

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

UNITED STATES OF AMERICA	) Criminal No. 99-244
	)
v.	) Judge Ronald L. Buckwalter
	)
SGL CARBON AKTIENGESELLSCHAFT and	) FILED: 5/4/99
ROBERT J. KOEHLER,	)
	)
Defendants.	)

GOVERNMENT’S RULE 11 MEMORANDUM

The United States, Robert J. Koehler, and SGL Carbon Aktiengesellschaft (SGL AG) have entered into plea agreements, pursuant to which Robert J. Koehler and SGL AG will waive indictment and plead guilty to the captioned Information. The one-count Information charges Robert J. Koehler and SGL AG with a violation of the Sherman Act, 15 U.S.C. § 1. The purpose of this memorandum is to provide the Court with sufficient information for acceptance of the pleas by setting forth the violated statute, a description of the criminal Information, the terms of the plea agreements, and a preliminary statement of facts which support the agreements.

I

STATUTE VIOLATED

A. **15 U.S.C. Section 1**

Section One of Title 15, United States Code, provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding \$10,000,000 if a corporation, or, if any

other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

B. The Information

The Information charges Robert J. Koehler and SGL AG with participating in a conspiracy to suppress and eliminate competition by fixing the price and allocating the volume of graphite electrodes sold in the United States and elsewhere in unreasonable restraint of trade and commerce from at least as early as July 1992 and continuing until at least June 1997.

C. Elements of the Offense

The elements of a Sherman Act offense, each of which the United States must prove beyond a reasonable doubt, are:

- (1) the conspiracy charged was formed, and it was in existence at or about the time alleged;
- (2) the defendants knowingly formed or participated in that conspiracy; and
- (3) the activity which was the object of the conspiracy was within the flow of, or substantially affected, interstate or foreign commerce.

D. Maximum Penalty

The maximum penalty Robert J. Koehler may receive upon his conviction in this case is a fine in an amount equal to the largest of: (a) \$350,000; (b) twice the gross pecuniary gain derived from the crime; or (c) twice the gross pecuniary loss caused to the victims of the crime. The maximum penalty SGL AG may receive upon its conviction in this case is a fine in an amount equal to the largest of: (a) \$10 million; (b) twice the gross pecuniary gain derived from the crime; or (c) twice the gross pecuniary loss caused to the victims of the crime.

II

FACTUAL BASIS

This statement of facts is intended to be used as a factual basis for the guilty pleas of Robert J. Koehler and SGL AG. It is not intended to be exhaustive in terms of all details surrounding the charged conspiracy.

A. Background

Graphite electrodes are large¹ columns that generate intense heat. They are used primarily by “mini-mills” in the production of steel in electric arc furnaces (EAF), the steel-making technology used by all “mini-mills,” and for refining steel in ladle furnaces. Graphite electrodes used in electric arc furnaces cost thousands of dollars, and because of the intense heat generated, they are consumed in the steel-making process. The instant conspiracy affected sales of graphite electrodes to steel mills in the United States and elsewhere.

B. The Conspiracy

During the period covered by the Information, Robert J. Koehler was engaged in the business of selling graphite electrodes to customers in the United States and foreign countries in his capacity as Chief Executive Officer and Chairman of the Executive Committee of SGL AG. At all times relevant hereto, SGL AG was a German corporation headquartered in Wiesbaden, Germany, which, through its subsidiaries, manufactured and sold graphite electrodes in various countries throughout the world. SGL Carbon Corp., the United States subsidiary of SGL AG, maintained offices in Briar Cliff Manor, New York or Charlotte, North Carolina, manufactured graphite electrodes in Morganton, North Carolina and Hickman, Arkansas, and sold graphite

¹ Graphite electrodes are usually 24 - 30 inches in diameter by eight feet in length.

electrodes in the United States and elsewhere.² As alleged in the Information, beginning at least as early as July 1992 and continuing until at least July 1997, Robert J. Koehler, SGL AG and certain competitor companies entered into and participated in a combination and conspiracy to suppress and eliminate competition by fixing the price and allocating the volume of graphite electrodes sold in the United States and elsewhere. The combination and conspiracy engaged in by the defendants and co-conspirators was in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

The conspiracy consisted of a continuing agreement, understanding, and concert of action among the conspirators, the substantial terms of which were:

- (1) to agree to fix and maintain prices and to coordinate price increases for the sale of graphite electrodes in the United States and elsewhere; and
- (2) to agree to allocate among the corporate conspirators the volume of sales of graphite electrodes in the United States and elsewhere.

