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: 01/17/01

UNITED STATES PROPOSED JURY INSTRUCTIONS

The United States, pursuant to Fed. R. Crim. P.30, requests this Court give the attached instructions in addition to the standard instructions to the jury in this case. The United States further requests, in accordance with Rule 30, that the Court inform counsel of its proposed actions on the requested instructions prior to counsels' arguments to the jury. The United States reserves the right to supplement, modify, or withdraw these requested instructions depending upon the evidence presented, the arguments of counsel, and any requests for instructions which the defendant files.

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GOVERNMENT'S REQUEST NO. 1

The Offense Charged

The defendant, Mitsubishi Corporation, is charged with violating Section One of the Sherman Act by aiding and abetting a conspiracy among certain major graphite electrode manufacturers to suppress and eliminate competition by fixing the price of graphite electrodes sold in the United States and elsewhere. The conspiracy is alleged to have begun at least as early as March 1992 and to have continued until at least June 1997.

The defendant has denied that it is guilty of the charge.

The Indictment in this case is the formal method of accusing the defendant. It is not evidence.

Authority

Indictment, ¶¶ 1- 4.

American Bar Association, *Sample Jury Instructions in Criminal Antitrust Cases*, No. 29, at 81 (1984).

GOVERNMENT'S REQUEST NO. 2

Aiding and Abetting

The defendant is charged in the Indictment with aiding and abetting the price-fixing conspiracy set forth in the Indictment in violation of Title 18, United States Code, Section 2(a), which provides in pertinent part:

> [W]hoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

Authority

18 U.S.C. § 2(a).

GOVERNMENT'S REQUEST NO. 3

Aiding and Abetting: Elements of the Offense

Aiding and abetting is not a separate offense. The statute simply makes those who aid and abet a crime punishable as principals--as if they had committed the crime itself.

Thus, a person may violate the law even though he or she did not do every act constituting the substantive offense or even, in fact, if he or she was incapable of committing the substantive offense, if that person "aided and abetted" the commission of the offense. Further, there is no requirement that the defendant know all the particulars of the substantive offense, in this case the antitrust conspiracy, to be guilty of aiding and abetting.

A corporation, such as the defendant, may be found guilty of aiding and abetting. Further, one may aid and abet an antitrust conspiracy just as one may aid and abet other offenses. That is the charge in this case, that Mitsubishi Corporation aided and abetted a price-fixing conspiracy in violation of Section One of the Sherman Act.

I will explain the elements of the substantive offense, conspiracy in violation of Section One of the Sherman Act, later to you. Now, I wish to explain the elements of aiding and abetting.

In order to find the defendant guilty of aiding and abetting, it is necessary for you to find, beyond a reasonable doubt, that the substantive crime, that is, the conspiracy in violation of Section One of the Sherman Act was committed, and that the defendant knew of the crime and in some way associated himself with it, and that it participated in it as something it wished to bring about or have succeed.

You should understand that mere knowledge on the part of the defendant that a crime is being committed or is about to be committed is not sufficient for you to find that the defendant

aided or abetted the commission of that crime.

Authorities

Nye and Nissin v. United States, 336 U.S. 613, 618-620 (1949).

United States v. Garth, 188 F.3d 99, 113 (3d Cir. 1999).

United States v. Portac, Inc., 869 F.2d 1288, 1293 (9th Cir. 1989), *cert. denied*, 498 U.S. 845 (1990).

United States v. Galiffa, 734, F.2d 306, 312 (7th Cir. 1984).

United States V. Bey, 736 F.2d 891, 895 (3d Cir. 1984).

United States v. Lane, 514, F.2d 22, 27 (9th Cir. 1975).

United States v. Tokoph, 514, F.2d 597, 602 (10th Cir. 1975).

United States v. Kale, 661 F. Supp. 724, 726 (E.D. Pa. 1987).

GOVERNMENT'S REQUEST NO. 4

"Means and Methods"

The Indictment alleges various "means and methods" by which the defendant is alleged to have aided, abetted, counseled, induced and procured the price-fixing conspiracy set forth in the Indictment. You will have the Indictment with you during your deliberations. The means and methods set forth in the Indictment are examples of the acts or omissions by which the Government claims the defendant aided and abetted the conspiracy. During the trial, the Government also has introduced evidence of other means and methods not alleged in the Indictment. You should consider these other means and methods as well in your deliberations.

