Paso, Texas, 79901.

By: 

José Luis González
Assistant U.S. Attorney

EXHIBIT "D"

**U.S. Department of Justice***United States Attorney
Western District of New York**Federal Center
138 Delaware Avenue
Buffalo, New York 14202**716-843-5700
FAX 716-551-9052*

April 20, 2005

Stephen Garcia, Esq.
United States Attorney's Office
Southern District of Texas
700 East San Antonio
El Paso, TX 79901

Re: Don Deland

Dear Mr. Garcia:

I understand that Don Deland is to be sentenced shortly and that you have requested an outline of the cooperation he has provided in this district so that cooperation may be made known to the sentencing judge.

Special Agent Steven Dickey of the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) has told me that on two recent occasions, Mr. Deland was debriefed by officers and agents from the local Contraband Cigarette Diversion Task Force. In those debriefings, Mr. Deland provided information on the following subjects:

- The names of internet cigarette sellers who had closed their sites.
- The names of internet cigarette sellers who remained open and how they proposed to get around the recent credit card ban, telling the agents the agents that an individual with some ten (10) offshore accounts linked to U.K. porn sites would allow payments to be made to these accounts and then he would route the funds back to the reservation internet sites for a fee (factoring).
- Information about a firearms trafficker on the Cattaraugus Indian Reservation.

04/20/2005 08:40 FAX 7165513250

US ATTORNEY

Special Agent Dickey told me the information Mr. Deland provided "had value" and "merited further investigation."

This information is provided to you for whatever purpose it may serve. However, it is to be considered only as a factual recitation and should in no way be considered as this office's or BATFE's way of advocating a downward departure for Mr. Deland. That is a decision left solely to your office.

Thank you for your attention to this matter. Please feel free to call me with questions.

Very truly yours,

MICHAEL A. BATTLE
United States Attorney



BY: ANTHONY M. BRUCE
Assistant U.S. Attorney
Strike Force Chief

AMB/lfs