

1 MICHAEL L. SCOTT (CSBN 165452)  
JEANE HAMILTON (CSBN 157834)  
2 VICTOR ALI (CSBN 229544)  
Antitrust Division  
3 U.S. Department of Justice  
450 Golden Gate Avenue  
4 Box 36046, Room 10-0101  
San Francisco, CA 94102  
5 Telephone: (415) 436-6660

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6 Attorneys for the United States  
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9 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11 UNITED STATES OF AMERICA )

No. CR 04-0235 MJJ

12 v. )

PLEA AGREEMENT

13 )  
14 BAYER AG, )

15 Defendant. )  
16

17 **PLEA AGREEMENT**

18 The United States of America and Bayer AG ("defendant"), a corporation organized and  
19 existing under the laws of Germany, hereby enter into the following Plea Agreement pursuant to  
20 Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

21 **RIGHTS OF DEFENDANT**

22 1. The defendant understands its rights:

23 (a) to be represented by an attorney;

24 (b) to be charged by Indictment;

25 (c) as a corporation organized and existing under the laws of Germany, to  
26 decline to accept service of the Summons in this case, and to contest the  
27 jurisdiction of the United States to prosecute this case against it in the  
28 United States District Court for the Northern District of California.

1 (d) to plead not guilty to any criminal charge brought against it;

2 (e) to have a trial by jury, at which it would be presumed not guilty of the  
3 charge and the United States would have to prove every essential element of the charged  
4 offense beyond a reasonable doubt for it to be found guilty;

5 (f) to confront and cross-examine witnesses against it and to subpoena  
6 witnesses in its defense at trial;

7 (g) to appeal its conviction if it is found guilty at trial; and

8 (h) to appeal the imposition of sentence against it.

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10 **AGREEMENT TO PLEAD GUILTY**  
**AND WAIVE CERTAIN RIGHTS**

11 2. The defendant waives the rights set out in Paragraph 1(b)-(g) above, including all  
12 jurisdictional defenses to the prosecution of this case, and agrees voluntarily to consent to the  
13 jurisdiction of the United States to prosecute this case against it in the United States District  
14 Court for the Northern District of California. The defendant also waives the right to appeal the  
15 imposition of sentence against it, so long as the sentence imposed is consistent with the  
16 recommendation in Paragraph 8 of this Plea Agreement. The defendant agrees to have its  
17 sentence determined under the United States Sentencing Guidelines (“U.S.S.G.”) and waives all  
18 constitutional challenges to the validity of the U.S.S.G. The defendant waives any right it may  
19 have to have facts that determine its statutory maximum sentence or Guidelines fine range under  
20 the U.S.S.G. (including any facts used to determine its offense level, base fine amount,  
21 culpability score, or any specific offense characteristic or other enhancement or adjustment  
22 under the U.S.S.G., as well as any pecuniary gain or loss resulting from the charged offense)  
23 alleged in an indictment and found by a jury beyond a reasonable doubt. The defendant agrees  
24 that facts that determine its statutory maximum sentence or Guidelines fine range will be found  
25 by the Court at sentencing by a preponderance of the evidence and that the Court may consider  
26 any reliable evidence, including hearsay, in making such determinations. Pursuant to Fed. R.  
27 Crim. P. 7(b), the defendant will waive indictment and plead guilty at arraignment to a one-count  
28 Information to be filed in the United States District Court for the Northern District of California.

1 The Information will charge the defendant with participating in a combination and conspiracy to  
2 suppress and eliminate competition by maintaining and increasing the price of certain rubber  
3 chemicals sold in the United States and elsewhere, beginning in or about July 1995 and  
4 continuing until in or about December 2001, in violation of Section One of the Sherman Act (15  
5 U.S.C. § 1).

6 3. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to  
7 the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to  
8 the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below.

9 **FACTUAL BASIS FOR OFFENSE CHARGED**

10 4. Had this case gone to trial, the United States would have presented evidence to  
11 prove the following facts:

12 (a) For purposes of this Plea Agreement, the “relevant period” is that period  
13 beginning in or about July 1995 and continuing until in or about December 2001. During  
14 the relevant period, the defendant was a corporation organized and existing under the  
15 laws of Germany. The defendant has its principal place of business in Leverkusen,  
16 Germany. During the relevant period, the defendant produced and sold certain rubber  
17 chemicals in the United States and elsewhere. Rubber chemicals are a group of additives  
18 used to improve the elasticity, strength, and durability of rubber products. Rubber  
19 chemicals are used primarily in the manufacture of tires, outdoor furniture, hoses, belts,  
20 and footwear.