The Government is not required to prove all of these means or methods.

In order to convict, however, each juror must agree with each of the other jurors that the same means or method was, in fact, engaged in or employed by the defendant in aiding and abetting the charged conspiracy. The jury need not unanimously agree on each means or method, but in order to convict, must unanimously agree that at least one such means or method was engaged in by the defendant.

Unless the Government has proven one or more of the same means or method to each of you, beyond a reasonable doubt, you must acquit the defendant of the crime charged in the Indictment.

Authorities

United States v. Schurr, 794 F.2d 903, 907 n.4 (3d Cir. 1986).

United States v. Lewis, 759 F.2d 1316, 1344 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985).

1A K.F. O'Malley, *et. al*, *Federal Jury Practice and Instructions*, § 13.07 (5th ed. 2000).

GOVERNMENT'S REQUEST NO. 5

Corporations Act Through Employees and Agents

Under the law, a corporation is a person, but it can only act through its agents--such as its directors, officers, employees, or others acting on its behalf. A corporation is legally bound by the acts and the statements of its agents or employees done or made within the scope of their employment or their actual or apparent authority.

Acts done within the scope of employment are acts performed on behalf of a corporation and directly related to the performance of the duties the agent or employee has general authority to perform. Apparent authority is the authority that outsiders could reasonably assume the agent or employee would have, judging from his position with the company, the responsibilities entrusted to him or his office, and the circumstances surrounding his conduct.

To summarize, in order for a corporation to be legally responsible for the acts or statements of its employees or agents, you must find that the employee or agent was acting within the scope of his employment or his actual or apparent authority.

A corporation is entitled to the same fair trial as a private individual. It is entitled to the same presumption of innocence as private individuals, and it may be found guilty only if the evidence establishes such guilt beyond a reasonable doubt. All persons, including corporations, stand equal before the law.

Authority

American Bar Association, *Sample Jury Instructions in Criminal Antitrust Cases*, No. 15, at 51 (1984).

GOVERNMENT'S REQUEST NO. 6

Statute of Limitations and Venue

In addition to the other elements of aiding and abetting, before you can find the defendant guilty, you must find beyond a reasonable doubt that the conspiracy charged in the indictment was in existence and that some portion of it was carried out in the Eastern District of Pennsylvania within the five year period immediately preceding the return of the Indictment. The conspiracy in this case is alleged to have been in existence from on or about March 1992 to on or about June 1997. If you find that the conspiracy was in existence and that a portion of it was carried out in some way in this District after January 19, 1995, the statute of limitations will not have run and venue would be appropriate.

It is sufficient for these purposes if the United States proves beyond a reasonable doubt that price quotations which were the subject of the conspiracy were submitted or sales were made to customers within the Eastern District of Pennsylvania after January 19, 1995. The United States has offered evidence that such sales were made to Lukens Steel located in Coatesville, Pennsylvania within the period in question. Coatesville is within the Eastern District.

You should understand, however, that there is no requirement that the acts or omissions which are alleged as the means and methods by which the defendant aided and abetted the conspiracy occurred after January 19, 1995. They could have occurred prior to the time the conspiracy started, such as by helping bring the conspirators together, or they could have occurred more recently during the existence of the alleged conspiracy. This is because the time period or statute of limitations for which the defendant may be held liable for aiding and abetting, as I have just told you, is measured by that which applies to the substantive offense, the conspiracy.

Authorities

United States v. Kissel, 218 U.S. 601, 606-608 (1910).

United States v. Northern Improvement Co., 814 F.2d 540, 541-544 (8th Cir.), *cert. denied*, 484 U.S. 846 (1987).

United States v. A-A-A- Electric Co., Inc., 788 F.2d 242, 244-246 (4th Cir. 1986).

United States v. Girard, 744 F.2d 1170, 1173-1174 (5th Cir. 1984).

United States v. Galiffa, 734 F.2d 306, 309 (7th Cir. 1984).

United States v. Walker, 653 F.2d 1343, 1346-1347 (9th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982).

United States v. Barnett, 667 F.2d 835, 841 (9th Cir. 1982).

United States v. Campbell, 426 F.2d 547, 553 (2nd Cir. 1970).

United States v. Lane, 514 F.2d 22, 26-27 (9th Cir. 1975).

United States v. Kale, 661 F. Supp. 724, 726 (E.D. Pa. 1987).

