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 & 18 U.S.C. § 2 (a)
	)	
Defendant.	)	Filed: 12-11-00

TRIAL MEMORANDUM OF THE UNITED STATES

ROBERT E. CONNOLLY
JOSEPH MUOIO
WENDY BOSTWICK NORMAN
ROGER L. CURRIER

Attorneys, Philadelphia Office
Antitrust Division
U.S. Department of Justice
The Curtis Center, Suite 650W
170 S. Independence Mall West
Philadelphia, PA 19106
Tel. No.: (215) 597-7401

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

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 & 18 U.S.C. § 2 (a)
	)	
Defendant.	)	Filed: 12-11-00

TRIAL MEMORANDUM OF THE UNITED STATES

I. PRELIMINARY STATEMENT

On January 19, 2000, a federal grand jury sitting in this District returned an Indictment charging the defendant with violating Section 1 of the Sherman Act by aiding and abetting a conspiracy to fix the price and allocate the volume of graphite electrodes sold in the United States and elsewhere from at least as early as March 1992 to at least June 1997.

II. ANTICIPATED LENGTH OF TRIAL

The Government estimates that it will take approximately one month to present its case-in-chief. The Government bases its estimate on the following. The Government presently intends to call approximately 20 witnesses, some of whom will describe events spanning several years. Nine of these witnesses are Japanese. Most of the Japanese witnesses speak English. While Japanese is their native language, most of these witnesses speak English in their business activities and

have spoken English during interviews and grand jury proceedings. These witnesses will testify in English, although there may be occasional difficulties with accents which may require them to speak slowly or repeat themselves. There will be an interpreter present should any difficulties arise with any particular expression or words. Other Japanese witnesses, however, will testify in Japanese and require the use of an interpreter, thereby lengthening their testimony.

The Government and the defense are arranging to have an interpreter present who, with the permission of the Court, will be the official trial or Court interpreter. In addition, each party will have its own interpreter. The parties contemplate that either party may object to the interpretation given by the Court interpreter. The interpreter may then accept the suggested correction or stand by his/her interpretation. The parties also contemplate having audio tape recordings made of the testimony so that, should the Court decline to interrupt the testimony with objections to interpretations, such challenges may be raised at a later time.

There are also a number of documents which are in Japanese which the Government will offer into evidence. Some of these are in Japanese and will require certified translations, which may add to the length of the trial.

III. THE DEFENDANT

Mitsubishi Corporation (Mitsubishi) is a Japanese corporation headquartered in Tokyo, Japan. It is one of the world's largest corporations with sales in 1999 of over $100 billion. Among its many worldwide business activities, Mitsubishi acts either directly or through subsidiaries and affiliates as a trading house selling,

among other things, graphite electrodes manufactured by other companies. These electrode sales are coordinated by the company's Carbon Division.

From February 25, 1991 until January 26, 1995, Mitsubishi owned 50% of the stock of UCAR Carbon Company (UCAR)[1] of Danbury, Connecticut, the world's largest producer of graphite electrodes and a named co-conspirator in the Indictment. Mitsubishi's investment in UCAR was overseen by Mitsubishi's Carbon Division. During this period, Mitsubishi, directly and indirectly, acted as UCAR's sales agent for graphite electrodes in certain areas of the world. Mitsubishi also acted as sales agent for Japanese graphite electrode manufacturers Tokai Carbon Co. Ltd.; Showa Denko KK; and SEC Corporation. Mitsubishi also held an equity interest in Tokai and SEC.

IV. THE INDICTMENT

The Indictment charges that Mitsubishi violated Section 1 of the Sherman Act, 15 U.S.C. § 1, and 18 U.S.C. § 2 by aiding and abetting a conspiracy among certain graphite electrode producers to fix prices and allocate the volume of graphite electrodes sold in the United States and elsewhere from at least as early as March 1992 to at least June 1997. Named as co-conspirators in the Indictment are UCAR International, Inc. and its wholly-owned subsidiary UCAR Carbon Company (collectively UCAR); SGL Carbon Aktiengesellschaft of Germany (SGL); and the

[1] In January 1995, Mitsubishi sold its interest in UCAR to the Blackstone Group for $406 million. As explained below, Mitsubishi thereafter continued to aid and abet the aforesaid conspiracy.

Japan based Tokai Carbon Co., Ltd. (Tokai); Showa Denko KK (Showa Denko); SEC Corporation (SEC); and Nippon Carbon Co., Ltd. (Nippon). The named co-conspirators are the world's leading manufacturers of graphite electrodes.[2]

The substantial terms of the charged conspiracy were:

(a) to agree to fix and maintain prices of, and to coordinate price increases for, graphite electrodes sold in the United States and elsewhere;

(b) to agree to follow the price increases of respective home market leaders in the United States and elsewhere; and

(c) to agree to maintain the respective market shares of the conspirator companies in various markets in the United States and elsewhere.

Indictment ¶ 3.

Graphite electrodes, the product which was the subject of the conspiracy, are large columns used in the production of steel in electric arc furnaces, the steel-making technology used by "mini-mills," and for refining steel in ladle furnaces. As conductors of electricity, electrodes generate sufficient heat to melt steel scrap and to refine molten steel into finished products. Nine electrodes, joined in columns of three each, are used in a typical electric arc furnace. Because of the intense heat of the melting process, electrodes are gradually consumed and, thus, require

[2] Pursuant to plea agreements with the United States, all of the named co-conspirator companies have pleaded guilty to Informations filed in this District charging them with violating Section 1 of the Sherman Act for their participation in the conspiracy. All have been sentenced and have agreed to cooperate with the Government.

replacement. During the term of the conspiracy, total sales of graphite electrodes in the United States were in excess of $1.7 billion. Some of these sales were made to steel companies located in the Eastern District of Pennsylvania.

Mitsubishi is charged with having aided and abetted the charged conspiracy prior to, during and after its part ownership of UCAR by, among other things:

(a) counseling, inducing, and encouraging UCAR and other industry participants to meet and agree to fix, maintain and stabilize prices of graphite electrodes;

(b) arranging, facilitating or otherwise providing assistance for conspiratorial meetings and communications between UCAR and competitors, including Showa Denko, Tokai, SEC and Nippon;

(c) selling graphite electrodes on behalf of Showa Denko, Tokai and SEC, at prices it knew to be fixed pursuant to the conspiracy;

(d) concealing the existence of the conspiracy from customers and others to allow the continuation of the conspiracy;

(e) meeting with and giving assurances to Japanese manufacturers that the Mitsubishi/UCAR joint venture would not result in increased competition but, rather, would result in the lessening of competition and an increase in prices;

(f) counseling, inducing and encouraging UCAR to permit Mitsubishi to continue to sell in the United States Japanese made electrodes in order to prevent an outbreak of competition;

(g) selling graphite electrodes of UCAR at prices it knew to be fixed pursuant to the conspiracy; and

(h) counseling, inducing and encouraging the attempted purchase of the stock or assets of a co-conspirator graphite producer in 1996 and 1997 to further eliminate competition in the graphite electrode industry.

Indictment ¶ 4; Government's Amended and Expanded Voluntary Bill of Particulars ¶ 3 (filed November 9, 2000).

V. SUMMARY OF THE EVIDENCE

The following is a summary of the facts the Government intends to prove at trial.

A. The Mitsubishi/Union Carbide Negotiations

In the late 1980's, the graphite electrode industry was characterized by over-capacity and low prices. As a result, UCAR, which was then a division of Union Carbide, was experiencing financial difficulties and Union Carbide spent several years trying to find a buyer for it. In 1989, Robert Krass, then President of UCAR, approached Yorizo Kimura, the Senior Vice President and General Manager of Mitsubishi International Corporation, Inc. (MIC) and the President of Carbonex, two U.S. subsidiaries of Mitsubishi, to see whether Mitsubishi was interested in investing in UCAR. Mitsubishi was interested and negotiations began.

To evaluate the potential investment in UCAR[3] and to conduct the

[3] Mitsubishi's prospective investment in UCAR was referred to within the company as Project Atlas.

negotiations, Mitsubishi created a team headed by Shiro Shinozaki, General Manager of Mitsubishi's Carbon Division. Yorizo Kimura and other personnel from MIC and other U.S. subsidiaries of Mitsubishi also played a substantial role in the negotiations.

During the lengthy negotiations, Mitsubishi emphasized to UCAR's Krass that Mitsubishi's worldwide connections in the graphite electrode industry would create harmony in the industry. Mitsubishi also made clear to Krass that it did not want to be a passive investor in UCAR, but wanted input into sales and pricing. Mitsubishi also insisted on continuing to act as sales agent for Tokai, Showa Denko, and SEC. Mitsubishi told Krass that this would give Mitsubishi access to pricing and customer information, promote an orderly market, and aid control of market pricing.

Within Mitsubishi, Kimura, Shinozaki and others supported the investment in UCAR, saying that it would lead to higher industry prices by enabling Mitsubishi to foster cooperation among the electrode producers. Also, contemporaneous documents from Mitsubishi and MIC establish that Mitsubishi planned to act as a communications bridge between UCAR and the other producers in Europe and Asia so that price competition among these producers would be suppressed and concerted price increases could be achieved. These documents show that even as early as 1990, Mitsubishi solicited support from Japanese manufacturers for its plan to coordinate pricing. Although Mitsubishi plainly recognized such cooperation could run afoul of the U.S. antitrust laws, Mitsubishi

nonetheless made contact with certain of the Japanese and European producers wary of the Mitsubishi/UCAR alliance and assured these producers that the alliance would result in cooperation among the producers.

