

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

|                          |   |                            |
|--------------------------|---|----------------------------|
| UNITED STATES OF AMERICA | ) | Criminal No. 99-233        |
|                          | ) |                            |
| v.                       | ) | Judge Clarence C. Newcomer |
|                          | ) |                            |
| TOKAI CARBON CO. LTD.,   | ) | Filed: 5/18/99             |
|                          | ) |                            |
| Defendant.               | ) |                            |

GOVERNMENT'S SENTENCING MEMORANDUM

The United States and Tokai Carbon Co. Ltd. (Tokai) have entered into a plea agreement, pursuant to which Tokai will waive indictment and plead guilty to the captioned Information. The one-count Information charges Tokai with a violation of the Sherman Act, 15 U.S.C. § 1.

I

STATUTE VIOLATED

A. 15 U.S.C. Section 1

Section One of Title 15, United States Code, provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

B. The Information

The Information charges the defendant with participating in a conspiracy to suppress and eliminate competition by fixing the price and allocating the volume of graphite electrodes sold in the United States and elsewhere in unreasonable restraint of trade and commerce beginning at least as early as July 1992 and continuing until at least June 1997.

C. Elements of the Offense

The elements of a Sherman Act offense, each of which the United States must prove beyond a reasonable doubt, are:

- (1) the charged conspiracy was formed, and it was in existence at or about the time

- alleged;
- (2) the defendant knowingly participated in that conspiracy; and
- (3) the activity which was the object of the conspiracy was within the flow of, or substantially affected, interstate or foreign commerce.

D. Maximum Penalty

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

II

THE SENTENCING GUIDELINES

The Government and Tokai agree that the following is the appropriate volume of affected commerce and the resultant United States Sentencing Guidelines fine range.

The Guidelines calculation is set forth below:

Commerce

|              |                    |  |
|--------------|--------------------|--|
| \$15,100,000 | Volume of Commerce | (United States sales of Tokai graphite electrodes for July 1992 - June 1997) |
|--------------|--------------------|--|

|             |                 |
|-------------|-----------------|
| \$3,020,000 | Base Fine (20%) |
|-------------|-----------------|

Culpability Score

|             |   |
|-------------|---|
| + 5         | Base Level  |
| + 3         | Over 200 employees and high level personnel involved    |
| 0           | No prior history, violation of an order, or obstruction |
| 0           | Absence of Effective Antitrust Program                  |
| <u>- 2</u>  | Acceptance of Responsibility and Full Cooperation       |
| + 6         | Culpability Score                                       |
| 1.20 - 2.40 | Multiplier  |

Guidelines Fine Range

\$3,624,000 - \$7,248,000

III

GOVERNMENT'S SENTENCING RECOMMENDATION

A.

### Defendant's Culpability

From the inception of the charged conspiracy period, Tokai played an active role in the illegal conduct. Through various officers and employees based in Japan, the defendant had full knowledge of price-fixing meetings which Tokai officers and employees attended and participated in for the purpose of coordinating and fixing prices and allocating the volume of graphite electrodes sold. Tokai officers and employees also had direct collusive contacts with competitors outside the context of the cartel meetings attended by Tokai.

On the other hand, although it was a significant player in the electrode industry, other conspiring competitors, including the leaders and organizers of the conspiracy, were substantially larger in terms of worldwide production and sales, and Tokai's share of the United States market was extremely small (approximately one percent). Furthermore, there were some discussions pertaining to the United States in which Tokai did not directly participate.

The plea agreement reached in the instant matter came late in the course of the grand jury investigation into price-fixing and market allocation in the graphite electrode industry investigation. This is the third similar case filed as a result of the investigation. On February 23, 1998 the Information in United States v. Showa Denko Carbon, Inc., Criminal No. 98-85 (E.D. Pa.) was filed in accordance with a plea agreement reached with Showa Denko Carbon (the United States subsidiary of a Japanese corporation) calling for its cooperation. Pursuant to a significant downward departure based on substantial assistance, Showa Denko Carbon was sentenced to pay a fine of \$32.5 million. On April 7, 1998, the Information in United States v. UCAR International Inc., Criminal No. 98-177 (E.D. Pa.) was filed in accordance with a plea agreement reached with UCAR International (a Danbury, Connecticut based company) calling for its cooperation. Based on UCAR International's inability to pay a higher fine without

jeopardizing the continued viability of the company (see U.S.S.G. 8C3.3(b)), UCAR International was sentenced to pay a fine of \$110 million, substantially below its Guidelines minimum.<sup>1</sup> While Tokai has provided and has agreed to continue to provide significant cooperation in the way of documents and witnesses beyond the United States' jurisdiction and was less culpable than the organizers and leaders of the conspiracy, its agreed-upon fine is appropriate in light of the timing of its plea agreement and the fine's smaller size in absolute terms.<sup>2</sup>

