UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA	)	Criminal No. 1:15-CR-00098
	)	
	)	
v.	)	
	)	Violation: 15 U.S.C. § 1
KAYABA INDUSTRY CO., LTD d/b/a KYB COPORATION,	)	
	)	Judge Michael R. Barrett
	)	
Defendant.	)	
	)	

UNITED STATES SENTENCING MEMORANDUM AND MOTION FOR A DOWNWARD DEPARTURE PURSUANT TO UNITED STATES SENTENCING GUIDELINES § 8C4.1

Kayaba Industry Co., Ltd d/b/a KYB Corporation ("KYB" or the "Defendant") is scheduled to appear before this Court for an initial hearing, change-of-plea hearing, and sentencing on October 29, 2015, at 9:30 a.m. The Defendant is charged with violating the Sherman Act, 15 U.S.C. § 1. The United States submits this Sentencing Memorandum to provide the Court with sufficient information that it may meaningfully exercise its sentencing authority under 18 U.S.C. §§ 3553 and 3572.

The United States also hereby moves for a downward departure pursuant to United States Sentencing Guidelines ("U.S.S.G.," "Sentencing Guidelines," or the "Guidelines") § 8C4.1 because the Defendant has provided substantial assistance to the government in its on-going investigation of Sherman Act violations by other companies and individuals in the shock absorber industry.

In support of both this Sentencing Memorandum and this Motion for a Downward Departure, the United States also submits, under seal, Attachment A ("Attachment A").

The United States and the Defendant jointly recommend that the Court sentence the Defendant to pay to the United States a $62 million criminal fine, payable in full before the fifteenth day after the date of judgment, no order of restitution, no term of probation, and to pay a $400 special assessment. This is a joint recommendation under Fed. R. Crim. P. 11(c)(1)(C). *See* Plea Agreement, ¶ 9, Docket No. 9.

I. BACKGROUND

The Sherman Act makes it illegal for competitors to eliminate competition among themselves by allocating markets, rigging bids, and fixing prices. The subversion and elimination of competition for business, whether done through agreement to divide up business by allocating customers or markets; fix prices charged to customers; or rig bids submitted to customers, typically results in the customer paying more than it should have for the work done or the product supplied. The Defendant has admitted that, through its employees, it conspired with other shock absorbers manufacturers to do these things made illegal by the Sherman Act.

Shock absorbers are part of the suspension system on automobiles and motorcycles. They absorb and dissipate energy to help cushion vehicles on uneven roads leading to improved ride quality and vehicle handling. Shock absorbers are also called dampers and on motorcycles are referred to as front forks and rear cushions.

On September 16, 2015, the United States filed a one-count criminal Information charging the Defendant with participating in a combination and conspiracy to suppress and eliminate competition in the automotive parts industry by agreeing to allocate markets, rig bids for, and to fix, stabilize, and maintain the prices of shock absorbers sold to Fuji Heavy Industries Ltd. (manufacturer of Subaru vehicles), Honda Motor Co., Ltd., Kawasaki Heavy Industries, Ltd., Nissan Motor Company Ltd., Suzuki Motor Corporation, and Toyota Motor Company, and

certain of their subsidiaries (collectively, the "Vehicle Manufacturers"), in violation of the Sherman Act, 15 U.S.C. § 1. *See* Docket No. 2.

II. SUMMARY OF THE OFFENSE

During the period charged in the Information, from at least as early as the mid-1990s and continuing until as late as December 2012 (the "Charging Period"), Defendant was a corporation organized and existing under the laws of Japan with its principal place of business in Tokyo, Japan. During the Charging Period, the Defendant and certain of its subsidiaries were engaged in the manufacture and sale of shock absorbers to Vehicle Manufacturers in the United States and elsewhere for installation in vehicles manufactured and sold in the United States and elsewhere. During the Charging Period, one of the Defendant's subsidiaries was KYB Americas Corporation, which has headquarters in Franklin, Indiana, and plants, offices, and facilities in Indiana, Illinois, Michigan, and Kansas.

During the Charging Period, Defendant and its co-conspirators entered into and engaged in a combination and conspiracy to suppress and eliminate competition in the automotive parts industry by agreeing to allocate markets, rig bids for, and to fix, stabilize, and maintain the prices of shock absorbers sold to Vehicle Manufacturers in the United States and elsewhere. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among Defendant and its co-conspirators. In furtherance of the conspiracy, the Defendant, through its managers and employees, engaged in discussions and attended meetings with co-conspirators employed by other manufacturers of shock absorbers. During these discussions and meetings, agreements were reached to rig bids for, and to fix, stabilize, and maintain the prices of shock absorbers sold to Vehicle Manufacturers in the United States and elsewhere. The Defendant has fully cooperated in the United States' investigation and entered into a plea agreement with the United States.

