

**Model Annotated Corporate Plea Agreement
Last Updated 3/14/2019**

UNITED STATES DISTRICT COURT

[XXXXXXX] DISTRICT OF [XXXXXXX]

UNITED STATES OF AMERICA)	Criminal No. [XXXX]
)	
)	Filed:
v.)	
)	Violation:
[GLOBAL PRODUCTS, INC.],)	
)	
Defendant.)	
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PLEA AGREEMENT¹

The United States of America and [Global Products, Inc.] (“defendant”), a corporation organized and existing under the laws of [STATE **OR if foreign--**COUNTRY], hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(B **OR C**)² of the Federal Rules of Criminal Procedure (“Fed. R. Crim. P.”):

¹ *This document contains the typical terms used in plea agreements entered into with the Antitrust Division of the Department of Justice for a Sherman Act offense. The local practice of the U.S. Attorney’s Office in the district where a plea agreement is filed will be adhered to wherever necessary. Brackets indicate either optional language or case-specific factual information. The Division will periodically update this model to reflect new case law, statutes, or policies. The most recent versions of the Division’s model plea agreements are available at <https://www.justice.gov/atr/criminal-enforcement>.*

This Model provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

² *See Speech by Gary R. Spratling Before ABA Criminal Justice Section Thirteenth Annual National Institute on White Collar Crime, Negotiating The Waters Of International Cartel Prosecutions -- Antitrust Division Policies Relating To Plea Agreements In International Cases*

RIGHTS OF DEFENDANT

1. The defendant understands its rights:
 - (a) to be represented by an attorney;
 - (b) to be charged by Indictment;
 - (c) to plead not guilty to any criminal charge brought against it;
 - (d) to have a trial by jury, at which it would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for it to be found guilty;
 - (e) to confront and cross-examine witnesses against it and to subpoena witnesses in its defense at trial;
 - (f) to appeal its conviction if it is found guilty; and
 - (g) to appeal the imposition of sentence against it.

AGREEMENT TO PLEAD GUILTY AND WAIVE CERTAIN RIGHTS

2. The defendant knowingly and voluntarily waives:
 - (a) the rights set out in subparagraphs 1(b)-(e) above;
 - (b) any right it might have as a corporation organized and existing under the laws of [COUNTRY] to decline to accept service of the Summons in this case;]

§ VI.A., at 17-18 (Mar. 4, 1999) [hereinafter *Spratling, Negotiating The Waters*], <https://www.justice.gov/atr/speech/negotiating-waters-international-cartel-prosecutions-antitrust-division-policies-relating>, for a discussion of the Division's policy on the use of Fed. R. Crim. P. 11(c)(1)(C) plea agreements ("C agreements") with foreign defendants in international cartel cases. Division speeches are available at <https://www.justice.gov/atr/criminal-policy-speeches> and <https://www.justice.gov/atr/speeches-0>.

(c) any right it might have as a corporation organized and existing under the laws of [COUNTRY] to contest that the United States District Court for the [XXXXXXX] District of [XXXXXXX] has jurisdiction over it for purposes of this case;]

(d) the right to file any appeal or collateral attack that challenges its conviction, including but not limited to any appeal or collateral attack raising any argument that (1) the statute to which it is pleading guilty is unconstitutional or (2) the admitted conduct does not fall within the scope of such statute; and

(e) the right to file any appeal or collateral attack, including but not limited to an appeal under 18 U.S.C. 3742, that challenges the sentence imposed by the Court if that sentence is consistent with or below the recommended sentence³ in Paragraph 9 of this Plea Agreement, regardless of how the sentence is determined by the Court. For purposes of the waiver of appeal or collateral attack of the sentence, the sentence imposed is deemed consistent with or below the recommended sentence in Paragraph 9 even if the sentence imposed includes a term of probation if it is otherwise consistent with or below the recommended sentence in Paragraph 9, unless the term of probation exceeds the length authorized by 18 U.S.C. § 3561(c). This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b)[*for C agreements only, also insert “-(c)”*].

Nothing in this paragraph, however, will act as a bar to the defendant perfecting any legal remedies it may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct. [*May also include following stipulation--*The

³ *If the Plea Agreement contains a substantial assistance departure recommendation for the fine with no specific recommendation as to the amount of the departure, whether there is a waiver of appeal with respect to the fine may depend on the specific situation and local practice.*

defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct.] Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty to a [one]-count Information [in the form attached] to be filed in the United States District Court for the [XXXXXX] District of [XXXXXXX]. The Information will charge the defendant with [participating in a conspiracy to suppress and eliminate competition by [DESCRIPTION OF CHARGE AS SET OUT IN THE CHARGING PARAGRAPH OF THE INFORMATION] sold in [the United States and elsewhere] [CHARGE PERIOD] in violation of the Sherman Antitrust Act, 15 U.S.C. § 1].

3. The defendant will plead guilty to the criminal charge described in Paragraph 2 above pursuant to the terms of this Plea Agreement and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below.

FACTUAL BASIS FOR OFFENSE CHARGED⁴

⁴ *Division plea agreements generally include a factual basis section, unless such a section is inconsistent with local practice. Under Apprendi v. New Jersey, 530 U.S. 466 (2000), facts that increase a penalty for a crime above the statutory maximum must be proved to a jury beyond a reasonable doubt or admitted by the defendant. Apprendi applies to fines as well as prison sentences. See Southern Union Co. v. United States, 567 U.S. 343 (2012). Thus, if 18 U.S.C. § 3571(d) is used to obtain a fine greater than the Sherman Act maximum fine, the Plea Agreement should address gain or loss as is done in subparagraph 9(f). In non-Title 15 cases, the Plea Agreement will normally contain a loss stipulation to support a sentence above the statutory maximum. Under United States v. Booker, 543 U.S. 220 (2005), the government is not required to allege facts supporting Guidelines enhancements in an indictment or plea agreement nor prove them beyond a reasonable doubt. This factual basis section includes Guidelines stipulations as optional language. For a discussion of the continued implications of Booker on sentencing recommendations, see Memorandum for All Federal Prosecutors from the Attorney General, Department Charging and Sentencing Policy (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>; Speech by Scott D. Hammond Before the ABA Section of Antitrust Law Spring Meeting, Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants (Mar. 30, 2005), <https://www.justice.gov/atr/speech/antitrust-sentencing-post-booker-era-risks-remain-high-non-cooperating-defendants>.*

4. Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts:⁵

(a) For purposes of this Plea Agreement, the “relevant period” is that period [CHARGE PERIOD FROM INFORMATION]. During the relevant period, the defendant was a corporation organized and existing under the laws of [STATE *OR if foreign*--COUNTRY]. The defendant had its principal place of business in [CITY, STATE *OR if foreign*--CITY, COUNTRY]. During the relevant period, the defendant was a [producer] of [PRODUCT][,] [and] was engaged in the sale of [PRODUCT] in [the United States and elsewhere][, and employed [X] or more individuals]. [SHORT PRODUCT DESCRIPTION.] [During the relevant period, the defendant’s sales of [PRODUCT] affecting U.S. customers totaled at least \$[AFFECTED SALES VOLUME THAT WILL BE USED TO CALCULATE ADVISORY GUIDELINES RANGE].]