21 (b) During the relevant period, the defendant, through its officers and  
22 employees, participated in a conspiracy among major rubber chemical producers, the  
23 primary purpose of which was to suppress and eliminate competition by maintaining and  
24 increasing the price of certain rubber chemicals sold in the United States and elsewhere.  
25 In furtherance of the conspiracy, the defendant, through its officers and employees,  
26 engaged in discussions and attended meetings with representatives of other major rubber  
27 chemical producers. During these discussions and meetings, agreements were reached to  
28 maintain and increase the price of certain rubber chemicals to be sold in the United States

1 and elsewhere.

2 (c) During the relevant period, rubber chemicals sold by one or more of the  
3 conspirator firms, and equipment and supplies necessary to the production and  
4 distribution of rubber chemicals, as well as payments for rubber chemicals, traveled in  
5 interstate and foreign commerce. The business activities of the defendant and its  
6 co-conspirators in connection with the production and sale of rubber chemicals affected  
7 by this conspiracy were within the flow of, and substantially affected, interstate and  
8 foreign trade and commerce.

9 (d) Rubber chemicals affected by this conspiracy were sold by one or more of  
10 the conspirators to customers in this District.

11 **POSSIBLE MAXIMUM SENTENCE**

12 5. The defendant understands that the maximum penalty which may be imposed  
13 against it upon conviction for a violation of Section One of the Sherman Antitrust Act is a fine in  
14 an amount equal to the greatest of:

15 (a) \$10 million (15 U.S.C. § 1);

16 (b) twice the gross pecuniary gain the conspirators derived from the crime  
17 (18 U.S.C. § 3571(c) and (d)); or

18 (c) twice the gross pecuniary loss caused to the victims of the crime by the  
19 conspirators (18 U.S.C. § 3571(c) and (d)).

20 6. In addition, the defendant understands that:

21 (a) pursuant to § 8B1.1 of the United States Sentencing Guidelines  
22 ("U.S.S.G."), the Court may order it to pay restitution to the victims of the offense;

23 (b) pursuant to 18 U.S.C. § 3013(a)(2)(B) and U.S.S.G. § 8E1.1, the Court is  
24 required to order the defendant to pay a \$400 special assessment upon conviction for the  
25 charged crime; and

26 (c) pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of  
27 probation of at least one year, but not more than five years.

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1 sentencing authority by the Court under 18 U.S.C. § 3553. The United States and  
2 defendant agree to request jointly that the Court accept the defendant's guilty plea and  
3 impose sentence on an expedited schedule as early as the date of arraignment, based upon  
4 the record provided by the defendant and the United States, under the provisions of Fed.  
5 R. Crim. P. 32(c)(1)(A)(ii), U.S.S.G. § 6A1.1, and Rule 18(b) of the Local Rules. The  
6 Court's denial of the request to impose sentence on an expedited schedule will not void  
7 this Plea Agreement.

8 9. The United States and the defendant agree that the applicable sentencing  
9 guidelines fine range exceeds the fine contained in the recommended sentence set out in  
10 Paragraph 8 above. Subject to the full and continuing cooperation of the defendant, as described  
11 in Paragraph 12 of this Plea Agreement, and prior to sentencing in this case, the United States  
12 agrees that it will make a motion, pursuant to U.S.S.G. § 8C4.1, for a downward departure from  
13 the guidelines fine range and will request that the Court impose the recommended sentence set  
14 out in Paragraph 8 of this Plea Agreement because of the defendant's substantial assistance in  
15 the government's investigation and prosecutions of violations of federal criminal law in the  
16 rubber chemicals industry and in another industry.

17 10. The United States and the defendant understand that the Court retains complete  
18 discretion to accept or reject the recommended sentence provided for in Paragraph 8 of this Plea  
19 Agreement.

20 (a) If the Court does not accept the recommended sentence, the United States  
21 and the defendant agree that this Plea Agreement, except for Paragraph 10(b) below,  
22 shall be rendered void. Neither party may withdraw from this Plea Agreement, however,  
23 based on the imposition of a term of probation.

