MARC SIEGEL (CSBN 142071)
MICHAEL L. SCOTT (CSBN 165452)
Antitrust Division
U.S. Department of Justice
450 Golden Gate Avenue
Box 36046, Room 10-0101
San Francisco, California 94102
Telephone: (415) 436-6660

Attorneys for the United States

FILED
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RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA v. HITOSHI HAYASHI, Defendant.	No. CR 01-0019 (SI) **PLEA AGREEMENT** San Francisco Venue

The United States of America and HITOSHI HAYASHI ("defendant") hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

RIGHTS OF DEFENDANT

1. The defendant understands his rights:

(a) to be represented by an attorney;

(b) as a citizen and resident of Japan, 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 him in the United States District Court for the Northern District of California;

(c) to plead not guilty to any criminal charge brought against him;

(d) to have a trial by jury, at which he 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 him to be found guilty;

(e) to confront and cross-examine witnesses against him and to subpoena witnesses in his defense at trial;

(f) not to be compelled to incriminate himself;

(g) to appeal his conviction, if he is found guilty at trial; and

(h) to appeal the imposition of sentence against him.

AGREEMENT TO PLEAD GUILTY AND WAIVE CERTAIN RIGHTS

2. The defendant 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 him in the United States District Court for the Northern District of California. The defendant agrees to have his sentence determined under the United States Sentencing Guidelines ("U.S.S.G.") and waives all constitutional challenges to the validity of the U.S.S.G. The defendant waives any right he may have to have facts that determine his Guidelines fine and imprisonment ranges under the U.S.S.G. (including any facts used to determine his offense level, volume of commerce, any specific offense characteristic or other enhancement or adjustment under the U.S.S.G.) alleged in an indictment and found by a jury beyond a reasonable doubt. The defendant agrees that facts that determine his Guidelines fine and imprisonment ranges will be found by the Court at sentencing by a preponderance of the evidence and that the Court may consider any reliable evidence, including hearsay, in making such determinations. The defendant also waives the right to appeal the imposition of the sentence against him, so long as the sentence imposed is consistent with the recommended sentence contained in Paragraph 8 of this Plea Agreement. The defendant will plead guilty at arraignment to a one-count Superseding Information to be filed in the United States District Court for the Northern District of California, in which he is charged with participating in a conspiracy to suppress and eliminate competition by fixing the prices and allocating the volumes of sorbates to be sold in the United States and elsewhere, beginning in 1992 and continuing until 1996, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. The United States agrees to move to dismiss the defendant from the pending Indictment, United

States v. Komatsu et al., CR 01-0019 (SI), immediately following the imposition of the sentence.

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 CHARGED

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

(a) For purposes of this Plea Agreement, the "relevant period" is that period beginning in 1992 and continuing until 1996. During the relevant period, the defendant was a salesman for Daicel Chemical Industries, Ltd. ("Daicel"), an entity organized and existing under the laws of Japan and with its principal place of business in Tokyo, Japan. During the relevant period, Daicel was a producer of sorbates and was engaged in the sale of sorbates in the United States and elsewhere. Sorbates are chemical preservatives used primarily as mold inhibitors in high-moisture and high-sugar food products. All references to "sorbates" in this Plea Agreement include the products potassium sorbate and sorbic acid. During the relevant period, Daicel's sales of sorbates to U.S. customers totalled at least $37.5 million.

(b) During the relevant period, the defendant participated in a conspiracy with other persons and entities engaged in the manufacture and sale of sorbates, the primary purpose of which was to fix the prices and allocate the volumes of sorbates sold in the United States and elsewhere. In furtherance of the conspiracy, the defendant engaged in conversations and attended meetings with representatives of other major sorbates producers. During such meetings and conversations, agreements were reached to fix the prices and allocate the volumes of sorbates to be sold in the United States and elsewhere.

