

1 **APPEARANCES, Continued:**

2 **For the Defendant:** Hiroki Tsukimori, Chief Compliance Officer

3 **Also Present:** Nanaka Yoshida King, Interpreter
4 Special Agent C.J. Freihofer (FBI)
5 Laura A. Shannon, U.S. Probation Officer
6 Brian D. Schnapp, Esq. (Vinson & Elkins)
7 Mr. Yoichiro Tanaka (Hitachi Legal Dept.)

8 **Courtroom Deputy:** Barbara A. Crum

9 **Court Reporter:** Maryann T. Maffia, RDR
10 239 Potter Stewart U.S. Courthouse
11 100 East Fifth Street
12 Cincinnati, Ohio 45202
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P R O C E E D I N G S

COURTROOM DEPUTY: On the docket this morning is District Court Case Number 1:16-CR-78: *United States of America versus Hitachi Automotive Systems, Limited.*

We're here this morning for sentencing.

THE COURT: All right. Good morning.

Is our interpreter present?

THE INTERPRETER: Yes.

THE COURT: Yes, ma'am. Will you introduce yourself for the record.

THE INTERPRETER: Hi. My name is Nanaka King.

THE COURT: Good morning.

Miss Crum, will you swear the interpreter, please.

(The interpreter was duly sworn by the courtroom deputy.)

THE INTERPRETER: Yes, I do.

COURTROOM DEPUTY: Thank you, ma'am.

THE COURT: Will counsel now introduce themselves for the record, and will the defense side also introduce the corporate representative again.

MR. JACOBS: Surely. Good morning, Your Honor. Matt Jacobs, Craig Seebald and Jeff Teeters on behalf of the defendant HIAMS. We have, in the courtroom, from Japan, Hiroki Tsukimori, also who will go by the name "T.K." He is here on behalf of the company. And also, Mr. Tenaka of the legal department of HIAMS is here.

1 THE COURT: Okay.

2 On behalf of the United States?

3 MS. STERN: Good morning, Your Honor. Carla Stern
4 for the United States along with Zoki Tasic and Special Agent
5 Freihofer from the F.B.I.

6 THE COURT: Okay. So on September 29th of last year,
7 the corporation appeared in front of me, entered a plea of
8 guilty to a one-count Information: Conspiracy to Restrain
9 Trade, a violation of 15 U.S.C. 1, a Class C felony.

10 The case was referred for a PSI at that time, which was
11 initially drafted on December 1st of '16 and then modified
12 January 10th of this year.

13 At the time we entered into the plea discussions, we had a
14 couple of agreements:

15 One, the recommended sentencing range was between 55 and
16 -- \$55.48 million and \$59.18 million.

17 Probation could be up to a term of three years at the
18 discretion of myself, and there would be reporting
19 requirements.

20 Having read all of the information that was sent to me,
21 it's my intention to follow the recommendation of the
22 Probation Department even though the actual Guidelines
23 calculation in this offense contemplates a wider fine range
24 than that with a potential higher fine to the company. But I
25 intend to follow the recommendations of the lawyers in that

1 regard.

2 So I would ask the corporate representative at this time
3 whether or not the plea that was made on September 29th, 2016,
4 was knowingly, voluntarily and intelligently made?

5 CORPORATE REPRESENTATIVE TSUKIMORI: (Via
6 Interpreter) We enter the guilty plea at our own will.

7 THE COURT: Okay. Thank you.

8 Therefore, I find that the corporate representative of the
9 Hitachi Corporation has indicated that the corporation enters
10 into this agreement in a fully competent and capable and
11 informed manner.

12 The plea of guilty is a knowing plea, it was a voluntary
13 plea supported by an independent basis of facts which contains
14 each of the essential elements of the offense charged.

15 So I previously accepted the plea, but now I'll make a
16 formal finding of guilty on the record.

17 All right. The United States, you've received a copy of
18 the presentence investigation as well as the defendant's
19 Sentencing Memo; correct?

20 MS. STERN: That's correct, Your Honor.

21 THE COURT: Okay. Opposite question to defense
22 counsel?

23 MR. JACOBS: Correct, Your Honor.

24 THE COURT: All right. Let's just run through the
25 guideline calculation for the purposes of this.

1 Pursuant to U.S.S.G. 8C2.3(a), for any counts covered by
2 8C2.1, the table in Chapter Two is used to calculate the
3 appropriate fine range in this case.

4 The Base Offense Level is a 12.

5 And because of the other specific characteristics involved
6 in this case, eight levels are added. So the Total Offense
7 Level at the end of the day, because of the amount of money
8 involved, ends up being a 21 pursuant to 8C2.4(d).