24 (b) If the Court does not accept the recommended sentence, the defendant will  
25 be free to withdraw its guilty plea (Fed. R. Crim. P. 11(c)(5) and (d)). If the defendant  
26 withdraws its plea of guilty, this Plea Agreement, the guilty plea, and any statement made  
27 in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or  
28 this Plea Agreement or made in the course of plea discussions with an attorney for the

1 government shall not be admissible against the defendant in any criminal or civil  
2 proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant  
3 agrees that, if it withdraws its guilty plea pursuant to this subparagraph of the Plea  
4 Agreement, the statute of limitations period for any offense referred to in Paragraph 14 of  
5 this Plea Agreement will be tolled for the period between the date of the signing of the  
6 Plea Agreement and the date the defendant withdrew its guilty plea or for a period of  
7 sixty (60) days after the date of the signing of the Plea Agreement, whichever period is  
8 greater.

9 11. In light of the private civil cases filed, which potentially provide for a recovery of  
10 a multiple of actual damages, the United States agrees that it will not seek a restitution order for  
11 the offense charged in the Information.

#### 12 **DEFENDANT'S COOPERATION**

13 12. The defendant and any of its subsidiaries engaged in the sale or production of  
14 rubber chemicals (collectively, "related entities") will cooperate fully and truthfully with the  
15 United States in the prosecution of this case, the conduct of the current federal investigation of  
16 violations of federal antitrust and related criminal laws involving the manufacture or sale of  
17 rubber chemicals, and any litigation or other proceedings arising or resulting from any such  
18 investigation to which the United States is a party ("Federal Proceeding"). The ongoing, full,  
19 and truthful cooperation of the defendant and its related entities shall include, but not be limited  
20 to:

21 (a) producing to the United States all non-privileged documents, information,  
22 and other materials, wherever located, in the possession, custody, or control of the  
23 defendant or its related entities, requested by the United States in connection with any  
24 Federal Proceeding; and

25 (b) using its best efforts to secure the ongoing, full, and truthful  
26 cooperation, as defined in Paragraph 13 of this Plea Agreement, of the current and  
27 former directors, officers, and employees of the defendant and its related entities as  
28 may be requested by the United States, but excluding Jurgen Ick, Martin Petersen,

1 Gunter Monn, Wolfgang Koch, and Volker Holitsch, and, including making these  
2 persons available in the United States and at other mutually agreed-upon locations,  
3 at the defendant's expense, for interviews and the provision of testimony in grand  
4 jury, trial, and other judicial proceedings in connection with any Federal  
5 Proceeding.

6 13. The ongoing, full, and truthful cooperation of each person described in  
7 Paragraph 12(b) above will be subject to the procedures and protections of this paragraph,  
8 and shall include, but not be limited to:

9 (a) producing in the United States and at other mutually agreed-upon  
10 locations all non-privileged documents, including claimed personal documents,  
11 and other materials, wherever located, requested by attorneys and agents of the  
12 United States;

13 (b) making himself or herself available for interviews in the United  
14 States and at other mutually agreed-upon locations, not at the expense of the  
15 United States, upon the request of attorneys and agents of the United States;

16 (c) responding fully and truthfully to all inquiries of the United States  
17 in connection with any Federal Proceeding, without falsely implicating any person  
18 or intentionally withholding any information, subject to the penalties of making  
19 false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503);

20 (d) otherwise voluntarily providing the United States with any non-  
21 privileged material or information not requested in (a) - (c) of this paragraph that  
22 he or she may have that is related to any Federal Proceeding;

23 (e) when called upon to do so by the United States in connection with  
24 any Federal Proceeding, testifying in grand jury, trial, and other judicial  
25 proceedings fully, truthfully, and under oath, subject to the penalties of perjury (18  
26 U.S.C. § 1621), making false statements or declarations in grand jury or court  
27 proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402), and obstruction  
28 of justice (18 U.S.C. § 1503); and



1 (f) agreeing that, if the agreement not to prosecute him or her in this  
2 Plea Agreement is rendered void under Paragraph 15(c), the statute of limitations  
3 period for any Relevant Offense as defined in Paragraph 15(a) will be tolled as to  
4 him or her for the period between the date of the signing of this Plea Agreement  
5 and six (6) months after the date that the United States gave notice of its intent to  
6 void its obligations to that person under the Plea Agreement.