(b) During the relevant period, the defendant, through its [RELEVANT ACTORS, e.g. officers and employees], [including high-level personnel of the defendant,] participated in a conspiracy among major [PRODUCT] [producers], the primary purpose of which was to [DESCRIPTION OF THE CHARGE] sold in [the United States and elsewhere]. In furtherance of the conspiracy, the defendant, through its [RELEVANT ACTORS], engaged in discussions and attended meetings with representatives of other major [PRODUCT] [producers]. During these discussions and meetings, agreements were reached to [DESCRIPTION OF THE CHARGE] to be sold in [the United States and elsewhere]. [*In a bid-rigging case where defendant submitted*

⁵ The amount of detail contained in subparagraphs 4(a) & (b) will normally track the detail in the Information. A factual basis must be established for each count of the Information.

comp bid(s), may insert the following if larger than the volume of commerce done by the defendant in the goods or services that were affected by the violation–The largest contract on which the defendant submitted a complementary bid in connection with the conspiracy was in the amount of \$[XXX].]

(c) *[Describe relevant interstate and foreign commerce. A common description of interstate commerce follows --*

During the relevant period, [PRODUCT] sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution of [PRODUCT], as well as payments for [PRODUCT], traveled in interstate commerce.] The business activities of the defendant and its co-conspirators in connection with the [production and sale] of [PRODUCT] that were the subject of this conspiracy were within the flow of, and substantially affected, interstate trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within the [XXXXXXX] District of [XXXXXXX]. *[Describe relevant venue. Common descriptions are as follows --* [The conspiratorial meetings and discussions described above took place in [the United States and elsewhere], and at least one of these meetings [which was attended by a representative of the defendant] occurred in this District.] *OR* [[PRODUCT] that [was/were] the subject of this conspiracy [was/were] sold by one or more of the conspirators to customers in this District.]]

[If the defendant is receiving a sentencing enhancement, or a separate charge, for an obstruction related offense, insert a description of the conduct –

(e) In an attempt to conceal this conspiracy, [*insert description of the obstructive conduct*].]

ELEMENTS OF THE OFFENSE

5. *[Insert elements for each count charged. Insert the following elements for any count involving any interstate commerce -- The elements of the charged offense are that:*
- (a) the conspiracy described in the Information existed at or about the time alleged;
 - (b) the defendant knowingly became a member of the conspiracy; and
 - (c) the conspiracy described in the Information either substantially affected interstate commerce in goods or services or occurred within the flow of interstate commerce in goods and services.]

POSSIBLE MAXIMUM SENTENCE

6. The defendant understands that the statutory maximum penalty which may be imposed against it upon conviction for [a][each] violation of Section One of the Sherman Antitrust Act is a fine in an amount equal to the greatest of:
- (a) \$100 million (15 U.S.C. § 1);
 - (b) twice the gross pecuniary gain the conspirators derived from the crime (18 U.S.C. § 3571(c) and (d)); or
 - (c) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (18 U.S.C. § 3571(c) and (d)).
7. In addition, the defendant understands that:
- (a) pursuant to §8D1.2(a)(1) of the United States Sentencing Guidelines (“U.S.S.G.,” “Sentencing Guidelines,” or “Guidelines”) or 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but not more than five years;

(b) pursuant to [U.S.S.G. §8B1.1 or 18 U.S.C. § 3563(b)(2) or 3663(a)(3), the Court may] **OR** [if a Title 18 mandatory restitution case-18 U.S.C. § 3663A(c)(1)(A)(ii), the Court is required to] order it to pay restitution to the victims of the offense;⁶ and

(c) pursuant to 18 U.S.C. § 3013(a)(2)(B), the Court is required to order the defendant to pay a \$400 special assessment [for each count] upon conviction for the charged crime.

SENTENCING GUIDELINES⁷

8. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider, in determining and imposing sentence, the Guidelines Manual in effect on the date of sentencing unless that Manual provides for greater punishment than the Manual in effect on the last date that the offense of conviction was committed, in which case the Court must consider the Guidelines Manual in effect on the last date that the offense of conviction was committed.⁸ [*Insert if there is currently no ex post facto*

⁶ *In corporate antitrust cases, a court may order restitution under 18 U.S.C. § 3563(b)(2) as a condition of probation or under 18 U.S.C. § 3663(a)(3) to the extent it is agreed to by the parties in a plea agreement. If the Division seeks restitution, the recommended sentence that is contained in Paragraph 9 should include the amount of recommended restitution. In most criminal antitrust cases, restitution is not sought or ordered because civil causes of action are filed to recover damages. In Title 18 cases, however, if the mandatory restitution requirements of 18 U.S.C. § 3663A(c)(1)(A)(ii) are met and the exceptions in 18 U.S.C. § 3663A(c)(3)(A)-(B) do not apply, subparagraph 7(b) should use “is required to order” instead of “may order.” Again, in such cases, the restitution amount should be included in the recommended sentence contained in Paragraph 9. In Division cases, section 3663A most frequently applies to mail or wire fraud cases. See 18 U.S.C. § 3663A(c)(1)(A)(ii) (“an offense against property under this title . . . including any offense committed by fraud or deceit”).*

⁷ *This section of the Plea Agreement may include Guidelines calculations.*

⁸ *U.S.S.G. §1B1.11 provides that the sentencing court should apply the Guidelines Manual in effect at sentencing unless that version of the Manual would violate the Ex Post Facto Clause of the Constitution by resulting in greater punishment than the Manual in effect on the date the offense of conviction was committed. U.S.S.G. §1B1.11(a)-(b)(1). If there is an ex post facto issue, the sentencing court should apply the Manual in effect on the last date the offense of*

issue--The parties agree there is no *ex post facto* issue under the [Month Day, 20XX] Guidelines Manual.] OR [If there is an *ex post facto* issue, insert the following stipulation and/or stipulations on specific Guidelines calculations--The parties agree that the [Month Day, 20XX] Guidelines Manual provides for greater punishment than the [Month Day, 20XX] Guidelines Manual, the version in effect on the last date the offense of conviction was committed.] The Court must also consider the other factors set forth in 18 U.S.C. § 3553(a) in determining and imposing sentence. The defendant understands that the Court will make Guidelines determinations by applying a standard of preponderance of the evidence. The defendant understands that although the Court is not ultimately bound to impose a sentence within the applicable Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). [Pursuant to U.S.S.G. § 1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected

conviction was committed. U.S.S.G. § 1B1.1(b)(1) and comment. (n.2) (“[T]he last date of the offense of conviction is the controlling date for ex post facto purposes[,]” regardless of whether relevant conduct under U.S.S.G. § 1B1.3 occurred at a later date.). In Peugh v. United States, 569 U.S. 530 (2013), the Supreme Court held that the Ex Post Facto Clause is violated when a court sentences a defendant under the version of the Sentencing Guidelines in effect at the time of sentencing rather than the version in effect at the time of the offense, and the newer Guidelines provide for a higher sentencing range. (“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. . . . Failure to [do so] constitutes procedural error. . . .” Id. at 536-37 (citation omitted).) Peugh does recognize, however, that the sentencing court may “give careful consideration to the current version of the Guidelines as representing the most recent views of the [Sentencing Commission].” Id. at 549. Thus, the “newer Guidelines . . . will have the status of one of many reasons a district court might give for deviating from the older Guidelines. . . .” Id. Accordingly, where there is an ex post facto issue, after using the Guidelines in effect at the time of the offense to determine the Guidelines range, the sentencing court could consult the higher range under the current Guidelines and choose to vary upward and sentence within the higher range.

