

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA

Criminal No.: 2:19-cr-20503-MAG-DRG

v.

Judge: Hon. Mark A. Goldsmith

D-1: NHK SPRING CO., LTD.,

Violation: 15 U.S.C. § 1  
Sherman Act Conspiracy

Defendant.

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**UNITED STATES' SENTENCING MEMORANDUM**

Defendant NHK Spring Co., Ltd. ("NHK Spring") has accepted responsibility for and pleaded guilty to a criminal antitrust charge for its role in a conspiracy to fix the prices of hard disk drive suspension assemblies ("HDD suspension assemblies"). Pursuant to its Rule 11(c)(1)(C) plea agreement, the government and NHK Spring jointly recommend a sentence consisting of a \$28.5 million fine, no order of restitution, no term of probation, and a special assessment of \$400. That sentence is supported by the sentencing factors in 18 U.S.C. § 3553(a), including the applicable sentencing guidelines calculations, and is a reasonable, sufficient, and just sentence. The government submits this memorandum in advance of NHK Spring's sentencing hearing scheduled for December 18, 2019, to advise the Court of relevant background and sentencing considerations and provide the Court with sufficient information that it may meaningfully exercise its sentencing authority under 18 U.S.C. § 3553.

**I. Summary of the Offense**

Section 1 of the Sherman Act, 15 U.S.C. § 1, makes it illegal for competitors to suppress competition among themselves by fixing prices, allocating markets, or rigging bids.

NHK Spring has admitted that it participated in a conspiracy to fix the prices of HDD suspension assemblies in violation of the Sherman Act. During the period of the conspiracy, NHK Spring was a producer of HDD suspension assemblies and was engaged in the sale of HDD suspension assemblies in the United States and elsewhere.

HDD suspension assemblies are essential components of hard disk drives, which are used to store information electronically and may be incorporated into computers or sold as stand-alone electronic storage devices. Hard disk drives use magnetic recording heads to read from and write onto rapidly spinning disks. HDD suspension assemblies hold the recording heads in close proximity to the disks and provide the electrical connection from the recording heads to the hard disk drives' circuitry.

From at least as early as May 2008 and continuing until at least April 2016, NHK Spring, through its officers and employees working in its hard disk drive division, including its high-level personnel, participated in a conspiracy whose primary purpose was to fix the prices of HDD suspension assemblies sold in the United States and elsewhere. In furtherance of the conspiracy, NHK Spring, through certain of those officers and employees, engaged in discussions and attended meetings with co-conspirators during which they reached agreements to refrain from competing on prices for, fix the prices of, and allocate their respective market shares for, HDD suspension assemblies. To effectuate these agreements, officers and employees of NHK Spring exchanged HDD suspension assemblies pricing information, including anticipated pricing quotes, with their co-conspirators. The conspirators relied on their agreements not to compete and used the exchanged pricing information to inform their negotiations with U.S. and foreign customers

that purchased HDD suspension assemblies and produced hard disk drives incorporating the suspension assemblies for sale in, or delivery to, the United States and elsewhere.

NHK Spring is cooperating with the government's investigation and, pursuant to its plea agreement, entered a plea of guilty on September 23, 2019. *See* Rule 11 Plea Agreement (ECF No. 15).

## **II. Legal Standard**

Rule 11(c)(1)(C) authorizes the United States to enter into plea agreements with parties in which the parties agree that a particular sentence is the appropriate disposition of the case. *See* Fed. R. Crim. P. 11(c)(1)(C). The Court, however, “retains absolute discretion whether to accept a plea agreement.” Fed. R. Crim. P. 11, Advisory Committee's Notes to 1999 Amendments. As the Supreme Court has observed:

Federal sentencing law requires the district judge in every case to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of federal sentencing, in light of the Guidelines and other [18 U.S.C.] § 3553(a) factors. The Guidelines provide a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion. Rule 11(c)(1)(C) permits the defendant and the prosecutor to agree that a specific sentence is appropriate, but that agreement does not discharge the district court's independent obligation to exercise its discretion.

*Freeman v. United States*, 564 U.S. 522, 529 (2011) (plurality opinion) (internal citations and quotation marks omitted).

## **III. Sentencing Guidelines Calculations and Fine Methodology**

In determining and imposing a sentence, the Court must consider the sentencing range established by the sentencing guidelines. 18 U.S.C. §§ 3553(a)(4). Organizations, such as NHK Spring, are sentenced pursuant to chapter 8 of the guidelines. For antitrust violations, there are also a number of special instructions for determining fines, found in section 2R1.1.

The first step in determining the fine under the guidelines is to determine the base fine. U.S.S.G. § 8C2.4. For organizational defendants in antitrust cases, 20 percent of the affected volume of commerce is used in lieu of pecuniary loss for purposes of the base fine. U.S.S.G. § 2R1.1(d)(1). “The purpose for specifying a percent of the volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss.” U.S.S.G. § 2R1.1 app’n n.3.

