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SENTENCING MEMORANDUM ON BEHALF OF DEFENDANT
BEHR IRON & STEEL

COMES NOW Defendant Behr Iron & Steel, Inc. by and through the undersigned attorneys, and for its sentencing memorandum, states as follows:

I. Preliminary Statement

Behr Iron & Steel, Inc. (Behr) is a closely held corporation incorporated under the laws of Illinois in 1986 and headquartered in Rockford, Illinois. The company is a high volume ferrous and non-ferrous scrap processor with three hundred thirty five employees across its ten facilities in Illinois, Iowa, and Wisconsin.

The facility at issue in this case is located in South Beloit, Illinois, which recycles metals contained in items such as automobiles and refrigerators. It is at this Behr facility that Mr. Reynaldo Hernandez Ortega suffered his untimely and tragic death. Behr has accepted responsibility for the offense charged, a misdemeanor violation of 29 U.S.C. § 666(e), and regrets the tragic loss of Mr. Ortega's life.

From the outset, Behr took full responsibility for the tragic incident and took remedial measures. The company immediately cooperated fully with OSHA in its investigation and then entered in a Stipulation and Settlement Agreement with OSHA (the "OSHA Stipulation"), agreeing to abatement of thirty six OSHA violations and payment of a total fine of \$520,000. The OSHA Stipulation contains a number of other features that demonstrate Behr's commitment to responsible corporate citizenship, including consent to warrantless OSHA inspections until all penalties have been paid, company-wide safety and health orientation, and an internal safety and health committee.

Behr is also cognizant that no actions on its part can bring Mr. Ortega back, as Ms. Zoila Marquez de Hernandez's touching victim impact statement plainly shows. For its part, though,

Behr has taken steps to comfort Mr. Ortega's family to the extent it is able. As stated in the plea agreement, the government and Behr have proposed a sentence that will allow the company to make an immediate restitution payment to Mr. Ortega's family of \$350,000. The payment proposed in the plea agreement would be in addition to a payment of \$268,000 made under the workers' compensation settlement and an additional \$19,369 in workers' compensation expenses. In addition, Behr paid \$7,611 for funeral expenses, as well as a \$3,000 payment to the family immediately after the incident. Ms. Hernandez also continues to prosecute a civil action in the Circuit Court for the 17th Judicial Circuit, County of Winnebago.

The payments by Behr and the payment proposed in the plea agreement all serve a number of the purposes of United States sentencing, including retribution and deterrence. The company's remedial measures and cooperation with authorities demonstrate that the sentencing goal of rehabilitation would be served by a sentence of five years' probation, the proposed restitution payment and no additional fine. As a result of this matter, Behr has renewed its commitment to being a strong corporate citizen that provides a source of income to its more than three hundred hard-working employees.

On this basis, Behr respectfully requests that the Court impose a sentence of five years' probation, restitution in the agreed-upon amount to Mr. Ortega's family, and the supervision currently imposed pursuant to the OSHA Stipulation. Behr respectfully submits that any additional financial penalty would serve only to weaken the company's ability to continue its operations and pay its employees, an outcome that would be inconsistent with the sentencing goal to impose a sentence sufficient but not greater than necessary to achieve the purposes of United States sentencing.

II. Principles of Sentencing

Title 18, United States Code, § 3553(a)(1) directs sentencing courts to consider among other things the “nature and circumstances of the offense and the history and characteristics of the defendant.” Section 3553(a) also requires the courts “to impose a sentence sufficient but not greater than necessary to comply with the purposes” of United States sentencing: (1) retribution, (2) general deterrence, (3) specific deterrence, and (4) rehabilitation. 18 U.S.C. § 3553(a)(2); *See United States v. Gupta*, 904 F.Supp.2d 349, 354-55 (S.D.N.Y. 2012); *United States v. Adelson*, 441 F.Supp.2d 506, 514 (S.D.N.Y. 2006). Courts are also directed by § 3553(a) to take into account the types of sentences available, the United States Sentencing Guidelines (“the Guidelines”), and pertinent policy statements. 18 U.S.C. § 3553(a)(3)-(5). Congress also specifically highlighted the goal to avoid unwarranted sentence disparity among defendants with similar records who have been found guilty of similar conduct. 18 U.S.C. § 3553(a)(6). Finally, the statute charges courts with considering the importance of restitution in the United States criminal system. 18 U.S.C. § 3553(a)(7).

The Supreme Court has recommended that a specific multi-step process be followed in imposing sentence. First, “a court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” *Gall v. United States*, 552 U.S. 38, 49 (2007).

