IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	Criminal No. 00-033
	)	
v.	)	Judge Marvin Katz
	)	
MITSUBISHI CORPORATION,	)	Violations: 15 U.S.C. § 1 and 18 U.S.C. § 2 (a)
	)	
Defendant.	)	Filed: 04/19/01

SENTENCING MEMORANDUM OF THE UNITED STATES

The United States files this Sentencing Memorandum in support of its joint recommendation with the defendant, Mitsubishi Corporation, that the Court sentence the defendant to pay a fine of $134 million, payable within 15 days of sentencing. The parties also request that sentence be imposed on May 10, 2001, based on the current record without need of an evidentiary sentencing hearing or a presentence report.

I
INTRODUCTION

Mitsubishi was convicted after a two week jury trial on a one count Indictment for aiding and abetting a conspiracy among graphite electrode manufacturers to fix the price of graphite electrodes from at least as early as March 1992 and continuing at least until June 1997. Because the case was tried before Your Honor, this memorandum will not recap the evidence presented at trial. This memorandum will, however, highlight various issues raised in calculating the relevant Sentencing Guidelines range, as well as agreements the Government and Mitsubishi Corporation have reached to resolve these issues. These agreements were reached as a result of negotiations concerning not only novel questions of how to apply the Sentencing Guidelines to a defendant who aided and abetted a price-fixing conspiracy, but also disputed issues of fact regarding the

gain to the defendant and others or the loss to the victims resulting from the crime.

The Government respectfully submits that the recommended sentence of $134 million is strong and appropriate punishment for Mitsubishi's role in aiding and abetting the graphite electrodes cartel. It would be the second largest fine imposed in this investigation and one of the largest antitrust fines ever imposed. It disgorges Mitsubishi's gain from the offense and serves as a strong deterrent to any corporation even contemplating assisting a price-fixing conspiracy from which it might profit.

II
PRIOR SENTENCES

The sentencing of Mitsubishi Corporation should bring to a close the graphite electrodes cartel grand jury investigation which became public in June 1997.[1] Over the course of the investigation, six corporate defendants and three individuals pled guilty to Informations filed in the Eastern District of Pennsylvania and were sentenced as follows:

Defendant	Date Case Filed	Sentence Imposed
Showa Denko Carbon, Inc.	02/23/98	$32.5 million
UCAR International, Inc.	04/07/98	$110 million
Tokai Carbon Co., Ltd.	04/29/99	$6 million
SGL Carbon AG	05/04/99	$135 million
Robert J. Koehler	05/04/99	$10 million
Robert J. Hart	09/23/99	$1 million; 9 months prison
Robert P. Krass	09/29/99	$1.25 million; 17 months prison
SEC Corporation	11/17/99	$4.8 million
Nippon Carbon Co., Ltd.	11/17/99	$2.5 million

[1] One other graphite electrode case is pending, United States v. Georges Schwegler, Crim. No. 00-034 (E.D. Pa.). Mr. Schwegler is a Swiss national living in South Africa, beyond the United States' jurisdictional reach.

III
SENTENCING AGREEMENT

The principal elements of the Sentencing Agreement[2] between the United States and Mitsubishi are:

1. The United States and Mitsubishi agree to jointly recommend that the Court impose a fine of $134 million payable within 15 days of sentencing.

2. The United States and Mitsubishi agree that this fine is near the top of the Sentencing Guidelines range for Mitsubishi, and that there was sufficient gain to Mitsubishi and/or loss to the victims to support such a fine under the alternative fine provisions of 18 U.S.C. § 3571(d).

3. Mitsubishi agrees to waive its right to appeal the conviction. Mitsubishi also waives its right to appeal sentencing if the agreed-upon recommendation is accepted by the Court.

4. The United States and Mitsubishi believe that the Sentencing Agreement, together with the record that was created at trial, this Sentencing Memorandum and any sentencing memorandum filed by the defendant, provide sufficient information concerning Mitsubishi, the offense charged, and Mitsubishi's role in the offense to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553.

5. The United States will not seek a term of probation or an order of restitution. A hearing on restitution would unduly burden the sentencing process and is not in the interest of justice where, as here, the victims of the offense are represented by counsel and have sued Mitsubishi in civil actions to recover damages. U.S.S.G. § 8B1.1(b)(2).

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[2] A fax copy of the Sentencing Agreement is attached. The original will be provided to the Court at sentencing.

IV
SENTENCING GUIDELINES CALCULATION

Mitsubishi was convicted of aiding and abetting a conspiracy of graphite electrode manufacturers to fix the price of graphite electrodes in violation of 15 U.S.C. § 1. Accordingly, the Sentencing Guidelines for a price-fixing offense apply.