III. UNITED STATES' FINE METHODOLOGY AND FACTORS TO CONSIDER IN DETERMINING THE SENTENCE

The jointly recommended criminal fine was calculated using sales figures submitted to the United States by the Defendant and the victims of the conspiracy. Based on these sales figures, the United States calculates the volume of commerce under U.S.S.G. § 2R1.1(d), adjusted to reflect information provided to the United States by the Defendant pursuant to U.S.S.G. § 1B1.8, to total approximately $324 million. The affected volume of commerce consists of sales of shock absorbers in the United States by the Defendant's U.S. subsidiary.

A. Sentencing Guidelines Fine Calculation

In determining and imposing sentence the Court must consider the kinds of sentence established by the advisory Sentencing Guidelines, 18 U.S.C. § 3553(a)(4). The Sentencing Guidelines procedure for calculating the Guidelines fine range for a corporation charged with an antitrust offense is set forth below. Organizations, such as the Defendant, are sentenced pursuant to Chapter 8 of the Sentencing Guidelines. In the case of antitrust violations, in addition to the provisions of Chapter 8, special instructions with respect to determining fines for organizations are found in the Antitrust Guideline, U.S.S.G. § 2R1.1.

Under the Sentencing Guidelines, the first step in determining a defendant's fine range is to determine the base fine. The controlling Guideline applicable to the count charged is U.S.S.G. § 2R1.1(d)(1), pursuant to which the base fine is 20% of the approximately $324 million in affected commerce, or approximately $64.8 million.

The next step is to determine the culpability score for a defendant. The base culpability score is 5. *See* U.S.S.G. § 8C2.5(a). The Defendant is a corporation with more than 5,000 employees, and the offense involved certain high-level personnel of the Defendant, which adjusts the culpability score upward by 5 points. *See* U.S.S.G. § 8C2.5(b)(1). The Defendant fully

cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, which adjusts the culpability score downward by 2 points. *See* U.S.S.G. § 8C2.5(g)(2). The resulting total culpability score is 8.

The culpability score is then used to determine the minimum and maximum multipliers. A culpability score of 8 corresponds to a minimum multiplier of 1.60 and a maximum multiplier of 3.20. *See* U.S.S.G. § 8C2.6.

Applying the multipliers to the base fine of $64.8 million yields a Guidelines fine range for the Defendant of $103.68 million to $207.36 million. *See* U.S.S.G. § 8C2.7.

B. Statutory Factors to Consider at Sentencing

In addition to the advisory Sentencing Guidelines, the Court must consider the other factors set forth in 18 U.S.C. §§ 3553(a) and 3572 in determining and imposing sentence. The Court's sentence must be sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). Because the Defendant in this case is a corporation, not all of the statutory factors apply. Below, the factors that are most relevant to the sentencing of this Defendant are highlighted.

1. Relevant Section 3553 Factors

a. The Seriousness of the Offense (3553(a)(2)(A))

Antitrust conspiracies are by their very nature serious offenses. Antitrust crimes strike a blow to the heart of the nation's economy—competition. When competition is eliminated, as it was here, consumers are likely to pay higher prices for goods and services. According to the background comments in the Antitrust Guideline, "there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid-rigging) and horizontal market-allocation, can cause serious economic harm." U.S.S.G. § 2R1.1, commentary (backg'd.).

b. The History, Characteristics, and Cooperation of the Defendant (3553(a)(1))

Prior to this offense, the Defendant had not been charged with any federal crime. The Defendant's cooperation in the United States' investigation was timely and complete, and the Defendant has clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct. Very shortly after the Defendant was notified of the government's investigation, it agreed to cooperate in the investigation and plead guilty to an antitrust violation. KYB then conducted a wide-ranging internal investigation designed to uncover the extent of its involvement in the antitrust crime under investigation. During the course of that investigation, the Defendant uncovered relevant documents located in the United States and elsewhere, and then quickly produced those documents to the United States, with translations where appropriate. The Defendant interviewed employees and then proffered the results of those interviews to the United States. At the request of the United States, the Defendant made its employees, including many who were outside of the United States and thus beyond the reach of grand jury subpoena, available for interviews. The Defendant also provided translators for those interviews.

The Defendant has agreed to continue cooperating in the United States' investigation. *See also* Attachment A.

c. Deterrence and Protecting the Public from Further Crimes of the Defendant (3553(a)(2)(B) and (C))

The large criminal fine of $62 million recommended in this case provides adequate deterrence to criminal conduct. The Defendant has clearly accepted responsibility for its criminal conduct. Additionally, as discussed below, the Defendant has implemented a new compliance policy to educate its employees to ensure that the company does not violate the antitrust laws in the future.