B. The Pre-Cartel Period (February 1991 - February 1992)

After the closing of the UCAR investment and in order to take an active role in the management of UCAR, Mitsubishi appointed three of the six members of the UCAR Board of Directors. It also "seconded," i.e., transferred, various of its executives to UCAR to participate in the company's operations. Among those seconded to UCAR were Kimura, who assumed the title of Senior Vice President Worldwide Coordination, and Ichiro ("Ricky") Fukushima, who was made a Sales Director and, later, Vice President Worldwide Sales Coordination in UCAR's sales operations. Shinozaki remained with Mitsubishi in Tokyo and was charged with overseeing the entire UCAR investment.

At about this time, the Japanese electrode producers that Mitsubishi represented became concerned that Mitsubishi now had a conflict of interest in continuing to sell their products. As a result, Kimura, Fukushima and other Mitsubishi executives contacted or visited executives of Tokai, SEC and Showa Denko, assuring them that Mitsubishi would control UCAR and that Mitsubishi/UCAR would promote cooperation and harmonization in the industry and generally seek to lessen competition. Mitsubishi documentation makes clear that Mitsubishi, in fact, did continue to seek to coordinate competition and promote

an orderly market where competitors would respect each others' home markets.

Throughout 1991, Shinozaki, with oversight responsibility for Mitsubishi's investment in UCAR, was not seeing substantial change in UCAR's market behavior or in its profit picture, i.e., UCAR failed to increase prices and profits. As a result, he had several meetings with UCAR's President Krass where he urged Krass to raise prices. He explained to Krass that the Far East had an orderly market where the Japanese producers did not take business from each other and urged Krass to get to know his competitors and to do the same.

When Krass went to Japan during this period, his visits were arranged by Mitsubishi and he generally was accompanied by Mitsubishi personnel. During these visits, Mitsubishi arranged meetings between Krass and executives of the Japanese electrode producers where, with Mitsubishi executives sometimes in attendance, there were discussions of the need to raise prices and the desire of the Japanese to cooperate with UCAR. Krass assured them that that was also UCAR's desire, but he remained skeptical whether any price-fixing agreement could work because there were too many producers in the market and the market continued to be characterized by overcapacity. Krass also expressed concern about antitrust laws in the United States. Accordingly, Krass refused to engage in price fixing through 1991 and into 1992 despite Mitsubishi's continued urging that he do so.

Fortunately for the would-be conspirators, however, the electrode industry began to change in the early 1990's. There were mergers among major producers, i.e., Tokai merged with Toyo, a smaller Mitsubishi affiliated Japanese electrode

producer. Sigri of Germany and Great Lakes Carbon Corporation of the United States merged to form SGL Carbon. Robert Koehler became the CEO of the combined company, now the world's second largest graphite electrode producer. As a result of these mergers, old plants were shut down and capacity was reduced to bring it more into line with demand.

In early 1992, SGL's Robert Koehler made a number of visits to the other graphite electrode producers. When he first visited Krass, then CEO of UCAR in Danbury, he told Krass that his business philosophy at SGL was to cut capacity and avoid price cutting. In March 1992, the two had a longer meeting in Wiesbaden Germany, where they discussed the need to reduce discounting and maintain strong pricing policies. Koehler and Krass realized they had similar ideas, and Koehler told Krass that he was soon going to Japan to discuss the industry with the Japanese. Krass was beginning to believe that the price-fixing plan pressed upon him by Mitsubishi might be worth the risk. In April 1992, Koehler met individually in Japan with Shinozaki and Kimura of Mitsubishi and then with executives of Showa Denko, Tokai, SEC and Nippon. The common theme of all of these meetings was that the producers had to cooperate to get prices up.

Following these visits, Koehler called Krass and told him there was a consensus among the producers to take action. They then arranged a formal cartel meeting to be held in London in May 1992.[4]

---

[4] Pursuant to plea agreements, both Krass and Koehler have pleaded guilty to Informations filed in this District alleging their participation in the conspiracy.

C. The Period of the Conspiracy (March 1992 - June 1997)

With the groundwork accomplished, the key meeting of the cartel occurred in London in May 1992. Attending that meeting were Krass and Koehler representing UCAR and SGL, respectively, and top executives from Tokai and Showa Denko, representing the Japanese.[5] Ricky Fukushima, still seconded by Mitsubishi to UCAR, was also present.

Those present reached agreement on the basic principles of the conspiracy which were (1) to raise and coordinate worldwide prices; (2) to reduce or eliminate discounts; (3) to follow the principal producer in certain geographic home markets on price increases; (4) to maintain or allocate sales volumes in various geographic markets; and (5) to ensure that the head of each company controlled pricing. It was further agreed to have periodic meetings among the top level executives ("top level" meetings) to discuss major issues and more frequent meetings among lower level officials ("working level" meetings) to work out pricing and volume problems at specific customers or in specific geographic areas.[6]

Krass has been sentenced to 17 months incarceration, and fined $1.25 million. Koehler, a German national, was not incarcerated, but was fined $10 million, a fine which was paid by Koehler's company, SGL. In addition, UCAR and SGL also were convicted for their role in the conspiracy and were fined $110 million and $135 million, respectively.

[5] Because they were small producers, SEC and Nippon were not at this meeting but SDK and Tokai were authorized to speak for the Japanese. SEC and Nippon did attend subsequent cartel meetings.

[6] From this point on, until the conspiracy terminated in June 1997, the conspirators had regular top level and working level meetings in various cities

Mitsubishi's Fukushima reported the success of the London meeting to Yorizo Kimura, Fukushima's superior at Mitsubishi. Thereafter, Fukushima continued to tell his colleagues and superiors at Mitsubishi of the conspiracy formalized in London. Following his return to Mitsubishi headquarters in Tokyo,[7] Fukushima also attended another top level meeting in London in 1993. At that meeting, UCAR and SGL demanded that the Japanese companies reduce exports from Japan in order to support higher prices. While higher prices would benefit Mitsubishi through its investment in UCAR, this action would have adverse consequences for Mitsubishi as a trading house as fewer sales meant fewer sales commissions. In addition, a reduction in Japanese electrode production would cut Mitsubishi's sale of needle coke to the Japanese producers.[8] Accordingly, Fukushima reported the details of the meeting to several executives within Mitsubishi, including the General Manager of the Carbon Division, the unit which oversaw Mitsubishi's marketing of electrodes as well as the UCAR project. The evidence will establish that in time, knowledge of the conspiracy was widespread in Mitsubishi.

---

throughout the world. They also had smaller meetings and other contacts as necessary to carry out the conspiracy. The conspiracy resulted in a series of worldwide price increases including eight in the United States led by UCAR, the leading U.S. producer. Specifically, UCAR raised graphite electrode prices in the United States from $.95/lb. in 1992 to $1.56/lb. in 1997, affecting approximately $1.7 billion in United States commerce.

[7] Fukushima returned to Tokyo as General Manager of the Carbon Business Development Department overseeing Mitsubishi's ownership interest in UCAR.

[8] Needle coke is a raw material used in the manufacturer of electrodes. Mitsubishi is a principal supplier of needle coke in Japan.

Not only were high-ranking Mitsubishi officials aware of the cartel, but so were the company's Export Managers who sold electrodes on behalf of the Japanese conspirators. They were told generally of cartel meetings, volume allocations, and agreed-upon price increases by the Japanese producers. This was necessary so that agreed-upon price increases would hold and so that collusive pricing at accounts, especially the elimination or reduction of discounts, could be managed.[9]

As the conspiracy progressed, Fukushima and other Mitsubishi sales personnel, both those seconded to UCAR and those in Japan, spoke of working cooperatively with competitors. For example, as UCAR sales personnel interacted with Mitsubishi sales personnel, cartel agreements and instances of non-compliance with the scheme were discussed.

Throughout the conspiracy, Mitsubishi continued to arrange meetings between Krass and the Japanese producers when Krass was in Japan and, as noted above, Fukushima frequently accompanied Krass on these visits.[10] At times, Fukushima briefed Krass before the meetings on market issues among the Japanese and on their efforts to increase prices. Occasionally, Fukushima remained with Krass during his meetings with the Japanese producers when cartel business was discussed. These briefings and conspiratorial visits, where Krass was

---

[9] There will also be evidence that MC Carbon, a wholly-owned subsidiary of Mitsubishi located in Tokyo, and a Mitsubishi employee located in Singapore, separately were actively involved in aiding and abetting the conspiracy in the Far East.

[10] Fukushima's superior, on occasion, accompanied him at these meetings.

escorted by Fukushima, continued even after Mitsubishi divested itself of its UCAR holdings.

Fukushima also acted as a line of communication between Krass and the Japanese conspirators to address cartel issues as they arose. Fukushima served as a conduit even after Mitsubishi sold its interest in UCAR. Fukushima knew Krass well and spoke English well, having been stationed in both the United States and England.

Just as Mitsubishi had hoped and planned when it made its investment in UCAR, the aforesaid cartel turned UCAR from a losing proposition to a very profitable one. In January 1995, Mitsubishi sold its ownership interest in UCAR to the Blackstone Group for $406 million. Mitsubishi's net profit on the UCAR investment was nearly $200 million. To ensure that the sale went through and that the conspiracy continued, Mitsubishi concealed the existence of the conspiracy from Blackstone when Mitsubishi's Hiroshi Kawamura falsely represented in the Agreement of Sale that "neither Mitsubishi, UCAR, or any of their respective subsidiaries were engaged in any violation of U.S. law." In truth and fact, as Kawamura, Fukushima and others throughout Mitsubishi knew full well, the aforesaid conspiracy was in place and operating well with the continuing assistance of Mitsubishi.