A. Base Fine - U.S.S.G. § 2R1.1

The Sentencing Guidelines for an antitrust offense for an organization typically are driven by the volume of commerce in the product affected by the conspiracy that is attributable to the organization. Unlike the other companies prosecuted in the graphite electrodes investigation, Mitsubishi did not directly manufacture graphite electrodes. Mitsubishi did, however, own 50% of UCAR International, the largest manufacturer of graphite electrodes, from February 1991 until January 1995. The Government and Mitsubishi have agreed that for purposes of this sentencing, it is reasonable and appropriate under the Guidelines to attribute to Mitsubishi 50% of UCAR's graphite electrodes sales for the period of the conspiracy during which Mitsubishi owned 50% of UCAR, resulting in commerce of $168,150,000.[3] In addition, Mitsubishi made direct sales of graphite electrodes as an agent of Tokai Carbon to one United States customer during the course of the conspiracy. Those sales ($7,300,000) are also attributable to Mitsubishi by agreement of the parties for purposes of this sentencing. Using this methodology, the parties have agreed that the total commerce attributable to Mitsubishi is $175,450,000.

[3] For purposes of this sentencing, the parties have agreed that UCAR's sales of graphite electrodes began to be affected by the charged conspiracy as of July 1, 1992, the date after which all of UCAR's shipments were to be made at the collusively increased price.

The base fine for an organization is 20% of the volume of commerce. Mitsubishi's base fine is, therefore, $35,090,000:

$168,150,000	50% of conspirator UCAR International's total United States affected sales of graphite electrodes for the portion of this conspiracy period during which Mitsubishi owned 50% of UCAR, July 1992-Jan 1995 (50% of $336,300,000)
$ 7,300,000	Mitsubishi's sales of graphite electrodes (manufactured by conspirator Tokai Carbon) to its only United States customer for the duration of the conspiracy.
$175,450,000	Volume of Commerce
$ 35,090,000	Base Fine (20%)

B. Culpability Score and Multiplier

In order to determine the Guidelines fine range, Mitsubishi's culpability score must be calculated using U.S.S.G § 8C2.5, and a resultant multiplier obtained under U.S.S.G. § 8C2.6. The base offense level is 5 (U.S.S.G § 8C2.5(a)). For Mitsubishi this is adjusted upward 3 levels because the offense involved its Carbon Division which had over 200 employees and the participation of a high-level employee within the unit (U.S.S.G § 8C2.5(b)(3)). While the jury verdict was general in nature and did not identify who in particular the jury found acted on Mitsubishi's behalf in aiding and abetting the conspiracy, for purposes of this sentencing, the parties agree that Ichiro Fukushima, a general manager in the Carbon Division, aided and abetted the cartel and was a high-level employee within the unit.

Because Mitsubishi was convicted in August 1994 for price fixing in the thermal fax paper industry,[4] its culpability score is increased 2 points based on its prior criminal history (U.S.S.G.§ 8C2.5(c)(2)). Therefore, Mitsubishi has a culpability score of 10 with a resulting multiplier of 2.0 to 4.0:

+5	Base level of culpability
+3	200+ employees and participation of Fukushima, a high level person within the unit
+2	Prior criminal history
0	No violation of an order
0	No obstruction of justice
0	No effective program to prevent and detect violations of the law
0	No acceptance of responsibility
+10	Culpability Score
2.0--4.0	Multiplier

C. Sentencing Guidelines Range

Based on the above calculations, Mitsubishi has a Guidelines fine range of $70,180,000 to $140,360,000. The agreed-upon recommendation to the Court is near the upper end of this Guidelines range.

V
ALTERNATIVE FINE CALCULATION

The Sherman Act has a statutory maximum fine of $10 million. Because the recommended fine is in excess of $10 million, the parties agree that the recommended fine must be based on the alternative fine provisions of 18 U.S.C. § 3571(d) which states:

[4] On August 15, 1994, Mitsubishi pled guilty to a one count Information charging it with a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, *United States v. Mitsubishi Corporation*, Crim. No. 94-10176-03-NMG, (D. Mass.), for conspiring to fix the price of jumbo roll thermal fax paper in the United States from July 1991 until early 1992. On August 19, 1994, a Judgement was entered ordering Mitsubishi to pay a fine of $1,260,000.