2 Edward J. Devitt, *et. al*, *Federal Jury Practice and Instructions*, § 51A.21 (5th ed. Supp. 2000).

American Bar Association, *Sample Jury Instructions in Criminal Antitrust Cases*, No. 67, at 185 (1984).

GOVERNMENT'S REQUEST NO. 7

Section One of the Sherman Act

Section One of the Sherman Act, which applies to the conspiracy charged in this case, provides in part that:

> Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . . Every person who shall engage in any [such] combination or conspiracy . . . shall be deemed guilty of [an offense against the laws of the United States].

This section makes it unlawful for two or more persons to conspire to engage in conduct which is in unreasonable restraint of interstate commerce. I will explain the concept of conspiracy, which is a major element of this case, in some detail later. But, let me tell you that a conspiracy is simply an agreement or mutual understanding, formal or informal, expressed or implied, entered into for an unlawful purpose. It means the same thing as "combination" or "concert of action."

You should also note that the term "every person" as used in the Sherman Act means not only an individual, but also a corporation.

The purpose of the antitrust laws is to preserve the free flow of commerce and trade among the states and to secure to everyone an equal right and opportunity to engage in the trade and commerce of the country.

So, any unreasonable interference, by contract, or combination, or conspiracy, with the ordinary, usual and freely competitive pricing or distribution system of the open market in interstate or foreign trade or commerce, constitutes an unreasonable restraint of that trade, and is in itself unlawful; and, if knowingly done, is a federal offense under the Sherman Antitrust Act.

Authorities

15 U.S.C. § 1

Esco Corp. v. United States, 340 F.2d 1000, 1007-1008 (9th Cir. 1965).

2 Edward J. Devitt, *et. al*, *Federal Jury Practice and Instructions*, §§ 51A.02, 51A.03, 51A.04 (5th ed. Supp. 2000).

GOVERNMENT'S REQUEST NO. 8

Sherman Act: Offense Charged and Elements of the Offense

The Indictment charges that certain major producers of graphite electrodes engaged in a conspiracy from at least as early as March 1992 until at least June 1997, which consisted of a continuing agreement, understanding and concert of action among those co-conspirators, the substantial terms of which were to suppress and eliminate competition by fixing the price of graphite electrodes sold in the United States and elsewhere. The defendant is charged with aiding and abetting that conspiracy.

There are certain essential elements which the Government must prove beyond a reasonable doubt in order to establish a violation of the Sherman Act as charged in this case.

First: that the conspiracy charged in the Indictment was knowingly formed and was in existence at or about the time alleged;

Second: that the co-conspirators knowingly entered into the conspiracy; and

Third: that the conspiracy was in unreasonable restraint of interstate or foreign commerce.

Let me again remind you, that to find the defendant guilty of aiding and abetting, the Government must first prove that the conspiracy charged in the Indictment was committed.

Authorities

Indictment, ¶¶ 1- 4.

United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940).

Nash v. United States, 229 U.S. 373, 378 (1913).

2 Edward J. Devitt, *et. al*, *Federal Jury Practice and Instructions*, § 51A.15 (5th ed. Supp. 2000).

GOVERNMENT'S REQUEST NO. 9

"Conspiracy" Defined

The words, "combination" and "conspiracy," while they are both used in the Sherman Act, may be considered for our purposes as having but a single meaning.

The type of relationship condemned by law as a conspiracy is often described as a "partnership in a crime," in which each member becomes the agent of every other member. To create such a relationship, two or more persons must enter into a mutual agreement or understanding that they will act together for an unlawful purpose.

In the absence of an agreement or mutual understanding or meeting of the minds, there can be no conspiracy. It is the agreement to act together for an unlawful objective that constitutes the gist of this crime.

This central requirement of an agreement does not mean, however, that in order to create an unlawful combination or conspiracy the undertaking of the parties must be embodied in express or formal contractual statements. This is rarely the way in which criminal conspiracies are formed. It is sufficient, therefore, if some communication occurred between the alleged conspirators which resulted in a mutual understanding of the common, unlawful objective or purpose to be accomplished, and a mutual understanding that they will combine their efforts to that end.

Because express agreements are neither necessary nor common in establishing unlawful conspiracies, the crime is one which may be shown from circumstantial evidence. In other words, whether a conspiracy existed beyond a reasonable doubt may be judged by what the parties actually did as well as from the words they used. An unlawful agreement may be shown if the proof establishes a concert of action, with all the parties working together with a single design for

the accomplishment of a common purpose.