The organization’s culpability score is then determined, U.S.S.G. § 8C2.5, and used to select the minimum and maximum multipliers that are applied to the base fine to determine the applicable guidelines fine range. U.S.S.G. §§ 8C2.6-7.

Here, as explained in more detail below, the sentencing guidelines generate a fine range of \$14,999,984 to \$29,999,968, based on the following methodology:

\$46,874,950	Volume of Commerce
\$9,374,990	Base Fine of 20% of Volume of Commerce (§ 8C2.4(a)(3); § 2R1.1(d)(1))
5	Base Culpability Score (§ 8C2.5(a))
+ 5	Number of Employees and High-Level Involvement (§ 8C2.5(b))
- 2	Cooperation and Acceptance of Responsibility (§ 8C2.5(g))
8	Total Culpability Score
<u>* 1.6 to 3.2</u>	Minimum and Maximum Multipliers Applied to Base Fine (§ 8C2.6)
\$14,999,984 to \$29,999,968	Guidelines Fine Range (§ 8C2.7)

The parties’ jointly recommended fine of \$28.5 million is within this range. *See* Plea Agreement ¶ 9.

#### **A. Volume of Commerce**

The volume of commerce attributable to a defendant for sentencing purposes in an antitrust case is the volume of commerce “done by him or his principal in goods or services that

were affected by the violation.” U.S.S.G. § 2R1.1(b)(2). Here, the parties have agreed that volume of commerce should be based on NHK Spring’s sales of unincorporated HDD suspension assemblies in the United States, plus its foreign sales of HDD suspension assemblies that were incorporated into stand-alone hard disk drives abroad and sold in the United States. Based on sales figures the government obtained from NHK Spring, its U.S. sales of unincorporated HDD suspension assemblies total \$ [REDACTED]. And based on information the government obtained from NHK Spring and its customers, the government has conservatively estimated the foreign sales of HDD suspension assemblies incorporated into stand-alone hard disk drives abroad and sold in the United States to be at least \$ [REDACTED]. Adding these sales together yields a volume of commerce of \$46,874,950.<sup>1</sup>

#### **B. Offense Level and Base Fine**

The base offense level for an antitrust violation is 12. U.S.S.G. § 2R1.1(a); §§ 8C2.1 & 8C2.3(a) (designating U.S.S.G. § 2R1.1 as the applicable provision). The volume of commerce attributable to NHK Spring, which is \$46,874,950 as described above, warrants a four-level increase under U.S.S.G. § 2R1.1(b)(2)(B). NHK Spring’s total offense level is thus 16.

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<sup>1</sup> The volume of commerce calculation does not include all of NHK Spring’s sales of HDD suspension assemblies, such as foreign sales of assemblies incorporated into hard disk drives abroad that were in turn incorporated into computers abroad and sold in the United States and elsewhere. While nothing in the sentencing guidelines or case law requires exclusion of sales of components sold abroad, the government has in similar cases taken a conservative approach that does not include all of a defendant’s foreign sales. *See, e.g., United States v. AU Optronics Corp.*, No. CR-09-0110 SI, United States’ Sentencing Mem. at 14, ECF No. 948 (N.D. Cal. Sept. 11, 2012) (excluding sales of LCD panels incorporated into computer monitors and laptops that did not enter the United States); *Id.*, Tr. of Proceedings at 8-10 & 34, ECF No. 963 (Sept. 20, 2012) (court accepting government’s volume of commerce calculation). For the sentence to reflect NHK Spring’s foreign sales of HDD suspension assemblies that were not included in the volume of commerce calculation, the parties have agreed that a sentence near the top of the guidelines range is warranted, as discussed below.

The base fine must reflect the greatest of: (1) the monetary amount listed in the offense level fine table provided in U.S.S.G. § 8C2.4(d) corresponding to the defendant's offense level; (2) the pecuniary gain to the organization from the offense; or (3) the pecuniary loss from the offense caused by the organization. *See* U.S.S.G. § 8C2.4(a)(1-3). Here, the greatest of these is the pecuniary loss, which in antitrust cases is 20 percent of the volume of affected commerce:

**Offense Level Fine Table:** NHK Spring's offense level of 16 would result in a fine of \$300,000.

**Pecuniary Gain:** Calculating the pecuniary gain to NHK Spring from the conspiracy would unduly prolong or complicate the sentencing process, *cf.* U.S.S.G. § 2R1.1 app'n n.3, and in such situations, the sentencing guidelines allow the Court not to use gain for the determination of the base fine. U.S.S.G. § 8C2.4(c).

**Pecuniary Loss:** Under the special instruction provision of U.S.S.G. § 8C2.4(b), the pecuniary loss under subsection (a)(3) for antitrust crimes is 20 percent of the defendant organization's volume of affected commerce. *See* U.S.S.G. §§ 8C2.4(b), 2R1.1(d). As the volume of commerce attributable to NHK Spring is \$46,874,950, 20 percent of the volume of commerce is \$9,374,990.

As \$9,374,990 is the greatest of the amounts provided by U.S.S.G. § 8C2.4(a), that is the base fine applicable to NHK Spring.