9 There was also a culpability score that starts at 5.

10 And according to 8C2.5(b)(1)(A), if the organization has
11 more than 5,000 employees, there is a five-point enhancement.

12 There was also acceptance of responsibility in this case,
13 and the total score range is at a 9.

14 So the fine range is anywhere between 36.99 million, which
15 is less than the discussion I had with counsel, and up to
16 73.98 million, which is more than the discussion I had with
17 counsel.

18 As I've already indicated, I intend to accept the
19 recommended fine in this case of \$55.48 million, plus the
20 400-dollar special assessment.

21 All right. Does anybody -- not as to mitigation or terms
22 of probation or anything like that, but does anybody have any
23 objections to the PSI or believe that any facts should be
24 added to the PSI or that any facts were omitted from the PSI?

25 MR. JACOBS: Nothing, Your Honor.

1 MS. STERN: Nothing, Your Honor.

2 THE COURT: Okay. Based upon that, I'm going to
3 adopt the findings of fact contained in the presentence
4 investigation as my own, which include:

5 The corporation entered a valid plea to Count One of the
6 Information in Case Number 1:16-CR-078, Conspiracy to Restrain
7 Trade. As I previously indicated, it's a Class C felony and a
8 violation of 15 U.S.C. 1.

9 The potential fine was up to a million dollars under the
10 statute.

11 The probationary term can be up to five years under the
12 statute.

13 A 400-dollar special assessment.

14 All right. Does anybody have any objections that they
15 wish to make at this time before we actually get into the
16 sentencing phase on the record?

17 MS. STERN: No, not from the government, Your Honor.

18 MR. JACOBS: No, Your Honor.

19 THE COURT: Okay. All right.

20 On behalf of the corporation, is there anything that you
21 wish to say or that the corporate representative wishes to say
22 in anticipation or mitigation of the potential sentence in
23 this case?

24 MR. JACOBS: Yes, Your Honor. Mr. Tsukimori has a
25 statement.

1 THE COURT: Okay.

2 Good morning.

3 CORPORATE REPRESENTATIVE TSUKIMORI: (Speaking
4 English) Good morning. Thank you, Your Honor.

5 First of all, let me express our heartfelt regret about
6 the violation of the Sherman Act by Hitachi Automotive Systems
7 involving shock absorbers. I'd like to extend our company's
8 sincerest apologies to our valued customers, U.S. consumers,
9 and the Court.

10 We acknowledge that, in the past, there was misconduct
11 that occurred during a time when there was a lax perception
12 concerning compliance issues in our company. But, we have
13 become more and more conscious about compliance issues. And,
14 by 2011, the company had introduced a series of measures that
15 formed the foundation of today's compliance program.

16 We enhanced our compliance program, as the Department of
17 Justice acknowledged, and we put special emphasis on making it
18 clear to the employees that the company is serious about
19 compliance.

20 The goal was to bring life to the robust compliance
21 program and foster a corporate culture which always encourages
22 employees to prioritize compliance. Our top management took
23 active roles in this endeavor. As a result, in my humble
24 opinion, today our company is at the forefront in terms of
25 compliance in the industry.

1 However, we are not complacent, and we never will be. As
2 part of my personal commitment to compliance as Chief
3 Compliance Officer, I have taken further steps to expand on
4 the already comprehensive program. In my tenure, which began
5 in April 2016, I have continued to ensure compliance remains a
6 central focus of the company. We will continue to keep close
7 watch on the effectiveness of our compliance program and
8 update it whenever we find any factors which require further
9 improvements. By way of such persistent efforts, we are
10 committed to preventing the recurrence of any violations of
11 the law in the future.

12 Thank you very much.

13 THE COURT: Thank you very much.

14 Counsel, anything else?

15 MR. JACOBS: Yes, Your Honor. If I could address
16 some of the issues regarding probation?

17 THE COURT: Sure, of course.

18 MR. JACOBS: First of all, thank you for your
19 attention to this issue, Your Honor.

20 Obviously, the question is whether to impose any sentence
21 of probation and, if so, what term. The government seeks two
22 years. We seek no probation at all, and certainly not the two
23 years that the government is seeking in this case.

24 There is obviously no dispute in this matter about the
25 fine or about the underlying facts in the case, and I think,

1 most importantly, there is no dispute, Your Honor, about the
2 comprehensiveness and the comprehensive nature of HIAMS'
3 compliance program. And I am emphasizing compliance because,
4 if you look at the Sentencing Guidelines, that is, in fact,
5 that critical factor about whether probation is warranted.

