

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

UNITED STATES OF AMERICA)	Criminal No. 98-177
)	
v.)	Judge Charles R. Weiner
)	
UCAR INTERNATIONAL INC.,)	Filed: 4/21/98
)	
Defendant.)	

GOVERNMENT'S SENTENCING MEMORANDUM

The United States and UCAR International Inc. (UCAR) have entered into a plea agreement, pursuant to which UCAR will waive indictment and plead guilty to the captioned Information. The one-count Information charges UCAR with a violation of the Sherman Act, 15 U.S.C. § 1.

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 defendant 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 beginning 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 charged conspiracy was formed, and it was in existence at or about the time alleged;
- (2) the defendant knowingly 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 UCAR 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 by the conspirators from the crime; or (c) twice the gross pecuniary loss caused to the victims of the crime.

II

THE SENTENCING GUIDELINES

The Government and UCAR agree that the following is the appropriate volume of affected commerce and the resultant United States Sentencing Guidelines fine range.

The guideline calculation is set forth below:

Commerce

\$713,000,000

Volume of Commerce

(UCAR's United States sales
for July 1992 - June 1997)

\$142,600,000 Base Fine (20%)

Culpability Score

+ 5	Base Level
+ 4	Over 1,000 employees and high level personnel involved
0	Lack of Effective Antitrust Program
<u>- 2</u>	Acceptance of Responsibility and Full Cooperation
+ 7	Culpability Score
1.40 - 2.80	Multiplier

Guidelines Fine Range

\$199,640,000 - \$399,280,000

Because any Guidelines fine would exceed the \$10 million statutory maximum under the Sherman Act, the fine must be supported by the alternative fine provisions of 18 U.S.C. § 3571(d). This statute provides that a defendant "may be fined not more than the greater of twice the gross gain or twice the gross loss ..." (i.e., pecuniary loss caused to victims). The parties have not calculated the amount of the overcharge to customers. However, the total volume of affected commerce for the charged conspiracy period from all conspirators is close to \$1.7 billion. Even a nominal overcharge to customers of, say, 10% would, when doubled, provide for a maximum fine under the alternative sentencing provision of approximately \$340 million. Thus, the parties agree that double the gain or loss would exceed the agreed-upon fine of \$110 million.

III

GOVERNMENT'S SENTENCING RECOMMENDATION

The agreed-upon fine is below the minimum of the United States Sentencing Guidelines

fine range due to UCAR's inability to pay a higher fine. See U.S.S.G. 8C3.3(b). The Rule 11(e)(1)(C) Plea Agreement calls for and the United States recommends that the Court impose a sentence requiring UCAR to pay a fine to the United States in the amount of \$110 million in accordance with the following schedule.¹ The first payment in the amount of \$20 million will be due within 90 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, as follows: \$15 million on the first anniversary of the date of sentencing; \$15 million on the second anniversary of the date of sentencing; \$18 million on the third anniversary of the date of sentencing; \$21 million on the fourth anniversary of the date of sentencing; and \$21 million on the fifth anniversary of the date of sentencing. Pursuant to 18 U.S.C. § 3612(f)(3)(A), the Government respectfully requests that the Court waive the requirement for interest due to UCAR's inability to pay.

The United States' determination that UCAR is unable to pay a fine higher than that recommended is based on an assessment of UCAR's present and projected financial condition and on potentially large liabilities UCAR faces resulting from its unlawful conduct. First, the United States considered the appropriate size and payment schedule for the criminal fine. UCAR maintains minimal cash on hand and instead relies on a large line of credit to handle operating expenses in the United States. Subsequent to the February 23, 1998 filing of a criminal

¹ While four of UCAR's executives, the most active participants in the conspiracy from the company, are neither protected by nor obliged to cooperate pursuant to the plea agreement, UCAR has provided and is committed to continue to provide significant cooperation. The cooperation includes eliciting information from its employees regarding their knowledge of and participation in conspiratorial contacts, making such individuals available for interviews and directing the Government's attention to pertinent documents. UCAR's cooperation to date has advanced the Government's investigation. However, while the cooperation has been meaningful, any downward departure the United States would have recommended for substantial assistance pursuant to U.S.S.G. §8C4.1 still would have called for a fine that exceeded UCAR's ability to pay.

Information alleging a Sherman Act violation by another graphite electrode manufacturer in United States v. Showa Denko Carbon, Inc., Criminal No. 98-85 (E.D. Pa.), UCAR's line of credit was frozen, and it has almost no cash available. That line of credit must be reopened, and because UCAR has hundreds of millions of dollars in short-term and long-term debt that will involve some restructuring, it will take UCAR time to secure financing for even the first \$20 million installment on the fine; accordingly, the initial payment is not due until 90 days after sentencing. It is anticipated that future fine payments (which gradually increase) will be covered by the projected operating profits generated by the company and its cash flow which should improve as debt is retired. Second, the United States considered potential damage payments to civil plaintiffs which were injured by the conspiracy and to other parties (such as the European Union) to which UCAR may be liable for its participation in the conspiracy--all of which payments will need to be made from future cash flow as well. In essence, the below-Guidelines minimum fine (but still \$10 million larger than the previous highest Sherman Act fine), the payment schedule, and the absence of interest reflect a public-interest balancing of the need to punish UCAR for its participation in this egregious conspiracy against the need to avoid jeopardizing the company's continued viability in light of its extensive liabilities.

The United States also recommends that the Court impose no order of restitution because UCAR has been sued by the victims of this conspiracy--all sophisticated companies represented by knowledgeable, private antitrust counsel. There are class actions, as well as suits instituted by other groups of graphite electrodes customers, which seek treble damages and attorneys fees as provided for persons damaged by violations of the antitrust laws under Section Four of the Clayton Act, 15 U.S.C. §4. Given the remedies afforded victims of antitrust crime and the active involvement of private antitrust counsel representing the victims of this case, the need to fashion

a restitution order is outweighed by the difficulty the Court would encounter in attempting to determine the losses suffered by all of the many victims and the undue complication and prolongation of the sentencing process.

IV

CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court impose a sentence consistent with the terms of the Plea Agreement between the United States and UCAR and the United States' recommendation; that is, that UCAR be required to pay a criminal fine of \$110 million payable over five years without interest in accordance with the schedule described above.

Dated:

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 21st day of April 1998, a copy of the Government's Sentencing Memorandum has been express mailed to counsel of record for the defendant as follows:

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