### C. Culpability Score

The starting point for NHK Spring's culpability score is 5 points. U.S.S.G. § 8C2.5(a). Because NHK Spring had more than 5,000 employees and its high-level personnel participated in the offense, 5 points are added. U.S.S.G. § 8C2.5(b)(1)(A)(i); *see* Plea Agreement ¶ 4(b) (during the relevant period, NHK Spring employed more than 5,000 people) & ¶ 4(c) (acknowledging that NHK Spring participated in the conspiracy "through its officers and employees working in its hard disk drive division, including its high-level personnel").

Given NHK Spring's acceptance of responsibility for its criminal conduct and its full and timely cooperation with the government's investigation, 2 points are subtracted from its culpability score pursuant to U.S.S.G. § 8C2.5(g)(2). NHK Spring has provided valuable

cooperation from the time it became aware of the investigation. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] NHK Spring also has agreed to provide continuing cooperation with the investigation. Plea Agreement ¶ 12.

NHK Spring's resulting total culpability score is thus 8.

**D. Fine Range and Recommended Fine**

The culpability score is used to determine the minimum and maximum multipliers. Here, NHK Spring's culpability score of 8 corresponds to a minimum multiplier of 1.6 and a maximum multiplier of 3.2. Multiplying the base fine amount of \$9,374,990 by the multipliers of 1.6 to 3.2 produces a fine range of \$14,999,984 to \$29,999,968.

The parties have agreed that within the guidelines fine range, NHK Spring's fine should be \$28.5 million. First, as noted above, the volume of commerce calculation does not include all of NHK Spring's sales of HDD suspension assemblies, such as those that were sold abroad, incorporated into hard disk drives abroad, and in turn incorporated into computers abroad, before being sold in the United States and elsewhere. To account for these sales, and thus reflect the seriousness of the offense and its harm in the United States, the parties have agreed that a fine at the top of the guidelines range would be warranted. *See* U.S.S.G. § 8C2.8(a)(1) (the seriousness of the offense should be considered in determining the amount of the fine within the guidelines range); U.S.S.G. § 2R1.1 app'n n. background ("there is near universal agreement that restrictive

agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm”).

Second, in recognition of NHK Spring’s full and timely cooperation with the government’s investigation, the parties have agreed that the appropriate fine is 5% below the high end of the guidelines range. *See* U.S.S.G. § 8C2.8(b) (any factor used to determine the guidelines range, including mitigating factors used to determine the culpability score, may be considered in determining the fine amount). After rounding to the nearest thousand, this results in a total recommended fine of \$28.5 million.<sup>2</sup>

#### **IV. Restitution**

The parties have agreed that, in light of the availability of civil causes of action, which potentially provide for a recovery of a multiple of actual damages, the recommended sentence does not include an order of restitution. Plea Agreement ¶ 9(c). Under the Crime Victims’ Rights Act, 18 U.S.C. § 3771, the government has notified NHK Spring’s HDD suspension assemblies customers of these proceedings, and indirect purchaser class actions have already been filed. *See In re Hard Disk Drive Suspension Assemblies Antitrust Litig.*, 19-md-02918-MMC (N.D. Cal.). Moreover, the Mandatory Victim Restitution Act does not mandate restitution for Sherman Act offenses, but only for crimes of violence and certain Title 18 and Title 21 offenses. 18 U.S.C. § 3663A(c)(1)(A).

#### **V. Probation**

The parties have further agreed to recommend that no term of probation be imposed. Plea Agreement ¶ 9(d). Pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but not more than five years. In considering whether to impose

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<sup>2</sup> The parties understand the Court will order NHK Spring to pay a \$400 special assessment, under 18 U.S.C. § 3013(a)(2)(B), in addition to the fine. Plea Agreement ¶ 9(b).



probation, the Court should consider the factors set forth in guidelines section 8D1.1, which include ordering a term of probation to secure payment of a fine, § 8D1.1(a)(2), or to ensure implementation of an effective compliance program, § 8D1.1(a)(3). None of these factors apply here. NHK Spring is a solvent corporation and has agreed to pay the agreed-upon fine of \$28.5 million within 15 days of the final judgment. Plea Agreement ¶ 9. Additionally, the company has already implemented a new antitrust compliance program, taken steps to punish individual employees involved in the conspiracy, and in no way indicated anything other than timely and complete acceptance of responsibility. Imposing probation on NHK Spring would not advance the sentencing goals of the guidelines or 18 U.S.C. § 3553(a), and the parties jointly recommend against it.<sup>3</sup>

## **VI. Conclusion**

The government respectfully recommends that the Court impose the parties' jointly recommended sentence consisting of a \$28.5 million fine, no order of restitution, no term of probation, and a special assessment of \$400.

Respectfully submitted,

/s/ Christina J. Brown

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<sup>3</sup> The government notes that, if the Court rejects the parties' recommendation of no probation, the terms of the plea agreement would nonetheless remain in effect. Plea Agreement ¶ 9(d).