6 In the government's memo, there is a lot of discussion
7 about factors, cooperation, the course of the investigation
8 and so forth that relate to the fine but that are
9 inappropriate with respect to probation. We think that's an
10 inappropriate approach.

11 And I would direct the Court specifically to Section 8D1.2
12 of the Guidelines which sets forth the terms under which the
13 Court may order or shall order a term of probation.

14 And in Section 8D1.3, there are -- or 8D1.1, there are
15 eight factors when the Court should impose probation. And I
16 don't think there would be any dispute between the government
17 and us or the probation officer that there's really only one
18 provision here, and that is paragraph (6) that should apply.

19 Paragraph (6) says, "if such sentence is necessary to
20 ensure that changes are made within the organization to reduce
21 the likelihood of future criminal conduct."

22 And I just want to pause on that a moment because there
23 are a couple of elements that I think are quite important
24 there.

25 Number one, it says "necessary to ensure changes are

1 made," "necessary" meaning required to bring about change,
2 meaning that the current compliance program in place under the
3 Guidelines have to be inadequate and probation must be
4 necessary in order to bring about those changes.

5 This is effectively a prospective view, if you will.

6 The Guidelines say the Court should look at what is the
7 current compliance program, is there some inadequacy in that
8 program, and, if there is, that probation is the only means
9 necessary to bring it about.

10 There is nothing in the Guidelines about cooperation or
11 any other factor. There is nothing about the conduct during
12 the investigation itself or the even the compliance program
13 during the underlying conduct.

14 When you couple that with the provision under 3553 and the
15 commentary of 8D1.2 that the penalty should be "sufficient but
16 not greater than necessary," I think that it leads the Court
17 to the place of having to say, in the absence of probation,
18 the Court would have to make a finding that HIAMS would
19 abandon this program or that the compliance program would
20 otherwise be inadequate.

21 And I would respectfully submit to Your Honor that on the
22 factual record we have in this case developed by the probation
23 officer, who did an incredibly thorough job, that it would be
24 impossible to make such a finding. There were no changes
25 identified by the probation officer or the United States

1 government after a thorough review of HIAMS' compliance
2 program, and I just want to flesh that out a little bit.

3 And directing the Court's attention to the PSR, I would
4 start with paragraph 50 on page 12. According to the PSR,
5 Miss Shannon found: "In recent years, the company's culture
6 has completely changed regarding compliance issues, and they
7 are dedicated to preventing any future violation of antitrust
8 law. The culture shift came directly from the highest levels
9 of the company, including top management personnel. The
10 compliance program developed at HIAMS consists of elements
11 approved by the Japanese Fair Trade Commission, the JFTC,"
12 which is the counterpart in Japan to the U.S. Department of
13 Justice here, "in early 2013."

14 Paragraph 51. "HIAMS has taken the following steps:
15 adopted strict standards and procedures; implemented and
16 enhanced a worldwide compliance promotion organization;
17 created and publicized an effective whistle-blowing system
18 which provides anonymity and confidentiality; taken extensive
19 steps to create a thorough and comprehensive training program;
20 developed creative and impactful ways of disseminating
21 compliance information; engaged in both structural auditing
22 and targeted auditing."

23 And this is not a press release that we've written. These
24 are the independent facts developed by the probation officer
25 which the government has accepted.

1 It goes on at quite length, and I won't go through all of
2 the provisions, but I would particularly draw the Court's
3 attention, if I could, to paragraph 71 of the PSR, because
4 paragraph 71 says, and this is an undisputed factual finding
5 in this case:

6 "HIAMS engages in careful monitoring and evaluation of its
7 compliance program to ensure that policies and procedure are
8 being followed closely. As part of the auditing process, the
9 company evaluates the processes and controls that are part of
10 its compliance program as well as conducts substantive
11 compliance assessments."

12 And in paragraph 75, Miss Shannon notes that "The officer
13 was able to verify the company has implemented the compliance
14 procedures as noted above," meaning that she did a site visit,
15 she did a thorough review and report, and she concluded that
16 HIAMS had an extraordinarily effective program and that it was
17 following and implementing that program to see that it was
18 being followed to the extent possible.

19 Translation is that HIAMS is already doing exactly the
20 things that the company should be doing, so I don't think
21 there's any factual suggestion in the record before the Court
22 that HIAMS doesn't have one of the most effective compliance
23 programs in the country and the world which has not been
24 challenged at all.

25 And, in fact, I'll say, we made a two-day-long

1 presentation a day in Chicago, and then we met with the
2 Assistant Attorney General where we went through our
3 compliance program in detail. And after those meetings, which
4 were a year ago, the government did not raise a single
5 question or challenge to any element.