Thereafter,

[a]fter giving both parties an opportunity to argue for whatever sentence they deem appropriate, the [court] should then consider all the §3553(a) factors to determine whether they support the sentence requested by a party. In so doing, [the court] may not presume that the Guidelines range is reasonable.

Id. at 49-50. As such, federal courts enjoy broad discretion in fashioning sentences based on the unique attributes of the individuals or corporations that come before them. *Koon v. United States*, 518 U.S. 81, 113 (1996) (“the sentencing judge . . . [shall] consider every convicted person as an

individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue”); *Pepper v. United States*, -- U.S. --, 131 S.Ct. 1229, 1240 (2011) (“punishment should fit the offender and not merely the crime”).

Here, Behr has pleaded guilty to a Class B misdemeanor, so the sentencing guidelines do not apply.

The §3553(a) factors are consistent with a sentence of five years’ probation and no additional fine. This is true first because Behr has agreed to pay restitution to the family of Mr. Ortega in the amount of \$350,000, along with the other payments the company has made to Mr. Ortega’s family. Second, the OSHA Stipulation demonstrates significant rehabilitation and dedication on Behr’s part to renewing its standing as a good corporate citizen. The company provided full cooperation and agreed to a timely resolution of the OSHA violations and immediately abated all issues cited by OSHA. The compliance program, the enhanced training efforts, and the immediate abatement of all OSHA citations show remedial actions by the company to implement an effective employee safety program. Paying restitution and cooperating with the relevant government agencies also weigh in favor of a probationary sentence with no additional fine imposed.

III. The History and Characteristics of Behr Iron & Steel, Inc. Demonstrate that Probation with No Additional Fine Is an Appropriate Sentence.

The history and characteristics of Behr, including the tragic circumstances of Mr. Ortega’s death, reveal that five years’ probation with no additional fine would be a sentence sufficient but not greater than necessary to comply with the purposes of sentencing.

Again, Behr states at the outset that it recognizes the tragedy of Mr. Ortega’s death. As the elements of 29 U.S.C. § 666 and the plea agreement state, Behr admits that it willfully failed to provide lockout / tagout protection contrary to 29 C.F.R. § 1910.147.

Briefly, Behr wishes to state for the Court its position that its history and characteristics support the sentence it seeks in this memorandum. A closely held corporation since 1986, the company has provided employment to thousands of Illinois residents over the course of its operation. Currently, more than three hundred employees depend on Behr for their income. Behr's cooperation with authorities and entry into the plea agreement demonstrates that it has and will continue to dedicate itself to these important goals of the company. Behr respectfully submits that its history and characteristics support a sentence of five years' probation with no additional fine imposed.

IV. A Sentence of Probation Would Be Sufficient but not Greater than Necessary to Achieve the Purposes of United States Sentencing.

Section 3553(a)(2) enumerates the purposes of sentencing to be achieved by imposing "a sentence sufficient but not greater than necessary": (1) retribution, (2) general deterrence, (3) specific deterrence, and (4) rehabilitation.

Retribution is not an easy concept to apply in the context of corporate criminal liability, particularly in circumstances where Ms. Ortega and her children rightfully will mourn the loss of Mr. Hernandez for some time. Behr has made several significant payments to the victim's family in this matter, and an additional restitution payment of \$350,000, if the recommended sentence is accepted by the Court, will be made at sentencing. Along with the pending civil lawsuit Ms. Ortega has filed, this represents a significant financial penalty to the company. The company respectfully submits that this achieves the United States sentencing goal of retribution. Likewise, the purpose of general deterrence is achieved, as other companies may observe the consequences for Behr of its violation of 29 U.S.C. § 666.

The OSHA Stipulation clearly serves the United States sentencing goal of specific deterrence. The company has agreed, among other serious reforms, to warrantless OSHA

inspections. Moreover, the financial ramifications to Behr given the current business environment reinforce that this purpose has been met.

Rehabilitation is similarly a concept not easily applied to a corporation, but here Behr respectfully submits that its actions in this matter support a finding that this purpose of United States sentencing is achieved by the sentence it requests from this Court. Behr has agreed to remain subject to the OSHA Stipulation until all penalties have been paid. It has instituted company-wide safety and health orientation, and an internal safety and health committee. Together with the restitution and other payments to Ms. Ortega, the company respectfully submits that its actions demonstrate that a probationary sentence with no additional fine would achieve the sentencing purpose of rehabilitation.

