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7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA)	No. CR 04- 0318 VRW
)	
12)	
13 v.)	
)	PLEA AGREEMENT
14 BAYER CORPORATION,)	
)	
15 Defendant.)	
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16
17 **PLEA AGREEMENT**

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

22 **RIGHTS OF DEFENDANT**

- 23 1. The defendant understands its rights:
- 24 (a) to be represented by an attorney;
- 25 (b) to be charged by Indictment;
- 26 (c) to contest venue in the United States District Court for the Northern
27 District of California;
- 28 (d) to plead not guilty to any criminal charge brought against it;

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

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

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

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

8
9 **AGREEMENT TO PLEAD GUILTY
AND WAIVE CERTAIN RIGHTS**

10 2. The defendant knowingly and voluntarily waives the rights set out in Paragraph
11 1(b)-(g) above, and specifically agrees for purposes of this plea to waive any right to contest
12 venue in the United States District Court for the Northern District of California. The defendant
13 also knows that it has, and voluntarily waives, the right to file any appeal, any collateral attack,
14 or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742, that
15 challenges the sentence imposed by the Court if that sentence is consistent with or below the
16 recommended sentence in Paragraph 9 of this Plea Agreement, regardless of how the sentence is
17 determined by the Court. This agreement does not affect the rights or obligations of the United
18 States as set forth in 18 U.S.C. § 3742(b) or (c). Pursuant to Fed. R. Crim. P. 7(b), the defendant
19 will waive indictment and plead guilty at arraignment to a one-count Information to be filed in
20 the United States District Court for the Northern District of California. The Information will
21 charge the defendant with participating in a combination and conspiracy to suppress and
22 eliminate competition by maintaining and increasing the price of aliphatic polyester polyols
23 made from adipic acid sold in the United States and elsewhere, beginning in or about February
24 1998 and continuing until in or about December 2002, in violation of Section One of the
25 Sherman Act (15 U.S.C. § 1).

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

1 **FACTUAL BASIS FOR OFFENSE CHARGED**

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

4 (a) For purposes of this Plea Agreement, the “relevant period” is that period
5 beginning in or about February 1998 and continuing until in or about December 2002.
6 During the relevant period, the defendant was a corporation organized and existing under
7 the laws of the state of Indiana, with its principal place of business in Pittsburgh,
8 Pennsylvania. During the relevant period, the defendant produced and sold aliphatic
9 polyester polyols made from adipic acid (“adipic-based polyester polyols”) in the United
10 States and elsewhere and employed more than 1,000 but fewer than 5,000 persons.
11 Adipic-based polyester polyols are used to improve tensile strength and resistance to
12 abrasion in a number of products, including flexible foams, synthetic leather and other
13 coatings, adhesives, and rigid plastics. Adipic-based polyester polyols are used primarily
14 in shoe soles, belts, seals and gaskets, and coatings on plastic grocery bags to prevent
15 sticking.

16 (b) During the relevant period, the defendant, through its officers and
17 employees, participated in a conspiracy among major producers of adipic-based polyester
18 polyols, the primary purpose of which was to suppress and eliminate competition by
19 maintaining and increasing the price of adipic-based polyester polyols sold in the United
20 States and elsewhere. In furtherance of the conspiracy, the defendant, through its officers
21 and employees, engaged in discussions and attended meetings with representatives of
22 another major producer of adipic-based polyester polyols. During these discussions and
23 meetings, agreements were reached to maintain and increase the price of adipic-based
24 polyester polyols to be sold in the United States and elsewhere.

25 (c) During the relevant period, adipic-based polyester polyols sold by one or
26 more of the conspirator firms, and equipment and supplies necessary to the production
27 and distribution of these polyester polyols, as well as payments for these polyester
28 polyols, traveled in interstate and foreign commerce. The business activities of the

1 defendant and its co-conspirators in connection with the production and sale of adipic-
2 based polyester polyols affected by this conspiracy were within the flow of, and
3 substantially affected, interstate and foreign trade and commerce.

4 **CALCULATION OF SENTENCE**

5 5. The United States contends that had this case gone to trial, the United States would
6 have presented evidence to prove that the gain derived from or the loss resulting from the
7 charged offense is sufficient to justify a fine of \$33 million, pursuant to 18 U.S.C. § 3571(d).
8 For purposes of this plea and sentencing, the defendant waives its rights to contest this
9 calculation.