6 At the end of those meetings, Your Honor, we asked the
7 government, "Is there anything else that you would like us to
8 do?" And the government has not come back with any
9 suggestions, improvements that could be made to the program.

10 I think at this time we'd like to approach to talk about
11 the matter that is under seal.

12 THE COURT: Sure.

13 * * *

14 (Proceedings filed separately under seal.)

15 * * *

16 THE COURT: Counsel.

17 MR. JACOBS: Thank you, Your Honor. I want to rebut
18 the notion that this is a program that was put in place just
19 in response to this case or is just a new program. In fact,
20 if you look at the PSR findings, there are elements of the
21 program that were put in place in 2009, in 2010, in 2011, '12,
22 '13, all of which are discussed in detail in the PSR. So this
23 is a program that was effectively fully realized as of 2011.

24 Now, you always make improvements to the program. And
25 we're, you know, as Mr. Tsukimori said, still making

1 improvements today. You always want to change and evaluate
2 your program.

3 But this is not a case where the program was just put in
4 place in response to this case or even the previous case.
5 And, in fact, the JFTC, the counterpart to the Department of
6 Justice, approved the implementation program of HIAMS'
7 compliance program in late 2013, including the auditing
8 methodology.

9 So very unusual that we have a government, the Japanese
10 government, that has effectively endorsed the compliance
11 program that HIAMS had.

12 We mentioned the previous case, and I just want to talk
13 about that for one moment.

14 As the Court knows, there was a previous case resulting in
15 a guilty plea in late 2013. There is no dispute that this is
16 a case of recidivism because the conduct had occurred during
17 the same period as the shocks conduct that we're now talking
18 about. But that case, Your Honor, is an important frame of
19 reference because, for two and a half years, we cooperated
20 with the United States Government in that case. For two and a
21 half years, Mr. Seebald and I sat with Miss Stern's colleagues
22 at the Department of Justice in, literally, dozens of meetings
23 talking about every aspect of the case. We were fully
24 cooperative in that case.

25 Not a single instance did a government prosecutor ask us

1 about whether Hitachi had a -- whether HIAMS had a compliance
2 program or what that compliance program amounted to.

3 And I offer that not to suggest that the government's
4 current interest in compliance is disingenuous but to point
5 out that, in fact, HIAMS' interest and commitment to
6 compliance long predates the United States' interest in
7 compliance.

8 It was not until Brent Snyder's speech in late 2014 that
9 the Antitrust Division showed any interest in the issues of
10 compliance.

11 So, the point being, this is not a program that was put in
12 place just in response to this. The factual record is that
13 the program was in place, adopted by the company, and there is
14 no reason to believe that it would not be pursued.

15 Just want to make a couple other points to the Court.

16 First, relating to different companies. This is a
17 three-company conspiracy to which we pled guilty. The first
18 company was Showa. Showa received amnesty for its conduct,
19 meaning no employees were charged, no charges were brought
20 against the company, no fine was paid and, importantly, no
21 probation or any condition of review was put on Showa by the
22 United States Government that we are aware of.

23 Second company, Kayaba, KYB, more involved in the
24 conspiracy than we were. And I say that because there were
25 six OEMs involving Kayaba. And if you look at their volume of

1 commerce and their fine, even though they were earlier to
2 plead than we were, it's larger.

3 Kayaba. We've looked at the Sentencing Memo in that case
4 and all of the publicly available information. It appears
5 that Kayaba put its compliance program in place after the
6 investigation began, unlike HIAMS which had its program in
7 place long before.

8 Have gone through the government's points about Kayaba in
9 the sentencing plea. All of the items mentioned by the
10 government with respect to Kayaba, which actually got not only
11 no probation but actually got a reduction in their sentence
12 based on their compliance program, we have exactly the same
13 elements in our compliance program as Kayaba and many
14 more.

15 I can't think of any reason, Your Honor, why HIAMS should
16 have a two-year, much less any probation, but a two-year term
17 of probation when Kayaba and Showa, the other equal
18 participants in the conspiracy, have had no probation at all.

19 And I would submit to the Court, respectfully, that the
20 only rationale to impose probation in this instance would be
21 punitive or punishment. And I believe and would submit that
22 the reason that the government wants to have probation in this
23 case is to punish HIAMS for having been the third company to
24 plead in this case. But punishment is not an element of the
25 Guidelines for probation.

1 So I come back to where we started, which is the
2 Guidelines set forth that you evaluate what is the current
3 compliant situation within the company, are there changes that
4 need to be made, and that probation is required to bring about
5 those changes.