commerce attributable to the defendant or in determining the defendant's applicable Guidelines range, except to the extent provided in U.S.S.G. §1B1.8(b).]⁹

SENTENCING AGREEMENT

9. Pursuant to Fed. R. Crim. P. 11(c)(1)(B **OR** C) and subject to the full, truthful, and continuing cooperation of the defendant [and its [related entities]], as defined in Paragraph 13 of this Plea Agreement, [*if a Fed. R. Crim. P. 11(c)(1)(B) plea agreement (“B agreement”)*--the United States agrees that it will recommend, as the appropriate disposition of this case, that the Court impose] **OR** [*if a C agreement*--the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose,] a sentence [within the applicable Guidelines range]¹⁰ requiring the defendant to pay to the United States a criminal fine of \$[XX] million [*insert if using the twice the gain or loss maximum to arrive at a recommended fine greater than the Sherman Act \$100 million maximum or the statutory maximum for another charged offense*--, pursuant to 18 U.S.C. § 3571(d),] [payable in full before the fifteenth (15th) day after the date of judgment] **OR** [payable in installments as set forth below [with interest accruing under 18 U.S.C. § 3612(f)(1)-(2)] **OR** [without interest pursuant to 18 U.S.C. § 3612(f)(3)(A) **OR** § 3612(h)],¹¹ [and no order of restitution] **OR** [and

⁹ A U.S.S.G. §1B1.8 provision is optional but is commonly included in Division plea agreements.

¹⁰ This optional language is not applicable in cases involving substantial assistance downward departures or an inability to pay a Guidelines fine.

¹¹ The Plea Agreement should specify the time for payment of the fine using one of these options. Note that for an installment schedule to be imposed, there must be a finding that installment payments are “in the interest of justice” under 18 U.S.C. § 3572(d)(1); for example, if the organization is financially unable to make immediate payment or if such payment would be unduly burdensome. See U.S.S.G. §8C3.2(b). If the defendant requests, and the staff agrees, that the fine be paid in installments, payable over a period not exceeding five years, the Plea Agreement should also include a provision such as subparagraph 9(a) setting forth the recommended installment schedule. If the defendant does not pay any fine greater than \$2,500

restitution of \$XXX pursuant to 18 U.S.C. § [3563(b)(2)/3663(a)(3)/ **OR** 3663A(c)(1)(A)(ii)]¹² [payable in full before the fifteenth (15th) day after the date of judgment] **OR** [payable in installments as set forth below [with interest accruing under 18 U.S.C. § 3612(f)(1)-(2)] **OR** [without interest pursuant to 18 U.S.C. § 3612(f)(3)(A) **OR** § 3612(h)]] (“the recommended sentence”). [*If Plea Agreement is an agreed-upon B agreement---*The defendant agrees that it will not present evidence or arguments to the Court in opposition to the sentencing recommendation made to the Court by the United States.] The parties agree that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Sentencing Guidelines justifying a departure pursuant to U.S.S.G. §5K2.0.¹³ The parties agree not to seek at the sentencing hearing any sentence outside of the Guidelines range nor any Guidelines adjustment

in full before the 15th day after the date of judgment, 18 U.S.C. § 3612(f)(1) requires the payment of interest unless the defendant does not have the ability to pay interest, in which case the Division may recommend that some or all of the interest be waived pursuant to either 18 U.S.C. § 3612(f)(3) or § 3612(h). If staff has concerns about the defendant's ability to pay or the preservation of defendant's assets, a guarantee provision may be warranted in the Plea Agreement.

¹² See footnote 6 above. Plea agreements in antitrust cases rarely include recommendations for restitution because victims normally file civil suits to recover treble damages. See optional subparagraph 9(c) in this model Plea Agreement. If restitution is desired in a particular case against a corporation, “the recommended sentence” in Paragraph 9 should include the recommended amount of restitution. In an antitrust case against a corporation, 18 U.S.C. §§ 3563(b)(2) (restitution as a discretionary condition of probation) and 3663(a)(3) (restitution to extent agreed to by parties in a plea agreement) provide statutory bases for ordering restitution. In mail or wire fraud cases, 18 U.S.C. § 3663A(c)(1)(A)(ii) provides the statutory basis for an order of restitution (restitution for “an offense against property under this title . . . , including any offense committed by fraud or deceit”).

¹³ This language refers to the inapplicability of U.S.S.G. §5K2.0 “out of the heartland” departures, while the next sentence allows for a substantial assistance departure, an inability to pay reduction, or a Guidelines adjustment that is set forth in the Plea Agreement.

for any reason that is not set forth in this Plea Agreement. The parties further agree that the recommended sentence set forth in this Plea Agreement is reasonable.

[(a)¹⁴ ***If a B agreement***--The United States agrees that it will recommend] **OR** ***if a C agreement***--The United States and the defendant agree to recommend], in the interest of justice pursuant to 18 U.S.C. § 3572(d)(1) [and U.S.S.G. §8C3.2(b)], that the fine be paid in the following installments: within thirty (30) days of imposition of sentence -- \$[XX] million [(plus any accrued interest)]; at the one-year anniversary of imposition of sentence (“anniversary”) -- \$[XX] million [(plus any accrued interest)]; at the two-year anniversary -- \$[XX] million [(plus any accrued interest)]; at the three-year anniversary -- \$[XX] million [(plus any accrued interest)]; at the four-year anniversary -- \$[XX] million [(plus any accrued interest)]; and at the five-year anniversary -- \$[XX] million [(plus any accrued interest)]; provided, however, that the defendant will have the option at any time before the five-year anniversary of prepaying the remaining balance [(plus any accrued interest)] then owing on the fine.]

(b) The defendant understands that the Court will order it to pay a \$400 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B), in addition to any fine imposed.

¹⁴ *Insert subparagraph (a) if the fine recommendation includes installment payments. See footnote 11. The length of the installment schedule, payment intervals, and installment amounts depend on the facts of the case, but the Division’s policy is, and the Guidelines recommend, that the length of the schedule not exceed five years. See U.S.S.G. §8C3.2, comment (n.1). If the Plea Agreement recommends restitution and the recommendation includes installment payments, a new subparagraph (b) comparable to subparagraph (a) should list the installment schedule for restitution and any restitution interest payments.*

[Insert subparagraph (c) if no restitution is sought in a Title 15 case –

(c) In light of the [availability of civil causes of action] **OR** [civil cases filed against the defendant, including [CASE NAME, CASE NUMBER], in the United States District Court, [XXXXXXX] District of [XXXXXXX]], which potentially provide for a recovery of a multiple of actual damages, the recommended sentence does not include a restitution order for the offense charged in the Information.]