B. Government's Sentencing Recommendation

The Rule 11(e)(1)(C) plea agreement calls for and the United States recommends that the Court impose a sentence requiring Tokai to pay a fine to the United States in the amount of \$6 million.<sup>3</sup> The \$6 million fine recommended falls above the midpoint of Tokai's Guidelines fine range.

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<sup>1</sup> On May 4, 1999, a fourth similar Information was filed in United States v. SGL Carbon Aktiengesellschaft and Robert J. Koehler, Criminal No. 99-244 (E.D. Pa.), in accordance with companion plea agreements reached with SGL Carbon (of Wiesbaden, Germany) and Mr. Koehler (a German citizen and resident) calling for their cooperation. While Mr. Koehler and SGL Carbon have not been sentenced yet, their plea agreements call for Mr. Koehler to pay a fine of \$10 million (to be guaranteed by SGL Carbon) and SGL Carbon to pay a fine of \$135--a fine below its Guidelines minimum due to SGL Carbon's inability to pay a higher fine without jeopardizing its continued viability.

<sup>2</sup> Tokai also reaps the benefit of the United States' agreement not to prosecute Tokai's executives, provided they fully cooperate.

<sup>3</sup> The Plea Agreement calls for the payment of the \$6 million fine over a period of three years, with the first installment in the amount of \$1.5 million payable within 15 days from the date of imposition of sentence and three successive payments of \$1.5 million plus accrued interest on each of the first, second and third anniversaries of the date of sentencing. The Plea Agreement also requires that the fine be secured by a letter of credit in a form acceptable to the Court which is to be posted within 15 days of the date of imposition of sentence. However, Tokai has notified the Court in a May 18, 1999 letter from counsel that it is prepared to pay the entire agreed-upon fine of \$6 million within 15 days of sentencing, obviating the installment plan and the letter of credit.

The United States also recommends that the Court impose no order of restitution because Tokai has been sued by the victims of this conspiracy--all sophisticated companies represented by knowledgeable, private antitrust counsel. There are class actions, as well as suits instituted by other groups of graphite electrodes customers, which seek treble damages and attorneys fees as provided for persons damaged by violations of the antitrust laws under Section Four of the Clayton Act, 15 U.S.C. §4. Given the remedies afforded victims of antitrust crime and the active involvement of private antitrust counsel representing the victims of this case, the need to fashion a restitution order is outweighed by the difficulty the Court would encounter in attempting to determine the losses suffered by all of the many victims and the undue complication and prolongation of the sentencing process.

#### IV

#### CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court impose a sentence consistent with the terms of the Plea Agreement between the United States and Tokai and the United States' recommendation; that is, that Tokai be required to pay a criminal fine of \$6 million.

Dated:

Respectfully submitted,

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JOSEPH MUOIO, JR.

Attorney, Antitrust Division  
U.S. Department of Justice  
Philadelphia Office  
The Curtis Center, Suite 650W  
170 S. Independence Mall West  
Philadelphia, PA 19106  
Tel. No.: (215) 597-7420

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  )  
  )  
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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of May 1999, a copy of the Government's Sentencing Memorandum has been express mailed to counsel of record for the defendant as follows:

Keith D. Shugarman, Esquire  
Goodwin Procter & Hoar LLP  
1717 Pennsylvania Avenue, N.W.  
Washington, DC 20006

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JOSEPH MUOIO, JR.

Attorney, Antitrust Division  
U.S. Department of Justice  
Philadelphia Office  
The Curtis Center, Suite 650W  
170 S. Independence Mall West  
Philadelphia, PA 19106  
Tel. No.: (215) 597-7420