However, it is the Government's burden to show such participation as a matter of conscious choice beyond a reasonable doubt. It is not enough to show only that the parties acted uniformly or similarly or in ways that may seem to be mutually beneficial. If such actions were taken independently and solely as a matter of individual business judgment, without any agreement or arrangement or understanding among the parties, then there would be no conspiracy, even though the separate and independent actions tended to achieve the same result.

In considering whether there was a conspiracy, you should bear in mind that a conspiracy does not have to be completely formed in one place or at one time. It can be put together a little at a time and can be joined at different time or in a different way by each alleged conspirator. What must be proved beyond a reasonable doubt is that the conspiracy charged was knowingly formed, and that two or more persons, knowingly became members of the conspiracy.

Authorities

United States v. General Motors, 384 U.S. 127, 142-143 (1966).

United States v. Singer Mfg. Co., 374 U.S. 174, 193-195 (1963).

Interstate Circuit v. United States, 306 U.S. 208, 226-227 (1939).

United States v. Continental Group, Inc., 603 F.2d 444, 465 (3d Cir.) *cert. denied*, 444 U.S. 1032 (1979).

GOVERNMENT'S REQUEST NO. 10

Knowledge and Intent

The element of intent as to the Sherman Act charge is established if the evidence in the case shows beyond a reasonable doubt that the conspiracy was knowingly formed or joined. An act is done knowingly if it is done voluntarily and not because of a mistake or accident.

Authorities

United States v. Wise, 370 U.S. 405, 415-416 (1962).

United States v. Continental Group, Inc., 603 F.2d 444, 464 (3d Cir.), *cert. denied,* 444 U.S. 1032 (1979).

United States v. Gillen, 599, F.2d 541, 542, 545 (3d Cir.), *cert. denied*, 444 U.S. 866 (1979).

GOVERNMENT'S REQUEST NO. 11

Exact Dates Not Required

You will note the Indictment charges that the Sherman Act price-fixing conspiracy began "at least as early as," "and continued "until at least" a certain date. The proof need not establish with certainty the exact dates of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed during a time period reasonably near the dates alleged.

Authority

1A K.F. O'Malley, *et. al*, *Federal Jury Practice and Instructions*, § 13.05 (5th ed. 2000).

GOVERNMENT'S REQUEST NO. 12

Price Fixing is Per Se Unreasonable

Price fixing is an agreement between two or more persons to fix, control, raise, lower, maintain or stabilize the prices charged or to be charged for their products or services. Although a price-fixing conspiracy is commonly thought of as an agreement to establish the same price, prices may be fixed in other ways. For example, prices are fixed if the range or level of prices is agreed upon, or if, by agreement, various guidelines or formulas are to be used in computing the prices. They are fixed because they are agreed upon. Thus, any agreement to raise prices, to set a specific price, to maintain a specific price, to stabilize prices by eliminating discounts, or to set other terms or conditions of sale relating to price, is illegal.

Every conspiracy to fix prices is unlawful, regardless of the motives of the parties or any economic justification. This is because the aim and result of every price-fixing agreement is the elimination of one form of competition. Whether the prices which the parties agreed to fix were or are reasonable or unreasonable, or too high or too low, is immaterial.

The Sherman Antitrust Act makes illegal every conspiracy formed for the purpose of fixing prices. If you find beyond a reasonable doubt that the conspiracy charged in the Indictment existed, then you need not decide whether that conspiracy was reasonable or unreasonable because, as I have just explained, an agreement among competitors to fix prices is illegal and a violation of the Sherman Antitrust Act.

Evidence that the producers actually competed with each other has been admitted to assist you in deciding whether they actually entered into an agreement or mutual understanding to fix prices. If the conspiracy charged in the Indictment is proved, it is no defense that the conspirators actually competed with each other in some manner or that they did not conspire to eliminate all

competition. Similarly, the conspiracy is unlawful even if it did not extend to all products sold by the conspirators or did not affect all of their customers.

If you should find that the producers entered into an agreement to fix prices, the fact that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objectives, is no defense. The agreement is the crime, even if it is never carried out.

Similarity of competitive business practices of the producers or the mere fact that they may have charged identical prices for the same goods, does not alone establish an agreement or mutual understanding to fix prices, since such practices may be consistent with ordinary and proper competitive behavior in a free and open market.