> (d) Alternative Fine Based on Gain or Loss - If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

In the present case there was both a gain to the defendant Mitsubishi and others from the offense, and of course, there was a loss to the victims as a result of overcharges from the price-fixing conspiracy. However, neither the precise amount of the gain nor loss can be determined from the evidence currently in the record. For example, during trial, the Government offered testimony showing that Mitsubishi made nearly $200 million from its investment in UCAR to demonstrate Mitsubishi's motive to encourage and facilitate a cartel. This gross gain figure, however, may not be the appropriate measure of Mitsubishi's gain from the offense for purposes of the alternative fine provision of 18 U.S.C. § 3571(d).[5] Among the issues that would likely be litigated at a sentencing hearing are:

1. What percentage of the gain to Mitsubishi from its sale of UCAR is attributable to United States based assets of UCAR International, a global company with numerous foreign subsidiaries? Mitsubishi may argue that the appreciation of UCAR's foreign based subsidiaries, even if due to the cartel activity, are not appropriate to be calculated under 18 U.S.C. § 3571(d).

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[5] For example, in *United States v. Hayes*, 242 F.3d 114 (3rd Cir. 2001), the Court held that in calculating the amount of loss attributable to a defendant who performed social services after being hired on forged qualifications, the District Court had to attempt to determine whether any of the defendant's services had value to her clients rather than using total amount of salary paid to defendant in all her fraudulently obtained employment as amount of loss. *Id*. at 119-120. *See also United States v. Dickler*, 64 F.3d 818, 828-829 (3rd Cir. 1995) (court must consider various adjustments such as expenses incurred when determining gain to defendant).

2. Clearly, the value of UCAR (and Mitsubishi's investment) increased as the price of graphite electrodes fixed by the cartel increased. At a sentencing hearing, however, Mitsubishi would be entitled to present evidence that prices of graphite electrodes would have increased absent a conspiracy due to lawful factors such as (a) increased costs of production of graphite electrodes for UCAR and other manufacturers, (b) increased demand for graphite electrodes, or (c) decreased supply due to greater market concentration among the manufacturers.[6] The Government could contest and the Court could reject such evidence, but clearly a hearing would be necessary and involve economic evidence from both parties.

3. Mitsubishi could also argue that at least some portion of the increased value of its investment in UCAR came from lawful business initiatives such as internal restructuring, sales efficiencies and other managerial acumen brought to UCAR by Mitsubishi.

4. Likewise, a calculation of the loss to the victims from the graphite electrode conspiracy would also focus on what prices might have been had only lawful forces of supply and demand been at work in the graphite electrode industry as opposed to a secret cartel.

The United States does not concede that Mitsubishi would prevail on any of these issues at an evidentiary hearing (or even that Mitsubishi would raise these issues or not raise others). These factual and legal issues are highlighted simply to demonstrate why the Government sought to avoid a prolonged evidentiary sentencing hearing and why the Government thinks that the agreed-upon sentence recommendation of $134 million is fair and appropriate.

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[6] In a price-fixing conspiracy, the usual measure of damages is the difference between the illegal price that was actually charged and the price that would have been charged absent the violation. *See State of New York v. Hendrickson Brothers*, 840 F.2d 1065, 1077 (2nd Cir. 1988).

VI
MITSUBISHI'S RELATIVE CULPABILITY

The agreed-upon sentencing recommendation of a fine of $134 million, if imposed, would be just below Mitsubishi's maximum Guidelines range of $140,360,000. A fine of this magnitude would be greater than that imposed on UCAR ($110 million) and just below that imposed upon SGL ($135 million). UCAR (Krass) and SGL (Koehler) were clearly the leading forces behind the cartel. Mitsubishi, however, also played a role, and through its 50% ownership in UCAR, received direct financial benefit from the crime. The Government believes that the agreed-upon fine appropriately punishes Mitsubishi for its role as an aider and abettor and beneficiary of the cartel and appropriately stops just short of imposing on Mitsubishi the highest fine in the entire investigation.

UCAR's fine was limited principally by its inability to pay a larger fine and also by the fact that the company came in relatively early and offered full and complete cooperation throughout the investigation. The fine of SGL was also limited by its ability to pay. In the view of the United States, Mitsubishi was not the most culpable actor in this cartel. On the other hand, unlike other corporate defendants, Mitsubishi did not plead guilty, accept responsibility and cooperate. Accordingly, a fine which is at the upper end of its Guidelines range and just below SGL's, a key player in the conspiracy, is just and appropriate. In addition, while trying to determine precisely Mitsubishi's gain from the conspiracy would require a complicated hearing, the Government believes that the recommended fine is sufficient to disgorge Mitsubishi of the profit which can be appropriately tied to the price-fixing cartel which it aided and abetted.

For the reasons stated above, the United States recommends, jointly with the defendant, that the Court impose a fine of $134 million as the sentence in this case.

Dated:

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 19th day of April 2001, a copy of the Government's Sentencing Memorandum has been faxed/mailed to counsel of record for the defendant as follows:

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