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: 01-26-01

GOVERNMENT'S RESPONSE TO DEFENDANT'S MEMORANDUM OF LAW ON AN EVIDENTIARY ISSUE THAT MAY ARISE AT TRIAL

Defendant asserts in its Memorandum of Law on an Evidentiary Issue that May Arise at Trial: (1) that conspirator statements made prior to the conspiracy identified in the Indictment are hearsay and not admissible as co-conspirator statements and (2) that statements made by conspirators during the course of the conspiracy are inadmissible because defendant has not been identified as a co-conspirator. Defendant's assertions are incorrect.

A. Pre-Conspiracy Statements

In its argument concerning "pre-conspiracy" statements, defendant incorrectly claims that conspiratorial statements made before the price-fixing conspiracy alleged in the Indictment are inadmissible because they could not have been made during the course of the charged conspiracy. A statement need not concern a charged conspiracy to meet the requirements of Rule 803(d)(2)(E), but may concern any joint enterprise as long as the statement is relevant. *See United States v. Ellis*, 156 F.3d 493, 496-97 (3d Cir. 1998). The Government need only show that defendant and the declarant participated in a joint enterprise at the time of the statement, and that the statement was made in furtherance of their joint enterprise. *See Virgin Islands v.*

Brathwaite, 782 F.2d 399, 403 (3d Cir. 1986); *In re: Japanese Elec. Prod. Antitrust Litg.*, 733 F.2d 238, 262 (3d Cir. 1983), *rev'd on other grounds sub nom.* 475 U.S. 574 (1986). The joint enterprise need not be criminal or in any way unlawful. *In re: Japanese Elec. Prod. Antitrust Litg.*, 733 F.2d at 262. The Government must prove the joint enterprise only by a preponderance of evidence, *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987), which may include the contents of the statements. *Id.*[1]

Should the Government offer into evidence a "pre-conspiracy" statement as a conspiratorial statement, it will establish that the statement was made in connection with some other joint undertaking in which defendant participated. Moreover, the Government may offer "pre-conspiracy" statements not for the truth of the matters stated, but to show only that the statements were made. Such statements are not hearsay. *See* Fed.R.Evid. 801(c).

B. <u>Statements During the Course of the Conspiracy</u>

Defendant erroneously claims that Rule 801(d)(2)(E) could not apply because the Indictment does not charge it with being a member of the alleged conspiracy, but only with aiding and abetting the conspiracy. Conspiratorial statements are admissible against a defendant who has aided or abetted a conspiracy, but has not been charged as a conspirator, as long as the other criteria of the Rule are met. *United States v. Portac, Inc.*, 869 F.2d 1288, 1294 (9th Cir. 1989), *cert. denied sub nom. Wolf v. United States*, 498 U.S. 845 (1990) (aiding and abetting an antitrust

[1] Interestingly, defendant correctly notes in its section "Hearsay Statements During the Course of Conspiracy" that conspiratorial statements need not relate to the charged conspiracy. There defendant states that, for purposes of Rule 801(d)(2)(E), the Government may show either (1) the conspiracy charged in the Indictment or (2) some other conspiracy "by offering proof at trial that the declarant and the defendant were involved in a joint enterprise." (Defendant's Memorandum, p.3)

conspiracy); *see also United States v. McCullah*, 745 F.2d 350, 352, 358 (6th Cir. 1984); *United States v. Samples*, 713 F.2d 298, 300, 303 (7th Cir. 1983); *United States v. Fried*, 576 F.2d 787, 794 n.8 (9th Cir.), *cert. denied*, 439 U.S. 895 (1978). No conspiracy need be charged at all for the Rule to apply. *United States v. Van Scoy*, 654 F.2d 257, 263 (3d Cir.), *cert. denied*, 454 U.S. 1126 (1981); *United States v. Ellis*, 156 F.3d at 497. Such a result is in full conformity with 18 U.S.C. §2, which makes one who aids and abets the commission of a federal offense liable as a principal. By definition, an aider or abettor is charged with associating himself with the underlying venture and participating in it as in something that he wishes to bring about. *See United States v. Bey*, 736 F.2d 891, 895 (3d Cir. 1984).

Rule 801(d)(2)(E) requires only that defendant and the declarant participate in a joint enterprise. It is an evidentiary rule, distinct from a rule of criminal conduct. As set forth in *Virgin Islands v. Brathwaite*:

> There is a distinction between "conspiracy" as a crime and the coconspirator exception to the hearsay rule set forth in Federal Rule of Evidence 801(d)(2)(E). Conspiracy as a crime encompasses more than mere joint enterprise. United States v. Trowery, 542 F.2d 623, 626 (3d Cir.1976). The coconspirator provision in Rule 801(d)(2)(E), however, is merely a rule of evidence founded on the rationale "that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not." Id.

782 F.2d at 403-04, n.1. If the Government establishes by a preponderance of evidence that the conspiracy existed and that defendant aided or abetted the conspiracy, then conspirator statements

made in furtherance of the conspiracy are admissible against defendant.

Dated:

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

This is to certify that on the 26th day of January 2001, a copy of the Government's Response to Defendant's Memorandum of Law on an Evidentiary Issue that may Arise at Trial has been hand-delivered to counsel of record for the defendant as follows:

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