10 **POSSIBLE MAXIMUM SENTENCE**

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

- 14 (a) \$10 million (15 U.S.C. § 1);
- 15 (b) twice the gross pecuniary gain the conspirators derived from the crime
16 (18 U.S.C. § 3571(c) and (d)); or
- 17 (c) twice the gross pecuniary loss caused to the victims of the crime by the
18 conspirators (18 U.S.C. § 3571(c) and (d)).

19 7. In addition, the defendant understands that:

- 20 (a) pursuant to § 8B1.1 of the U.S.S.G., 18 U.S.C. § 3563(b)(2) or 3663(a)(3)
21 the Court may order it to pay restitution to the victims of the offense;
- 22 (b) pursuant to 18 U.S.C. § 3013(a)(2)(B) and U.S.S.G. § 8E1.1, the Court is
23 required to order the defendant to pay a \$400 special assessment upon conviction for the
24 charged crime; and
- 25 (c) pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of
26 probation of at least one year, but not more than five years.

27 **SENTENCING GUIDELINES**

28 8. The defendant understands that the U.S.S.G. is advisory, not mandatory, but that

1 the Court must consider the U.S.S.G. Manual in effect on the day of sentencing, along with the
2 other factors set forth in 18 U.S.C. § 3553(a), in imposing sentence. The defendant understands
3 that the U.S.S.G. determinations will be made by a preponderance of the evidence standard. The
4 defendant understands that although the Court is not ultimately bound to impose a sentence
5 within the applicable U.S.S.G. range, its sentence must be reasonable based upon consideration
6 of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). Pursuant to U.S.S.G. § 1B1.8,
7 the United States agrees that self-incriminating information that the defendant provides to the
8 United States pursuant to this Plea Agreement will not be used to increase the volume of affected
9 commerce attributable to the defendant or in determining the defendant's applicable U.S.S.G.
10 range, except to the extent provided in U.S.S.G. § 1B1.8(b).

11 **SENTENCING AGREEMENT**

12 9. Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the defendant
13 agree that the appropriate disposition of this case is, and agree to recommend jointly that the
14 Court impose a sentence requiring the defendant to pay to the United States a criminal fine of
15 \$33 million, pursuant to 18 U.S.C. § 3571(d), payable in full before the fifteenth (15th) day after
16 the date of judgment, and no term of probation ("the recommended sentence"). The parties agree
17 that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not
18 adequately taken into consideration by the U.S. Sentencing Commission in formulating the
19 U.S.S.G. that should result in a sentence outside of the advisory U.S.S.G. range. The parties
20 agree not to seek or support any sentence outside of the U.S.S.G. range nor any U.S.S.G.
21 adjustment for any reason that is not set forth in this Plea Agreement. The parties further agree
22 that the recommended sentence set forth in this Plea Agreement is reasonable.

23 (a) The defendant understands that the Court will order it to pay a \$400
24 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B) and U.S.S.G. § 8E1.1, in
25 addition to any fine imposed.

26 (b) Subject to the ongoing, full, and truthful cooperation of the defendant
27 described in Paragraph 13 of this Plea Agreement, and before sentencing in the case, the
28 United States will fully advise the Court of the fact, manner, and extent of the

1 defendant's cooperation and its commitment to prospective cooperation with the United
2 States' investigation and prosecutions, all material facts relating to the defendant's
3 involvement in the charged offense, and all other relevant conduct. The United States
4 and the defendant jointly submit that this Plea Agreement, together with the record that
5 will be created by the United States and the defendant at the plea and sentencing
6 hearings, will provide sufficient information concerning the defendant, the crime charged
7 in this case, and the defendant's role in the crime to enable the meaningful exercise of
8 sentencing authority by the Court under 18 U.S.C. § 3553. The United States and
9 defendant agree to request jointly that the Court accept the defendant's guilty plea and
10 impose sentence on an expedited schedule as early as the date of arraignment, based upon
11 the record provided by the defendant and the United States, under the provisions of Fed.
12 R. Crim. P. 32(c)(1)(A)(ii), U.S.S.G. § 6A1.1, and Rule 32-1(b) of the Local Rules. The
13 Court's denial of the request to impose sentence on an expedited schedule will not void
14 this Plea Agreement.

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

24 11. The United States and the defendant understand that the Court retains complete
25 discretion to accept or reject the recommended sentence provided for in Paragraph 9 of this Plea
26 Agreement.

27 (a) If the Court does not accept the recommended sentence, the United States
28 and the defendant agree that this Plea Agreement, except for Paragraph 11(b) below,

1 shall be rendered void.