2. Relevant Section 3572 Factors

a. Preventing Recurrence of the Offense—Compliance (3572 (a)(8))

From the moment KYB received notification of the government's investigation, management committed to instituting policies that would ensure that it would never again violate the antitrust laws. Direction for this change came straight from the top—KYB's president, Masao Usui. He directed a full and complete investigation be conducted and ordered all employees to cooperate fully and truthfully with the investigation.

Simultaneously, a comprehensive and innovative compliance policy was conceived and implemented. That policy, at the direction of the Defendant's senior management, sought to change the culture of the company to prevent recurrence of the offense. KYB's compliance policy has the hallmarks of an effective compliance policy including direction from top management at the company, training, anonymous reporting, proactive monitoring and auditing, and provided for discipline of employees who violated the policy. While not exhaustive, the following is a description of some of the highlights of KYB's compliance program.

The new policy required training of senior management and all sales personnel. In addition to classroom training, it provided one-on-one training for personnel with jobs, such as sales people, where there is a high risk of antitrust crimes. The effectiveness of the training was measured by testing employees' awareness of antitrust issues before and after the training. The policy requires prior approval, where possible, of all contacts with competitors and reporting of all contacts with competitors. These reports are audited by in-house counsel. Under the new compliance policy, sales personnel must certify that all prices were independently determined and that they did not exchange information or conspire with competitors when determining the price. An anonymous hotline was set up so that employees can report possible violations of the

antitrust laws. Senior management's efforts set the tone at the top and made compliance with the antitrust laws a true corporate priority.

b. Discipline of Culpable Actors (3572 (a)(8))

Two high-ranking employees who were personally involved, or supervised employees who were involved, in the conduct charged in this case were demoted and no longer have sales responsibilities. Other, lower-ranking, employees who were involved in the conduct may also be disciplined.

c. The Defendant's Financial Position (3572 (a)(1))

The Defendant is a solvent corporation and has agreed to pay the agreed-upon fine of $62 million within 15 days of the final judgment.

IV. MOTION FOR DOWNWARD DEPARTURE PURSUANT TO U.S.S.G. § 8C4.1

The United States requests that the Court impose a sentence that includes a criminal fine of $62 million, which is below the Guidelines fine range of $103.68 million to $207.36 million. While the recommended criminal fine reflects a 40% reduction from the minimum fine under the Sentencing Guidelines, the United States believes it is sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2), and reflects the factors enumerated in 18 U.S.C. § 3572. The recommended fine is also appropriate because of the substantial assistance the Defendant provided to the United States in its continuing investigation of Sherman Act violations by other companies and individuals.

A. Legal Framework for Departures/Factors to be Considered

Under U.S.S.G. § 8C4.1, upon motion of the United States, when sentencing an organization, the Court may depart from the fine range determined pursuant to the Sentencing Guidelines based on the defendant's substantial assistance in investigating or prosecuting another

organization or individual. When determining the appropriateness and scope of any such departure, the Court may consider a variety of factors, including (but not limited to):

1. The significance and usefulness of the defendant's assistance;
2. The nature and extent of the defendant's assistance; and
3. The timeliness of the defendant's assistance.

U.S.S.G. § 8C4.1(b)

B. Summary of Substantial Assistance Provided

The United States' request for a downward departure is based on the three factors enumerated above.

First, the Defendant's assistance was extremely significant and useful in quickly moving the investigation forward. As a result of the cooperation provided by the Defendant, the United States was able to obtain important evidence of the conspiracy that was otherwise unavailable to the United States. The United States was able to obtain important documents evidencing the conspiracy that were located outside of the United States and, thus, beyond the reach of grand jury subpoena power. When producing these documents, as well as documents located within the United States, the Defendant provided English translations of important Japanese-language documents, thus making them immediately accessible to the United States and reducing the time and cost of the government's investigation. Additionally, as a result of the cooperation provided by the Defendant and its employees, both within the United States and from Japan, the United States was able to rapidly identify incriminating evidence on key documents and gain an in-depth understanding of the nature and scope of the conspiracy. Upon government request, the Defendant made company employees available for interviews at the Antitrust Division office in Chicago. These employees were based in Japan, beyond the reach of grand jury subpoenas.

When making employees available for interviews, the Defendant also provided Japanese-language interpreters as needed.

Second, the Defendant cooperated fully. It quickly conducted a comprehensive internal investigation designed to uncover the scope of the antitrust conspiracy. The Defendant provided information that assisted the United States in determining the extent to which the conspiracy impacted United States commerce, allowing the United States to more quickly focus its investigation.