7 **GOVERNMENT'S AGREEMENT**

8 14. Upon acceptance of the guilty plea called for by this Plea Agreement and  
9 the imposition of the recommended sentence, and subject to the cooperation requirements  
10 of Paragraph 12 of this Plea Agreement, the United States agrees that it will not bring  
11 further criminal charges against the defendant or any of its related entities for any act or  
12 offense committed before the date of this Plea Agreement that was undertaken in  
13 furtherance of an antitrust conspiracy involving the manufacture or sale of rubber  
14 chemicals. The nonprosecution terms of this paragraph do not apply to civil matters of  
15 any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

16 15. The United States agrees to the following:

17 (a) Upon the Court's acceptance of the guilty plea called for by this  
18 Plea Agreement and the imposition of the recommended sentence and subject to  
19 the exceptions noted in Paragraph 15(c), the United States will not bring criminal  
20 charges against any current or former director, officer, or employee of the  
21 defendant or any of its related entities for any act or offense committed before the  
22 date of this Plea Agreement and while that person was acting as a director, officer,  
23 or employee of the defendant or any of its related entities that was undertaken in  
24 furtherance of an antitrust conspiracy involving the manufacture or sale of rubber  
25 chemicals ("Relevant Offense"), except that the protections granted in this  
26 paragraph shall not apply to Jurgen Ick, Martin Petersen, Gunter Monn, Wolfgang  
27 Koch, and Volker Holitsch;

28 (b) Should the United States determine that any current or former

1 director, officer, or employee of the defendant or any of its related entities may  
2 have information relevant to any Federal Proceeding, the United States may  
3 request that person's cooperation under the terms of this Plea Agreement by  
4 written request delivered to counsel for the individual (with a copy to the  
5 undersigned counsel for the defendant) or, if the individual is not known by the  
6 United States to be represented, to the undersigned counsel for the defendant;

7 (c) If any person requested to provide cooperation under Paragraph  
8 15(b) fails to comply with his or her obligations under Paragraph 13, then the  
9 terms of this Plea Agreement as they pertain to that person, and the agreement not  
10 to prosecute that person granted in this Plea Agreement, shall be rendered void;

11 (d) Except as provided in Paragraph 15(e), information provided by a  
12 person described in Paragraph 15(b) to the United States under the terms of this  
13 Plea Agreement pertaining to any Relevant Offense, or any information directly or  
14 indirectly derived from that information, may not be used against that person in a  
15 criminal case, except in a prosecution for perjury (18 U.S.C. § 1621), making a  
16 false statement or declaration (18 U.S.C. §§ 1001, 1623), or obstruction of justice  
17 (18 U.S.C. § 1503);

18 (e) If any person who provides information to the United States under  
19 this Plea Agreement fails to comply fully with his or her obligations under  
20 Paragraph 13 of this Plea Agreement, the agreement in Paragraph 15(d) not to use  
21 that information or any information directly or indirectly derived from it against  
22 that person in a criminal case shall be rendered void;

23 (f) The nonprosecution terms of this paragraph do not apply to civil  
24 matters of any kind, to any violation of the federal tax or securities laws, or to any  
25 crime of violence; and

26 (g) Documents provided under Paragraphs 12(a) and 13(a) shall be  
27 deemed responsive to outstanding grand jury subpoenas issued to the defendant or  
28 any of its related entities.

1           16.     The United States agrees that when any person travels to the United States  
2 for interviews, grand jury appearances, or court appearances pursuant to this Plea  
3 Agreement, or for meetings with counsel in preparation therefor, the United States will  
4 take no action, based upon any Relevant Offense, to subject such person to arrest,  
5 detention, or service of process, or to prevent such person from departing the United  
6 States. This paragraph does not apply to an individual's commission of perjury (18 U.S.C.  
7 § 1621), making false statements (18 U.S.C. § 1001), making false statements or  
8 declarations in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice  
9 (18 U.S.C. § 1503), or contempt (18 U.S.C. §§ 401-402) in connection with any testimony  
10 or information provided or requested in any Federal Proceeding.

11           17.     The defendant understands that it may be subject to administrative action  
12 by federal or state agencies other than the United States Department of Justice, Antitrust  
13 Division, based upon the conviction resulting from this Plea Agreement, and that this Plea  
14 Agreement in no way controls whatever action, if any, other agencies may take. However,  
15 the United States agrees that, if requested, it will advise the appropriate officials of any  
16 governmental agency considering such administrative action of the fact, manner, and  
17 extent of the cooperation of the defendant and its related entities as a matter for that  
18 agency to consider before determining what administrative action, if any, to take.

19                           **REPRESENTATION BY COUNSEL**

20           18.     The defendant has been represented by counsel and is fully satisfied that its  
21 attorneys have provided competent legal representation. The defendant has thoroughly  
22 reviewed this Plea Agreement and acknowledges that counsel has advised it of the nature  
23 of the charge, any possible defenses to the charge, and the nature and range of possible  
24 sentences.