VI. LEGAL DISCUSSION

Defendant Mitsubishi is charged with aiding and abetting a Sherman Act conspiracy. Accordingly, at trial the Government will offer evidence establishing

the existence of that conspiracy. Discussed below are certain relevant legal issues that may arise in this case.

A. Liability Under 18 U.S.C. § 2 (Aiding and Abetting)

Defendant Mitsubishi is charged as an aider and abettor in the aforesaid conspiracy pursuant to 18 U.S.C. § 2 which provides in relevant part as follows:

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

18 U.S.C. § 2(a).

The aiding and abetting statute does not create a separate offense. It simply makes those who aid and abet a crime punishable as principals. United States v. Galiffa, 734 F.2d 306, 312 (7th Cir. 1984). One can be guilty of aiding and abetting even if he lacks the capacity to be guilty as a principal. United States v. Tokoph, 514 F.2d 597 (10th Cir. 1975); United States v. Kale, 661 F. Supp. 724, 726 (E.D. Pa. 1987). Thus, defendant Mitsubishi may not argue that its status as a trading house (as distinguished from that of a producer of electrodes) allows it to escape liability as an aider and abettor of the charged conspiracy.

Liability for aiding and abetting extends to corporations and, as with other substantive crimes, one may be guilty of aiding and abetting a conspiracy in violation of the Sherman Act. United States v. Portac, Inc., 869 F.2d 1288, 1293 (9th Cir. 1989). Further, just as one may aid and abet an ongoing conspiracy, United States v. Lane, 514 F.2d 22, 26-27 (9th Cir. 1975), one may also aid and abet

the formation of a conspiracy by bringing the parties together to enter into the illicit agreement. United States v. Galiffa, 734 F.2d at 309. In the instant case, the evidence will show that defendant Mitsubishi did just that, i.e., it counseled, induced and encouraged UCAR and other electrode producers to meet and agree to fix prices.

There is no requirement that the defendant know all the particulars of the substantive offense, United States v. Lane, 514 F.2d at 27, or that his acts occur at any particular time in relation to the commission of the substantive crime. As the court said in United States v. Barnett, 667 F.2d 835 (9th Cir. 1982):

> The fact that the aider and abettor's counsel and encouragement is not acted upon for long periods of time does not break the actual connection between the commission of the crime and the advice to commit it. "It is only necessary that the appellant counseled and advised the commission of the crime, and that the counsel and advice influenced the perpetration of the crime. We know of no rule of law which fixes a time limit within which the crime must be perpetrated." Workman v. State, 216 Ind. 68, 21 N.E.2d 712, 714 (1939).

667 F.2d at 841. In this case, the Government's evidence will show that the defendant's aiding and abetting activities began in 1990, well in advance of the commencement of the charged Sherman Act conspiracy. This evidence is not extrinsic evidence, but evidence of the crime itself of aiding and abetting the formation of the conspiracy.

All that is required for conviction under 18 U.S.C. § 2 is proof of the substantive crime and that the defendant, with knowledge of that crime, acted in some way with intent to facilitate it or 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 extent of the defendant's actions necessary to support a conviction was set forth by the Third Circuit in United States v. Bey, 736 F.2d 891 (3d Cir. 1984), when it wrote:

> To support a conviction on a charge of aiding and abetting another to commit a crime, the prosecution must show that the defendant "in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, that he [sought] by his action to make it succeed." Nye & Nissen v. U.S., 336 U.S. 613, 619, 69 S.Ct. 766, 769, 93 L.Ed. 919 (1949) (quoting U.S. v. Peoni, 100 F.2d 401, 402 (2d Cir. 1948)). See also U.S. v. Newman, 490 F.2d 139, 143 (3d Cir. 1974).

736 F.2d at 895. Thus, it is not incumbent on the Government to demonstrate that, but for the actions of the defendant, the substantive crime would not have been committed or even that those who committed the crime depended to any great degree on the defendant for completion of the crime.

Finally, the applicable statute of limitations on a charge of aiding and abetting is that which pertains to the underlying offense, United States v. Campbell, 426 F.2d 547, 553 (2d Cir. 1970), and the statute does not begin to run until completion of the last act of that offense. United States v. Kale, 661 F. Supp. 724, 726 (E.D. Pa. 1987).

B. The Sherman Act Conspiracy

1. Conspiracy Under the Sherman Act

In a Sherman Act conspiracy case the agreement itself constitutes the complete criminal offense. Nash v. United States, 229 U.S. 373, 378 (1913).

Therefore, it is not necessary that any overt acts in furtherance of the conspiracy be alleged or proved. United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 224-25 n.59, reh'g denied, 310 U.S. 658 (1940); United States v. Tedesco, 441 F. Supp. 1336, 1339 (M.D. Pa. 1977). A conspiracy that "contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up" is a single continuing conspiracy, United States v. Kissel, 218 U.S. 601, 607 (1910), even though it may embrace many lesser agreements, for example, the elimination of discounts at specific accounts. United States v. Consolidated Packaging Corporation, 575 F.2d 117, 128 (7th Cir. 1978).

In the instant case the Government's evidence will establish the existence of a single worldwide conspiracy to suppress and eliminate competition in the graphite electrode industry by, inter alia, agreeing to fix prices, agreeing to follow price increases led by respective home market leaders, and agreeing to maintain respective market shares of the conspirator companies.

2. Elements of a Sherman Act Conspiracy (Price Fixing is Per Se Unlawful)

Section 1 of the Sherman Act (15 U.S.C. § 1) declares every contract, combination, and conspiracy in restraint of trade to be illegal. The elements of a Sherman Act conspiracy are:

(1) that the conspiracy was knowingly formed and joined at or around the time alleged;

(2) that the defendant knowingly joined the conspiracy; and

(3) that the conspiracy concerned goods or services in interstate or foreign commerce.

United States v. Trenton Potteries Co., 273 U.S. 392, 397-99 (1927).

Conspiracies between firms to fix prices are per se violations of Section 1 of the Sherman Act. See e.g., F.T.C. v. Superior Court Trial Lawyers Ass'n., 493 U.S. 411, 435-36 (1990); United States v. Fischbach & Moore, Inc., 750 F.2d 1183, 1192, 1196 (3d Cir. 1984), cert. denied, 470 U.S. 1085 (1984). In reaffirming the validity of the per se proscription, the United States Supreme Court has stated that when prices are fixed, "[t]he character of the restraint produced by such an agreement is considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in which the arrangement may be found." Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984). In a price-fixing case, therefore, the prosecution need not prove that the conspiracy had an anticompetitive effect on the market. See United States v. Fischbach & Moore, Inc., 750 F.2d at 1192, 1196. Thus, the price-fixing conspiracy charged herein cannot be excused or justified because the prices set were reasonable, or because the conspirators were motivated by good intentions or business necessity. See National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 102, n.23 (1984) (good motives will not validate an otherwise anticompetitive practice); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980) (reasonableness of prices is irrelevant); United States v. Socony-Vacuum Oil Co., 310 U.S. at 221-22 (claims of competitive abuses do not justify a Sherman Act violation); Paramount Famous Lasky Corp. v.

United States, 282 U.S. 30, 44 (1930) (Sherman Act's prohibitions cannot be evaded by good motives). In fact, because such agreements are per se illegal without regard to whatever economic justification a particular agreement may be thought to have, no inquiry into the reasonableness of a particular per se agreement is permitted. See United States v. Socony-Vacuum Oil Co., 310 U.S. at 218-22, 224.

One corollary to the rule of per se illegality is that economic data is not relevant to any issue except the existence of an agreement. See Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 468 (1941); United States v. Socony-Vacuum Oil Co., 310 U.S. at 222-23.

3. Background Evidence of Pre-Conspiracy Activity by Co-Conspirators Is Admissible

Where the conspiracy is alleged to be a continuing one, courts have routinely admitted evidence of events or conduct occurring before the period covered by the statute of limitations or the conspiratorial period charged in the indictment. See United States v. United States Gypsum Co., 600 F.2d 414, 417-18 (3d Cir.), cert. denied, 444 U.S. 884 (1979); United States v. Enright, 579 F.2d 980, 988 (6th Cir. 1978); United States v. Continental Group, Inc., 456 F. Supp. 704, 719 (E.D. Pa. 1978). Such evidence will be particularly important in this case, where the conspiracy to fix prices worldwide was preceded by more modest attempts to fix prices in particular geographic regions. These regional agreements, although short-lived, provide the context within which the charged conspiracy arose, i.e., they show why Mitsubishi thought the global market was ripe for the worldwide conspiracy it

hoped to put into place. In addition, the Government will introduce evidence of the dealings between Krass and Koehler and between Krass and the Japanese producers prior to March 1992. Such evidence is relevant to show the aims and objectives of the conspiracy as they developed over time. In United States v. Dunham Concrete Products Inc., 475 F. 2d 1241 (5th Cir. 1973), cert. denied, 414 U.S. 832 (1973), the Court allowed testimony of price-fixing attempts over ten years before the charged conspiracy stating:

> Appellants contend that this testimony was inadmissible because it recounted events remote in time to the period 1966 to 1969 covered by the indictment. Although criminal defendants may not be convicted for acts occurring prior to the period of time spanned in the indictment, federal courts in antitrust cases have, for the purpose of showing intent, consistently admitted evidence of conduct prior to the time covered by the indictment.

