

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

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No.
)	
D.C. GUELICH EXPLOSIVE CO.,)	
)	(15 U.S.C. § 1)
Defendant.)	

PLEA AGREEMENT

D.C. GUELICH EXPLOSIVE CO., the defendant, through its authorized representative, and the United States of America agree as follows:

RIGHTS OF THE DEFENDANT

1. The defendant understands its rights:
 - (a) to be represented by an attorney;
 - (b) to plead not guilty;
 - (c) to have a trial by jury; and
 - (d) to confront and cross-examine witnesses and to call witnesses in its defense.

WAIVER OF RIGHTS AND OFFENSE CHARGED

2. The defendant waives the rights set out in 1(b)-1(d) above. The defendant will waive indictment and will plead guilty to a criminal Information, a copy of which will be attached to this Plea Agreement at the time of filing. The Information will charge the defendant with participating in a conspiracy to restrain competition for certain commercial explosives sold to the Whelpley Job of Hepburnia Coal Company, located in Snyder Township, Pennsylvania, from mid-1990 until early 1992 in

violation of Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1). The defendant will make a factual admission of guilt to the Court in accordance with Rule 11 of the Federal Rules of Criminal Procedure.

3. The defendant waives its right to assert at trial or on appeal any defects or errors arising from the Information, the information process, or the fact that it has been prosecuted by way of an information.

POSSIBLE MAXIMUM SENTENCE

4. The defendant understands that the Court may impose the following statutory maximum sentence for a violation of the Sherman Antitrust Act (15 U.S.C. § 1; 18 U.S.C. § 3571(c), (d)):

(a) a fine in an amount equal to the greatest of:

(1) \$10 million;

(2) twice the gross pecuniary gain derived from the crime; or

(3) twice the gross pecuniary loss caused to the victims of the crime;

(b) a mandatory special assessment of \$200; and

(c) restitution may be ordered by the Court.

5. The defendant understands that sentencing for the offense to be charged will be under the United States Sentencing Guidelines Manual ("USSG"). The sentence in this case will be imposed by the Court.

SENTENCING AGREEMENT

6. Pursuant to Rule 11(e)(1)(C), the United States and the defendant agree that the appropriate disposition of this Information is a fine of \$200,000. The parties agree that calculation of double the gain or double the loss would unduly complicate or prolong the sentencing process. 18 U.S.C. §§ 3571(c) and (d). Therefore, the parties agree that such calculations are not appropriate. The parties also agree that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process. 18 U.S.C. §3663(d) and USSG § 8B1.1(b). The defendant agrees that the fine is to be paid to the United States and agrees not to propose or advocate that any payment be made, or service rendered to any person, organization, institution or agency in lieu of the fine or any part of the fine. The defendant agrees that it will not, absent a written agreement with the United States, file any motion to reduce, modify or alter the fine imposed upon it by the Court so long as the total fine imposed does not exceed \$200,000.

7. In connection with their determination of the appropriate criminal fine set forth in the sentencing agreement in Paragraph 6, the United States and the defendant analyzed the appropriate Guidelines as follows:

(a) the applicable guideline is USSG § 2R1.1, and the base offense level is 10;

(b) the base fine is \$20,000 pursuant to USSG § 8C2.4(a) and (d);

(c) the culpability score is six (6), pursuant to USSG § 8C2.5 (§§ 8C2.5(a), (b)(4) and (g)(3)). Accordingly, the minimum multiplier to be applied to the base fine is 1.20 and the maximum multiplier is 2.40, pursuant to USSG § 8C2.6. Thus, under the Guidelines, the fine would range from approximately \$24,000 to \$48,000.

(d) Section 5K2.0 provides for a sentence above the range established by the applicable guideline if an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration in formulating the Guidelines exists. The parties agree that the nature of the conduct still under investigation and the defendant's desire to dispose of any and all other criminal liability that may continue to develop in the course of that ongoing investigation that would be relevant to computing defendant's sentence under §§ 1B1.3. and 1B1.4 are atypical circumstances not taken in consideration by the Guidelines. See USSG Ch. 1, Pt. A, intro. comment 4(b). The parties therefore agree that an upward departure is appropriate. Any calculation of the total volume of commerce affected by the defendant's conduct would be speculative at this time; therefore, the parties agree that an upward departure to a \$200,000 fine is appropriate.

8. Defendant agrees to pay the \$200 special assessment pursuant to 18 U.S.C. § 3013(a)(2)(B) at the time of sentencing.

The defendant agrees to pay the total fine amount of \$200,000 as follows:

(a) the first payment of \$25,000 will be due within 15 days of the date of sentencing in this matter;

(b) the second payment of \$25,000, with accrued interest as provided in 18 U.S.C. § 3612(f)(2), will be due on the first anniversary of the date of sentencing in this matter;

(c) the third payment of \$50,000, with accrued interest as provided in 18 U.S.C. § 3612(f)(2), will be due on the second anniversary of the date of sentencing in this matter;

(d) the fourth payment of \$50,000, with accrued interest as provided in 18 U.S.C. § 3612(f)(2), will be due on the third anniversary of the date of sentencing in this matter;

(e) the last payment of \$50,000, with accrued interest as provided in 18 U.S.C. § 3612(f)(2), will be due on the fourth anniversary of the date of sentencing in this matter;

(f) the defendant may prepay any or all of the above referenced payments without penalty; and

(g) the defendant agrees that in the event it shall fail to make any payment when due, the entire unpaid balance of the fine, plus accrued interest, shall be immediately due and payable should the United States so elect.