A person may lawfully charge prices identical to those charged by competitors and still not violate the Sherman Act. A person may follow and conform exactly to the price policies and price changes of competitors; and such conduct, without more, would not be violative of the law, unless you find it was done pursuant to an agreement or mutual understanding between two or more persons, as charged in the Indictment.

Nevertheless, you may consider such facts and circumstances along with all other evidence in determining whether the similarity or identify of prices resulted from the independent acts or business judgment in a freely competing open market, or whether it resulted from an agreement or mutual understanding between one or more competitors.

Authorities

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-25 n.59 (1940).

United States v. Trenton Potteries Co., 273 U.S. 392, 396 (1927).

United States v. Portsmouth Paving Corp., 694 F.2d 312, 317-18 (4th Cir. 1982).

United States v. Koppers Co., Inc., 652 F.2d 290, 293 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1982).

American Bar Association, *Sample Jury Instructions in Criminal Antitrust Cases*, No. 52, 54, at 149, 153-156 (1984).

GOVERNMENT'S REQUEST NO. 13

Absence of Certain Co-Conspirators

During the course of the trial, reference has been made to acts performed by alleged co-conspirators who were not named in the Indictment. You are not to consider why any other company or individual was not indicted in this case. If you think the evidence may have suggested that possibility, these are not matters for you to surmise or speculate upon. You are to consider only what is in evidence here before you as it relates to the guilt or innocence of the defendant now on trial.

Authorities

United States v. Continental Group, Inc., Crim. No. 76-514 (E.D. Pa. 1979), *aff'd* 603 F.2d 444 (3d Cir.), *cert. denied*, 444 U.S. 1032 (1980) (excerpted in ABA Antitrust Section, *Jury Instructions in Criminal Antitrust Cases 1976-1980*, 114 (1982)).

GOVERNMENT'S REQUEST NO. 14

Interstate Commerce Generally

Section One of the Sherman Act applies only to unreasonable restraints of interstate and foreign commerce. The term interstate or foreign commerce refers to transactions in goods or services between persons in one state and persons in another state or country.

To obtain a conviction for violation of Section One of the Sherman Act, the Government must prove beyond a reasonable doubt either that the restraint charged in the Indictment (that is the price-fixing conspiracy) was imposed directly on goods or services in the flow of interstate or foreign commerce or that the restraint affected such commerce.

In this case, the Government has produced evidence to show that the restraint was imposed directly on goods or services in the flow of interstate and foreign commerce. That is that the conspiracy charged in the Indictment involved fixing the prices of graphite electrodes sold and shipped by the conspirators to customers located in states or countries other than those in which the electrodes were manufactured.

The restraint charged may have substantial effects on interstate or foreign commerce even though some of the parties to the conspiracy were not engaged in interstate commerce.

The amount, quantity, or value of interstate or foreign commerce involved or affected is unimportant, so long as you find that the restraint charged in the Indictment or the activities affected by the conspiracy had some effect upon interstate or foreign commerce.

Authorities

United States v. Fischbach and Moore, Inc., 750 F.2d 1183, 1191-2 (3d Cir. 1984), *cert. denied* 470 U.S. 1029 (1985).

Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center, 721 F.2d 68, 71 (3d Cir. 1983).

American Bar Association, *Sample Jury Instructions In Criminal Antitrust Cases*, No. 33, at 89 (1984).

GOVERNMENT'S REQUEST NO. 15

Direct and Circumstantial Evidence

There are two types of evidence which are generally presented at trial: direct and circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence nor is a greater degree of certainty required of circumstantial evidence than direct evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Authority

1A K.F. O'Malley, *et. al*, *Federal Jury Practice and Instructions* § 12.04 (5th ed. 2000).

GOVERNMENT'S REQUEST NO. 16

Inferences

In considering the evidence, you are not limited to the statements of the witnesses or the appearance of a particular exhibit. On the contrary, you are permitted to draw from the facts which you find to have been proved such reasonable inferences as seem justified to you.

What are inferences?

Inferences are simply deductions or conclusions which reason and common sense lead you to draw from the evidence.

Authority

1A K.F. O'Malley, *et. al*, *Federal Jury Practice and Instructions* § 12.05 (5th ed. 2000).