475 F.2d at 1250 (citations omitted).

The law is well-settled that in proving a criminal antitrust conspiracy and its purposes, the Government may introduce "background evidence" of acts and declarations occurring prior to the conspiratorial period charged in the indictment. The federal courts have allowed:

> evidence of uncharged acts to be introduced if the evidence is 'intricately related' to the acts charged in the indictment. Under this doctrine, evidence of uncharged criminal activity is admissible to provide the jury with a complete story of the crime on trial, to complete what would otherwise be a chronological or conceptual void to the story of the crime, or to explain the circumstances surrounding the charged crime.

United States v. Spaeni, 60 F.3d 313, 316 (7th Cir. 1995), cert. denied, 516, U.S. 997 (1995) (citations omitted). In United States v. Ramos, 971 F. Supp. 186, 191

(E.D. Pa.1997), aff'd 151 F.3d 1027 (3d 1998), the Court similarly stated that acts intrinsic to the crime are not proscribed by Rule 404(b). "Thus, an act is intrinsic to the charged act or crime if it is inextricably intertwined with the charged act or crime, in this case, the conspiracy, or is necessary to complete a coherent story of the crime charged. Id. at 192 (citations omitted). See also United States v. United States Gypsum Co., 600 F.2d 414, 417 (3d Cir.), cert. denied 444 U.S. 884 (1979) (rejecting contention "that the Government is limited in the proof of its case solely to those events which occurred during the statutory period"); United States v. General Electric Co., 82 F. Supp. 753, 903 (D.N.J. 1949) ("In antitrust cases, it is deemed essential to develop fully the background facts out of which the conspiracy is alleged to have risen and in the midst of which it operated").

4. Interstate and Foreign Trade and Commerce

The jurisdictional reach of the Sherman Act is as inclusive as the power to regulate under the Commerce Clause of the Constitution. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194 (1974); United States v. Foley, 598 F.2d 1323, 1327 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980). Thus, the interstate commerce element in Sherman Act cases is established by proof that the conspirators' business activity is either in the flow of interstate or foreign commerce (the "in commerce" or "flow" theory) or had an effect on some other appreciable activity demonstrably in interstate or foreign commerce (the "effect on commerce" or "effects" theory). McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232,

242 (1980); United States v. Foley, 598 F.2d at 1328-31; United States v. Cargo Service Stations, Inc., 657 F.2d 676, 679-80 (5th Cir. 1981) (en banc), cert. denied, 455 U.S. 1017 (1982). "[J]urisdiction is established if any one of [the allegations on interstate commerce] satisfies either of the criteria for interstate commerce." Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48, 51 (3d Cir. 1973).

The interstate commerce element in this instant case will be established through proof that the conspirators, as part of their normal business activity, sold substantial quantities of graphite electrodes across state lines and into and out of the United States in a continuous and uninterrupted flow of interstate and foreign commerce.

C. Corporate Liability

Applicable in this case to Mitsubishi's responsibility in aiding and abetting the charged conspiracy is the well settled principle that a corporation can only act through its officers, employees or agents and is legally responsible for their conduct when undertaken within the scope of their employment or apparent authority.

The Third Circuit has held that corporations may be liable for antitrust violations committed by their officers. In United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971), presidents and vice presidents of corporations charged with price fixing appealed the trial court's jury instructions on corporate liability. The Third Circuit held that the instruction appropriately articulated the law of corporate liability, i.e., that to find the defendant corporations guilty the agents must have acted "within

the scope of their employment or their apparent authority." The Court then defined the two operative terms:

> Acts within the scope of employment are acts done on behalf of a corporation and directly related to the performance of the type of duties the employee has general authority to perform. Apparent authority is the authority which outsiders could reasonably assume that the agent would have, judging from his position with the company, the responsibilities previously entrusted to him, and the circumstances surrounding his past conduct.
>
> When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.

433 F.2d at 204-05.

When an authorized or apparently authorized agent or employee commits a criminal act, a corporation is liable even if it did not specifically authorize the act and even if the act violated corporate policies or express instructions. United States v. Automated Medical Laboratories, Inc., 770 F.2d 399, 406-07 (4th Cir. 1985); United States v. Basic Construction Co., 711 F.2d 570, 573 (4th Cir.) (per curiam), cert. denied, 464 U.S. 956 (1983); United States v. Cincotta, 689 F.2d 238 (1st Cir.), cert. denied, 459 U.S. 991 (1982); United States v. Koppers Co., 652 F.2d 290, 298 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d at 204-205; United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004-07 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973). Acts done to benefit or further a corporation's business are within the scope of an individual's employment. United States v. One Parcel of Land Located at 7326

Highway 45 North, Three Lakes, Oneida County, Wisconsin, 965 F.2d 311, 316 (7th Cir. 1992) (acting within the scope of agency is defined as acting at least in part by an intent to benefit the corporation); United States v. Gold, 743 F.2d 800, 823 (11th Cir. 1984), cert. denied, 469 U.S. 1217 (1985); United States v. Koppers Co., 652 F.2d at 298; United States v. Automated Medical Laboratories, Inc., 770 F.2d at 406. Actual benefit is irrelevant; it is the employee's intent to benefit that is determinative. Standard Oil Co. v. United States, 307 F.2d l20, l28 (5th Cir. l962).

As an artificial entity, a corporation cannot in and of itself have "intent." When a corporation is held liable for crimes in which intent is an element, its liability is predicated entirely on the knowledge and purpose of its owners, officers, employees and agents. See United States v. Basic Constr. Co., 711 F.2d at 573; United States v. Steiner Plastic Mfg. Co., Inc., 231 F.2d 149, 153 (2d Cir. 1956); United States v. Gibson Prod. Co., Inc., 426 F. Supp. 768, 770 (S.D. Tex. 1976).

D. Evidence of Defendant's Pre-Conspiracy Aiding and Abetting Activities Is Admissible

The Indictment in this case charges defendant Mitsubishi with aiding and abetting a worldwide price-fixing conspiracy that began "at least as early as March 1992." Indictment ¶ 2. The Indictment further charges that defendant aided and abetted this conspiracy, in part, by "counseling, inducing, and encouraging" its formation. Indictment ¶ 4(a). The Government will offer evidence of two types of defendant's pre-conspiracy activities: (a) direct evidence of the charged offense, i.e., actions by defendant to induce and encourage the formation of a price-fixing

conspiracy among UCAR and its competitors worldwide, and (b) evidence of Mitsubishi's plans to encourage such a price-fixing scheme.

Direct evidence of defendant's aiding and abetting clearly is not "[e]vidence of other crimes, wrongs, or acts" within the province of Rule 404(b) because it is evidence of the crime itself. United States v. Blyden, 964 F.2d 1375, 1378 (3d Cir. 1992) (when evidence of another crime is necessary to establish an element of the offense being tried, there is no "other crime."). United States v. Conley, 878 F. Supp.751, 755 (W.D. Pa. 1994) (evidence of uncharged "other crimes, wrongs, and acts" which are "part and parcel" and which tends to directly and intrinsically establish the defendant's participation in the charged offense, is simply not evidence of other crimes, wrongs, and acts. Rule 404B is not implicated by such evidence.) United States v. Butch, 48 F. Supp. 2d 453, 458 (D.N.J. 1999). The earliest evidence proffered by the Government, i.e., evidence that defendant began to formulate its scheme to encourage a worldwide price-fixing conspiracy as early as 1990, likewise is evidence of the crime itself and is not extrinsic "other act" evidence subject to Rule 404(b). Id.

In United States v. Andreas, 216 F.3d 645 (7th Cir. 2000), cert. denied, 2000 WL 162 4502 (2000), the Court stated "'[o]ther crimes or acts' does not include those acts that are part and parcel of the charged crime itself; they simply are not 'other.'" 216 F.3d at 665. As the Andreas Court explained, to omit such evidence "would leave unanswered some questions regarding the charged offense." Id. The proper question is "'whether the evidence is properly admitted to provide the jury with a

complete story of the crime . . . .'" Id., quoting United States v. Ramirez, 45 F.3d 1096, 1102 (7th Cir. 1995). In this case, the proffered evidence of Mitsubishi's investment in UCAR and its concurrent efforts to encourage a price-fixing conspiracy among UCAR and its competitors is necessary to the jury's full understanding of defendant's conduct as charged in the Indictment.

In United States v. Lambert, 995 F.2d 1006, 1007 (10th Cir.), cert. denied, 510 U.S. 926 (1993), an appellate court again held that planning evidence was not extrinsic evidence covered by Rule 404(b). In Lambert, the defendant challenged admission of evidence of his discussions with an accomplice in which potential targets for a bank robbery were discussed. 995 F.2d at 1007. Even though the challenged discussion did not focus on defendant Lambert's actual robbery victim, but on an entirely different potential target, the court found that the discussion was intrinsic to the planning for the charged offense and not covered by Rule 404(b). Id. Quoting United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990), the Tenth Circuit stated that "'[o]ther act evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged'" (emphasis added). United States v. Lambert, 995 F.2d at 1007. In the instant case, evidence of Mitsubishi's plan to encourage the formation of a worldwide price-fixing conspiracy was a necessary preliminary to the very crime with which it is charged, aiding and abetting such a conspiracy. Thus, again, such evidence is not extrinsic evidence within the province of Rule 404(b).