6 There is nothing in there about punishment. There is
7 nothing in there about cooperation. Cooperation, yes, but
8 cooperation does not equal a compliance program.

9 And I would just respectfully submit to the Court that the
10 Guidelines do not contemplate punishment as a basis to impose
11 probation. That is not in the spirit or the letter of the
12 Guidelines.

13 And there are serious consequences to a company to being
14 on probation, well beyond the reporting requirements. It
15 gives the government the ability, if something happens, to
16 bring another case, if you're on probation, and to basically
17 start from, instead of the 20-yard line, start from the
18 50-yard line or beyond.

19 And I would actually direct the Court to the government's
20 Sentencing Memo at page 15. At page 15, the Sentencing Memo
21 of the government says, "The United States believes that a
22 term of probation of two years is sufficient time to enable
23 the Court, Probation Office and the United States to monitor
24 the continued implementation of HIAMS' enhanced antitrust
25 compliance program and evaluate the effectiveness of that

1 program to" --

2 And this is the key passage.

3 -- "ensure that HIAMS does not violate the antitrust laws
4 in the future."

5 That is a quote from paragraph (6) which we were talking
6 about, but it changes paragraph (6). Paragraph (6) says you
7 have a compliance program in order "to reduce the likelihood
8 of future criminal conduct," but the government says "to
9 ensure that HIAMS does not violate the antitrust laws in the
10 future."

11 It's a subtle but very important change that the
12 government put into its Sentencing Memo. Maybe it's a slip of
13 the pen, but the point is that the government's view is:
14 Well, if you have a compliance program and there's any
15 violation by anyone in the world, then your program has been
16 ineffective.

17 And I would respectfully submit to the Court that under
18 the *U.S. Attorneys' Manual*, under the Guidelines themselves,
19 and under any realistic view of the world, the most effective
20 compliance program in the world cannot guaranty that there
21 will never be a violation. And I would put our program
22 against anyone's, but -- you know, we have thousands of
23 employees in this country and around the world, and people are
24 fallible, as I believe this Court knows better than anyone.

25 So the fact of being on probation, if some issue were to

1 occur, gives the government a major benefit.

2 I want to make two final points, Your Honor.

3 First, the government's Sentencing Memo references other
4 Hitachi entities that had antitrust issues in the past, and I
5 believe that that reference is both unfair and unenlightening.

6 HIAMS is an independent company. It has its own board.
7 The other companies referenced by the government are
8 completely independent, separately traded. They may have
9 Hitachi in the name. Many of these companies are publicly
10 traded on the Tokyo Stock Exchange, but they are completely
11 separate companies.

12 The purpose of probation, the purpose of sentencing is to
13 address the actions of the company that is the defendant.
14 These other companies bear no relationship to this company.
15 They are not defendants in this case. They have nothing to do
16 with this case. And, more importantly, there is no control or
17 any basis to believe that this company has anything to do with
18 those other companies other than sharing a name.

19 Lastly, Your Honor, HIAMS is a Japanese company, yes, but
20 doing business in the United States, creating jobs here, and
21 employs many American citizens, as well as bringing Japanese
22 citizens here to come with their families and live in American
23 communities. HIAMS is an upstanding citizen and is committed,
24 Your Honor, to obeying the laws of this country.

25 By any measure and, most importantly, based on the facts

1 that are undisputed as part of the PSR developed by the
2 probation officer, HIAMS has put in place, in design and
3 implementation, a compliance program that is a model for other
4 companies, not just Japanese companies, but all companies.
5 The purpose of the Guidelines, and they are very specific in
6 this regard, is to encourage companies to put in place such
7 compliance programs.

8 It would be ironic and, frankly, counterproductive if, in
9 this circumstance, with the evidence showing that HIAMS did
10 exactly that before it was ever encouraged to do so by the
11 United States Government, if it would then be punished for
12 doing so and forced to accept a condition of probation.

13 So thank you for your attention. Obviously happy to
14 answer any questions or otherwise engage.

15 THE COURT: Thank you.

16 Okay. On behalf of the United States, a couple of
17 questions. You can make a presentation however you want to.

18 But part of the reason for the probation officer's
19 recommendation was the related entities argument that the
20 defense just brought up, so I would like to hear a little bit
21 about that, and I'd also like you to distinguish this case
22 from the Kayaba case, if you can.