[(d)¹⁵ Both parties will recommend that no term of probation be imposed, but the defendant understands that the Court’s denial of this request will not void this Plea Agreement.]

[(e)¹⁶ The United States and the defendant jointly submit that this Plea Agreement, together with the record that will be created by the United States and the defendant at the plea and sentencing hearings, and the further disclosure described in Paragraph 11, will provide sufficient information concerning the defendant, the crime charged in this case, and the defendant’s role in the crime to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553. The United States and defendant agree to request jointly that the Court accept the defendant’s guilty plea

¹⁵ *The Plea Agreement may generally include this optional subparagraph unless probation is called for by local practice or under U.S.S.G. §8D1.1 or 18 U.S.C. §§ 3553(a) and 3562(a) (e.g. to ensure payment of restitution, to ensure payment of fine if not paid in full upfront, to protect against future crime by defendant, due to prior similar criminal offense within the last five years by defendant or high-level personnel, etc.). Local practice in some districts requires probation whenever the fine is paid in installments.*

¹⁶ *Subparagraph 9(e) applies only when the parties want to expedite sentencing. In jurisdictions where the practice is permissible, the Division generally will agree to a request for expedited sentencing made by a foreign-based corporation which is pleading guilty pursuant to a C agreement.*

and impose sentence on an expedited schedule as early as the date of arraignment, based upon the record provided by the defendant and the United States, under the provisions of Fed. R. Crim. P. 32(c)(1)(A)(ii), U.S.S.G. §6A1.1, and [Rule XXX] of the Criminal Local Rules. The Court's denial of the request to impose sentence on an expedited schedule will not void this Plea Agreement.]

[(f)¹⁷ The United States contends that had this case gone to trial, the United States would have presented evidence to prove that the gain derived from or the loss resulting from the charged offense is sufficient to justify a fine of [RECOMMENDED FINE], pursuant to 18 U.S.C. § 3571(d). For purposes of this plea and sentencing only, the defendant waives its rights to contest this calculation.]

[10.¹⁸ [The United States and the defendant agree that the applicable Guidelines fine range exceeds the fine contained in the recommended sentence set out in Paragraph 9 above. Subject to the full, truthful, and continuing cooperation of the defendant [and its [related entities]], as defined in Paragraph 13 of this Plea Agreement, and prior to sentencing in this case, the United States agrees that it will make a motion, pursuant to U.S.S.G. §8C4.1,¹⁹ for a

¹⁷ *The Plea Agreement should contain this subparagraph if it recommends a fine greater than the Sherman Act maximum pursuant to 18 U.S.C. § 3571(d). In non-Title 15 cases, the Plea Agreement normally contains a loss stipulation to support a sentence above the statutory maximum.*

¹⁸ *If the Plea Agreement recommends a fine below the applicable Guidelines range, it should contain one of the listed explanatory paragraphs, either an agreement to make a downward departure motion for substantial assistance or a recommendation for a reduced fine based on an inability to pay a Guidelines fine.*

¹⁹ *Note that the Guidelines do not permit an 8C4.1 departure motion based on the organization's cooperation in the investigation or prosecution of its own employees. See U.S.S.G. §8C4.1(a) and comment. (n.1). For a discussion of Division recommendations for substantial assistance sentencing departures, see Speech by Brent Snyder Before the Yale School of Management Global Antitrust Enforcement Conference, Individual Accountability for Antitrust Crimes (Feb.*

downward departure from the Guidelines fine range in this case and will request that the Court impose the fine contained in the recommended sentence set out in Paragraph 9 of this Plea Agreement because of the defendant's [and its [related entities']] substantial assistance in the government's investigation and prosecutions of violations of federal criminal law in the [PRODUCT] industry.] **OR**

[The United States and the defendant agree that the applicable Guidelines fine range exceeds the fine contained in the recommended sentence set out in Paragraph 9 above. The United States and the defendant further agree that the recommended fine is appropriate pursuant to [U.S.S.G. §8C3.3(a) [and 18 U.S.C. § 3572(b)]²⁰ due to the inability of the defendant to pay a fine greater than that recommended without impairing its ability to make restitution to victims] **OR** [U.S.S.G. §8C3.3(b) due to the inability of the defendant to pay a fine greater than that recommended without substantially jeopardizing its continued viability].]²¹

11. Subject to the full, truthful, and continuing cooperation of the defendant [and its [related entities]], as defined in Paragraph 13 of this Plea Agreement, and prior to sentencing in this case, the United States will fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's [and its [related entities']] cooperation and [its/their] commitment to prospective cooperation with the United States' investigation and prosecutions,

19, 2016) [*hereinafter Snyder, Individual Accountability for Antitrust Crimes*], <https://www.justice.gov/opa/file/826721/download>.

²⁰ The phrase "and 18 U.S.C. § 3572(b)" should be inserted if the defendant is obligated as a result of a conviction to make restitution to a victim other than the United States and a Guidelines fine would impair the defendant's ability to pay restitution.

²¹ Normally the Plea Agreement contains only one of these inability to pay provisions, and in most cases the second provision is used.

all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct.

12. The United States and the defendant understand that the Court retains complete discretion to accept or reject [the recommended sentence][*if no agreed-upon sentence but two different recommendations*—either party's sentencing recommendation] provided for in Paragraph 9 of this Plea Agreement. [*If a B agreement* --- The defendant understands that, as provided in Fed. R. Crim. P. 11(c)(3)(B), if the Court does not impose [the recommended sentence][*if no agreed-upon sentence but two different recommendations*—either party's sentencing recommendation] contained in this Agreement, it nevertheless has no right to withdraw its plea of guilty.]

[Insert (a) and (b) only for C agreements-- (a) If the Court does not accept the recommended sentence, the United States and the defendant agree that this Plea Agreement, except for subparagraph 12(b) below, will be rendered void.

(b) If the Court does not accept the recommended sentence, the defendant will be free to withdraw its guilty plea (Fed. R. Crim. P. 11(c)(5) and (d)(2)(A)). If the defendant withdraws its plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an attorney for the government will not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant agrees that, if it withdraws its guilty plea pursuant to this subparagraph of this Plea Agreement, the statute of limitations period for any offense referred to in Paragraph 15 of this Plea Agreement will be tolled for the period between

the date of signature of this Plea Agreement and the date the defendant withdrew its guilty plea or for a period of sixty (60) days after the date of signature of this Plea Agreement, whichever period is greater.]