E. Statements of Defendant and its Individual And Corporate Agents Are Admissions

Under the provisions of Fed. R. Evid. 801(d)(2)(D), statements by a party's agent or employee concerning a matter within the scope of the agency or employment and made during the existence of the relationship are not hearsay. The existence of an agency relationship is a matter for preliminary determination by the Court under Fed. R. Evid. 104(a). Hilao v. Estate of Marcos, 103 F.3d 767, 775 (9th Cir. 1996); United States v. Flores, 679 F.2d 173, 178 (9th Cir. 1982), cert. denied, 459 U.S. 1148 (1983).

An agent may bind its principal if there is actual authority to act or if there is implied or apparent authority to do so. National Risk Management, Inc. v. Brumwell, 819 F. Supp. 417, 434 (E.D. Pa. 1993). Agency need not be created by formal appointment, but can be inferred from other circumstances such as the statements and conduct of the parties. Crowe v. Hertz Corp., 382 F.2d 681, 688 (5th Cir. 1967); Don Kemper Co. v. Beneficial Standard Life Ins. Co., 404 F.2d 752, 756 (3d Cir. 1969).

Finally, acts and statements by a subsidiary corporation acting as an agent can be attributed to the parent corporation as principal. See, e.g., Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1373 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993); United States v. Johns Manville Corp., 231 F. Supp. 690, 698 (E.D. Pa. 1964).

1. <u>"Secondees" were Agents of Defendant</u>

The Government at trial will show that upon purchasing its 50% interest in UCAR, Mitsubishi sent certain of its employees, designated as "secondees," to work in UCAR's corporate offices in Danbury, Connecticut. Notwithstanding their physical location in Danbury and their temporary designation as UCAR employees, all of these secondees plainly remained agents of Mitsubishi, as evidenced by the following: (1) Mitsubishi insisted that UCAR accept Mitsubishi's secondees; (2) Mitsubishi reimbursed UCAR some of the cost of employing the secondees; (3) to the extent UCAR paid any secondee less than that secondee would have earned as a Mitsubishi employee, Mitsubishi paid that secondee the difference; (4) Mitsubishi reimbursed secondees for benefits they would have earned in Japan, but which were not provided to them by UCAR; (5) Mitsubishi directly reimbursed its secondees for certain travel and entertainment expenses through another of its U.S. subsidiaries, Carbonex; (6) Mitsubishi's secondees regularly and routinely reported back to their superiors at Mitsubishi concerning the activities of UCAR and their specific activities as secondees; (7) some Mitsubishi secondees maintained home fax machines so that they could secretly communicate with Mitsubishi without UCAR's knowledge; (8) time served as a secondee counted toward seniority within Mitsubishi; (9) Mitsubishi secondees did in fact return to positions at Mitsubishi; and (10) Mitsubishi's own documents state that the secondees had "two faces," <u>i.e.</u>, secondees served both UCAR and Mitsubishi.

2. Certain of its U.S. Subsidiaries Were Agents of Defendant

The Government will further show at trial that three U.S. subsidiaries of Mitsubishi acted as its agents during the period relevant to this case, i.e., MIC, MIC Consulting, Inc. and Carbonex. MIC, a wholly-owned subsidiary of Mitsubishi, played a key role in the analysis of the prospective UCAR investment, subsequent negotiation for that investment, and oversight of the investment. Specifically, MIC[11] executives regularly worked with Mitsubishi's Project Atlas team, the team responsible for the UCAR investment. MIC also served as a U.S. repository of documents related to the investment. MIC Consulting, Inc. similarly played a key role in analyzing, negotiating and overseeing the investment. Indeed, MIC Consulting, Inc., a subsidiary jointly owned by Mitsubishi and MIC, entered into a contractual arrangement with Mitsubishi for this very purpose. Finally, Carbonex, also jointly owned by Mitsubishi and MIC, also acted as Mitsubishi's agent by holding itself out as a prospective "dummy" company through which Mitsubishi might distribute Japanese electrodes. In addition, Carbonex was used as a vehicle through which Mitsubishi's secondees had certain expenses reimbursed, including expenses incurred by secondees engaged in aiding and abetting the charged conspiracy.

[11] Certain MIC executives simultaneously held executive titles at Carbonex and the defendant Mitsubishi.

F. Documents Obtained from MIC Are Authentic and Are Admissible as Admissions and/or Business Records

1. The MIC Documents Are Authentic

Rule 901(a) of the Federal Rules of Evidence provides as follows:

> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

In In re: Japanese Elec. Prod. Antitrust Litg., 723 F.2d 238, 285 (3d Cir. 1983), rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Third Circuit noted that under 901(a) "[a]ll that is required is a foundation from which the fact-finder could legitimately infer that the evidence is what its proponent claims it to be." The burden of proof for authentication is slight. United States v. Reilly, 33 F.3d 1396, 1404 (3d Cir. 1994). If authenticity is disputed, the dispute is to be resolved by the jury. See also United States v. Goichman, 547 F.2d 778, 784 (3d Cir. 1976).

Authenticity may be determined by the surrounding circumstances and by the appearance and contents of the documents. Fed.R.Evid. 901(b)(4). In In re: Japanese Elec. Prod. Antitrust Litg., the Third Circuit held that unsigned typewritten documents which appeared to be minutes of a meeting and which were produced from a stack of similar minutes of monthly meetings were sufficiently authenticated because, among other things, "[t]hey have the appearance, content and substance typical of minutes." 723 F.2d at 286. In McQueeney v. Wilmington

Trust Co., 779 F.2d 916, 929 (3d Cir. 1985), the Third Circuit held that the plaintiff's Sea Service Records were authentic because, inter alia, "the contents tend to support their claim to authenticity." As the Third Circuit more recently observed:

> Fed.R.Evid. 901(b) provides examples of appropriate methods of authentication. These examples include '[t]estimony that a matter is what it is claimed to be,' Rule 901(b)(1), and '[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances,' Rule 901(b)(4). Thus, '[i]t is clear that the connection between a message (either oral or written) and its source may be established by circumstantial evidence.' United States v. Addonizio, 451 F.2d 49, 71 (3d Cir. 1971), cert. denied, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812 (1972). Moreover, '[a]ny combination of items of evidence illustrated by Rule 901(b) . . . will suffice so long as Rule 901(a) is satisfied.' 5 Weinstein's Evidence ¶901(b)(1)[01] at 901-32. Finally, '[t]he burden of proof for authentication is slight.' Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918, 927 (3d Cir. 1986) (quoting McQueeney v. Wilmington Trust Co., 779 F.2d 916, 928 (3d Cir. 1985)). We have explained that
>
> > 'the showing of authenticity is not on a par with more technical evidentiary rules, such as hearsay exceptions, governing admissibility. Rather, there need be only a prima facie showing, to the court, of authenticity, not a full argument on admissibility. Once a prima facie case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court. The only requirement is that there has been substantial evidence from which they could infer that the document was authentic.'
>
> McGlory, 968 F.2d at 328-29 (quoting Link, 788 F.2d at 928 (quoting United States v. Goichman, 547 F.2d 778, 784 (3d Cir. 1976)) (emphasis omitted).

United States v. Reilly, 33 F.3d 1396, 1404 (3d Cir. 1994).

> "The Federal Rules of Evidence take a flexible approach to this issue."

United States v. Gonzalez-Maldonado, 115 F.3d 9, 20 (1st Cir. 1997). "There is no single way to authenticate evidence." United States v. Holmquist, 36 F.3d 154, 167 (1st Cir. 1994). "[A] document's '[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances,' can, in cumulation, even without direct testimony, provide sufficient indicia of reliability to permit a finding that it is authentic." United States v. Holmquist, 36 F.3d at 167 (quoting Fed.R.Evid. 901(b)(4)); United States v. McGlory, 968 F.2d 309, 329 (3d Cir. 1992), cert. denied, 506 U.S. 956 (1992) (Despite government inability to establish fully by expert opinion defendant's authorship of handwritten notes seized from his garage and residence, jury could find that defendant authored the notes from fact that they were seized from trash outside defendant's known residence, that some of the notes were torn from notebook found in one of defendant's residences, that some notes were contained in same garbage bags as other identifying information and that some notes were written on note paper from hotels at which defendant stayed.). Thus, the direct testimony of a custodian or a percipient witness is not required. United States v. Holmquist, 36 F.3d at 167.

Moreover, "the burden of authentication does not require the proponent of the evidence to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be. Rather, the standard for authentication, and hence for admissibility, is one of reasonable likelihood." United States v. Holmquist, 36 F.3d at 168; United States v. Alicea-Cardoza, 132

F.3d 1, 4 (1st Cir. 1997) (quoting United States v. Holmquist, 36 F.3d 154, 168 (1st Cir. 1994)).

The author of a document need not be established to authenticate it. In United States v. Echeverri, 982 F.2d 675, 680 (1st Cir. 1993), the First Circuit stated that the Government was not required to authenticate a drug ledger with conclusive proof of the author's identity. According to the court, "[w]hether [the defendant], his co-conspirator, or some third person was the one who actually put pen to paper and wrote down the figures is of no moment . . . . the evidence that identified the document as a drug ledger was the key to the issue of authentication." 982 F.2d at 680. In fact, anonymous or unsigned documents may be authenticated if the document is "sufficiently distinctive, ... within the meaning of Fed.R.Evid. 901(b)(4)." United States v. Bello-Perez, 977 F.2d 664, 672 (1st Cir. 1992); see also United States v. Newton, 891 F.2d 944, 947 (1st Cir. 1989) (authentication of unsigned document based on internal references to information relating to the defendant's wife, lawyer and aliases).