For the purpose of forming and carrying out the charged combination and conspiracy, Robert J. Koehler, SGL AG, and co-conspirators did those things that they combined and conspired to do, including, among other things:

- (1) participating in meetings and conversations in the Far East, Europe, and the United

² In February 1992, Hoechst AG of Frankfurt, Germany, and Horsehead Industries of New York City, New York merged their respective carbon and graphite production operations--Sigri GmbH (wholly owned by Hoechst) and Great Lakes Carbon Corporation (wholly owned by Horsehead). They created Sigri Great Lakes Carbon GmbH which was 66.7% owned by Hoechst AG and 33.3% owned by Horsehead. The United States subsidiary was named Sigri Great Lakes Carbon Corporation. In November 1994, Sigri Great Lakes Carbon GmbH's name was changed to SGL Carbon AG, and shortly thereafter the United States subsidiary changed its name to SGL Carbon Corp. The United States corporate office was located in Briar Cliff Manor, NY until the end of 1994, when the management of North American operations was consolidated in Charlotte, North Carolina.

States to discuss the prices and volume of graphite electrodes sold in the United States and elsewhere;

- (2) agreeing, during those meetings and conversations, to charge prices at certain levels and otherwise to increase and maintain prices of graphite electrodes sold in the United States and elsewhere;
- (3) agreeing, during those meetings and conversations, to eliminate discounts from the fixed price of graphite electrodes offered to customers in the United States and elsewhere;
- (4) agreeing, during those meetings and conversations, to allocate among the corporate conspirators the approximate volume of graphite electrodes to be sold by each corporate conspirator in the United States and elsewhere;
- (5) agreeing, during those meetings and conversations, to divide the world market among themselves, and to designate on a region-by-region basis, including the United States, the conspirator who would fix the price that others would follow in that region;
- (6) agreeing, during those meetings and conversations, to restrict graphite electrode producing capacity among the corporate conspirators;
- (7) agreeing, during those meetings and conversations, to restrict non-conspirator companies' access to certain graphite electrode manufacturing technology;
- (8) discussing, during those meetings and conversations, methods to conceal the agreement, including the use of code names by the corporate conspirators;
- (9) exchanging sales and customer information for the purpose of monitoring and enforcing adherence to the above-described agreement; and

(10) issuing price announcements and price quotations in accordance with the agreements reached.

C. Interstate and Foreign Commerce

At all times during the conspiracy, SGL Carbon Corp. or its predecessor, headquartered in Briar Cliff Manor, New York and later, in Charlotte, North Carolina, or other conspirators from other locations, sold a substantial quantity of graphite electrodes in a continuous and uninterrupted flow of interstate and foreign commerce to customers located in states or countries other than the states or countries in which graphite electrodes were produced.

III

PLEA AGREEMENTS

The guilty pleas in this case will be entered pursuant to plea agreements between Robert J. Koehler, SGL AG, and the Antitrust Division.

A. Robert J. Koehler

The plea agreement provides that Robert J. Koehler will enter a plea of guilty in the Eastern District of Pennsylvania pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, to a one-count criminal Information charging him with participating in a conspiracy to restrict competition by fixing the price and allocating the volume of graphite electrodes sold in the United States and elsewhere from at least as early as July 1992 and continuing until at least June 1997 in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

Also pursuant to the plea agreement, the United States and Robert J. Koehler agree to jointly recommend that the Court impose a sentence requiring Mr. Koehler to pay a fine to the United States in the amount of \$10 million as an appropriate disposition of the case. The first payment in the amount of \$1 million will be due within ninety days from the date of imposition of

sentence. Thereafter, the defendant shall make five payments, each on the yearly anniversary of the date of sentencing, according to the following schedule: \$1 million on the first anniversary of the date of sentencing; \$2 million on the second anniversary of the date of sentencing; \$2 million on the third anniversary of the date of sentencing; \$2 million on the fourth anniversary of the date of sentencing; and \$2 million on the fifth anniversary of the date of sentencing. Pursuant to 18 U.S.C. § 3612(f)(3)(A), interest shall be waived due to Mr. Koehler's inability to pay.³ The agreed-upon fine is within the United States Sentencing Guidelines fine range. The United States and Robert J. Koehler will also jointly request that the Court accept Mr. Koehler's guilty plea and immediately impose sentence on the day of arraignment.⁴ Should the Court reject the agreed-upon disposition of the case, Mr. Koehler will be free to withdraw his plea.