DEFENDANT'S COOPERATION²²

13. The defendant [and its [LIST TYPES OF OTHER RELATED CORPORATE ENTITIES] [(collectively “related entities”) --- ***only use shorthand of related entities if more than one type of related entity is listed***]]²³ will cooperate fully and truthfully²⁴ with the United

²² *The cooperation terms of Paragraphs 13 and 14 must be at least as broad as the nonprosecution terms of Paragraphs 15 and 16. For instance, if Paragraph 15 provides nonprosecution protection to the named defendant and certain related entities (e.g., subsidiaries), Paragraph 13 must require that the same entities provide ongoing cooperation. Likewise, the class of individuals (i.e., the directors, officers, and employees of the defendant and its related entities) receiving nonprosecution protection under Paragraph 16 must be required to provide ongoing cooperation under Paragraphs 13 and 14. The products and/or industry referenced in the nonprosecution paragraph should also be referenced in the cooperation paragraphs. Under some circumstances, it may be appropriate for the cooperation obligations to be broader than the nonprosecution provisions. For example, in some situations, the Division may require that the defendant use its best efforts to secure the cooperation of former personnel, but only provide nonprosecution protection for specific former personnel who do cooperate. The Division may provide that protection in the corporate plea agreement, or preferably, in a separate nonprosecution agreement with each such individual.*

²³ *Often, the defendant requests that the Plea Agreement cover certain corporate entities related to the named corporate defendant, such as subsidiaries or parents. Before adding subsidiaries (or any other related entity) to the Plea Agreement, staff must be satisfied that those entities can and will provide ongoing cooperation in its investigation. If the Plea Agreement covers subsidiaries, that term must be defined, as below. Additionally, some plea agreements limit the covered subsidiaries to those that “are engaged in the sale or production” of the product at issue. While past Division plea agreements included “affiliates” in the definition of related entities, the Division no longer uses such a broad term in plea agreements. If the defendant seeks to include protections for certain affiliates, the Plea Agreement must name those specific affiliates.*

²⁴ *Full and truthful cooperation includes identifying to the Division all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and disclosing completely to the Division all facts relating to that misconduct. See Principles of Federal Prosecution of Business Organizations, Justice Manual 9-28.700,*

States in the prosecution of this case, the current federal investigation of violations of federal antitrust and related criminal laws involving the [manufacture or sale] of [PRODUCT][*if domestic conspiracy insert--* in [GEOGRAPHIC AREA]], any federal investigation resulting therefrom, and any litigation or other proceedings arising or resulting from any such investigation to which the United States is a party (collectively “Federal Proceeding”).²⁵ Federal Proceeding includes, but is not limited to, an investigation, prosecution, litigation, or other proceeding regarding obstruction of, the making of a false statement or declaration in, the commission of perjury or subornation of perjury in, the commission of contempt in, or conspiracy to commit such offenses in, a Federal Proceeding. *[If subsidiaries are included in the Plea Agreement cooperation and nonprosecution paragraphs, must insert the names of the covered subsidiaries at the beginning of first sentence of this paragraph and at all other Plea Agreement references to the covered subsidiaries, or if covered subsidiaries are too numerous to name in those references, must insert one of the following definitions of covered subsidiaries—[The defendant’s subsidiaries for purposes of this Plea Agreement are [insert names of the covered subsidiaries].] OR [The defendant’s subsidiaries for purposes of this Plea Agreement are entities that the defendant had a greater than 50% ownership interest in as of the date of signature of this Plea Agreement.]] [Name other types of covered related entities, such as parents, at the beginning of the first sentence of this paragraph and at all other Plea*

<https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700>.

²⁵ The term “Federal Proceeding” identifies the federal investigations and litigations in which the corporate defendant, its related entities, and their directors, officers, and employees must cooperate in order to receive the Plea Agreement's protections. Paragraph 13 defines how the corporate defendant and its related entities must cooperate in any Federal Proceeding. Subparagraphs 14(a)-(h) defines how the directors, officers, and employees of the corporate defendant and its related entities must cooperate in any Federal Proceeding.

Agreement references to those entities or if they are too numerous to name in those references, must define them here–The defendant’s [parents] for purposes of this Plea Agreement are

[***insert names of the companies***].] The full, truthful, and continuing cooperation of the defendant [and its [related entities]] will include, but not be limited to:

(a) producing to the United States all documents, information, and other materials, wherever located,²⁶ not protected under the attorney-client privilege or the work-product doctrine,²⁷ [and with translations into English,] in the possession, custody, or control of the defendant [and its [related entities]], that are requested by the United States in connection with any Federal Proceeding; and

(b) using [its][their] best efforts²⁸ to secure the full, truthful, and continuing

²⁶ *The defendant’s obligation to produce responsive documents in its possession, custody, or control, wherever located, applies to plea agreements in both domestic and international cases. See Spratling, Negotiating The Waters, supra note 2, § II.B., at 4 for a discussion of the defendant’s obligation in international cases to produce documents wherever located.*

²⁷ *Prosecutors may not request that a defendant or its related entities that are included in the Plea Agreement disclose privileged attorney-client communications or attorney work product, with the exception that prosecutors may ask for disclosure of communications allegedly supporting an advice of counsel defense. In addition, communications with counsel made in furtherance of a crime or fraud are outside the scope and protection of the attorney-client privilege. Of course, defendants and its related entities are free to waive the protections of the attorney-client privilege or work-product doctrine and produce communications and documents so protected if they voluntarily choose to do so, but prosecutors may not request that they do so. To receive credit for cooperation, defendants and its related entities must produce relevant underlying facts, as well as relevant underlying non-privileged evidence, such as business records and emails between non-attorney employees. See Principles of Federal Prosecution of Business Organizations, Justice Manual 9-28.710– 9-28.720, <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.710>.*

²⁸ *Subparagraph 13(b) of the Model Corporate Plea Agreement calls for the defendant and its related entities to use their “best efforts” to secure the cooperation of their current directors, officers, and employees and on occasion former directors, officers, or employees or specific former directors, officers, or employees that are named in an under seal attachment. See Spratling, Negotiating The Waters, supra note 2, § II.F., at 6 for a discussion of what constitutes best efforts. The Division has infrequently used an additional cooperation subparagraph that*

cooperation of the current [and former]²⁹ directors, officers, and employees of the defendant [and its [related entities]][, and the individuals listed in Paragraph [1] of Attachment A filed under seal,]³⁰ as may be requested by the United States, [but

requires the corporate defendant and its related entities to “secure” the cooperation of certain named individuals. If the value of the defendant’s or its related entities’ cooperation is based on the cooperation of certain key foreign-based current or former executives, the Division may require that the companies specifically promise to make these individuals available for interviews and testimony. If one of the designated individuals fails to cooperate, the United States can void the Plea Agreement with the defendant. Conditioning the Plea Agreement on the cooperation of certain key individuals is appropriate where the companies’ cooperation is essentially meaningless without the Division having access to the specified individuals and the specified individuals are located outside the United States. See Spratling, Negotiating The Waters, supra note 2, § II.E., at 5-6.

²⁹ In some situations, the Division may want to use this option of requiring that the defendant and its related entities use their best efforts to secure the cooperation of all former personnel excluding any specific former personnel who are “carved out” of the cooperation provision. A corporate plea agreement, however, may not provide nonprosecution protection to all former personnel. In this situation, the Division may provide any nonprosecution protection for specific former personnel who do cooperate in either the nonprosecution provisions of the corporate plea agreement or preferably, in a separate nonprosecution agreement for each individual, which will also detail the individual’s specific cooperation obligations. In other situations, as discussed in footnote 30, the Division may wish to use the option of including only specific named former personnel in the cooperation provisions of the corporate plea agreement rather than requiring that the corporate defendant and its related entities use their best efforts to secure the cooperation of all former personnel.