Accordingly, the mere fact that the document came from the files of a co-conspirator may, in appropriate circumstances, be enough to warrant its admission. United States v. Eisenberg, 807 F.2d 1446, 1452 (8th Cir. 1986); United States v. Black, 767 F.2d 1334, 1341-42 (9th Cir. 1985), cert. denied, 474 U.S. 1022 (1985).

2. The MIC Records Are Admissions and/or Business Records

The Government intends to introduce various documents produced by

Mitsubishi internatonal Corporation in response to grand jury subpoenas. Documents of Mitsubishi corporation located in Tokyo were beyond the scope of the subpoena, but many Mitsubishi corporation documents were contained in the files of MIC.

MIC produced the grand jury documents with an affidavit dated May 28, 1998, and signed by Hiroshi Sato, Vice President and General Manager. The affidavit stated in part:

> 3. A complete and comprehensive search was made of MIC's files for the documents called for in the subpoena as modified.
>
> 4. All documents that were located in the search that are responsive to the subpoena as modified are included in the documents MIC has produced in response to the subpoena, except for documents listed on the privilege log being supplied by MIC's counsel.
>
> 5. All documents which MIC has produced to the grand jury are authentic and genuine.

A similar affidavit accompanied a further production of grand jury documents by MIC on September 21, 1999.

All of the MIC documents which the Government intends to introduce at trial are admissible as admissions. Any document made by the defendant or the defendant's agent, qualifies as admission. McQueeney v. Wilmington Trust Co., 779 F.2d at 930; United States v. Evans, 572 F.2d 455, 487-88 (5th Cir.), reh'g denied, 576 F.2d 931, cert. denied, 439 U.S. 870 (1978) . As noted above, acts and statements by a subsidiary corporation acting as an agent are attributable to the parent as principal. See e.g., Big Apple BMW, Inc. v. BMW of North America, Inc.,

974 F. 2d 1358, 1373 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1992). Accordingly, the records of MIC, Mitsubishi's subsidiary acting as its agent in connection with the UCAR investment, are the admissions of defendant Mitsubishi.

The aforesaid documents are also admissible as business records under Fed.R.Evid. 803(6). Whether such documents are business records is a question for the Court under Fed.R.Evid 104(a). In making this determination the Court is not bound by the rules of evidence. Japanese Electronic Products, 723 F.2d at 287-88. The Court may make its determination relying upon documentary evidence, affidavits, admissions of parties or by any other circumstantial evidence. It is not necessary that a custodian of records physically appear and testify. Id. at 288 ("It would make little sense to require live witness testimony every time a business record is offered when from the other materials open for the court's consideration, it can make the required finding to its own satisfaction."). The burden is upon the proponent to show that the documents meet the requirements of the business records exception by a preponderance of the evidence. Id. at 287-88.

The trustworthiness of business records is inherent in the fact that they are routinely made to reflect the day-to-day operations of the business and are relied upon for important decisions in the business world. See e.g., Palmer v. Hoffman, 318 U.S. 109, 112-114 (1943). The business records of any corporation, to the extent they are relevant, are admissible against all defendants as evidence of the transactions to which they relate. See Carroll v. United States, 326 F.2d 72, 78 (9th Cir. 1963). The records or statements of other wholly independent companies

that are found in the files of the company of the qualifying witness may also be admitted as business records "if witnesses testify that the records are integrated into a company's records and relied upon in its day to day operations." Matter of Ollag Construction Equipment Corp., 665 F.2d 43, 46 (2d Cir. 1981). See also United States v. Jakobetz, 955 F.2d 786, 800-01 (2d Cir.), cert. denied, 506 U.S. 834 (1992) (approving admission of bridge toll receipt that had been made a part of defendant's expense reports).

In the instant case, the proffered documents reflect Mitsubishi's extensive use of MIC in connection with the UCAR investment, i.e., analysis of the prospective investment, negotiations leading to the investment, management of the investment, divesture of the investment, and expenses and issues relating thereto. In addition, the Government will elicit testimony from appropriate MIC personnel attesting to the fact that the documents in question were authentic, maintained by MIC and produced to the grand jury in response to a subpoena duces tecum.

G. A Witness May Testify About Whether An Agreement Or Understanding Was Reached by the Conspirators

In order to prove the defendant guilty of aiding and abetting a price-fixing conspiracy, the Government must prove that there was, in fact, a conspiracy. The central issue in any price-fixing conspiracy is whether the defendant is a member of the conspiracy. Accordingly, a witness should be permitted to testify as to whether an agreement was reached in any particular transaction or conversation. United States v. MMR Corp. (LA), 907 F.2d 489, 495-96 (5th Cir. 1990), cert. denied, 499

U.S. 936 (1991). Such testimony is proper because it describes a key fact in the case, and is based upon the witness's own personal observations, knowledge and inferences. Fed.R.Evid. 602, 701. Furthermore, the evidence is not excludable on the theory that it invades the province of the jury or that it calls for a conclusion of the witness. Fed.R.Evid. 701, 704, United States v. Smith, 550 F.2d 277, 281 (5th Cir.), cert. denied, 434 U.S. 841 (1977).

H. A Lay Witness May Testify Regarding The Meaning of Certain Terms

A related matter concerns a conspirator's understanding of certain terms used by Mitsubishi. There will be testimony that Mitsubishi agents encouraged conspirators to "cooperate with the competition," "harmonize prices," "get to know the competition," and words to that effect. The Government may question witnesses about their understanding of the meaning of certain words or phrases used by Mitsubishi personnel. The Government may also ask such witnesses whether others attributed the same meaning to such words or phrases. Such testimony is specifically authorized by Fed.R.Evid. 701, under which lay witness opinion or inference testimony is admissible if it is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." See United States v. Williams, 952 F.2d 1504, 1518 (6th Cir. 1991) (lay opinion admissible where rationally based upon witness's perception); Swajian v. General Motors Corp., 916 F.2d 31, 36 (1st Cir. 1990); United States v. Towns, 913 F.2d 434, 445 (7th Cir. 1990); United States v.

Rea, 958 F.2d 1206, 1214-15 (2d Cir. 1992). "Rationally based" means only that the opinion or inference is one which a normal person would form on the basis of the observed facts. 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 701[02] at 701-18 (1988). The "admissibility of lay opinion testimony is within the sound discretion of the trial court." United States v. Huddleston, 810 F.2d 751, 754 (8th Cir. 1987).

In essence, a witness may give his opinion, under Rule 701, about the state of mind of another person, including the defendant. United States v. Guzzino, 810 F.2d 687, 699 (7th Cir.), cert. denied, 481 U.S. 1030 (1987); United States v. Rea, 958 F.2d at 1214-15; United States v. Fowler, 932 F.2d 306, 312 (4th Cir. 1991); United States v. Thompson, 708 F.2d 1294, 1298 (8th Cir. 1982), reh'g and reh'g en banc denied (1983). Such testimony is merely a "shorthand rendition of [his] knowledge of the total situation and collective facts." Id.; United States v. McClintic, 570 F.2d 685, 690 (8th Cir. 1978); United States v. W.F. Brinkley & Son Construction Co., 783 F.2d 1157, 1158-59 (4th Cir. 1986); Cf. United States v. Continental Group., Inc., 603 F.2d at 468 n.5 (co-conspirator permitted to explain his understanding of the meaning of silence at conspiratorial meetings).

I. Definiteness of Recollection

Some of the earliest acts of Mitsubishi aiding and abetting the charged conspiracy go back approximately ten years. In light of this passage of time, witnesses may have difficulty recalling precisely certain events and conversations. Given the difficulty of recalling conversations precisely, the law permits a witness

to testify to the substance or effect of a conversation, or to his "understanding" or "impression" of its meaning, if he cannot recall its details. VII Wigmore, Evidence, § 2097 (Chadbourne Rev. 1978). Testimony in the form of a witness's "impressions" or "beliefs" is admissible so long as the witness has a minimal present recollection of the events to which he is testifying. Exact recollection is not required. III Wigmore, Evidence, § 726 and 728 (Chadbourne Rev. 11970); McCormick, Evidence, § 910 at 21-22 (2d ed. 1972); Graham, Handbook of Federal Evidence, § 602.2 (1981).

The Indictment charges Mitsubishi with aiding and abetting a conspiracy beginning at least as early as March 1992. Acts of aiding and abetting in the formation of the conspiracy go back even further. Some witnesses may qualify their testimony by such expressions as "I think," "I believe," or "to the best of my recollection." Language differences increase the difficulty of precisely recounting statements. Since these qualifications go to the weight of the testimony and not its admissibility, such testimony is admissible over objection that it is not based upon the witness's personal knowledge. See United States v. Powers, 75 F.3d 335, 340 (7th Cir. 1996); Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 927 (2d Cir. 1977).

In addition, the Government's witnesses may not always be able to specify the exact dates of particular communications. Instead, the witnesses may have a general recollection of meetings or conversations, and although they may be certain that they participated in a number of such meetings and conversations, they may

have difficulty distinguishing one specific meeting or conversation from another. There were many meetings and phone conversations among co-conspirators and the defendant which furthered the conspiracy. Although the Government's witnesses will identify a number of specific meetings and conversations, under the circumstances it will be understandable if the witnesses cannot distinguish each meeting or conversation that was the subject of the conspiracy. Nonetheless, it will be important for the jury to hear about all of the meetings and conversations so that the jury will understand the full scope and nature of the conspiracy.