GOVERNMENT'S REQUEST NO. 17

Credibility of Witnesses

You as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

Authority

1A K.F. O'Malley, *et. al*, *Federal Jury Practice and Instructions* § 15.01 (5th ed. 2000).

GOVERNMENT'S REQUEST NO. 18

Testimony Given Pursuant to Plea Agreements and Grants of Immunity

Certain witnesses have testified in this case under grants of immunity or promises of non-prosecution pursuant to the terms of plea agreements the Government has entered into with their corporate employers who admitted to their participation in the price-fixing conspiracy. Other witnesses, specifically, Robert Krass and Robert Koehler have testified pursuant to plea agreements wherein they have pleaded guilty to criminal Informations filed by the United States charging them with involvement in the price-fixing conspiracy. These witnesses are competent witnesses and their testimony may be received in evidence and considered by you.

Such testimony, however, should be examined by you with greater care than the testimony of an ordinary witness. You should consider whether the testimony has been affected by the witness's own interest; by the agreement his or her corporation has with the Government, or by the imposition of a reduced sentence as the result of a plea agreement. After such consideration, you may give the testimony of these witnesses such weight as you feel it deserves.

As I said, you should receive such testimony with care. But the mere fact that a witness may have been a participant, or that he may have violated the law, does not mean that he has not told the truth, and you are free to convict on the testimony of a participant alone, if you believe his testimony to be true. On the other hand, as with any witness, you may disregard all or part of such testimony, as you see fit.

Persons violating the law do not usually publicly proclaim their activities, and it is, therefore, necessary in many cases to rely on the testimony of such participants. You may also bear in mind that such testimony may be corroborated by the testimony of other witnesses and

other evidence in the case.

You should also consider whether the testimony of an accomplice has been affected by self-interest, or by an agreement he or she may have with the Government, or by his or her own self-interest in the outcome of the case, or by prejudice against the defendant. Taking these things into consideration, it is within your province, and yours alone, to give to the testimony of each witness such weight and value as you may deem it entitled.

Authorities

Caminetti v. United States, 242 U.S. 470, 495 (1917).

Audett v. United States, 265 F.2d 837, 846-47 (9th Cir.), *cert. denied*, 361 U.S. 815 (1959).

McClanahan v. United States, 230 F.2d 919, 922 (5th Cir.), *cert. denied*, 352 U.S. 825 (1956).

United States v. Rosenberg, 195 F.2d 583, 592 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

Ruby v. United States, 61 F.2d 617, 618-19 (6th Cir. 1932), *cert. denied*, 288 U.S. 617 (1933).

Richardson v. United States, 181 Fed. 1, 9 (3d Cir. 1910).

American Bar Association, *Jury Instructions in Criminal Antitrust Cases 1964-76,* 100-01 (1978).

1A K.F. O'Malley, *et. al*, *Federal Jury Practice and Instructions*, §§ 15.03, 15.04 (5th Ed. 2000).

GOVERNMENT'S REQUEST NO. 19

Wisdom of Immunizing Witnesses

It would be improper and a violation of your oath to question the wisdom or propriety of the policy permitting the Government to immunize certain witnesses, or the Government's decision to obtain immunity for certain witnesses. As I told you earlier, your function as jurors is to determine the facts from the evidence and to apply to those facts the law as I instruct you concerning it in order to arrive at a verdict of guilty or not guilty. The matter of immunity is relevant only in your consideration of the credibility of witnesses who have been immunized.

Authorities

United States v. Cheung Kin Ping, 555 F.2d 1069, 1073-4 (2d Cir. 1977).

United States v. Renfroe, 634 F. Supp. 1536, 1538-9 (W.D. Pa. 1986).

GOVERNMENT'S REQUEST NO. 20

Consideration to be Given to Guilty Pleas and Plea Agreements

Evidence of a testifying witness's guilty plea or the fact that the witness is testifying pursuant to a plea agreement entered into by his or her corporate employer, has been admitted by this Court for very limited, but permissible, purposes. Evidence of these pleas and plea agreements was admitted:

(1) to allow you to accurately assess the credibility or believability of the witness;

(2) to eliminate any concerns you may have concerning whether the Government has selectively prosecuted the defendant; and

(3) to explain how the witness had first-hand knowledge concerning the events about which he or she testified.

As I cautioned you before, however, you are not to consider such guilty pleas or plea agreements in any way in determining the guilt of the defendant.