(c) During the relevant period, sorbates sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution of

sorbates, as well as payments for sorbates, traveled in interstate and foreign commerce. The business activities of Daicel and co-conspirators in connection with the production and sale of sorbates affected by 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 Northern District of California. Sorbates affected by 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 maximum penalty which may be imposed against him upon conviction for a violation of Section One of the Sherman Antitrust Act is:

(a) a term of imprisonment for three years (15 U.S.C. § 1);

(b) a fine in an amount equal to the greatest of (1) $350,000; (2) twice the gross pecuniary gain the conspirators derived from the crime, or (3) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (15 U.S.C. § 1; 18 U.S.C. § 3571(b) and (d)); and

(c) a term of supervised release of one year following any term of imprisonment. If the defendant violates any condition of supervised release, the defendant could be imprisoned for the entire term of supervised release (18 U.S.C. § 3559(a)(5); 18 U.S.C. § 3583(b)(3) and (e)(3); and U.S.S.G. § 5D1.2(a)(3)).

6. In addition, the defendant understands that:

(a) pursuant to U.S.S.G. § 5E1.1, the Court may order him to pay restitution to the victims of the offense; and

(b) pursuant to 18 U.S.C. § 3013(a)(2)(A) and U.S.S.G. § 5E1.3, the Court is required to order the defendant to pay a $100.00 special assessment upon conviction for the charged crime.

SENTENCING GUIDELINES

7. Sentencing for the offense to be charged will be conducted pursuant to

the U.S.S.G. Manual in effect on the day of sentencing. The United States and the defendant agree on the determination of the U.S.S.G. offense level in this case, as set out below, based on currently available information. The defendant understands that, should the United States become aware of information that renders incorrect the calculation of the defendant's total offense level, criminal history category, or applicable adjustments or enhancements set out below, the United States will notify the Court before sentencing. 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 Sentencing Guidelines range, except to the extent provided in U.S.S.G. § 1B1.8(b).

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(a)	Base Offense Level (§ 2R1.1(a))	10
(b)	Volume of Affected Commerce (§ 2R1.1(b)(2)(F)) (More than $37.5 million)	+6
(c)	Total Adjusted Offense Level	16
(d)	Victim-Related Adjustments (§ 3A)	+0
(e)	Role in the Offense Adjustments (§ 3B)	+0
(f)	Obstruction Adjustments (§ 3C)	+0
(g)	Acceptance of Responsibility (§ 3E1.1(a) and (b))	-3
(h)	Total Offense Level	13
(i)	Criminal History Category (§ 4A1.1)	I

(j) Therefore, the appropriate range of sentence is 12 to 18 months imprisonment, no term of probation (§ 5B1.1), supervised release of one year (§§ 5D1.1, 5D1.2(a)(3)), restitution (§ 5E1.1), a fine of 1% to 5% of the volume of commerce (§§ 2R1.1(c)(1), 5E1.2(b)), and a special assessment of $100 (§ 5E1.3).

SENTENCING AGREEMENT

8. (a) Pursuant to Fed R. Crim. P. 11(c)(1)(C), 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 requiring the defendant to pay to the United States a criminal

fine of $20,000, payable in full before the fifteenth (15th) day after the date of judgment; a period of incarceration of ~~three months~~ 90 DAYS; and no period of supervised release ("the recommended sentence").

(b) The United States will not object to the defendant's request that the Court make a recommendation to the Bureau of Prisons that the Bureau of Prisons designate that the defendant be assigned to a Federal Minimum Security Camp (if possible at Lompoc, California) to serve his sentence of imprisonment and that the defendant be released following the imposition of sentence to allow him to self-surrender to the assigned correctional facility on a specified date.

(c) The defendant understands that the Court will order him to pay a $100 special assessment pursuant to 18 U.S.C. § 3013(a)(2)(A) and U.S.S.G. § 5E1.3 in addition to any fine imposed.

9. Based on the information now known to it, the United States agrees that it will make a motion, pursuant to U.S.S.G. § 3E1.1, for a downward adjustment of three levels for acceptance of responsibility due to the defendant's timely notification of his intention to enter a guilty plea.

10. The United States and the defendant agree that the applicable Sentencing Guidelines fine and incarceration ranges exceed the fine and term of imprisonment 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. § 5K1.1, for a downward departure from the Guidelines sentence in this case and will request that the Court impose the fine and term of imprisonment contained in the recommended sentence set out in Paragraph 8 of this Plea Agreement because of the defendant's substantial assistance in the government's investigation and prosecutions of violations of federal criminal law in the sorbates industry.