23 MS. STERN: Certainly, Your Honor.

24 With regard to the other Hitachi entities, all of these
25 entities, including HIAMS, the parent company is Hitachi,

1 Limited. Hitachi, Limited has been involved in the compliance
2 and directing its subsidiaries to engage in compliance
3 activities. It also is part of the compliance program that
4 HIAMS has enacted, in that part of the reporting that
5 employees are directed that they can do under the compliance
6 program is that they can report violations both to Hitachi,
7 Limited as well as to the subsidiary HIAMS.

8 We believe all these are related and that the name keeps
9 popping up with regard to violations of the antitrust laws.
10 That is one of the reasons that we are advocating for
11 probation in this case. This conduct has been going on for
12 decades with regard to the specific conduct for HIAMS, but
13 also pervasive across the company.

14 And, therefore, in order to overcome the culture that has
15 existed for decades that condones anticompetitive conduct and
16 violations of the antitrust laws, we believe that having the
17 Court and Probation, as well as the United States, monitor the
18 continued implementation of the compliance program for two
19 years would ensure that that program becomes imbedded and a
20 part of the culture of the company and replaces the culture
21 that led to the violations that we're here for today.

22 With respect to Kayaba, or KYB, I do not believe they are
23 similarly situated for this reason. First of all, that was
24 the first -- when Kayaba was convicted and pled guilty to the
25 shock absorbers conduct, that was their first run-in with the

1 antitrust laws. This was not the first run-in with the
2 antitrust laws for HIAMS.

3 Additionally, Kayaba, when confronted with the
4 allegations, almost immediately began to cooperate and
5 cooperated fully and completely. That is not the case with
6 HIAMS, which is sort of remarkable given that HIAMS has
7 recently been involved in pleading to conduct, antitrust
8 conduct, with regard to other products. You would have
9 thought that they would have been uniquely situated to
10 cooperate completely and fully from the beginning, and that
11 didn't happen. And that, I think, relates to the compliance
12 program and what is happening at HIAMS.

13 It is true that HIAMS began implementing compliance in
14 2009, '10, '11 and '13 when they implemented a program that
15 the JFTC approved. The problem is, it didn't uncover the
16 shocks conduct. And there have been enhancements since then,
17 and I would like to see, and I think it's important for
18 respect for the law, that those improvements and compliance
19 continue and become imbedded as a part of the company.

20 Defense counsel advocated that, under the Guidelines,
21 there was only one provision whereby the Court could impose
22 probation. I would respectfully submit that there is more
23 than one, and that is under 8D1.1(8), which also says that
24 probation can be imposed to accomplish the purposes set forth
25 in 18 U.S.C. 3553. Two of those purposes enumerated in 3553

1 are to protect the public from future crimes, which could be
2 implementation of a compliance program and the continued
3 implementation of it, and also to promote respect for the law.

4 With the number of violations committed by HIAMS and its
5 Hitachi-related companies recently related to antitrust, we
6 believe that probation is appropriate also to promote respect
7 for the law in this case.

8 The conditions of probation that the United States has set
9 forth in the Plea Agreement essentially relate to reporting
10 violations to the United States should they occur or should
11 they be discovered and uncovered; implementing and continuing
12 to implement the program; and reporting what they've done to
13 the Court, to Probation, and to the United States to enable us
14 to continue to monitor and evaluate that this program
15 continues to be implemented.

16 We also have the mandatory not committing other crimes
17 during a term of probation, which would be mandatory under the
18 terms of probation under the statute.

19 We want to ensure, through this probation and through the
20 continued evaluation and monitoring by the Court, that this
21 compliance program which has been instituted and enhanced
22 continues to operate and be imbedded in the company.

23 The company acknowledged as late as 2014 that their
24 employees weren't taking the compliance program as being very
25 serious, and I think the company is working hard to change

1 that attitude, but those attitudes that existed for decades
2 don't change overnight.

3 Compliance can easily get lost in the many and varied
4 priorities of a corporation. Being on probation and having to
5 report to the Court will ensure that it does not get lost and
6 that it continues to remain a high priority.

7 We believe that the term of probation of two years and the
8 related conditions in the Plea Agreement would protect the
9 public from further antitrust crimes under 3553 and enable the
10 Court to monitor this and ensure continued compliance.

11 A sentence of two years of probation is sufficient and not
12 greater than necessary to ensure that this compliance
13 continues.

14 Therefore, we would recommend that the Court sentence
15 HIAMS to two years of probation.

16 In addition, I just wanted to say, I know that we've --
17 the Court has agreed with our fine recommendation, but I just
18 wanted to put forth that the United States recommended a fine
19 of 55.48 million, which is the low end of the agreed range,
20 and we recommended that because HIAMS has continued to
21 cooperate with the United States since it entered into its
22 Plea Agreement and has provided access to individuals and
23 documents from Japan that we would not have had access to but
24 for their cooperation, so that is why we recommended the lower
25 fine.

