

**Model Annotated Corporate Plea Agreement
Last Updated December 19, 2008**

UNITED STATES DISTRICT COURT

[XXXXXXX] DISTRICT OF [XXXXXXXXXX]

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) of the Federal Rules of Criminal Procedure (“Fed. R. Crim. P.”):

RIGHTS OF DEFENDANT

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 the plea agreement is filed will be adhered to wherever necessary. Brackets denote either optional language or case-specific factual information. The models will be updated periodically by the Division to comply with changing laws, statutes or policies. The most recent versions of the Division’s model plea agreements are available at <http://www.usdoj.gov/atr/public/criminal.htm>.*

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.

1. The defendant understands its rights:
 - (a) to be represented by an attorney;
 - (b) to be charged by Indictment;
 - [(c) as a corporation organized and existing under the laws of [COUNTRY], to decline to accept service of the Summons in this case, and to contest the jurisdiction of the United States to prosecute this case against it in the United States District Court for the [XXXX] District of [XXXX];]
 - (d) to plead not guilty to any criminal charge brought against it;
 - (e) 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;
 - (f) to confront and cross-examine witnesses against it and to subpoena witnesses in its defense at trial;
 - (g) to appeal its conviction if it is found guilty; and
 - (h) to appeal the imposition of sentence against it.

**AGREEMENT TO PLEAD GUILTY
AND WAIVE CERTAIN RIGHTS**

2. The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(g) above[, including all jurisdictional defenses to the prosecution of this case, and agrees voluntarily to consent to the jurisdiction of the United States to prosecute this case against it in the United States District Court for the [XXXXX] District of [XXXX]]. The defendant also knowingly and voluntarily waives the right to file any appeal, any collateral attack, or any other writ or motion, 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 sentence² in Paragraph 8 of this Plea Agreement, regardless of how the sentence is determined by the Court. 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, shall 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.³ Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty at arraignment to a [one]-count Information [in the form attached] to be filed in the United States District Court for the [XXXXXX] District of [XXXXXX]. 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], [TIME FRAME], in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

3. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 above 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

² *If the plea agreement contains a substantial assistance departure with no specific recommendation as to the amount of the departure in the plea agreement, whether there is a waiver of appeal of sentence may depend on the specific situation involved and local practice.*

³ *Plea agreements may also include following stipulation: “The defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct.”*

⁴ *A factual basis section has generally been included in Division plea agreements; however, it may be omitted if its inclusion would be inconsistent with local practice. Under the*

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 [TIME PERIOD FROM CHARGING PARAGRAPH OF INFORMATION]. During the relevant period, the defendant was a corporation organized and existing under the laws of [STATE OR if foreign--COUNTRY]. The defendant has its principal place of business in [CITY, STATE OR if foreign--CITY, COUNTRY]. During the relevant period, the defendant was a [producer] of [PRODUCT], 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,

decision in United States v. Booker, 543 U.S. 220 (2005), the government is not required to allege facts supporting Guidelines enhancements in an indictment nor prove them beyond a reasonable doubt. Therefore, facts that would support Guidelines enhancements may, but are not required to, be included in the factual basis section of Division plea agreements. Such language is included in this factual basis section as optional language. However, facts that authorize a higher statutory maximum must be proved to a jury beyond a reasonable doubt or admitted by the defendant. Thus, if 18 U.S.C. § 3571(d) is used to obtain a fine greater than \$10 million for a pre-June 22, 2004 Sherman Act conspiracy or above \$100 million for a post-June 22, 2004 Sherman Act conspiracy, the plea agreement should address gain or loss as is done in Paragraph 8(e). For a discussion of the implications of Booker on Division charging and plea agreement practice, see 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), available at <http://www.usdoj.gov/atr/public/speeches/208354.htm>].

⁵ The amount of detail contained in Paragraphs 4(a) and (b) will normally track the detail in the Information.

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 comp bid(s), may insert –* The largest contract on which the defendant submitted a complementary bid in connection with the conspiracy was in the amount of \$[XXX].]

