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:

ORDER

AND NOW, this day of January 2001, upon consideration of the Defendant's Motion to Exclude 1990 Documents and the Government's Response in Opposition thereto

IT IS hereby ORDERED that the Motion is DENIED.

By the Court:

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UNITED STATES DISTRICT JUDGE

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	)	
Defendant.	)	Filed: 01-25-01

GOVERNMENT'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO EXCLUDE 1990 DOCUMENTS

For the reasons stated in the accompanying Memorandum, the Government hereby opposes Defendant's Motion to Exclude 1990 Documents.

Dated: 01-25-01

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE 1990 DOCUMENTS

Pursuant to Federal Rule of Evidence 403, defendant Mitsubishi Corporation has moved for an order excluding from evidence 20 Mitsubishi documents that were created in 1990. In the alternative, defendant has asked that the parties be precluded from mentioning the documents in their opening statements. The crux of defendant's motion is its incorrect assertion, made in conclusory fashion, that the documents have little or no relevance to the charge and that their introduction will waste significant time. To the contrary, the documents defendant seeks to exclude provide compelling evidence of defendant's plan and initial efforts to induce and encourage the formation of the conspiracy charged in the Indictment. Defendant's Motion is without merit and should be denied.

To exclude evidence pursuant to Rule 403, "its probative value must be 'substantially outweighed' by the listed dangers, rather than simply 'not more probative than prejudicial.'" *Petruzzi's IGA Supermarkets v. Darling-Delaware Company*, 998 F.2d 1224, 1237 (3d Cir. 1993). "Evidence should be excluded under Rule 403 only sparingly . . . . The balance under the rule should be struck in favor of admissibility." *Spain v. Gallegos*, 26 F.3d 439, 453 (3d Cir. 1994) (citations omitted).

Defendant is charged with aiding and abetting a price-fixing conspiracy among graphite

electrode manufacturers. To prove the allegation, the Government must show not only that defendant knew of the graphite electrode conspiracy, but that it acted in some way with the intent to facilitate it or to help bring it about. *United States v. Salmon*, 944 F.2d 1106, 1113 (3d Cir. 1991), *cert. denied*, 502 U.S. 1110 (1992); *United States v. Dixon*, 658 F.2d 181, 189 n.17 (3d Cir. 1981). The Indictment alleges that defendant aided and abetted the conspiracy by, among other things, counseling, inducing, and encouraging UCAR Carbon Company ("UCAR"), a graphite electrode manufacturer, to meet with competitors to agree to fix prices. Defendant purchased a 50 percent share of UCAR in February 1991.

The Government's evidence of defendant's efforts to aid and abet the graphite electrodes conspiracy falls into three time periods. First was the period starting in 1990, when defendant considered the merits of acquiring UCAR. Evidence from that period shows defendant planned to encourage and assist collusion among graphite electrode manufacturers. Significantly, it shows defendant believed its purchase of UCAR would actually facilitate collusion, in part, due to defendant's connections to other electrode manufacturers. More important, some of the documents indicate that during this period Mitsubishi began to implement its plan by discussing it with other manufacturers and seeking their approval. It is this evidence that defendant seeks to exclude as irrelevant.[1] Defendant has not challenged the relevance of evidence from the second and third periods. During the second period, after defendant purchased UCAR, but pre-conspiracy, defendant encouraged UCAR and other electrode manufacturers to fix prices. During the final period, after the conspiracy was formed, defendant continued to encourage and

[1] Although defendant did not concede these documents are authentic in its response to the Government's motion seeking their admission, it apparently does so in its own motion, identifying 18 of the 20 documents as "internal Mitsubishi documents analyzing the proposed [acquisition of UCAR]" and the other two as Mitsubishi correspondence. (Defendant's Memorandum, p.4)

facilitate implementation of the conspiracy. The 1990 pre-acquisition evidence of defendant's intent to encourage and facilitate collusion is inextricably linked with the post-acquisition evidence, which shows defendant did what it had planned to do.[2]

Defendant notes throughout its Memorandum that the evidence at issue predates the conspiracy and was never shown to conspirators. That relevant evidence predates the conspiracy is hardly surprising when it concerns defendant's intent and motivation in facilitating the conspiracy's formation. Defendant does not explain the significance of the conspirators' failure to have seen the documents, and the Government fathoms none.