³⁰ The Division uses this optional language in subparagraph 13(b) when it wishes to require that the defendant and its related entities use their best efforts to secure the cooperation of only specific former personnel rather than all former personnel. While it is preferable to enter a separate cooperation and nonprosecution agreement with each such individual, the Division may, in its discretion and with the approval of the Division’s Assistant Attorney General, agree to include or “carve in” specific former personnel in the cooperation and nonprosecution provisions of a corporate plea agreement when their cooperation is noncumulative, substantial, and obtainable. As noted in footnote 22, any personnel, current or former, who are included in the nonprosecution protections of Paragraph 16, must be included in the cooperation requirements of Paragraphs 13 and 14. Before the Division decides whether to extend cooperation requirements and nonprosecution protections of a corporate plea agreement to specific former personnel, those individuals must submit to an interview with Division attorneys and company counsel must make a commitment that the company will continue to assist in securing the cooperation of those individuals in the investigation, e.g., that the former personnel will continue to be made available for interviews. If a corporate plea agreement includes

excluding **[[insert names of all carve outs who have been publicly charged]** (who [has][have] [entered a separate plea agreement with the United States][been separately charged]) and] [the individuals listed in Paragraph [2] of Attachment A filed under seal.]]³¹ Such efforts will include, but not be limited to, making these persons available **[insert if defendant has foreign-located witnesses--**in the United States and at other mutually agreed-upon locations] at the defendant's expense for interviews and the

specific former personnel in its cooperation requirements and nonprosecution protections, those personnel will be named in an under seal attachment to the Plea Agreement. Of course, if a coconspirator now employs a former employee who is a subject or target of the investigation, the individual will not be included in the cooperation requirements of the corporate plea agreement or protected by the nonprosecution terms of the corporate plea agreement.

³¹ *The Division seeks to prosecute culpable individuals from all corporate conspirators, domestic and foreign, except the leniency applicant. Thus, the Division excludes from or "carves out" of both the cooperation requirements of subparagraph 13(b) and Paragraph 14 and the nonprosecution provisions of Paragraph 16 personnel the Division has reason to believe were involved in criminal wrongdoing and who are potential targets of the investigation. In addition, the Division will revoke the nonprosecution protection of any "carved in" individual who does not fully and truthfully cooperate with the investigation. See Press Release, Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division's Carve-Out Practice Regarding Corporate Plea Agreements (Apr. 12, 2013), <https://www.justice.gov/opa/pr/statement-assistant-attorney-general-bill-baer-changes-antitrust-division-s-carve-out>; Speech by Bill Baer Before the Georgetown University Law Center Global Antitrust Enforcement Symposium, Prosecuting Antitrust Crimes 6 (Sept. 10, 2014) [hereinafter Baer, Prosecuting Antitrust Crimes], <https://www.justice.gov/atr/file/517741/download>. The Division may, as an exercise of its prosecutorial discretion, decide to include in or carve in the nonprosecution protection of the corporate plea agreement personnel who were involved in the offense but who do not warrant prosecution given their degree of culpability, the need for and value of their cooperation, and other relevant factors. The Division makes the decision to carve in a culpable individual in accord with the Principles of Federal Prosecution on an employee-by-employee basis. See Justice Manual 9-27.220, 27.230, <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.220>. Thus, the order in which companies approach the Division does not provide a formula to determine the number of carve-outs a company has, although the earlier a company provides cooperation to the Division the greater the opportunity it and its personnel have to provide valuable, noncumulative cooperation. See Snyder, Individual Accountability for Antitrust Crimes, supra note 19, at 11; Baer, Prosecuting Antitrust Crimes, supra, at 6-7. The Division will not trade corporate guilty pleas or corporate fines for nonprosecution protection for individuals who warrant prosecution.*

provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding. Current directors, officers, and employees are defined for purposes of this Plea Agreement as individuals who are directors, officers, or employees of the defendant [or any of its [related entities]] as of the date of signature of this Plea Agreement.

14. The full, truthful, and continuing cooperation of the current directors, officers, and employees of the defendant [and its [related entities]][, and the individuals listed in Paragraph [1] of Attachment A filed under seal,]³² will be subject to the procedures and protections of this paragraph, and will include, but not be limited to:

(a) producing [*insert if defendant is foreign or has relevant foreign affiliates*—in the United States and at other mutually agreed-upon locations] all documents, including claimed personal documents, and other materials, wherever located, not protected under the attorney-client privilege or the work-product doctrine,³³ [and with translations into English,] that are requested by attorneys and agents of the United States in connection with any Federal Proceeding;

³² *The categories of individuals and any specific individuals covered by the nonprosecution provision of subparagraph 16(a) must be obligated to cooperate under Paragraph 14. Even if subparagraph 13(b) requires the defendant and related entities to use their best efforts to secure the cooperation of all former personnel, Paragraph 14 will only apply to specific former personnel who actually provide cooperation prior to the entry of the Plea Agreement and are listed in Paragraph 1 of Attachment A, the under seal carve-in/carve-out attachment. Note also the carve-in and carve-out text at the end of Paragraph 14 of this Plea Agreement. If additional specific former personnel cooperate after the Plea Agreement is entered, the Division may consider entering a separate cooperation and nonprosecution agreement with such personnel, which will detail their cooperation obligations.*

³³ *See footnote 27.*

(b) making himself or herself available for interviews [*insert if defendant has foreign-located witnesses*—in the United States and at other mutually agreed-upon locations], not at the expense of the United States, upon the request of attorneys and agents of the United States in connection with any Federal Proceeding;

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. §§ 1503 *et seq.*), or conspiracy to commit such offenses;

(d) otherwise voluntarily providing the United States with any material or information not requested in (a) - (c) of this paragraph and not protected under the attorney-client privilege or work-product doctrine³⁴ that he or she may have that is related to any Federal Proceeding;

(e) when called upon to do so by the United States in connection with any Federal Proceeding, participating in affirmative investigative techniques, including but not limited to making telephone calls, recording conversations, and introducing law enforcement officials to other individuals, with all such activity being conducted only at the express direction and under the supervision of attorneys and agents of the United States;³⁵

³⁴ See footnote 27.

³⁵ Counsel for the defendant should discuss with the Division any concerns, such as safety concerns, regarding engaging in affirmative investigative techniques. The Division will take those concerns into consideration in assessing the defendant's good faith and complete cooperation.

(f) when called upon to do so by the United States in connection with any Federal Proceeding, testifying in grand jury, trial, and other judicial proceedings [*insert if defendant has foreign-located witnesses*—in the United States] fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making a false statement or declaration in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice (18 U.S.C. §§ 1503 *et seq.*), and contempt (18 U.S.C. §§ 401-402);

(g) not committing, participating in, or attempting to commit or participate in any additional antitrust crime in violation of Title 15, United States Code, or any acts of perjury or subornation of perjury (18 U.S.C. §§ 1621-22), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. §§ 1503 *et seq.*), contempt (18 U.S.C. §§ 401-402), or conspiracy to commit such offenses; and

(h) agreeing that, if the agreement not to prosecute him or her in this Plea Agreement is rendered void under subparagraph 16(c), the statute of limitations period for any Relevant Offense, as defined in subparagraph 16(a), will be tolled as to him or her for the period between the date of signature of this Plea Agreement and six (6) months after the date that the United States gave notice of its intent to void its obligations to that person under this Plea Agreement.³⁶

This Paragraph 14 does not apply [to the individuals listed in Paragraph 2 of Attachment A filed under seal, regardless of their employment status, or] to any former director, officer, or employee

³⁶ *Cooperating individuals will sign a separate letter tolling the statute of limitations with respect to them before they can receive the nonprosecution protections of the corporate plea agreement.*

of the defendant [or its [related entities]][, except those listed in Paragraph 1 of Attachment A filed under seal].