(c) *[Description of relevant interstate and foreign commerce. Common description is as 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 [and foreign]commerce.] The business activities of the defendant and its co-conspirators in connection with the [production and sale] of [PRODUCT] that were the subjects of this conspiracy were within the flow of, and substantially affected, interstate [and foreign]trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within the [XXXXXX] District of [XXXXXX], [XXXXXX] Division. *[Description of 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 the subject of this conspiracy was sold by one or more of the conspirators to customers in this District.]]

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty which may be imposed against it upon conviction for a violation of Section One of the Sherman Antitrust Act is a fine in an amount equal to the greatest of:

- (a) \$[10]⁶ 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)).

6. In addition, the defendant understands that:

- (a) 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;
- (b) pursuant to §8B1.1 of the United States Sentencing Guidelines (“U.S.S.G.,” “Sentencing Guidelines,” or “Guidelines”), 18 U.S.C. § 3563(b)(2) or 3663(a)(3), the Court may order⁷ it to pay restitution to the victims of the offense; and

⁶ *If the conspiracy continued on or after the June 22, 2004 enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, maximum corporate fine under Sherman Act would be \$100 million.*

⁷ *In corporate antitrust cases, restitution may be ordered 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 agreed to by the parties in a plea agreement. If restitution is sought under one of these sections, the restitution amount*

(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 upon conviction for the charged crime.

SENTENCING GUIDELINES⁸

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on the day of sentencing,⁹ along with the other factors set forth in 18 U.S.C. § 3553(a), in determining and imposing sentence. The defendant understands that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. 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 commerce attributable to the defendant or in determining the defendant's applicable Guidelines range, except to the extent

should be included in the recommended sentence contained in Paragraph 8. In most Sherman Act criminal cases, restitution is not sought or ordered because civil causes of action will be filed to recover damages.

⁸ *Guidelines calculations may also be included in the Plea Agreement.*

⁹ *While it is the norm to apply the Guidelines Manual in effect at sentencing, U.S.S.G. §1B1.11(b)(1) provides that if that version of the Manual would violate the ex post facto clause of the Constitution by resulting in greater punishment, the Manual in effect on the date the offense was committed shall be used. However, now that the Guidelines are advisory, some courts have questioned whether the ex post facto clause applies to advisory guidelines. See e.g., *United States v. DeMaree*, 459 F.3d 791 (7th Cir. 2006) (holding that the ex post facto clause does not apply to the now advisory Guidelines); see also *United States v. Andrews*, 532 F.3d 900, 909 (D.C. Cir. 2008) (collecting cases). The Division reserves the right to argue that notwithstanding any potential ex post facto issue, that the court should nevertheless apply the current version of the Guidelines Manual.*

provided in U.S.S.G. §1B1.8(b).]¹⁰

SENTENCING AGREEMENT

8. Pursuant to Fed. R. Crim. P. 11(c)(1)(B OR C), [*if a 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]¹¹ requiring the defendant to pay to the United States a criminal fine of \$[XX] million¹²[, pursuant to 18 U.S.C. § 3571(d),¹³][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)]]¹⁴, [and restitution of \$XXX pursuant to 18 U.S.C. §

¹⁰ A U.S.S.G. §1B1.8 provision is optional, but it is commonly included in Division plea agreements.

¹¹ This optional language is not applicable in cases involving substantial assistance downward departures or the inability to pay a Guidelines fine.

¹² The recommended fine for corporations is usually a specific dollar amount, but a plea agreement may recommend a sentence within a certain Guidelines range.

¹³ Section 3571 is only referenced if relying on twice the gain or loss maximum to arrive at a recommended fine above the Sherman Act maximum.

¹⁴ The time for payment of the fine should be specified using one of these options. 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 paragraph such as Paragraph 8(a) setting forth the recommended installment schedule. 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). Note that if any fine is not paid in full before the 15th day after the date of judgment, the payment of interest is required on any fine or restitution of more than \$2,500 pursuant to 18 U.S.C. § 3612(f)(1) unless the defendant does not have the ability to pay interest, in which case

[3563(b)(2)/3663(a)(3)]¹⁵ [payable in full before [DATE]] *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”). 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. §5K2.0.¹⁶ The parties agree not to seek or support any sentence outside of the Guidelines range nor any Guidelines adjustment 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) 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

the Division may recommend that interest be waived pursuant to either 18 U.S.C. § 3612(f)(3)(A) or § 3612(h).

