

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA) Criminal No. 00-033
)
) Judge Marvin Katz
)
MITSUBISHI CORPORATION,) Violations: 15 U.S.C. § 1 and 18 U.S.C. § 2 (a)
)
) Filed: 05/23/00
Defendant.

**MEMORANDUM IN SUPPORT OF
GOVERNMENT’S RESPONSE IN OPPOSITION
TO DEFENDANT’S MOTION TO STRIKE**

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Defendant Mitsubishi Corporation (Mitsubishi) has moved this Court for an order striking subparagraphs 4(c) and 4(d) of the Indictment, which enumerate certain of the means and methods utilized by defendant in aiding and abetting of a worldwide price-fixing agreement in the graphite electrodes industry. Specifically, defendant argues that these paragraphs relate solely to its role as a trader of graphite electrodes and, therefore, are insufficient to support a charge of aiding and abetting as a matter of law. The Government submits that the Indictment in this case properly charges Mitsubishi with aiding and abetting a price-fixing conspiracy in violation of 15 U.S.C. §1 and 18 U.S.C. § 2 and that Paragraph 4 of the Indictment, including subparagraphs 4(c) and 4(d), properly allege means and methods by which Mitsubishi aided and abetted the charged conspiracy. Accordingly, the Government opposes defendant’s motion and in support thereof submits the following.

I
THE INDICTMENT

The Indictment charges that Mitsubishi violated Section One of the Sherman Act (15 U.S.C. § 1) by aiding and abetting a conspiracy among certain producers 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. Named as co-conspirators are UCAR International Inc. and its wholly-owned subsidiary UCAR Carbon Company (collectively UCAR), SGL Carbon Aktiengesellschaft of Germany (SGL), Tokai Carbon Co., Ltd. (Tokai), Showa Denko KK (Showa Denko), SEC Corporation (SEC) and Nippon Carbon Co., Ltd. (Nippon), all headquartered in Japan. The named co-conspirators constitute the free-world's leading manufacturers of graphite electrodes.¹

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).

¹ 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 I of the Sherman Act for their participation in the conspiracy. All have been sentenced and have agreed to cooperate with the Government.

During both the period it owned half of UCAR and at other times, Mitsubishi is alleged to have aided and abetted the charged conspiracy by, among other things:

- (a) counseling, inducing, and encouraging UCAR to meet with competitors and to 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; and
- (d) concealing the existence of the conspiracy from customers and others to allow the continuation of the conspiracy.

(Indictment ¶4).

II

FACTUAL BACKGROUND

A. Description of the Defendant

Mitsubishi Corporation is a Japanese corporation headquartered in Tokyo, Japan. It is one of the world's largest corporations, with sales in fiscal 1999 of approximately \$116 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. Mitsubishi's electrode sales are coordinated by the company's Carbon Division.

From February 25, 1991, until January 26, 1995, Mitsubishi owned 50 percent of the stock of UCAR Carbon Company of Danbury, Connecticut, the world's largest producer of

graphite electrodes and a named co-conspirator in the present Indictment.² During this period, Mitsubishi acted as UCAR's sales agent for graphite electrodes in certain areas of the world. In January 1995, Mitsubishi sold its interest in UCAR to the Blackstone Group for \$406 million. Mitsubishi also held small equity interests in Tokai and SEC. Moreover, since Tokai, SEC, and Showa Denko did not have sales forces of their own, Mitsubishi Corporation acted as part of their sales force, selling graphite electrodes manufactured by these companies to various customers worldwide. Tokai, Showa Denko and SEC are also named co-conspirators.

Thus, while Mitsubishi was not itself a direct manufacturer of graphite electrodes, Mitsubishi had ownership interest in several manufacturers and also acted as a sales agent so its profitability was tied to the profitability of several of the principal actors in the cartel.

B. The Conspiracy and Mitsubishi's Role

The Indictment alleges a conspiracy among graphite electrode producers covering just over five years. The Indictment further alleges that Mitsubishi encouraged the formation of the cartel; actively participated in arranging and facilitating meetings and other conspiratorial communications during which prices were fixed; knowingly sold electrodes at the resulting fixed prices; and concealed the existence of the cartel from customers and others. The Government will prove that Mitsubishi took these actions for the purpose of enriching itself with a share of the illegal gains, and the defendant realized over \$200 million in profit as a result of the cartel's success.