9. The defendant understands that the Court has absolute discretion, pursuant to Rule 11, to accept or reject the sentencing agreement set out in Paragraph 6 above. The defendant understands that should the Court reject the sentencing

agreement, it may withdraw its guilty plea as a matter of right under Fed. R. Crim. P. 11(e)(2) and (4) and the guilty plea, if withdrawn, shall not be admissible against the defendant in any criminal or civil proceeding as provided by Fed. R. Crim. P. 11(e)(6).

10. In the event that the Court rejects the sentencing agreement set out in Paragraph 6 above, this Plea Agreement shall be rendered null and void.

DEFENDANT'S COOPERATION

11. The defendant agrees it will cooperate fully with the United States in the conduct of any federal grand jury or other federal criminal investigation involving alleged antitrust violations in the explosives or ammonium nitrate industries between 1987 and the date of the signing of this Plea Agreement, and in any criminal litigation or other proceedings arising or resulting from such investigation. Defendant's cooperation will include:

(a) providing all documents or other items under its control or which may come under its control; and

(b) making its officers and employees reasonably available for such interviews at the offices of the Antitrust Division in Washington, D.C. as the United States may require.

12. Upon the request of the defendant, the United States will bring to the attention of any governmental or regulatory authority the nature and extent of the defendant's cooperation in

the investigation and any proceedings arising out of the investigation.

GOVERNMENT'S AGREEMENT

13. Subject to the defendant's full and continuing cooperation, as described in Paragraph 11 above, the United States agrees not to bring further criminal charges against the defendant under the federal antitrust statutes (15 U.S.C. § 1 *et seq.*), the mail or wire fraud statutes (18 U.S.C. §§ 1341, 1343), the federal conspiracy statute (18 U.S.C. § 371), the false claims statutes (18 U.S.C. §§ 286-287), the false statement statute (18 U.S.C. § 1001), the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962) or any other criminal statute that prohibits any act also prohibited by any of these statutes, for any violations committed as of the date of this Plea Agreement arising out of its participation in any combination or conspiracy to fix prices, rig bids or otherwise restrain trade in the sale of explosives or ammonium nitrate. This paragraph does not apply to any violations of federal tax and securities laws or civil matters of any kind.

WAIVER OF RIGHT TO APPEAL SENTENCE

14. Except as otherwise provided in this Plea Agreement, the defendant expressly waives the right to appeal its sentence on any ground, provided that the total fine imposed does not exceed \$200,000, including any appeal right conferred by 18 U.S.C. § 3742, and the defendant further agrees not to contest

its sentence in any post conviction proceeding, including but not limited to a proceeding under 28 U.S.C. § 2255.

REPRESENTATION OF COUNSEL

15. Defendant has thoroughly reviewed all legal and factual aspects of this case with its attorney and is fully satisfied with that attorney's legal representation. The defendant has received explanations satisfactory to it from defendant's attorney concerning each paragraph of this Plea Agreement, and the alternatives available to the defendant other than entering into this Plea Agreement. After conferring with counsel, the defendant has concluded that it is in its best interest to enter into this Plea Agreement and to waive the rights set out in Paragraph 1(b)-(d) above, and to waive the right to appeal its sentence subject to the restrictions set out in Paragraph 14 above rather than to proceed to trial in this case.

VOLUNTARY PLEA

16. The plea of guilty is freely and voluntarily made and not the result of force or threats or of promises or representations apart from those set forth in this Plea Agreement. There have been no representations or promises from anyone as to what sentence this Court will impose.

VIOLATION OF PLEA AGREEMENT

17. During the period of time of the United States' investigation into criminal violations in the explosives and the ammonium nitrate industries and any court proceedings arising from such investigations, defendant agrees that should it fail to

provide full cooperation or otherwise violate any other provision, the United States, in its sole discretion, may void any of its obligations under this Plea Agreement and the defendant shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, obstruction of justice and the substantive offenses arising from this investigation. Should this Plea Agreement become void, the defendant agrees that, for a period of two years after receiving notice from the United States of its decision to void the Plea Agreement, that it will waive any defense to any charge which it might otherwise have under any statute of limitations or the Speedy Trial Act from the date of the execution of this Plea Agreement.

ENTIRETY OF AGREEMENT

18. This Plea Agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the charge in this case. The United States has made no other promises to or agreement with the defendant relating to price fixing or bid rigging or other restraints of trade in the explosives and ammonium nitrate industries. This Plea Agreement cannot be modified other than in writing signed by the parties.

AGREED TO AND SIGNED this _____ day of _____, 1996.

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