2 (b) If the Court does not accept the recommended sentence, the defendant will
3 be free to withdraw its guilty plea (Fed. R. Crim. P. 11(c)(5) and (d)). If the defendant
4 withdraws its plea of guilty, this Plea Agreement, the guilty plea, and any statement made
5 in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or
6 this Plea Agreement or made in the course of plea discussions with an attorney for the
7 government shall not be admissible against the defendant in any criminal or civil
8 proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant
9 agrees that, if it withdraws its guilty plea pursuant to this subparagraph of the Plea
10 Agreement, the statute of limitations period for any offense referred to in Paragraph 15 of
11 this Plea Agreement will be tolled for the period between the date of the signing of the
12 Plea Agreement and the date the defendant withdrew its guilty plea or for a period of
13 sixty (60) days after the date of the signing of the Plea Agreement, whichever period is
14 greater.

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

18 **DEFENDANT'S COOPERATION**

19 13. The defendant, its parent, Bayer AG, and any of Bayer AG's subsidiaries
20 engaged in the sale or production of adipic-based polyester polyols (collectively, "related
21 entities") will cooperate fully and truthfully with the United States in the prosecution of this
22 case, the conduct of the current federal investigation of violations of federal antitrust and related
23 criminal laws involving the manufacture or sale of adipic-based polyester polyols, and any
24 litigation or other proceedings arising or resulting from any such investigation to which the
25 United States is a party ("Federal Proceeding"). The ongoing, full, and truthful cooperation of
26 the defendant and its related entities shall include, but not be limited to:

27 (a) producing to the United States all non-privileged documents, information,
28 and other materials, wherever located, in the possession, custody, or control of the

1 defendant or its related entities, requested by the United States in connection with any
2 Federal Proceeding; and

3 (b) using its best efforts to secure the ongoing, full, and truthful
4 cooperation, as defined in Paragraph 14 of this Plea Agreement, of the current and
5 former directors, officers, and employees of the defendant and its related entities as
6 may be requested by the United States, but excluding Anthony Forgione, Douglas
7 Brown, Michael McCann and Joerg Hellwig, including making these persons
8 available in the United States and at other mutually agreed-upon locations, at the
9 defendant's expense, for interviews and the provision of testimony in grand jury,
10 trial, and other judicial proceedings in connection with any Federal Proceeding.

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

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

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

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

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

28 (e) when called upon to do so by the United States in connection with

1 any Federal Proceeding, testifying in grand jury, trial, and other judicial
2 proceedings fully, truthfully, and under oath, subject to the penalties of perjury (18
3 U.S.C. § 1621), making false statements or declarations in grand jury or court
4 proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402), and obstruction
5 of justice (18 U.S.C. § 1503); and

6 (f) agreeing that, if the agreement not to prosecute him or her in this
7 Plea Agreement is rendered void under Paragraph 16(c), the statute of limitations
8 period for any Relevant Offense as defined in Paragraph 16(a) will be tolled as to
9 him or her for the period between the date of the signing of this Plea Agreement
10 and six (6) months after the date that the United States gave notice of its intent to
11 void its obligations to that person under the Plea Agreement.

12 **GOVERNMENT'S AGREEMENT**

13 15. Upon acceptance of the guilty plea called for by this Plea Agreement and
14 the imposition of the recommended sentence, and subject to the cooperation requirements
15 of Paragraph 13 of this Plea Agreement, the United States agrees that it will not bring
16 further criminal charges against the defendant or any of its related entities for any act or
17 offense committed before the date of this Plea Agreement that was undertaken in
18 furtherance of an antitrust conspiracy involving the manufacture or sale of adipic-based
19 polyester polyols ("Relevant Offense"). The nonprosecution terms of this paragraph do
20 not apply to civil matters of any kind, to any violation of the federal tax or securities laws,
21 or to any crime of violence.

22 16. The United States agrees to the following:

23 (a) Upon the Court's acceptance of the guilty plea called for by this
24 Plea Agreement and the imposition of the recommended sentence and subject to
25 the exceptions noted in Paragraph 16(c), the United States will not bring criminal
26 charges against any current or former director, officer, or employee of the
27 defendant or any of its related entities for any act or offense committed before the
28 date of this Plea Agreement and while that person was acting as a director, officer,

1 or employee of the defendant or any of its related entities that was undertaken in
2 furtherance of the Relevant Offense, except that the protections granted in this
3 paragraph shall not apply to Anthony Forgione, Douglas Brown, Michael McCann
4 or Joerg Hellwig;