11. The United States and the defendant jointly submit that this Plea Agreement, 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 12, will provide sufficient information concerning the defendant, the offense charged in this case, and the defendant's role in the offense to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553. The United States will not object to the defendant's request that the Court accept the defendant's plea of guilty 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 Rule 32(b)(1), Fed. R. Crim. P., U.S.S.G. § 6A1.1, and Rule 32-1(b) 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. Should the Court deny defendant's request to impose sentence on an expedited schedule, the United States agrees that, at the initial appearance or arraignment, it will recommend the release of the defendant on his personal recognizance, under 18 U.S.C. § 3142, without restriction as to travel, pending the sentencing hearing in this case.

12. 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 of the fact, manner, and extent of the defendant's cooperation and his 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.

13. The United States and the defendant understand that the Court retains complete discretion to accept or reject the recommended sentence provided for in Paragraph 8(a) of this Plea Agreement.

(a) If the Court does not accept the recommended sentence, the United States and the defendant agree that this Plea Agreement, except for Paragraph 13(b) below, shall be rendered void.

(b) If the Court does not accept the recommended sentence, the defendant will be free to withdraw his guilty plea (Fed. R. Crim. P. 11(c)(5) and(d)). If the defendant withdraws his 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 he withdraws his guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any Relevant Offense, as defined in Paragraph 15 below, will be tolled for the period between the date of the signing of the Plea Agreement and the date the defendant withdrew his guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater. For a period of three (3) consecutive days following such a withdrawal of the guilty plea under this subparagraph, the United States shall take no action, based upon either a Relevant Offense or any actual or alleged violation of the Plea Agreement, to revoke the defendant's release on his personal recognizance, to subject the defendant to service of process, arrest, or detention, or to prevent the defendant from departing the United States.

DEFENDANT'S COOPERATION

14. The defendant will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigations of violations of federal antitrust and related criminal laws involving the manufacture or sale of sorbates, and the manufacture or sale of chlorinated acetyls manufactured by Daicel and sold in the United States through its Organic Chemicals Division; 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"). The ongoing, full, and truthful cooperation of the defendant shall include, but not be limited to:

(a) producing in the United States and at other mutually agreed-upon locations all documents, including claimed personal documents, and other materials, wherever located, in the possession, custody, or control of the defendant, requested by attorneys and agents of the United States;

(b) making himself 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);

(d) otherwise voluntarily providing the United States with any material or information not requested in (a) - (c) of this paragraph that he may have that is related to any Federal Proceeding; and

(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).

GOVERNMENT'S AGREEMENT

15. Subject to the full, truthful, and continuing cooperation of the defendant, as described in Paragraph 14 of this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, the United States will not bring further criminal charges against the defendant for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of an attempted or completed antitrust conspiracy involving the manufacture or sale of sorbates, or the manufacture or sale of chlorinated acetyls manufactured by Daicel and sold in the United States through its Organic Chemicals Division ("Relevant Offense"). 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.

16. The United States agrees that when the defendant 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 the defendant to arrest, detention, or service of process, or to prevent the defendant from departing the United States. Counsel for the United States shall provide the defendant a letter to this effect in connection with any such travel required by the United States. This paragraph does not apply to the defendant'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), or contempt (18 U.S.C. §§ 401 - 402) in connection with any testimony or information provided or requested in any Federal Proceeding.

17. (a) Subject to the full and continuing cooperation of the defendant, as described in Paragraph 14 of this Plea Agreement, and upon the Court's acceptance of the defendant's guilty plea and imposition of sentence in this case, the United States agrees not to seek to remove the defendant from the United States under Section 240 of the Immigration and Nationality Act based upon the defendant's guilty plea and conviction in this case, should the defendant apply for or obtain admission to the United States as a nonimmigrant (hereinafter referred to as the "agreement not to seek to remove the defendant"). The agreement not to seek to remove the defendant is the equivalent of an agreement not to exclude the defendant from admission to the United States as a nonimmigrant or to deport the defendant from the United States. (Immigration and Nationality Act, § 240(e)(2)).

(b) The Antitrust Division of the United States Department of Justice has consulted with the Bureau of Immigration and Customs Enforcement of the United States Department of Homeland Security ("ICE"). ICE, in consultation with the United States Department of State, has agreed to the inclusion in this Plea Agreement of this agreement not to seek to remove the defendant.