1 If the Court has any other questions?

2 THE COURT: No, I do not.

3 MS. STERN: Thank you.

4 THE COURT: Anything you need to add?

5 MR. JACOBS: Yes. If I could briefly respond, Your
6 Honor?

7 THE COURT: Sure.

8 MR. JACOBS: First, with respect to the other
9 companies, Hitachi Chemical, which is referenced in the
10 government's Sentencing Memo, is an independent company traded
11 on the Tokyo Stock Exchange. Hitachi Metals is the same.

12 HIAMS is an independent company. It has its own -- it's a
13 subsidiary of Hitachi, Limited, yes, but it has its own board,
14 its own management.

15 Other than the assertion by counsel, there is nothing in
16 the record tying HIAMS or any -- there is no suggestion
17 factually in the record that HIAMS has any control over these
18 other entities.

19 THE COURT: What about the Michigan case? Wasn't
20 there another case in Michigan involving the same folks?

21 MR. JACOBS: Yes, Your Honor. So that's the 2013
22 case.

23 THE COURT: Right.

24 MR. JACOBS: And so -- and I think this comes into
25 the issue with KYB as well.

1 THE COURT: Mm-hmm.

2 MR. JACOBS: So the government's argument "Well, KYB
3 is differently situated because this is their first offense"
4 is basically a recidivism argument wrapped up in sheep's
5 clothing. But they've had to concede that this is not an
6 incidence of recidivism. So what you have, Your Honor, is
7 there was conduct that, you know, goes back in the 1990s and
8 the early 2000s -- or it goes into the 2000s. The conduct
9 that occurred in the previous case is exactly the same time
10 period as the shocks conduct that we're now addressing.

11 So this is not a case of first offense, then you commit
12 another offense, and then, you know -- you have to come back
13 to the Court as a recidivist? This is -- we were unaware of
14 the earlier conduct when we pled before. But the conduct
15 occurred during the same period, so it's not at all a
16 situation where the company committed a violation, you know,
17 came in and said it recognized its responsibility and then
18 went on and did the same thing. I really don't think Miss
19 Stern would disagree with that.

20 I think that the key to the government's argument, and it
21 comes up again with respect to Kayaba -- Miss Stern makes
22 reference to that they were the second company to cooperate.

23 And I think there is a very important principle here, Your
24 Honor, which is --

25 I understand why the Department of Justice wants to

1 increase the incentives for every company to come in
2 immediately and cooperate, but the reality is that not every
3 investigation initiated by our government has merit. You
4 can't penalize companies for conducting internal
5 investigations and considering their options, and probation is
6 not a vehicle to help the amnesty program grow and expand.

7 Again, I understand why the government wants to take that
8 position, but that's already been counted in the sentence.

9 So, for example, our fine is in the mid range instead of
10 the low range because we were not -- because we didn't
11 cooperate as early as KYB. We got a cooperation credit, but
12 it's significantly less than the cooperation credit given to
13 KYB and, certainly, to Showa, which had a complete pass for
14 its early cooperation.

15 The fundamental point here is that the Sentencing
16 Guidelines contemplate probation being a measure of what's the
17 situation in the compliance program currently and what will it
18 look like going forward. It's not a tool or a vehicle for the
19 United States Government to encourage companies to cooperate.

20 And that's the fundamental difference, Your Honor, and why
21 we think, under the Guidelines, it's very clear there should
22 be no probation, and certainly, based on the facts amply
23 developed by Miss Shannon and unchallenged by the government,
24 that certainly the two years sought by the government is
25 utterly unwarranted in these circumstances.

1 THE COURT: Okay. Anything else?

2 MR. JACOBS: That's it. Thank you very much.

3 THE COURT: All right. As the parties know, it's my
4 duty to impose a sentence which is sufficient but not greater
5 than necessary to comply with the purposes set forth in
6 18 U.S.C. 3553.

7 As to the nature and circumstances of this offense, I
8 believe that the fine of \$55.48 million, as contemplated in
9 paragraph 9 of the Plea Agreement, is appropriate and takes
10 into account the conduct of the defendant corporation in this
11 particular situation.

12 Was there an agreement that the fine be paid within 15
13 days, or was that just a recommendation?

14 MS. STERN: It's part of the Plea Agreement, yes.

15 THE COURT: Okay. I just want to make sure. Okay.

16 And that can be done?

17 MR. JACOBS: Yes, Your Honor.

18 THE COURT: Okay. So that will be done within 15
19 days of the date of the judgment, which will likely go on, if
20 not today, probably tomorrow.