Robert J. Koehler has agreed to fully cooperate with the United States in the conduct of the present investigation of the graphite electrode industry and any litigation or other proceedings to which the United States is a party resulting therefrom. Such cooperation includes, but is not limited to, the production of relevant documents under the control of Robert J. Koehler, making himself available upon reasonable notice, not at the expense of the United States, for interviews in the United States and at other mutually agreed-upon locations, and responding fully and truthfully to all inquiries of the United States in connection with the present investigation of the graphite electrode industry and any litigation or other proceedings to which the United States is a party resulting therefrom. Such cooperation also includes testifying truthfully in trial and grand jury proceedings.

³ SGL AG also agrees to guarantee the payment of the \$10 million criminal fine called for in the Plea Agreement between the United States and Robert J. Koehler.

⁴ The United States is informed that Robert J. Koehler will waive the presentence report.

Also pursuant to the plea agreement, the United States agrees, subject to the continuing full cooperation of Robert J. Koehler, not to bring further criminal proceedings against Robert J. Koehler for any act or offense committed prior to the date of the plea agreement undertaken in connection with any antitrust conspiracy involving the sale or manufacture of graphite electrodes.

B. SGL AG

The plea agreement between SGL AG and the United States provides that SGL AG will enter a plea of guilty in the Eastern District of Pennsylvania pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, to a one-count criminal Information charging the company with participating in a conspiracy to restrict competition by fixing the price and allocating the volume of graphite electrodes sold in the United States and elsewhere from at least as early as July 1992 and continuing until at least June 1997 in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

Also pursuant to the plea agreement, the United States and SGL AG agree to jointly recommend that the Court impose a sentence requiring SGL AG to pay a fine to the United States in the amount of \$135 million as an appropriate disposition of the case. The first payment in the amount of \$13.5 million will be due within ninety days from the date of imposition of sentence. Thereafter, the defendant shall make five payments, each on the yearly anniversary of the date of sentencing, according to the following schedule: \$13.5 million on the first anniversary of the date of sentencing; \$27 million on the second anniversary of the date of sentencing; \$27 million on the third anniversary of the date of sentencing; \$27 million on the fourth anniversary of the date of sentencing; and \$27 million on the fifth anniversary of the date of sentencing. Pursuant to

18 U.S.C. § 3612(f)(3)(A), interest shall be waived due to SGL AG's inability to pay.⁵ Although the United States Sentencing Guidelines fine range exceeds the agreed-upon fine, the United States agrees to recommend that the Court impose a sentence requiring SGL AG to pay a fine to the United States in the amount of \$135 million due to SGL AG's inability to pay. The United States and SGL AG will also jointly request that the Court accept SGL AG's guilty plea and immediately impose sentence on the day of arraignment.⁶ Should the Court reject the agreed-upon disposition of the case, SGL AG will be free to withdraw its plea.

SGL AG and its subsidiaries have agreed to fully cooperate with the United States in the conduct of the present investigation of the graphite electrode industry and any litigation or other proceedings to which the United States is a party resulting therefrom. Such cooperation includes, but is not limited to, the production of relevant documents under the control of SGL AG and its subsidiaries. SGL AG must also use its best efforts to secure, in connection with the present investigation and any litigation resulting therefrom, the full and truthful cooperation of current directors, officers and employees of SGL AG, including its subsidiaries, with relevant information who are identified by the United States. Such cooperation includes testifying truthfully in trial and grand jury proceedings.

Also pursuant to the plea agreement, the United States agrees, subject to the continuing full cooperation of SGL AG and its subsidiaries, not to bring further criminal proceedings against SGL AG or its subsidiaries for any act or offense committed prior to the date of the plea

⁵ SGL AG also agrees to guarantee the payment of a \$10 million criminal fine called for in the separate plea agreement between the United States and SGL AG's Chief Executive Officer, Robert J. Koehler.

⁶ The United States is informed that SGL AG will waive the presentence report.

agreement undertaken in connection with any antitrust conspiracy involving the sale or manufacture of graphite electrodes. Subject to their continuing cooperation, directors, officers, and employees of SGL AG and its subsidiaries (other than Robert J. Koehler, SGL AG's Chief Executive Officer, with whom the United States has entered into a separate plea agreement) will receive the same non-prosecution protection.

Dated:

Respectfully submitted,

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