¹⁵ *See footnote 7 above. It is extremely rare to have restitution included as part of a plea agreement in a Sherman Act case, as civil suits are normally filed by victims to recover damages. See U.S.S.G. §8B1.1 and optional Paragraph 13.*

¹⁶ *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 or inability to pay departure or a Guidelines adjustment that is set forth in the Plea Agreement.*

accrued interest)]; provided, however, that the defendant shall 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.]¹⁷

(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.

[(c) 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.]¹⁸

[(d) 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 10, 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 and impose sentence on an expedited schedule as early as the date of arraignment, based

¹⁷ *The length of the installment schedule, payment intervals, and installment amounts will depend on the facts of the case, but the Division's policy is, and the Guidelines recommend, that the length of the schedule may not exceed five years. See U.S.S.G. §8C3.2, n.1.*

¹⁸ *This optional subparagraph may be included unless probation is specifically called for 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 paid in installments, to protect against future crime by defendant, recidivism within last 5 years by company or high-level personnel, etc.) or if the local district practice is to require probation whenever the fine is paid in installments.*

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.]¹⁹

[(e)²⁰ 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 the recommended sentence set forth in this paragraph, 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.]

9.²¹ [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 8 above. Subject to the full and continuing cooperation of the defendant, as described in Paragraph 14 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, for a downward departure from the Guidelines fine range and will request that the Court impose the recommended sentence set out in Paragraph 8 of this Plea Agreement because of the defendant's substantial assistance in the government's

¹⁹ *Paragraph 8(d) 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.*

²⁰ *Only insert this subparagraph if a fine greater than the Sherman Act maximum is being sought pursuant to 18 U.S.C. § 3571(d).*

²¹ *If the recommended fine is below the applicable Guidelines range, insert one of the listed explanatory paragraphs, either an agreement to make a downward departure for substantial assistance or an inability to pay determination.*

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 8 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)]²², 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].²³

10. Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 14 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's cooperation [and its commitment to prospective cooperation] with the United States' investigation and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct.

11. The United States and the defendant understand that the Court retains complete discretion to accept or reject the recommended sentence²⁴ provided for in Paragraph 8 of this

²² *Insert 18 U.S.C. § 3572(b) if restitution will be ordered pursuant to 18 U.S.C. § 3563(b)(2), 3663(a)(3), or pursuant to 3663A(c)(1)(A)(ii) in a fraud case, and a Guidelines fine would impair the ability of the defendant to make restitution.*

²³ *Normally only one of these inability to pay provisions would be used, and in most cases it will be the second provision.*

²⁴ *If each party is making a different sentencing recommendation such that there is no agreed-upon recommended sentence, then instead of referring to "the recommended sentence"*

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 sentence²⁵ 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 Paragraph 11(b) below, shall 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)). 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 shall 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 the Plea Agreement, the statute of limitations period for any offense referred to in Paragraph 16 of this Plea Agreement shall be tolled for the period between the date of the signing of the Plea Agreement and the date the defendant withdrew its guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater.]

here, it is more appropriate to refer to “either party’s sentencing recommendation.”

²⁵ *If each party is making a different sentencing recommendation such that there is no agreed-upon recommended sentence, then instead of referring to “the recommended sentence” here, it is more appropriate to refer to “either party’s sentencing recommendation.”*

12.²⁶ [The defendant shall give notice of its conviction and sentence to victims of the offense as specified in the presentence report. The form of the notice shall be approved by the U.S. Probation Officer and the Court. The defendant shall bear the costs associated with the mailing of the notice.]