21 All right. There is a 400-dollar special assessment which
22 is owing and due and should be paid immediately.

23 In terms of the arguments on probation, part of the whole
24 construct of the Guidelines and the entire sentence, which
25 oftentimes includes jail time and supervised release or, in

1 some situations, a fine and possibly probation, part of it is
2 to ensure that everybody recognizes the seriousness of the
3 offense and also to afford adequate deterrence to criminal
4 conduct and protecting the public.

5 And I think defense counsel is correct: Probation is not
6 to be part of punishment.

7 But it is, in part, to make sure that there is future
8 compliance.

9 I think that the defendant corporation has implemented a
10 comprehensive compliance program at this stage, appears to be
11 working diligently to ensure that future violations haven't
12 occurred. However, the widespread nature of this offense
13 under the corporate umbrella does give me pause and will not
14 permit me to give a pass on probation in this case.

15 However, I do not want to hamstring the company for a
16 probation that is a longer term than necessary. I believe, in
17 this case, that a term of 18 months probation is appropriate.

18 And I would ask defense counsel and the Probation
19 Department to work towards a report to me sometime delivered
20 between six months from now or a year from now --

21 The earlier the better, probably, for defendant.

22 -- and I will review the length of probation at that time.
23 As I do in most criminal cases, if there appears to be
24 compliance with probation and there is not a need for further
25 probation, I have a tendency to terminate on an early basis.

1 But I think, at this time, 18 months is the appropriate
2 term.

3 Obviously, the usual terms and conditions apply.

4 Not violating any other federal, state or local crimes.

5 Part of the monitoring will be satisfying the probation
6 officer that the corporation continues to implement and
7 maintain the program and report any type of antitrust
8 information which comes to their attention.

9 I think that's appropriate under all the circumstances of
10 this case. It takes into consideration the corporation's
11 conduct in this case, the appropriate sentencing factors, and
12 18 U.S.C. 3553.

13 Is there anything else from the Probation Department on
14 that?

15 U.S. PROBATION OFFICER SHANNON: No, Judge.

16 THE COURT: Okay. Anything else before I advise
17 people of their appellate rights? Is there anything else from
18 defendant or the United States?

19 MR. JACOBS: Nothing, Your Honor.

20 MS. STERN: Nothing Your Honor.

21 THE COURT: Okay. Here's what I do on a routine
22 basis. You work with them, you convince Probation you're
23 doing a good job, you know, it's going to take a few months
24 before you can do that, I have no problem terminating if
25 somebody appears to be in compliance. I've done that in all

1 kinds of cases, not -- well, I've done it in all kinds of
2 cases, just so you know. That's sort of my track record.

3 All right. I mean, I don't think I have to go through the
4 usual stuff about notifying the U.S. Attorney of your address
5 and all that because you're going to take care of the fine;
6 right?

7 MR. JACOBS: Correct, Your Honor.

8 THE COURT: Okay. All right. I think that the
9 appellate rights that were contained in the Plea Agreement are
10 somewhat of a limitation, but both parties are notified they
11 have the right to appeal the sentence.

12 There are certain appellate rights that cannot be waived
13 such as prosecutorial misconduct or ineffective assistance of
14 counsel.

15 And to the extent other appellate rights are not limited
16 in the Plea Agreement, that procedure can take place in one of
17 two ways: either, A, if you tell us, as you sit here today,
18 you wish to appeal the sentence, Miss Crum will start the
19 paperwork in that regard; or, B, you'll have 14 days from the
20 date of the judgment entry going on to then work through
21 counsel to effect appeal in this case.

22 As you guys sit here today, is the corporation interested
23 in appealing the sentence?

24 MR. JACOBS: No, Your Honor.

25 THE COURT: Okay. And, of course, if somebody

1 changes their mind, you'll protect their interests; correct?

2 MR. JACOBS: Right.

3 THE COURT: Okay. So take care of the 400-dollar
4 assessment, take care of the 55.48-million-dollar fine, work
5 with the Probation Department. Hopefully, we can get this
6 behind the corporation sooner rather than later.

7 Anything else on behalf of anybody?

8 MR. JACOBS: Nothing. Thank you, Your Honor.

9 MS. STERN: No, Your Honor.

10 THE COURT: All right. Thank you, guys.

11 MS. STERN: Thank you.

12 (The proceedings concluded at 11:08 a.m.)

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C E R T I F I C A T E

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19 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM
20 THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

21

22 S/MARYANN T. MAFFIA, RDR

23 Official Court Reporter

24

25