

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA)	Filed:
)	
v.)	Crim. No.
)	
ETI EXPLOSIVES TECHNOLOGIES)	
INTERNATIONAL INC.,)	15 U.S.C. § 1
)	
Defendant.)	

PLEA AGREEMENT

ETI EXPLOSIVES TECHNOLOGIES INTERNATIONAL INC., 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 commercial explosives sold to certain

customers located in Alaska from mid-1992 until late 1993 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 \$950,000, which fine is within the range of the Court's discretion. 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 calculation of loss for purposes of possible restitution would unduly complicate or prolong the sentencing process. 18 U.S.C. § 3663(d). Therefore, the parties agree that restitution is not appropriate. 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 \$950,000.

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) increase three (3) levels because the volume of commerce attributable to the defendant was more than \$2.5 million, pursuant to USSG § 2R1.1(b)(2)(C). The United States' best estimate of the affected volume of commerce is \$4.5 million;

(c) the base fine is 20 percent of the volume of commerce, pursuant to USSG § 2R1.1(d)(1) and § 8C2.4(a) and (b), or approximately \$900,000;

(d) 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 1.2 and the maximum multiplier is 2.4, pursuant to USSG § 8C2.6. Thus, under the Guidelines, the fine would range from approximately \$1,080,000 to \$2,160,000.

(e) The United States has analyzed the current financial condition of the defendant and has concluded that the defendant is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required by USSG § 8C2.7 within the meaning of USSG § 8C3.3(b). The United States and the defendant, based on their assessment of the defendant's financial condition, agree that \$950,000 is the appropriate amount the defendant can pay without substantially jeopardizing its continued viability.

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 \$950,000 as follows:

(a) the first payment of \$150,000 will be due within 15 days of the date of sentencing in this matter;

(b) the second payment of \$200,000, 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 \$200,000, 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 \$200,000, 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 \$200,000, 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.

13. Each current officer or employee of the defendant (other than certain individuals identified in an attachment to this Plea Agreement to be filed under seal) who may have knowledge which would be of substantial assistance to the currently ongoing grand jury investigation of price fixing in the explosives and ammonium nitrate industries may, within sixty (60) days from the date of this Plea Agreement, unless extended by the United States in writing, provide the Antitrust Division staff with a personal proffer generally outlining the substance of his or her knowledge. If, in the judgment of the staff, such proffer is fully truthful and complete, the staff agrees to recommend to its supervisors that informal immunity be granted to the officer or employee so that information given to the prosecutors in the interview, and testimony given to the grand jury shall be accorded the scope of immunity protection as provided in 18 U.S.C. § 6002. If, in the sole judgment of the staff, such proffer is not fully truthful and complete, the officer or employee shall be subject to prosecution for any federal crime. Such prosecution may be based upon any information provided by the officer or employee during the personal proffer.

GOVERNMENT'S AGREEMENT

14. 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 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 or 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 against the defendant or any subsidiary of the defendant. 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

15. 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 \$950,000, 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. The defendant, however, reserves the right: (a) to appeal any punishment imposed in excess of a statutory maximum; (b) to appeal any punishment to the extent it constitutes an upward departure from

the Guidelines range deemed most applicable by the sentencing court; (c) to appeal on the grounds of arithmetic errors in the guidelines calculations; and (d) to appeal on the ground of ineffective assistance of counsel.

REPRESENTATION OF COUNSEL

16. 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 15 above rather than to proceed to trial in this case.

VOLUNTARY PLEA

17. 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

18. 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

19. 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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