[The defendant shall publicize at its expense in [the Wall Street Journal] and in [the New York Times] in prominent, one-quarter page advertisements within ten days of the date of conviction the nature of the offense committed by the defendant in this case, the fact of conviction, the sentence imposed in this case, and the steps that will be taken to prevent the recurrence of similar offenses.]

[13. In light of the availability of civil causes of actions, which potentially provide for a recovery of a multiple of actual damages, the United States agrees that it will not seek a restitution order for the offense charged in the Information.²⁷]

²⁶ *The optional notices in Paragraph 12 have been ordered previously in Division cases where it was agreed that defendant provide notice to victims or public notice of the offense.*

²⁷ *If civil actions have been filed, this language should be modified to reflect the filing of these suits; the staff may want to cite those filed cases in this paragraph and state “In light of the civil cases filed, which potentially provide”*

DEFENDANT'S COOPERATION²⁸

14. The defendant [and its [LIST TYPES OF OTHER RELATED CORPORATE ENTITIES]²⁹ [(collectively, "related entities") --- *only use if more than one type of related entity is listed*]] will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the [manufacture or sale] of [PRODUCT]³⁰, any other 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 ("Federal Proceeding").³¹ The ongoing, full, and truthful cooperation of the defendant shall include, but not be limited to:

²⁸ *The entities and employees covered in the cooperation terms in Paragraphs 14 and 15 must be co-extensive with the nonprosecution terms of Paragraphs 16 and 17(a). For instance, if the named defendant and certain related entities (e.g., subsidiaries) are receiving nonprosecution protection (i.e., transactional immunity) under Paragraph 16, then the same entities must be required to provide ongoing cooperation under Paragraph 14 of the Plea Agreement. Likewise, the class of individuals (i.e., the directors, officers, and employees of the defendant and its related entities) receiving nonprosecution protection under Paragraph 17(a) must be required to provide ongoing cooperation under Paragraphs 14(b), 14(c), and 15.*

²⁹ *Related entities such as subsidiaries of the named corporate defendant may be covered by the Plea Agreement if those entities can and will provide ongoing cooperation to the staff in its investigation. Often the covered subsidiaries are limited to those that "are engaged in the sale or production" of the product at issue. While past Division plea included "affiliates" in the definition of related entities, the Division's current practice is not to include such a broad term in the Plea Agreement. If the defendant seeks to have certain affiliates included, those affiliates should be specifically named.*

³⁰ *If the investigation involves a domestic conspiracy, this description will be limited in the cooperation provision normally to "the [manufacture or sale] of [PRODUCT] in [geographic area]"*

³¹ *The term "Federal Proceeding" identifies the federal investigations and litigation in which the corporate defendant and its employees must cooperate in order to receive the Plea Agreement's protections. Paragraph 14 defines how the corporate defendant must cooperate in any Federal Proceeding. Paragraph 15(a)-(f) defines how the directors, officers, and employees of the corporate defendant must cooperate in any Federal Proceeding.*

(a) producing to the United States all non-privileged³² documents, information, and other materials, wherever located,³³ in the possession, custody, or control of the defendant [or any of its [related entities]], requested by the United States in connection with any Federal Proceeding;

[(b) securing the ongoing, full, and truthful cooperation, as defined in Paragraph 15 of this Plea Agreement, of [NAMED INDIVIDUALS], including making such persons available in the United States and at other mutually agreed-upon locations, at the defendant's expense, for interviews and the provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding;]³⁴ and

³² *Prosecutors may not request that a defendant disclose privileged attorney-client communications or attorney work product, unless the crime-fraud exception applies or the advice of counsel defense is asserted. Of course, defendants are free to waive the attorney-client privilege or work product privilege and produce communications and documents protected by such privileges if they voluntarily choose to do so, but prosecutors may not request that they do so. See Principles of Federal Prosecution of Business Organizations, U.S.A.M. §§ 9-28.710 - 9.28.720, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.710.*

