

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

UNITED STATES OF AMERICA)	
)	Criminal No. 02-194
v.)	
)	Judge Robert J. Kelly
VAW CARBON GMBH,)	
)	Filed: 4-24-02
Defendant.)	

GOVERNMENT’S SENTENCING MEMORANDUM

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

I
STATUTE VIOLATED

A. 15 U.S.C. § 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 . . . , in the discretion of the court.

B. The Information

The Information charges the defendant with participating in a conspiracy to suppress and eliminate competition by fixing the price of carbon cathode block sold in the United States and elsewhere in unreasonable restraint of trade and commerce beginning at least as early as February 1996 and continuing until at least December 1997.

C. Elements of the Offense

The elements of a Sherman Act offense, each of which the United States would be required to prove beyond a reasonable doubt at trial, are:

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

D. Maximum Penalty

The maximum penalty VAW Carbon 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 VAW Carbon agree that the following is the appropriate volume of affected commerce and the resultant United States Sentencing Guidelines fine range. The Guidelines calculation is set forth below:

a. Base Fine = \$650,378

$$\text{Volume of Commerce } (\$3,251,892) \times .20 = \$650,378$$

b. Culpability Score = 5 (Multiplier = 1.0 - 2.0):

Base Score	5
>200 employees	3
Cooperation/Acceptance of Responsibility	<u>-2</u>
	6

c. Guidelines Fine Range = \$780,454 - \$1,560,907

\$650,378 (Base Fine) x 1.2 = \$780,454

\$650,378 (Base Fine) x 2.4 = \$1,560,907

III **GOVERNMENT'S SENTENCING RECOMMENDATION**

Pursuant to the terms of the Plea Agreement entered into with VAW Carbon, the United States recommends that the Court impose a sentence requiring VAW Carbon to pay a Guidelines fine of \$990,000. If accepted by the Court, VAW Carbon will pay the \$990,000 fine within seven (7) days from the date of the imposition of sentence. Defendant's total relevant U.S. commerce during the conspiratorial period was \$3,251,892. Thus, the Guidelines fine range is \$780,454 to \$1,560,907, and the agreed-upon fine of \$990,000 is within the Guidelines range.

There are several reasons why the agreed-upon fine is the appropriate disposition of this matter. While defendant was a participant in the conspiracy, it was not one of its organizers, leaders or major players. All of defendant's assets have been sold since its participation in the conspiracy ended, and the individuals responsible for its antitrust misconduct are no longer employees of the Defendant or any of its affiliates. Defendant is presently a shell corporation with only two employee/managers to wind up its affairs. Its parent, VAW Aluminum, has recently itself been acquired by Norsk Hydro. In addition, Defendant has waived venue and agreed to submit to jurisdiction. Further, while Defendant's ability to do so is obviously limited, Defendant has already provided meaningful cooperation in this investigation, *e.g.*, in terms of the identity and addresses of potential witnesses and/or subjects of the investigation, and its cooperation is ongoing. For all these reasons, the Government submits that this agreed-upon fine is in the public interest and is the appropriate disposition of this case.

The United States also recommends that the Court not impose an order of restitution due to the likelihood that the victims of the conspiracy, all sophisticated aluminum companies, may

institute individual or class actions seeking treble damages and attorneys fees as provided for persons harmed by violations of the antitrust laws under Section Four of the Clayton Act, 15 U.S.C. § 4. Indeed, we are advised that two of the aluminum companies have filed individual suits. Given the remedies afforded victims of antitrust crimes and the anticipated involvement of private antitrust counsel representing victims in this case, the need to fashion a restitution order is outweighed by the difficulty the Court would encounter in attempting to determine the amount of any losses suffered by all of the victims and would unduly complicate and prolong the sentencing process. Further, we have notified the aluminum companies about this Information and they have the right to be heard at sentencing, if they so choose, and none have contacted us.

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 entered into between the United States and VAW Carbon and with the recommendation of the United States that VAW Carbon be required to pay a criminal fine of \$990,000 within seven (7) days of the date of the imposition of sentence.

Dated: 4-24-02

Respectfully submitted,

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