(c) So that the defendant will be able to obtain any nonimmigrant visa that he may need to travel to the United States, ICE and the Visa Office, United States Department of State, have concurred in the granting of a nonimmigrant waiver of the

defendant's inadmissibility. This waiver will remain in effect as long as this agreement not to seek to remove the defendant remains in effect. While the waiver remains in effect, the Department of State will not deny the defendant's application for a nonimmigrant visa on the basis of the defendant's guilty plea and conviction in this case, and ICE will not deny his application for admission as a nonimmigrant on the basis of his guilty plea and conviction in this case.

(d) This agreement not to seek to remove the defendant will remain in effect as long as the defendant:

(i) acts and has acted consistently with his cooperation obligations under this Plea Agreement;

(ii) is not convicted of any felony under the laws of the United States or any state, other than the conviction resulting from the defendant's guilty plea under this Plea Agreement or any conviction under the laws of any state resulting from conduct constituting an offense subject to this Plea Agreement; and

(iii) does not engage in any other conduct that would warrant his removal from the United States under the Immigration and Nationality Act.

The defendant understands that, should the Antitrust Division become aware that the defendant has violated any of these conditions, the Antitrust Division will notify ICE. ICE will then determine, in consultation with the Antitrust Division, whether to rescind this agreement not to seek to remove the defendant.

(e) The defendant agrees to notify the Assistant Attorney General of the Antitrust Division should the defendant be convicted of any other felony under the laws of the United States or of any state.

(f) Should the United States rescind this agreement not to seek to remove the defendant because of the defendant's violation of a condition of this Plea Agreement, the defendant irrevocably waives his right to contest his removal from the United States under the Immigration and Nationality Act on the basis of his guilty plea and conviction in this case, but retains his right to notice of removal proceedings.

18. The defendant understands that he 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 as a matter for that agency to consider before determining what administrative action, if any, to take.

REPRESENTATION BY COUNSEL

19. The defendant has reviewed all legal and factual aspects of this case with his attorney and is fully satisfied with his attorney's legal representation. The defendant has thoroughly reviewed this Plea Agreement with his attorney and has received satisfactory explanations from his attorney concerning each paragraph of this Plea Agreement and alternatives available to the defendant other than entering into this Plea Agreement. After conferring with his attorney and considering all available alternatives, the defendant has made a knowing and voluntary decision to enter into this Plea Agreement.

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. 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 has 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 the

defendant or his counsel in writing by personal or overnight delivery or facsimile transmission, and may also notify his counsel by telephone, of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph), and the defendant 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 may seek Court review of any determination made by the United States under this paragraph to void any of its obligations under the 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 for any Relevant Offense, the statute of limitations period for such offense will be tolled for the period between the date of the signing 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 him resulting from the release of the United States from its obligations under this Plea Agreement based on the defendant's violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by him to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against him in any such further prosecution. In addition, the defendant unconditionally waives his right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

23. The defendant agrees to and adopts as his own the factual statement contained in Paragraph 4 above. In the event that the defendant breaches the Plea Agreement, the defendant agrees that the Plea Agreement, including the factual statement contained in Paragraph 4 above, provides a sufficient basis for any possible future extradition request that may be made for his return to the United States to face charges either in the Superseding Information referenced in Paragraph 2 of this Plea Agreement or in the related Indictment. The defendant further agrees not to oppose or contest any request for extradition by the United States to face charges in the Indictment referenced in Paragraph 2 of this Plea Agreement.

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 in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

25. 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.

26. 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: 8·3·04

Respectfully submitted,

BY: _____
Hitoshi Hayashi
Defendant

BY: _____
Marc Siegel
Michael L. Scott
Attorneys

BY: _____
John K. Carroll, Esq.
James D. Miller, Esq.
Counsel for Hitoshi Hayashi

U.S. Department of Justice
Antitrust Division
450 Golden Gate Ave.
10th Floor
San Francisco, CA 94102
Tel: (415) 436-6660

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

US,

Plaintiff,

v.

USA,

Defendant.

_____/

Case Number: CR01-00019 SI

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on September ~~8~~ 9, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Marc Siegal
U.S. Department of Justice
450 Golden Gate Ave.
P.O. Box 36046
San Francisco, CA 94102

John K. Carroll
Chifford Chance
31 W 52nd Street
New York, NY 10019

USPO

Dated: September 8, 2004

Richard W. Wieking, Clerk
By: Tracy Sutton, Deputy Clerk

TSutton