Defendant also asserts that "the documents say nothing about illegal price-fixing." (Defendant's Memorandum, p.2) While direct references to illegal conduct would no doubt make prosecution easier, such references are not a prerequisite to relevance. Examples of evidence contained in the Mitsubishi documents defendant seeks to exclude include:[3]

Exhibit GX-103: The author, while discussing the merits of Mitsubishi's acquiring UCAR, refers to the need to secure the cooperation of Japanese manufacturers Tokai, Toyo, SDK, and SEC before agreeing to the acquisition.[4] Three of those companies, Tokai, SDK and SEC pled guilty to conspiring with UCAR and others to fix graphite electrode prices. The

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[2] Even if evidence from the pre-acquisition period were not direct evidence of Mitsubishi's efforts to promote the conspiracy, it would still be admissible to provide the jury with a complete story of the crime, United States v. Andreas, 216 F.3d 645, 665 (7th Cir.), cert. denied, 121 S.Ct. 573 (2000), and to show defendant's motive, plan and intent during the latter period. See United States v. Console, 13 F.3d 651, 659 (3d Cir. 1993), cert. denied sub nom. Curcio v. United States, 511 U.S. 1076 (1994); United States v. Hangar One, Inc., 563 F.2d 1153, 1158 (5th Cir. 1977).

[3] Copies of the translations of these cited documents are attached and have been highlighted for the Court's convenience.

[4] These summaries are based on certified translations of Japanese documents.

fourth, Toyo merged into Tokai at the end of 1991.

Exhibit GX-105.2: An October 4th memorandum concerning Mitsubishi's proposed acquisition of UCAR states, "Under the US Antitrust Act, the establishment of the J/V itself is not a problem, but it may become a target in the process of promoting cooperation and harmony in the industry. We must really recognize this risk."

Exhibits GX-105.10, GX-105.9, and GX-108: In an October 1, 1990 version of a Mitsubishi proposal to acquire UCAR (GX-105.10), the proponents: (1) state Mitsubishi intention to "promote the establishment of a structure for concerted actions and the qualitative improvement of the industry that each company has long awaited;" (2) identify a Mitsubishi's sales strategy upon completion of the UCAR acquisition to "encourage makers to respect each other's home markets in sales;" and (3) report that certain Japanese manufacturers "confidentially expressed their intention to 'aggressively back up MC[,]'" while others are "seeking a powerful leader in the industry and desire the establishment of an orderly system for the industry." In GX-105.9, an October 3rd version of the proposal apparently submitted to Mitsubishi's Investment Committee, the second statement was dropped, but the first and third were retained. All three statements were deleted in the version provided to the Government in connection with a Hart-Scott-Rodino pre-acquisition clearance review (GX-108).

Exhibit GX-107: In an October 18, 1990 document, the author writes that when two senior Mitsubishi executives "confidentially notified the top executive of Showa Denko, Japan's largest electrode maker, they were given a promise of maximum cooperation; this indicates smooth progress with the industry scheme . . ."

Such evidence surely is relevant to the connection between defendant's acquisition of UCAR and its plan to promote the formation of a conspiracy among UCAR and UCAR's

competitors.

In support of its Motion, defendant notes its concern that introduction of this evidence will be time consuming. Defendant's concern relates primarily to the time defendant will take to rebut the evidence contained in the documents. (Defendant's Memorandum, pp.5-6) While evidence may be subject to interpretation, and defendant may feel compelled to attempt to rebut the Government's interpretation, that is hardly a legitimate basis to exclude evidence under the strict standards of Rule 403.[5]

The cases defendant cites in support of its Motion to exclude pursuant to Rule 403 all relate to collateral issues or to evidence with minimal probative value. The documents defendant seeks to exclude here, defendant's own analyses of its UCAR acquisition, are far from irrelevant or collateral. They concern core issues relating to the aiding and abetting charge. The documents provide substantial evidence of defendant's plan and intent to purchase UCAR and then encourage UCAR to form and participate in the graphite electrode conspiracy. While defendant may dispute the import of the documents, the jury should not be precluded from considering such relevant evidence. Defendant's Motion to exclude this evidence should be denied.

Defendant has moved in the alternative that the Government be prohibited from mentioning Mitsubishi's pre-acquisition documents in its opening statement. This also should be denied. Defendant's Motion is based on its claim that the Court will realize the documents' irrelevance once the trial begins. For the reasons set forth above, this is a faulty premise.

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[5] Defendant's other basis for delay is the time it will spend at trial challenging Government translations of Japanese documents. It would be an odd result that, by memorializing evidence in a foreign language, one increases the likelihood it will be excluded at trial. Defendant has had copies of the Government's translations, but has not identified to the Government what it believes is inaccurate. The Government does not have copies of any defense translations to compare to its own. Consequently, there has been no opportunity to resolve differences.

Evidence from the pre-acquisition period is no less admissible than post-acquisition evidence and should not be treated differently. The evidence explains defendant's plan to implement the conspiracy and explains why defendant later encouraged UCAR to participate. Failure of the Government to mention defendant's intentions in acquiring UCAR would deny the jury the effective preview of the Government's case to which the jury is entitled.

Dated: 01-25-01

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 25th day of January 2001, a copy of the Government's Response in Opposition to Defendant's Motion to Exclude 1990 Documents, Memorandum in Support thereof, and a proposed Order have been hand-delivered to counsel of record for the defendant as follows:

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