Authority

United States v. Universal Rehabilitation Services (Pa.) Inc., 205 F.3d 657, 665 (3d Cir. 2000).

GOVERNMENT'S REQUEST NO. 21

Prior Inconsistent Statements

You have heard evidence that, before testifying at this trial, certain witnesses made statements orally and/or in writing, during interviews and otherwise, concerning the same subject matter as their testimony in this trial. You may consider those earlier oral and written statements to help you decide how much of the witnesses' testimony to believe. If you find that the prior statements were not consistent with the witnesses' testimony at this trial, then you should decide whether that affects the believability of the witnesses' testimony at this trial.

To the extent that witnesses' prior inconsistent statements were given under oath at previous judicial proceedings, such as grand jury proceedings, you may consider those earlier statements, not just to help you decide how much of the witnesses' testimony to believe, but also as evidence of the facts at issue in this trial.

Authorities

Fed.R.Evid. 801(d)(1)(A).

1st Cir. Pattern Jury Instructions, Instruction No. 2.02, at 17 (1998).

GOVERNMENT'S REQUEST NO. 22

Expert Witness

The rules of evidence provide that if scientific, technical, or other specialized knowledge will assist you in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify concerning such specialized areas and state his or her opinion regarding such matters.

To the extent that an expert testifies about his personal observation of particular facts, his testimony is to be considered by you the same as that of any other witness. An expert's opinion may be based on his own personal observations, the facts made known to him or facts reasonably relied upon by experts in the field in forming opinions. However, the opinions of experts based upon assumptions do not establish that such assumptions are facts. You must determine the actual facts based on the evidence and not upon assumptions of expert witnesses in forming opinions or in preparing summaries, computations, or other exhibits.

You should consider each expert opinion received in evidence and give it such weight as you think it deserves. The opinions of experts are not binding upon you, and you are free to accept them or reject them in whole or in part. In deciding the weight to give to an expert opinion, you should consider whether the opinion is based upon the facts as you find them. You should also consider the qualifications and experience of the expert witness, the soundness of the reasons given in support of the opinions, the weight of the other evidence, and the factors for weighing the testimony of any other witnesses.

Authority

American Bar Association, *Sample Jury Instructions in Criminal Antitrust Cases*, No.21, at 65 (1984).

GOVERNMENT'S REQUEST NO. 23

Attorney Interviewing Witness

(If applicable.)

During the trial, there was testimony that certain witnesses were interviewed by the lawyers prior to trial. I instruct you, ladies and gentlemen, that it is proper for an attorney to interview any witness in preparation for trial.

Authority

7th Cir. Crim. Jury Instr., § 1.07 (1999).

GOVERNMENT'S REQUEST NO. 24

Evidence, Stipulations, Arguments of Counsel

You must consider only the evidence which has been admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record; and all facts which may have been admitted, agreed to or stipulated.

While we were hearing the evidence, you were told that the United States and the defendant agreed, or stipulated to some matters. This simply means that they both accept the matters recited in the stipulation as facts. There is no disagreement over that, so there was no need for evidence by either side on these points. You should accept these facts as true, even though nothing more was said about them one way or the other.

Remember that anything the lawyers say is not evidence in the case. It is your recollection and interpretation that controls. What the lawyers say is not binding upon you. You should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

Authorities

11th Cir. Pattern Jury Instr., Basic Instruction 4.1; 4.2, at 17-20 (1997).

American Bar Association, *Sample Jury Instructions in Criminal Antitrust Cases*, No. 20, at 63 (1984).

GOVERNMENT'S REQUEST NO. 25

Reasonable Doubt

The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a "clean slate," with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense--the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So if you, after careful and impartial consideration of all the evidence in the case, have a reasonable doubt that the defendant is guilty of the charge, you must acquit. If you view the evidence in the case as reasonably permitting either of two conclusions--one of innocence, the other of guilt--you should adopt the conclusion of innocence.

Authority

1A K.F. O'Malley, *et. al*, *Federal Jury Practice and Instructions* § 12.10 (5th ed. 2000).

CONCLUSION

The United States requests that this Court give the jury the foregoing proposed instructions.

Dated:

Respectfully submitted,

____

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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: 01/17/01

CERTIFICATE OF SERVICE

This is to certify that on the day of 17th January 2001, a copy of the Government's Proposed Jury Instructions has been mailed/faxed to counsel of record for the defendant as follows:

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