³³ *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 Negotiating The Waters Of International Cartel Prosecutions -- Antitrust Division Policies Relating To Plea Agreements In International Cases, Speech by Gary R. Spratling, Before ABA Criminal Justice Section 13th Annual National Institute on White Collar Crime at § II(B), p.4 - 5 (March 4, 1999), available at <http://www.usdoj.gov/atr/public/speeches/2275.htm>, (hereinafter "Negotiating The Waters") for a discussion of the defendant's obligation in international cases to produce documents wherever located.*

³⁴ *This provision has been used infrequently where the defendant's cooperation is based on the cooperation of certain key foreign-based executives and the company's cooperation is essentially meaningless without the Division having access to the specified individuals. See "Negotiating The Waters" at § II(E), p. 6-7.*

(c) using its best efforts³⁵ to secure the ongoing, full, and truthful cooperation, as defined in Paragraph 15 of this Plea Agreement, of the current [and former]³⁶ directors, officers, and employees of the defendant [or any of its [related entities]][, in addition to those specified in subparagraph (b) above,] as may be requested by the United States,[but excluding [Samuel T. Jones], [John R. Doe], and [Robert P. Smith],]³⁷ including making these persons available [in the United States and at other mutually agreed-upon locations], at the defendant's expense, for interviews and the provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding.

15. The ongoing, full, and truthful cooperation of each person described in [either] Paragraph 14(b) [or 14(c)] above will be subject to the procedures and protections of this

³⁵ See "Negotiating The Waters" at § II(F), p. 7-8 for a discussion of what constitutes best efforts.

³⁶ If the nonprosecution terms of Paragraph 17(a) cover former executives, then the cooperation terms of Paragraphs 14(c) and 15 must also cover former employees. Before nonprosecution protections of the corporate plea agreement will be extended to former employees, company counsel must make a commitment that the company can assist in securing the cooperation of key former employees, e.g., that the former employees will be made available for interviews. If a former employee is now employed at a competitor and is a subject or target of the investigation, the employee will be excluded from Paragraphs 14(c) and 17(a).

³⁷ The Division seeks to prosecute culpable individuals from all corporate conspirators, domestic and foreign, except the amnesty applicant, and thus, will carve culpable individuals out of the corporate plea agreement. Companies that offer early cooperation may have fewer carved-out executives than latecomers. See *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations*, Speech by Scott D. Hammond, Before 54th Annual American Bar Association Section of Antitrust Law Spring Meeting at § II(D)(March 29, 2006), available at <http://www.usdoj.gov/atr/public/speeches/215514.htm>. Employees refusing to cooperate may also be carved out of the Plea Agreement's coverage. The carved-out individuals will be excluded from both the corporate cooperation requirements of Paragraph 14(c) and the nonprosecution coverage of Paragraph 17(a).

paragraph, and shall include, but not be limited to:

(a) producing [in the United States and at other mutually agreed-upon locations] all non-privileged³⁸ documents, including claimed personal documents, and other materials, wherever located, requested by attorneys and agents of the United States;

(b) making himself or herself available for interviews [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;

(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 false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503 *et seq.*);

(d) otherwise voluntarily providing the United States with any non-privileged³⁹ material or information not requested in (a) - (c) of this paragraph 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, testifying in grand jury, trial, and other judicial proceedings[in the United States] fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402), and obstruction of justice (18 U.S.C. § 1503 *et seq.*); and

³⁸ See footnote 32.

³⁹ See footnote 32.

(f) agreeing that, if the agreement not to prosecute him or her in this Plea Agreement is rendered void under Paragraph 17(c), the statute of limitations period for any Relevant Offense as defined in Paragraph 17(a) shall be tolled as to him or her for the period between the date of the signing 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 the Plea Agreement.⁴⁰

GOVERNMENT'S AGREEMENT

16. Upon acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, and subject to the cooperation requirements of Paragraph 14 of this Plea Agreement, the United States agrees that it will not bring further criminal charges against the defendant [or any of its [related entities]] for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of an antitrust conspiracy involving the [manufacture or sale] of [PRODUCT]⁴¹. The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

17. 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 the recommended sentence and subject to the

⁴⁰ *Cooperating individuals will have to 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.*