25                           **VOLUNTARY PLEA**

26           19.     The defendant's decision to enter into this Plea Agreement and to tender a  
27 plea of guilty is freely and voluntarily made and is not the result of force, threats,  
28 assurances, promises, or representations other than the representations contained in this

1 Plea Agreement and the Bayer Cooperation Agreement, filed separately with the Court.  
2 The United States has made no promises or representations to the defendant as to whether  
3 the Court will accept or reject the recommendations contained within this Plea Agreement.

4 **VIOLATION OF PLEA AGREEMENT**

5 20. The defendant agrees that, should the United States determine in good  
6 faith, during the period that any Federal Proceeding is pending, that the defendant or any  
7 of its related entities have failed to provide full and truthful cooperation, as described in  
8 Paragraph 12 of this Plea Agreement, or has otherwise violated any provision of this Plea  
9 Agreement, the United States will notify counsel for the defendant in writing by personal  
10 or overnight delivery or facsimile transmission and may also notify counsel by telephone  
11 of its intention to void any of its obligations under this Plea Agreement (except its  
12 obligations under this paragraph), and the defendant and its related entities shall be subject  
13 to prosecution for any federal crime of which the United States has knowledge including,  
14 but not limited to, the substantive offenses relating to the investigation resulting in this  
15 Plea Agreement. The defendant and its related entities may seek court review of any  
16 determination made by the United States under this Paragraph to void any of its  
17 obligations under the Plea Agreement. The defendant and its related entities agree that, in  
18 the event that the United States is released from its obligations under this Plea Agreement  
19 and brings criminal charges against the defendant and its related entities for any offense  
20 referred to in Paragraph 14 of this Plea Agreement, the statute of limitations period for  
21 such offense will be tolled for the period between the date of the signing of this Plea  
22 Agreement and six (6) months after the date the United States gave notice of its intent to  
23 void its obligations under this Plea Agreement.

24 21. The defendant understands and agrees that in any further prosecution of it  
25 or its related entities resulting from the release of the United States from its obligations  
26 under this Plea Agreement, because of the defendant's or its related entities' violation of  
27 the Plea Agreement, any documents, statements, information, testimony, or evidence  
28 provided by it, its related entities, or current or former directors, officers, or employees of

1 it or its related entities to attorneys or agents of the United States, federal grand juries, or  
2 courts, and any leads derived therefrom, may be used against it or its related entities in  
3 any such further prosecution. In addition, the defendant unconditionally waives its right  
4 to challenge the use of such evidence in any such further prosecution, notwithstanding the  
5 protections of Fed. R. Evid. 410.

6 **ENTIRETY OF AGREEMENT**

7 22. This Plea Agreement and the Bayer Cooperation Agreement, filed  
8 separately with the Court, constitute the entire agreement between the United States and  
9 the defendant concerning the disposition of the criminal charge in this case. This Plea  
10 Agreement cannot be modified except in writing signed by the United States and the  
11 defendant.

12 23. The undersigned is authorized to enter into this Plea Agreement on behalf  
13 of the defendant as evidenced by the Resolution of the Board of Directors of the defendant  
14 attached to, and incorporated by reference, in this Plea Agreement.

15 24. The undersigned attorneys for the United States have been authorized by  
16 the Attorney General of the United States to enter this Plea Agreement on behalf of the  
17 United States.

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1           25.     A facsimile signature shall be deemed an original signature for the purpose  
2 of executing this Plea Agreement. Multiple signature pages are authorized for the purpose  
3 of executing this Plea Agreement.

4  
5 DATED: 7/8/04

6  
7 BAYER AG

8  
9 BY: \_\_\_\_\_/s/\_\_\_\_\_

10     Dr. Roland Hartwig  
11     General Counsel  
12     Bayer AG  
13     Corporate Center, Law & Patents  
14     D-51368 Leverkusen, Germany

15 COUNSEL FOR BAYER AG

16  
17 BY: \_\_\_\_\_/s/\_\_\_\_\_

18     Phillip A. Proger, Esq.  
19     Brian K. Grube, Esq.  
20     Ryan C. Thomas, Esq.  
21     Jones Day  
22     51 Louisiana Ave., N.W.  
23     Washington, DC 20001-2113

Respectfully submitted,

U.S. DEPARTMENT OF JUSTICE  
ANTITRUST DIVISION

BY: \_\_\_\_\_/s/\_\_\_\_\_

— Michael L. Scott  
Jeane Hamilton  
Victor Ali  
Attorneys

450 Golden Gate Avenue  
Box 36046, Room 10-0101  
San Francisco, CA 94102  
(415) 436-6660