In particular, pursuant to U.S.S.G. § 1B1.8, the Defendant provided information that expanded the scope of the conspiracy's impact on U.S. commerce. The United States was able to conduct interviews of the Defendant's employees more efficiently because of the Defendant's thorough and complete internal investigation. The Defendant is committed to continuing its cooperation by, among other things, continuing to provide documents and make its employees available to be interviewed in the United States. The Defendant is also committed to make its employees available to testify before the grand jury or at any trial that may result from the investigation. *See* Plea Agreement, ¶¶ 13-14, Docket No. 9.

Third, the Defendant's assistance was timely. Within a very short time after the service of a grand jury subpoena upon the Defendant, the Defendant agreed to cooperate and acknowledged that cooperation included pleading guilty to conduct that violated the Sherman Act, 15 U.S.C. § 1. Thereafter, the Defendant undertook an internal investigation, and subsequently made several attorney proffers to the United States regarding conduct relating to shock absorbers. Those attorney proffers enabled the United States to focus its investigation. The Defendant's early and wholehearted cooperation significantly advanced the United States'

investigation, particularly since evidence provided by the Defendant implicated another corporation and its employees in conduct that violates the Sherman Act.

C. United States' Evaluation of Substantial Assistance

The Sentencing Guidelines list as a relevant factor the United States' evaluation of the assistance rendered by the organization. U.S.S.G. § 8C4.1(b)(1). The United States believes that the Defendant has provided full, substantial, and timely cooperation that has been significant and provided useful assistance in the United States' ongoing investigation of violations of federal antitrust and related criminal laws in the shock absorbers industry. The Defendant's cooperation has provided the United States with extensive, credible information against both corporate and individual coconspirators, which has significantly advanced its investigation.

V. RECOMMENDED SENTENCE

The sentence recommended in this case takes into account the Defendant's substantial assistance as well as the factors enumerated in 18 U.S.C. §§ 3553 and 3572, and is a sentence sufficient, but not greater than necessary, to reflect the seriousness of the offense, to promote respect for the law, and to afford adequate deterrence. The United States and the Defendant jointly recommend the Court sentence the Defendant as follows. *See* Plea Agreement, ¶ 9, Docket No. 9.

A. $62 Million Criminal Fine

The United States and the Defendant have agreed that a criminal fine of $62 million is an appropriate sentence in this matter. In arriving at this figure, the United States took into account various factors enumerated in 18 U.S.C. §§ 3553(a) and 3572(a)(8), as discussed above, as well as the factors enumerated above in the government's motion for a downward departure for substantial assistance pursuant to U.S.S.G. § 8C4.1.

B. No Order of Restitution

Restitution is also a factor the Court must consider under 18 U.S.C. §§ 3553(a) and 3272 in determining and imposing sentence. Pursuant to 18 U.S.C. § 3663, restitution is not mandatory for violations of 15 U.S.C. § 1, and in light of the availability of civil causes of action that potentially provide for a recovery of a multiple of actual damages, *see* 15 U.S.C. § 15, the United States and the Defendant recommend that the sentence not include a restitution order.

C. No Term of Probation

Pursuant to 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. In considering whether to impose a term of probation the Court should consider the factors set forth in 18 U.S.C. § 3553. *See* 18 U.S.C. § 3562. However, as noted above, because the Defendant is a corporation many of those factors do not apply. For the same reason, many of the conditions of probation set forth in 18 U.S.C. § 3563 are not applicable. The Court should also consider the factors in U.S.S.G. § 8D1.1 which set forth the circumstances under which a sentence to a term of probation is required. These circumstances include ordering a term of probation to secure payment of the special assessment, the fine, or restitution, or to ensure implementation of an effective compliance program.

In this case, the Defendant, a solvent corporation, has agreed to pay the special assessment and the agreed-upon fine of $62 million within 15 days of the final judgment. Furthermore, as noted above, the United States and the Defendant have agreed to recommend that restitution is not appropriate in this case because of the availability of civil causes of action that potentially provide for a recovery of a multiple of actual damages. *See* 15 U.S.C. § 15.

Finally, as described above, the Defendant has already implemented a new compliance program, taken action against culpable employees and managers, and has is no way indicated anything other than timely and complete acceptance of responsibility. Therefore, for these

reasons, the United States and the Defendant recommend that no term of probation be imposed by the Court in this case.

D. $400 Special Assessment

The Court should order the Defendant to pay a $400 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B), and as agreed to by the United States and the Defendant.

VI. CONCLUSION

For these reasons, the United States recommends that the Court impose a sentence requiring the Defendant to pay a fine of $62 million, payable within 15 days of judgment, no order of restitution, no term of probation, and to pay a $400 special assessment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on _____, 2015, I caused the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

1. Caitlin Felvus (cfelvus@taftlaw.com);
2. Larry A. Mackey (lmackey@btlaw.com);
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Respectfully submitted,

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