⁴¹ *If the investigation involves a domestic conspiracy, the nonprosecution provisions will normally be limited to "the [manufacture or sale] of [PRODUCT] in [GEOGRAPHIC AREA]."*

exceptions noted in Paragraph 17(c), the United States will not bring criminal charges against any current [or former] director, officer, or employee of the defendant [or its [related entities]] for any act or offense committed before the date 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 of an antitrust conspiracy involving the [manufacture or sale] of [PRODUCT]⁴² (“Relevant Offense”)[, except that the protections granted in this paragraph shall not apply to [Samuel T. Jones], [John R. Doe], or [Robert P. Smith]]];

(b) Should the United States determine that any current or former director, officer, or employee of the defendant [or its [related entities]] 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 Paragraph 17(b) fails to comply with his or her obligations under Paragraph 15, 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, shall be rendered void;

(d) Except as provided in Paragraph 17(e), information provided by a person described in Paragraph 17(b) to the United States under the terms of this Plea Agreement

⁴² See footnote 41.

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 (18 U.S.C. § 1621), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), or obstruction of justice (18 U.S.C. § 1503 *et seq.*);

(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 15 of this Plea Agreement, the agreement in Paragraph 17(d) not to use that information or any information directly or indirectly derived from it against that person in a criminal case shall be rendered void;

(f) The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence; and

(g) Documents provided under Paragraphs 14(a) and 15(a) shall be deemed responsive to outstanding grand jury subpoenas issued to the defendant [or any of its [related entities]].⁴³

[18.⁴⁴ 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

⁴³ For a discussion of Division policy on this issue, see “*Negotiating The Waters*” at § II(C), p. 5-6.

⁴⁴ Paragraph 18 may be inserted if the defendant has foreign-located officers, directors, or employees. See “*Negotiating The Waters*” at § II(G), p. 8-9 for a discussion of Division policy regarding this safe passage provision.

prevent such person from departing the United States. This paragraph does not apply to an individual's commission of perjury (18 U.S.C. § 1621), making false statements (18 U.S.C. § 1001), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice (18 U.S.C. § 1503 *et seq.*), or contempt (18 U.S.C. §§ 401-402) in connection with any testimony or information provided or requested in any Federal Proceeding.]

[19. The defendant understands that it may be subject to administrative action by federal or state 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 whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative 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 administrative action, if any, to take.]⁴⁵

REPRESENTATION BY COUNSEL

20. 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.

⁴⁵ *Optional paragraph where administrative actions are a possibility.*

VOLUNTARY PLEA

21. 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. 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

22. 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]] have failed to provide full and truthful cooperation, as described in Paragraph 14 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify counsel for the defendant in writing by personal or overnight delivery 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),⁴⁶ and the defendant [and its [related entities]] shall be subject 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 [and its [related entities]] agree 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 16 of this Plea Agreement, the statute of limitations period for such offense shall be tolled for the period between the date of the signing of this Plea

⁴⁶ See "*Negotiating The Waters*" at § II(H), p. 9 for a discussion of Division policy regarding voiding the Plea Agreement.

Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement.

23. The defendant understands and agrees that in any further prosecution of it [or its [related entities]] resulting from the release of the United States from its obligations under this Plea Agreement, because of the defendant's [or its [related entities']] violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by it[, its [related entities],] or [current or former directors, officers, or employees of it [or its [related entities]]]⁴⁷ 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 any such further prosecution. 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.

ENTIRETY OF AGREEMENT

24. This Plea Agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the criminal charge[s] 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

⁴⁷ *This language should be consistent with the individuals covered in the nonprosecution and cooperation paragraphs.*

by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

[27. A facsimile signature shall 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] ⁴⁸
[Title]
[Global Products, Inc.]

BY: _____
[STAFF]

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

⁴⁸ *Most courts will not accept a corporate plea agreement that is executed by counsel for the company. An authorized corporate officer, in addition to the company attorney, must normally sign the Plea Agreement, and the Resolution of the Board of Directors, which is attached to the Plea Agreement, should grant that officer the power to enter into the agreement on behalf of the company.*

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