GOVERNMENT'S AGREEMENT

15. Subject to the full, truthful, and continuing cooperation of the defendant [and its [related entities]], as defined in Paragraph 13 of this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of *[if a C agreement--*the recommended] sentence, the United States agrees that it will not bring further criminal charges against the defendant [or any of its [related entities]]³⁷ for any act or offense committed before the date of signature of this Plea Agreement that *[If the defendant is receiving both antitrust and obstruction nonprosecution protection, separate the two nonprosecution coverages into subparagraphs (a) and (b)--*(a) was undertaken in furtherance of an antitrust conspiracy involving the [manufacture or sale] of [PRODUCT] *[if domestic conspiracy insert--* in [GEOGRAPHIC AREA]]*[only insert the obstruction nonprosecution coverage that follows if defendant has a sentencing enhancement, or a separate charge, for an obstruction related offense--* or (b) is specified in subparagraph 4(e)]. The nonprosecution terms of this paragraph do not apply to (a) any acts of subornation of perjury (18 U.S.C. § 1622), making a false statement (18 U.S.C. § 1001), obstruction of justice (18 U.S.C. §§ 1503 *et seq.*), contempt (18 U.S.C. §§ 401-402), or conspiracy to commit such offenses *[insert if defendant has a sentencing enhancement, or a separate charge, for an obstruction related offense--*, except for the conduct specified in subparagraph 4(e) of this Plea Agreement]; (b) civil matters of any kind;

³⁷ *The entities included in this corporate nonprosecution paragraph must be required to provide cooperation under Paragraph 13 of the Plea Agreement.*

- (c) any violation of the federal tax or securities laws or conspiracy to commit such offenses; or
- (d) any crime of violence.

16. The United States agrees to the following:

(a) Upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of [*if a C agreement*--the recommended] sentence and subject to the exceptions noted in subparagraph 16(c), the United States agrees that it will not bring criminal charges against any current director, officer, or employee of the defendant [or its [related entities]]³⁸, or any individual listed in Paragraph [1] of Attachment A filed under seal,³⁹ for any act or offense committed before the date of signature of this Plea Agreement and while that person was acting as a director, officer, or employee of the defendant [or its [related entities]] that was undertaken in furtherance

³⁸ *The entities whose personnel are referenced in this individual nonprosecution paragraph must be included in the cooperation requirements of the Paragraph 13 preamble and subparagraphs 13(a) and 13(b).*

³⁹ *The categories of individuals and any specific individuals receiving nonprosecution protection in this paragraph must be required to cooperate under Paragraphs 13 and 14. As discussed in footnote 29 above, a corporate plea agreement may not provide nonprosecution protection to all former personnel. The Division may exercise its discretion to provide nonprosecution protection to specific former personnel in a corporate plea agreement when their cooperation is noncumulative, substantial, and obtainable. The Division prefers, however, to enter a separate cooperation and nonprosecution agreement with specific former personnel rather than include them in the cooperation and nonprosecution provisions of the corporate plea agreement. Before the Division decides whether to extend the cooperation obligations and nonprosecution protection of a corporate plea agreement to specific former personnel, those individuals must submit to an interview with Division attorneys and company counsel must make a commitment that the company will continue to assist in securing the cooperation of those individuals in the investigation, e.g., that the former personnel will continue to be made available for interviews. If a corporate plea agreement includes specific former personnel in its nonprosecution protection, they will be named in an under seal attachment to the Plea Agreement. Of course, if a coconspirator employs a former employee who is a subject or target of the investigation, the employee will not be included in the cooperation requirements of Paragraph 13 or 14 or the nonprosecution protection of Paragraph 16.*

of an antitrust conspiracy involving the [manufacture or sale] of [PRODUCT]⁴⁰ *if domestic conspiracy insert--*in [GEOGRAPHIC AREA]] (“Relevant Offense”)[, except that the protections granted in this paragraph do not apply to *[[insert names of all carve outs who have been publicly charged]* (who [has][have] [entered a separate plea agreement with the United States][been separately charged]) or] [the individuals listed in Paragraph [2] of Attachment A filed under seal]];

(b) Should the United States determine that any current director, officer, or employee of the defendant [or its [related entities]][, or any individual listed in Paragraph [1] of Attachment A,]⁴¹ may have information relevant to any Federal Proceeding, the United States may request that person’s cooperation under the terms of this Plea Agreement by written request delivered to counsel for the individual (with a copy to the undersigned counsel for the defendant) or, if the individual is not known by the United States to be represented, to the undersigned counsel for the defendant;

(c) If any person requested to provide cooperation under subparagraph 16(b) fails to comply fully with his or her obligations under Paragraph 14, then the terms of this Plea Agreement as they pertain to that person and the agreement not to prosecute that person granted in this Plea Agreement will be rendered void, and the United States may

⁴⁰ Note that the Division does not provide nonprosecution protection for individuals relating to obstruction in a corporate plea agreement. See subparagraph 16(f) below. The Division may consider negotiating a separate nonprosecution agreement with specific individuals relating to obstruction when warranted.

⁴¹ The personnel referenced in this subparagraph 16(b) should be the same as the personnel referenced in subparagraph 16(a). As discussed in footnotes 29 and 30, former or specified former personnel may on occasion be included in the cooperation provision of subparagraph 13(b) of the corporate plea agreement, but the nonprosecution provisions of the corporate plea agreement may not include all former personnel.

prosecute such person criminally for any federal crime of which the United States has knowledge, including, but not limited to any Relevant Offense;

(d) Except as provided in subparagraph 16(e), information provided by a person described in subparagraph 16(b) to the United States under the terms of this Plea Agreement pertaining to any Relevant Offense, or any information directly or indirectly derived from that information, may not be used against that person in a criminal case, except in a prosecution for perjury or subornation of perjury (18 U.S.C. §§ 1621-22), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. §§ 1503 *et seq.*), contempt (18 U.S.C. §§ 401-402), or conspiracy to commit such offenses;

(e) If any person who provides information to the United States under this Plea Agreement fails to comply fully with his or her obligations under Paragraph 14 of this Plea Agreement, the agreement in subparagraph 16(d) not to use that information or any information directly or indirectly derived from it against that person in a criminal case will be rendered void;

(f) The nonprosecution terms of this paragraph do not apply to civil matters of any kind; any violation of the federal tax or securities laws or conspiracy to commit such offenses; any crime of violence; or perjury or subornation of perjury (18 U.S.C. §§ 1621-22), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. §§ 1503 *et seq.*), contempt (18 U.S.C. §§ 401-402), or conspiracy to commit such offenses; and

(g) Documents provided under subparagraphs 13(a) and 14(a) will be deemed responsive to outstanding grand jury subpoenas issued to the defendant [or any of its

[related entities]].⁴²

[17.⁴³ The United States agrees that when any person travels to the United States for interviews, grand jury appearances, or court appearances pursuant to this Plea Agreement, or for meetings with counsel in preparation therefor, the United States will take no action, based upon any Relevant Offense, to subject such person to arrest, detention, or service of process, or to prevent such person from departing the United States. This paragraph does not apply to an individual's commission of perjury or subornation of perjury (18 U.S.C. §§ 1621-22), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), obstruction of justice (18 U.S.C. §§ 1503 *et seq.*), contempt (18 U.S.C. §§ 401-402), or conspiracy to commit such offenses.]