Fed.R.Evid. 602 requires that a witness have personal knowledge of the matters about which he testifies, but does not require that a witness's recollection be perfect or certain. United States v. Evans, 484 F.2d 1178, 1181 (2d Cir. 1973). All that is required for the testimony to be admissible is that there be some evidence to support a finding that the witness observed or had an opportunity to observe the matters about which he testifies. Id. "The judge should admit the testimony if the jury could find that the witness perceived the event to which he is testifying, since credibility is a matter for the jury." 3 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 602[02] at 602-11 (1993). See also United States v. Allen, 10 F.3d 405, 414 (7th Cir. 1993). For example, in United States v. Lyon, 567 F.2d 777, 783-84 (8th Cir. 1977), cert. denied, 435 U.S. 918 (1978), the Eighth Circuit approved the admission of testimony despite the witness's lack of independent recollection of the matters about which he testified. The court held that Rule 602 only excludes testimony concerning a matter the witness did not observe or had no

opportunity to observe. Similarly, in M.B.A.F.B. Fed. Credit Union v. Cumis Ins. Soc., Inc., 681 F.2d 930 (4th Cir. 1982), the Fourth Circuit stated:

> Rule 602, however, does not require that the witness' knowledge be positive or rise to the level of absolute certainty. Evidence is inadmissible under this rule only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to.

681 F.2d at 932.

Testimony based on imperfect recollection also is admissible over the objection that it is "opinion" or "speculation" whenever the witness either observed or participated in the circumstances about which he is testifying. The witness's lack of definitiveness is for the jury to evaluate. S.E.C. v. Singer, 786 F. Supp. 1158, 1165-66 (S.D.N.Y. 1992) (witness's belief that he informed defendant of certain facts admissible); United States v. Cranston, 686 F.2d 56, 60 n.1 (1st Cir. 1982) (witness allowed to testify that he believed telephone call was with a certain individual, although he was not certain); Tripp v. United States, 381 F.2d 320, 321 (9th Cir. 1967) (the contention that testimony was vague and uncertain goes to its weight, not its admissibility).

J. Government May Impeach Its Own Witness

Many of the Government's witnesses are still employed by the co-conspirator companies implicated in the charged conspiracy. Moreover, many of these co-conspirator companies are now defendants in a private civil action brought by graphite electrode and other customers. Other witnesses are still employed by

Mitsubishi or one of its subsidiaries. Several of the Japanese conspirator companies have very close ongoing business relationships with Mitsubishi or its affiliate companies such as Mitsubishi Bank or Mitsubishi Chemical. Thus, some witnesses may be biased in favor of Mitsubishi. Accordingly, the Government may find it necessary to impeach its own witnesses. Fed.R.Evid. 607 permits the Government to impeach its own witness using his prior statements.

In United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101, 1108 (7th Cir.), cert. denied, 444 U.S. 840 (1979) the Government called four officers of corporate defendants who had previously testified before the grand jury. 598 F.2d at 1108. At trial, the witnesses gave testimony favorable to the defendants and inconsistent with their grand jury testimony. Id. The Government was then allowed to impeach the witnesses with their prior testimony, which was admitted into evidence. Id. The Seventh Circuit affirmed the impeachment, holding that "[u]nder Rule 607, . . . the government was permitted to impeach the witness it had called by introducing the inconsistent grand jury testimony. Such testimony was also substantive evidence." Id. at 1108.

A witness's prior inconsistent statements need not have been made during a grand jury proceeding in order to be used for impeachment purposes under Fed.R.Evid. 607. For example, in United States v. Carter, 973 F.2d 1509 (10th Cir. 1992), cert. denied, 507 U.S. 922 (1993), one of the Government's witnesses testified at trial in a manner inconsistent with prior statements he had given to a police officer. Id. at 1512. The Tenth Circuit held that it was proper for the District Court

to have permitted the Government to impeach its own witness, not only by referring to his prior inconsistent statements during the interview session with the police officer, but also by calling the police officer to the stand to testify about the nature and extent of the statements made during the interview session. Id.

K. Use of Leading Questions

1. Government May Use Leading Questions of Witnesses Identified With Defendant

Rule 611(c) of the Federal Rules of Evidence specifically provides that an attorney may ask leading questions on direct examination during the interrogation of a "hostile witness, an adverse party or a witness identified with an adverse party . . . ." See Chonich v. Wayne County Community College, 874 F.2d 359, 368 (6th Cir. 1989). Certain categories of witnesses are "automatically regarded and treated as hostile" under Rule 611(c), including officers, directors, employees and managing agents of a corporate adverse party. Notes of Advisory Committee on Proposed Rule 611, Subdivision (c); see also 3 Weinstein's Evidence, ¶ 611[05] at 611-81 & n.21 (1988); Ellis v. City of Chicago, 667 F.2d 606, 612 (7th Cir. 1981); see Haney v. Mizell Memorial Hosp., 744 F.2d 1467, 1478 (11th Cir. 1984); Perkins v. Volkswagen of America, Inc., 596 F.2d 681, 682 (5th Cir. 1979).

In this case, while certain witnesses will be testifying pursuant to plea agreements their employers have with the Government, they may nonetheless be hostile because of outstanding civil damage cases by customers, and close ongoing business ties with the defendant. The Government has latitude to lead co-

conspirators and witnesses whose testimony is instrumental to constructing the Government's case and to attempt to impeach him about those aspects of his testimony that conflict with the Government's account of the same events. See United States v. Eisen, 974 F.2d 246, 262 (2d Cir. 1992), cert. denied, 507 U.S. 1029 (1993). Courts also have permitted the use of leading questions in cases in which the witness was inarticulate and evasive, United States v. Stelivan, 125 F.3d 603, 608 (8th Cir. 1997), where the witness is openly hostile, United States v. Shursen, 649 F.2d 1250, 1254 (8th Cir. 1981), and where the witness has suffered a lapse of memory. United States v. Brown, 603 F.2d 1022, 1026 (1st Cir. 1979).

2. Government May Use Leading Questions With Foreign Witnesses

Leading questions are also permissible when the witness does not speak English well or where English is not the witness's first language in order to avoid the danger that the witness will misunderstand the questions and therefore answer incorrectly. Fed.R.Evid. 611(c) specifically provides that leading questions are allowed "to develop the testimony" of the witness. When a witness "does not appreciate the tenor of the desired details" it is a permissible exercise of the court's discretion to allow leading questions. III Wigmore on Evidence at § 778; United States v. Amjal, 67 F.3d 12, 16 (2d Cir. 1995).

In United States v. Rodriguez-Garcia, 983 F.2d 1563, 1570 (10th Cir. 1993), the Court found that it was not an abuse of discretion for the trial court to allow the Government to ask leading questions of its chief witness who did not speak English

and was testifying through an interpreter. The court reasoned that although the witness was not hostile or aligned with an adverse party, leading questions were permissible to develop the witness's testimony. The Court also noted that the Advisory Committee Notes provide for the use of leading questions where an adult has communication problems.

In United States v. Olivo, 69 F.3d 1057, 1065 (10th Cir. 1995), cert. denied, 519 U.S. 906 (1996), the Government's primary witness stated he was uncomfortable in the courtroom and hesitant to testify. In addition, he indicated he had difficulty understanding English. The Court, in reviewing the trial court's exercise of discretion in allowing leading questions, found ample basis in the record that leading questions were permissible because, among other reasons, the witness was having trouble communicating. Id.; see also United States v. Mulinelli-Navas, 111 F.3d 983, 990 (1st Cir. 1997) (where witness was, at times, "unresponsive or showed a lack of understanding," the prosecutor could use leading questions to assist in developing coherent testimony); United States v. Amjal, 67 F.3d at 15-16 (trial court did not abuse its discretion by allowing the prosecution to use leading questions with a principal witness who spoke little English and testified through a interpreter).

3. Defendant May Not Use Leading Questions When Cross-Examining Witnesses Identified With It

Fed.R.Evid. 611(c) also provides that leading questions should "ordinarily" be

permitted on cross-examination. The qualification "ordinarily" was included in the rule "to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact . . . ." Notes of Advisory Committee on Proposed Rule 611, Subdivision (c). Accordingly, courts have precluded defendants from using leading questions during cross-examination of prosecution witnesses who are identified with defendants' interests. See United States v. Bensinger Co., 430 F.2d 584, 591-92 (8th Cir. 1970) (in antitrust prosecution of manufacturer and one of its dealers, manufacturer precluded from using leading questions to cross-examine a dealer's representative); Mitchell v. United States, 213 F.2d 951, 954-56 (3d Cir. 1954), cert. denied, 348 U.S. 912 (1955) (in tax prosecution of husband and wife, defendant precluded from using leading questions to cross-examine prosecution witness who was employed by the husband and a good friend of the wife).

L. Prior Inconsistent Statements May Be Used As Substantive Evidence

Fed.R.Evid. 801(d)(1)(A) provides that an out-of-court statement of a witness who testifies at trial and is subject to cross-examination concerning the statement is not hearsay if the prior statement is "inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding." In essence, the rule allows a witness's grand jury testimony to be introduced as substantive evidence at trial if it is inconsistent with the witness's trial testimony. United States v. Hemmer, 729 F.2d 10, 17 (1st Cir.), cert. denied

sub nom. Randozza v. United States, 467 U.S. 1218 (1984); United States v. Marchand, 564 F.2d 983, 999 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978); United States v. DiCaro, 772 F.2d 1314, 1321 (7th Cir. 1985), cert. denied, 475 U.S. 1081 (1986).