5 (b) Should the United States determine that any current or former
6 director, officer, or employee of the defendant or any of its related entities may
7 have information relevant to any Federal Proceeding, the United States may
8 request that person's cooperation under the terms of this Plea Agreement by
9 written request delivered to counsel for the individual (with a copy to the
10 undersigned counsel for the defendant) or, if the individual is not known by the
11 United States to be represented, to the undersigned counsel for the defendant;

12 (c) If any person requested to provide cooperation under Paragraph
13 16(b) fails to comply with his or her obligations under Paragraph 14, then the
14 terms of this Plea Agreement as they pertain to that person, and the agreement not
15 to prosecute that person granted in this Plea Agreement, shall be rendered void;

16 (d) Except as provided in Paragraph 16(e), information provided by a
17 person described in Paragraph 16(b) to the United States under the terms of this
18 Plea Agreement pertaining to any Relevant Offense, or any information directly or
19 indirectly derived from that information, may not be used against that person in a
20 criminal case, except in a prosecution for perjury (18 U.S.C. § 1621), making a
21 false statement or declaration (18 U.S.C. §§ 1001, 1623), or obstruction of justice
22 (18 U.S.C. § 1503);

23 (e) If any person who provides information to the United States under
24 this Plea Agreement fails to comply fully with his or her obligations under
25 Paragraph 14 of this Plea Agreement, the agreement in Paragraph 16(d) not to use
26 that information or any information directly or indirectly derived from it against
27 that person in a criminal case shall be rendered void;

28 (f) The nonprosecution terms of this paragraph do not apply to civil

1 matters of any kind, to any violation of the federal tax or securities laws, or to any
2 crime of violence; and

3 (g) Documents provided under Paragraphs 13(a) and 14(a) shall be
4 deemed responsive to outstanding grand jury subpoenas issued to the defendant or
5 any of its related entities.

6 17. The United States agrees that when any person travels to the United States
7 for interviews, grand jury appearances, or court appearances pursuant to this Plea
8 Agreement, or for meetings with counsel in preparation therefor, the United States will
9 take no action, based upon any Relevant Offense, to subject such person to arrest,
10 detention, or service of process, or to prevent such person from departing the United
11 States. This paragraph does not apply to an individual's commission of perjury (18 U.S.C.
12 § 1621), making false statements (18 U.S.C. § 1001), making false statements or
13 declarations in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice
14 (18 U.S.C. § 1503), or contempt (18 U.S.C. §§ 401-402) in connection with any testimony
15 or information provided or requested in any Federal Proceeding.

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

24 **REPRESENTATION BY COUNSEL**

25 19. The defendant has been represented by counsel and is fully satisfied that its
26 attorneys have provided competent legal representation. The defendant has thoroughly
27 reviewed this Plea Agreement and acknowledges that counsel has advised it of the nature
28 of the charge, any possible defenses to the charge, and the nature and range of possible

1 sentences.

2 **VOLUNTARY PLEA**

3 20. The defendant's decision to enter into this Plea Agreement and to tender a
4 plea of guilty is freely and voluntarily made and is not the result of force, threats,
5 assurances, promises, or representations other than the representations contained in this
6 Plea Agreement and the Bayer Cooperation Agreement, filed separately with the Court.
7 The United States has made no promises or representations to the defendant as to whether
8 the Court will accept or reject the recommendations contained within this Plea Agreement.

9 **VIOLATION OF PLEA AGREEMENT**

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

22. The defendant understands and agrees that in any further prosecution of it or its related entities resulting from the release of the United States from its obligations under this Plea Agreement, because of the defendant's or its related entities' violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by it, its related entities, or current or former directors, officers, or employees of it or its related entities to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against it or its related entities in any such further prosecution. In addition, the defendant unconditionally waives its right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

ENTIRETY OF AGREEMENT

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

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

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

26. A facsimile signature shall be deemed an original signature for the purpose

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4 of executing this Plea Agreement. Multiple signature pages are authorized for the purpose
5 of executing this Plea Agreement.

6

7 DATED:

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9 BAYER CORPORATION

10

11 BY: _____/s/_____
12 George J. Lykos
13 Senior Vice President, Chief Legal Officer
14 and Secretary
15 Bayer Corporation

14

15

16

17

18 COUNSEL FOR BAYER CORPORATION

19

20 BY: _____/s/_____
21 Phillip A. Proger, Esq.
22 Jones Day
23 51 Louisiana Ave., N.W.
24 Washington, DC 20001-2113

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28

Respectfully submitted,

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

BY: _____/s/_____
Barbara J. Nelson
Carolyn E. Galbreath
Attorneys

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