V. A Sentence of Probation with No Addition Fine Would Achieve the Sentencing Goal of Avoiding Unwarranted Sentence Disparity among Defendants with Similar Records Who Have Been Found Guilty of Similar Conduct.

OSHA contains relatively few criminal provisions: (1) willful OSHA violation causing death to an employee, (2) giving advance notice of an OSHA inspection, and (3) knowingly making false statements in required documentation. 29 U.S.C. § 666(e)-(g); *United States v. Atlantic States Cast Iron Pipe Co.*, 627 F.Supp.2d 180, 193 (D. N.J. 2009) (citing limited OSHA criminal provisions); *United States v. Myr Group, Inc.*, 361 F.3d 364, 366 (7th Cir. 2004) (noting liability limitations under this statutory provision). As a result, there is not an abundance of legal precedent sentencing defendants under 29 U.S.C. § 666(e) for Behr Iron & Steel to direct the Court's attention toward.

The L.E. Myers Company is one organizational defendant that has been convicted under § 666(e), and was sentenced to probation for a term of three years. *United States v. The L.E. Myers Company*, Case No. 1:02-cr-01205, (N.D. Ill. December 8, 2005). There, the company was

similarly ordered to submit to OSHA inspections without warrant, to participate in ongoing monitoring, and to brief OSHA annually regarding the safety and health of the company's employees. In *L.E. Myers*, "the government alleged that L.E. Myers had failed to properly train its employees, improperly determined work-site conditions, failed to conduct a pre-job briefings of potential hazards, failed to ensure that employees were qualified for the work they were performing, failed to ensure that employees maintained a minimum safe-approach distance to energized power lines, and . . . failed to ensure proper use of grounding cables," which OSHA violations caused the deaths of two employees. *United States v. L.E. Myers Co.*, 562 F.3d 845, 849 (7th Cir. 2009). The government obtained conviction as to one of these deaths. *Id.* at 852. L.E. Myers, then, represents a defendant—albeit one whose exact record is unknown to counsel—found guilty of similar conduct as Behr. The sentence imposed there is analogous to that which the company seeks from this Court.

Moreover, unlike The L.E. Myers Company and certain other defendants in this circuit that have forced the government to prove their guilt beyond a reasonable doubt, Behr has been fully cooperative from the outset in this matter, and has accepted responsibility for this offense. *See, e.g., United States v. Ladish Malting Co.*, 135 F.3d 484, 491-92 (7th Cir. 1998).

A sentence consistent with the plea agreement would achieve the sentencing goal of avoiding unwarranted disparity among defendants with similar records who have been found guilty of similar conduct.

VI. A Sentence of Probation Would Achieve the Sentencing Goal of Restitution.

As indicated, Behr and the government have agreed that Behr will make a restitution payment to Mr. Ortega's family of \$350,000 at the time of sentencing if the recommended sentence is accepted by the Court. This restitution payment is in addition to \$268,000 for

workers' compensation and in addition to payments to the family for funeral expenses and special pay designed to ease the strain on Mr. Ortega's family during their time of loss.

Congress specifically noted restitution as one of the significant factors to weigh into the district court's sentencing decision. § 3553(a)(7). Restitution and cooperation with authorities is also one the factors that federal prosecutors are encouraged to take into account in charging decisions. *Principles of Federal Prosecution of Business Organizations*, in 9 U.S. ATTORNEYS' MANUAL 9-28.300 (2008). As a result, Behr respectfully submits that its agreement to pay the family of Mr. Ortega a sizable restitution payment weighs in favor of the probationary sentence with no additional fines that it seeks from this Court.

VII. Conclusion

Behr recognizes and regrets the tragic loss of a valued employee, Reynaldo Hernandez Ortega. While no sentence of a corporate defendant will ever fully redress such a tragedy, Behr respectfully submits that the probationary sentence agreed upon by the parties, the proposed sizable restitution payment it will make to Mr. Ortega's family, and its compliance with the detailed provisions of the OSHA Stipulation work to achieve the purposes of United States sentencing in this matter. As a result, Behr respectfully requests that the Court impose a probationary sentence with these conditions and no additional fine.

WHEREFORE Defendant Behr Iron & Steel respectfully requests this court to consider all of the matters presented herein and impose a sentence consistent with the foregoing.

Respectfully submitted,

/s/Matthew T. Schelp

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the Court's CM/ECF system to be served up on all parties of record on July 1, 2016.

/s/Matthew T. Schelp