Prior testimony is admissible if it is helpful in resolving a material, consequential fact in issue, and need not be "diametrically opposed" to or "logically incompatible" with a witness's current answers in order to be "inconsistent" within the meaning of Rule 801(d)(1)(A). United States v. Williams, 737 F.2d 594, 598 (7th Cir. 1984), cert. denied, 470 U.S. 1003 (1985) (inconsistency may be found in evasive answers, silence, a change in position, or a purported change in memory). Testimony is inconsistent under Rule 801(d)(1)(A) whenever a reasonable person could infer, comparing the two statements, that they were produced by inconsistent beliefs. United States v. Morgan, 555 F.2d 238, 242 (9th Cir. 1977).

Prior inconsistent statements are also admissible where the trial witness denies knowledge of or suffers a failure of recollection with respect to the matter at issue. United States v. Distler, 671 F.2d 954, 958-59 (6th Cir.), cert. denied, 454 U.S. 827 (1981). Total failure of recollection is not required. United States v. Palumbo, 639 F.2d 123, 128 n.6 (3d Cir. 1981), cert. denied 454 U.S. 819 (1981). Moreover, "[i]t is immaterial whether the reason for the witness's denial of knowledge on the second appearance is fear, . . . a desire to help the defense, . . . or an honest lapse of memory in the interval." United States v. Klein, 488 F.2d 481, 483 (2d Cir. 1973), cert. denied, 419 U.S. 1091 (1974) (citations omitted); see also

United States v. Distler, 671 F.2d at 958 (holding that a partial or vague recollection is inconsistent with total or definite recollection for purposes of Fed.R.Evid. 801(d)(1)(A), and that corroborative portions of the prior statements are admissible to put the contradictory portions in context.) Thus, prior inconsistent statements are admissible where the witness's testimony at trial is evasive. See United States v. Morgan, 555 F.2d at 241-42.

A prior inconsistent statement, whether sworn or unsworn, is also admissible as substantive evidence where the witness affirms the truth of the earlier statement. The jury may accept either version as correct. See, e.g., United States v. Klein, 488 F.2d at 483; United States v. Borelli, 336 F.2d 376 (2d Cir. 1984). Moreover, the Government may use prior inconsistent testimony to impeach its own witnesses even absent a showing of surprise. Fed.R.Evid. 607; United States v. Jordano, 521 F.2d 695 (2d Cir. 1975). This may be especially appropriate where, as here, some of the Government's witnesses are employees or former employees of the co-conspirators. The grand jury testimony is admissible as substantive evidence even if the witness's testimony was in response to leading questions. United States v. Champion Int'l Corp., 557 F.2d 1270, 1274 (9th Cir.), cert. denied, 434 U.S. 938 (1977); United States v. Dennis, 625 F.2d 782, 795 (8th Cir. 1980).

The key to the admissibility of a prior inconsistent statement is relevance, i.e., whether the statement is "helpful in resolving a material, consequential fact in issue . . . ." United States v. Morgan, 555 F.2d at 242. For example, in Brighton Bldg. & Maintenance Co., an antitrust bid-rigging case, the Government introduced

in evidence the grand jury testimony of four officers of corporate defendants who had testified pursuant to compulsion orders before the grand jury. The court found that "[t]here were numerous and significant instances where the grand jury testimony tended to convict and the trial testimony did not." 598 F.2d at 1108. The grand jury testimony was held to have been properly admitted. Id. See also United States v. Murphy, 696 F.2d 282, 284 (4th Cir. 1982), cert. denied, 461 U.S. 945 (1983) (holding that Rule 801(d)(1)(A) "'provide[s] a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case'").

M. The Government May Elicit Testimony Concerning Immunity Grants, Plea Agreements and Prior Felony Convictions

Several of the Government's witnesses will be testifying under grants of immunity or plea agreements the Government has with their employer corporations involving the charged conspiracy. Two others, Robert Krass and Robert Koehler, have entered guilty pleas and have been sentenced pursuant to plea agreements for their parts in the same conspiracy. The Government has provided defendant with copies of all such agreements.

Recently, the Court of Appeals for the Third Circuit, sitting en banc, considered the question of the admissibility of testifying witnesses's guilty pleas and plea agreements in the Government's case-in-chief. In United States v. Universal Rehabilitation Services (PA), Inc., 205 F.3d 657 (3d Cir. 2000),

defendants had moved prior to trial to prevent the Government from introducing the guilty pleas and plea agreements of two witnesses involved in defendants' mail fraud scheme, representing that they would not affirmatively challenge the credibility of those witnesses. Id. at 662-63. The district court denied the defendants' motion and permitted the introduction of the evidence, subject to cautionary instructions that the pleas and plea agreements could not be considered against the defendants. Id. at 662.

In upholding the convictions and settling a conflict which had existed in this Circuit on the admissibility of guilty pleas and plea agreements, the Court of Appeals held that the admission of such matters is within the discretion of the trial court and is controlled by Rule 403 of the Federal Rules of Evidence. Id. at 664-65. Further, the Court noted that Rule 403 favors a presumption of admissibility and that district courts should utilize the rule only rarely to cause the exclusion of such evidence. Id. at 664. As to the grounds for admissibility, the Court stated:

> It is well-settled that evidence of a testifying witness's guilty plea or plea agreement may be introduced for probative, and therefore permissible, purposes. As this Court has identified on numerous occasions, such purposes include: (1) to allow the jury accurately to assess the credibility of the witness; (2) to eliminate any concern that the jury may harbor concerning whether the government has selectively prosecuted the defendant; and (3) to explain how the witness has first-hand knowledge concerning the events about which he/she is testifying.

Id. at 665 (citations omitted). Such evidence is admissible even when defendants promise not to attack the witnesses' credibility, since credibility remains an issue for the jury even in the absence of an affirmative challenge. Id. at 665-66. Finally, the Court noted that the introduction of a witness's guilty plea concerning facts and circumstances similar to that for which the defendant is being tried could have the prejudicial effect of suggesting that the defendant should be found guilty merely because of the witness's plea. Id. at 668. The Court stated, however, that it had "consistently held this prejudicial effect is typically cured through a curative instruction to the jury" and that other Circuits were of the same view. Id. at 668.

The Third Circuit has made no distinction between the permissibility of referencing guilty pleas and plea agreements in opening statements and eliciting testimony regarding guilty pleas and the details of plea agreements on direct examination. To the contrary, the same analysis applies to each context. See Government of Virgin Islands v. Mujahid, 990 F.2d 111, 117 (3d Cir. 1993) (Government reference to co-defendant plea agreement in opening statement would have been cured by limiting instruction); see also United States v. Veltre, 591 F.2d 347, 349 (5th Cir. 1979) (Government reference in opening statement to co-conspirator's plea agreement was for proper purpose and cautionary instruction was appropriate and effective to avoid prejudice); United States v. Sockwell, 699 F.2d 213, 216 (5th Cir. 1983), cert. denied, 461 U.S. 936 (1983) (Government reference in opening statement to co-conspirators' guilty pleas and direct examination thereon was for proper purpose and any prejudice was cured by

cautionary instruction).

N. Translations of Foreign Language Documents

The United States intends to offer into evidence foreign language documents and English translations thereof. Specifically, the United States intends to introduce documents that are in Japanese or a mixture of English and Japanese. The English translations of these Japanese language documents have been certified by a professional translator. Certified translations have been provided to the defendant. Defense counsel has advised the Government that they presently do not intend to offer their own translations of the Government's exhibits, but will cross examine the Government's translator as they deem necessary.

It is proper for the jury to retain the English translations and the Japanese documents during the testimony and deliberations. United States v. Pecora, 798 F.2d 614, 631 (3d Cir. 1986), cert. denied, 479 U.S. 1064 (1986); United States v. Adams, 759 F.2d 1115 (3d Cir.), cert. denied, 474 U.S. 971 (1985). See also United States v. Cruz, 765 F.2d 1020 (11th Cir. 1985) (English transcript of Spanish conversation properly admitted as substantive evidence to aid the jury in determining content and meaning); United States v. Valencia, 957 F.2d 1189, (5th Cir.), cert. denied, 506 U.S. 889 (1992) (English language transcript of

conversation in a foreign language can be introduced without admitting and playing underlying foreign language tape).

Respectfully submitted,

_____"/s/"_____
ROBERT E. CONNOLLY
JOSEPH MUOIO
WENDY BOSTWICK NORMAN
ROGER L. CURRIER
Attorneys, Antitrust Division
U.S. Department of Justice
Philadelphia Office
The Curtis Center, Suite 650W
170 S. Independence Mall West
Philadelphia, PA 19106
Tel.: (215) 597-7405

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 & 18 U.S.C. § 2 (a)
	)	
Defendant.	)	Filed: 12-11-00

CERTIFICATE OF SERVICE

This is to certify that on the 11th day of December 2000, a copy of the Government's Trial Memorandum, has been mailed/faxed to counsel of record for the defendant as follows:

Theodore V. Wells, Esquire
Paul Weiss Rifkind Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-6064

"/s/"

ROBERT E. CONNOLLY
Attorney, Philadelphia Office
Antitrust Division
U.S. Department of Justice
The Curtis Center, Suite 650W
170 S. Independence Mall West
Philadelphia, PA 19106
Tel. No.: (215) 597-7405