[18.⁴⁴ The defendant understands that it may be subject to suspension or debarment action by state or federal agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls what action, if any, other agencies may take. However, the Antitrust Division agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such action of the fact, manner, and extent of the cooperation of the defendant [and its [related entities]] as a matter for that agency to consider before determining what action, if any, to take. The defendant nevertheless affirms that it wants to plead guilty regardless of any suspension or debarment consequences of its plea.]

⁴² *For a discussion of Division policy on this issue, see Spratling, Negotiating The Waters, supra note 2, § II.C., at 4-5.*

⁴³ *Insert Paragraph 17 if the defendant or its related entities have cooperating foreign-located officers, directors, or employees. See Spratling, Negotiating The Waters, supra note 2, § II.G., at 7 for a discussion of Division policy regarding this safe passage provision.*

⁴⁴ *If suspension or debarment is a possibility, the Division may agree to include this optional paragraph for cooperating defendants.*

REPRESENTATION BY COUNSEL

19. The defendant has been represented by counsel and is fully satisfied that its attorneys have provided competent legal representation. The defendant has thoroughly reviewed this Plea Agreement and acknowledges that counsel has advised it of the nature of the charge, any possible defenses to the charge, and the nature and range of possible sentences.

VOLUNTARY PLEA

20. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement[*insert if Plea Agreement has an attached carve-in and/or carve-out list--* and Attachment A]. The United States has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

21. The defendant agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that the defendant [or any of its [related entities]] [has/have] failed to provide full, truthful, and continuing cooperation, as defined in Paragraph 13 of this Plea Agreement, or [has/have] otherwise violated any provision of this Plea Agreement, the United States will notify counsel for the defendant in writing by personal or overnight delivery, email, or facsimile transmission and may also notify counsel by telephone of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph),⁴⁵ and the defendant [and its [related entities]] will be subject

⁴⁵ See Spratling, *Negotiating The Waters*, supra note 2, § II.H., at 7-8 for a discussion of Division policy regarding voiding the Plea Agreement.

to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. The defendant agrees that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant [or its [related entities]] for any offense referred to in Paragraph 15 of this Plea Agreement, the statute of limitations period for such offense will be tolled for the period between the date of signature of this Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement.

22. The defendant understands and agrees that in any further prosecution of it [or any of its [related entities]] resulting from the release of the United States from its obligations under this Plea Agreement because of the defendant's [or any of its [related entities']] violation of this Plea Agreement, any documents, statements, information, testimony, or evidence provided by it[,]; [its [related entities][,];] [or] [its/their] current [or former] directors, officers, or employees[; or the individuals listed in Paragraph [1] of Attachment A filed under seal]⁴⁶ to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against it [or its [related entities]]. In addition, the defendant unconditionally waives its right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

PUBLIC STATEMENTS BY THE DEFENDANT

23. The defendant expressly agrees that it will not, through current or future attorneys, directors, officers, employees, agents, or any other person authorized by the defendant

⁴⁶ *The categories of personnel and specific individuals referenced here should be consistent with the individuals included in the corporate cooperation subparagraph of the Plea Agreement, i.e. subparagraph 13(b) in this model.*

to speak on its behalf, make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by the defendant set forth above or the facts described in the Information or Factual Basis section of this Plea Agreement. Any such contradictory statement will, subject to cure rights of the defendant described below, constitute a violation of this Plea Agreement, and the defendant thereafter will be subject to prosecution as set forth in Paragraphs 21-22 of this Plea Agreement. The decision whether any public statement by any such person contradicting a fact contained in the Information or Factual Basis section of this Plea Agreement was made on behalf of the defendant for the purpose of determining whether it has violated this Plea Agreement will be at the sole discretion of the United States. If the United States determines that a public statement by any such person contradicts in whole or in part a statement contained in the Information or Factual Basis section of this Plea Agreement, the United States shall so notify the defendant, and the defendant may avoid a violation of this Plea Agreement by publicly repudiating such statement(s) within five (5) business days after notification. The defendant will be permitted to raise defenses and to assert affirmative claims in other proceedings relating to the matters set forth in the Information and the Factual Basis section of this Plea Agreement provided that such defenses and claims do not contradict, in whole or in part, a statement contained in the Information or Factual Basis section of this Plea Agreement. This paragraph does not apply to any statement made by any current or future director, officer, employee, or agent of the defendant in the course of any criminal, regulatory, or civil case initiated against such individual, unless such individual is speaking on behalf of the defendant. This paragraph does not affect the obligation of any person, who is providing cooperation pursuant to Paragraph 14 of this Plea Agreement, to respond fully and truthfully to all inquiries of the United States without falsely implicating any person or intentionally

withholding information and to testify fully and truthfully as required by Paragraph 14 of this Plea Agreement.

ENTIRETY OF AGREEMENT

24. This Plea Agreement [*insert if Plea Agreement has an attached carve-in and/or carve-out list--*and Attachment A] [constitutes/constitute] the entire agreement between the United States and the defendant concerning the disposition of the criminal charge in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

25. The undersigned is authorized to enter this Plea Agreement on behalf of the defendant as evidenced by the Resolution of the Board of Directors of the defendant attached to, and incorporated by reference in, this Plea Agreement.

26. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

[27. A facsimile or PDF signature will be deemed an original signature for the purpose of executing this Plea Agreement. Multiple signature pages are authorized for the purpose of executing this Plea Agreement.]

DATED: _____

Respectfully submitted,

BY: _____
[CORPORATE REPRESENTATIVE]⁴⁷

BY: _____
[STAFF]

⁴⁷ Most courts will not accept a corporate plea agreement that is only executed by counsel for the company. An authorized corporate officer, in addition to the company attorney, must

[Title]
[Global Products, Inc.]

BY: _____
[NAME OF CORPORATE COUNSEL]
Counsel for [Global Products, Inc.]

Attorneys
U.S. Department of Justice
Antitrust Division
[STREET ADDRESS]
[CITY, STATE, ZIP CODE]
Tel.: [(XXX) XXX-XXXX]

normally sign the Plea Agreement, and the Resolution of the Board of Directors, which is attached to the Plea Agreement, must grant that officer the power to enter into the agreement on behalf of the company.