Prior to 1990, Mitsubishi had long been closely associated with Japanese electrode

² Union Carbide Corporation owned the other 50 percent of UCAR's stock in a joint venture with Mitsubishi.

manufacturers through its various ownership interests, through its role as a distributor and as a supplier of raw materials used to make electrodes such as needle coke. During this same period, Union Carbide, through its wholly-owned subsidiary, UCAR, was the largest supplier of graphite electrodes worldwide. In 1990, Mitsubishi began contemplating a joint venture with Union Carbide in which each company would own 50 percent of UCAR. Mitsubishi believed that its ownership in UCAR, coupled with its longstanding relationship with Japanese graphite electrode producers, would put Mitsubishi in a position to promote harmony and cooperation among the producers and result in increased prices for graphite electrodes and profits for both the producers and Mitsubishi. In February 1991, Mitsubishi successfully completed its deal with Union Carbide and became 50 percent owner of UCAR.

Both before and after the UCAR closing, Mitsubishi began taking steps to encourage the formation of the cartel it envisioned. Mitsubishi assigned senior level employees to work with UCAR management in the United States and abroad.³ These executives and other Mitsubishi personnel began to counsel UCAR on the need to increase prices through cooperation with competitors. Promoting the cartel more directly, Mitsubishi used its contacts with the Japanese producers to arrange meetings in Tokyo between UCAR Chief Executive Officer Robert Krass⁴ and his Japanese competitors. A senior Mitsubishi executive personally attended some of these meetings during which ideas about the feasibility of a cartel and the competitors' willingness to collude were discussed. Meanwhile, other Mitsubishi executives also traveled through Europe

³ These employees were "seconded" to UCAR, a status whereby they were put on the UCAR payroll while continuing to accrue service time and other benefits as Mitsubishi employees.

⁴ Krass is currently serving a 17 month term of imprisonment for his role in the cartel.

visiting various electrode producers and promoting Mitsubishi's desire to see a cartel form, and cautioning that companies that failed to cooperate would be punished by the combined Mitsubishi/UCAR entity.

The charged conspiracy began at least as early as March 1992 and by May 1992 the co-conspirators held their first group cartel meeting in London.⁵ The meeting was attended by all the major electrode manufacturers. One of the Mitsubishi executives working at UCAR attended the London meeting, acted as an interpreter and reported the results of the meeting back to Mitsubishi headquarters in Tokyo. At this first group cartel meeting, the participants agreed: (a) to raise prices in the United States and elsewhere; (b) to follow the price increases of respective home market leaders in the United States and elsewhere; (c) to limit pricing authority to high level executives; (d) to eliminate discounts; and (e) to hold continuing cartel meetings.

Attainment of the cartel's objectives over the next five years required additional conspiratorial meetings.⁶ Mitsubishi's significant investment in UCAR, its relationships with the Japanese conspirators, and its knowledge of the cartel by Mitsubishi executives who spoke both English and Japanese, made Mitsubishi a useful intermediary among the conspirators, and so

⁵ The evidence will show that these initial efforts by Mitsubishi to promote a conspiracy were not immediately successful. "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." United States v. Barnett, 667 F. 2d 835, 841 (9th Cir. 1982).

⁶ The conspiracy operated with three kinds of conspiratorial meetings: (1) top level meetings among Presidents or other high ranking officers to discuss general themes of the conspiracy; (2) working level meetings among marketing managers and other sales executives to implement the agreements; and (3) ad hoc meetings among several, but not all conspirators to re-affirm commitment to the cartel principles.

Mitsubishi continued its role as an aider and abetter during the life of the conspiracy. Mitsubishi executives attended several conspiratorial meetings; arranged, facilitated or otherwise provided assistance for other meetings; and acted as a conduit of information among the conspirators between meetings.

A principal goal of the cartel was to raise profits by selling graphite electrodes to customers at prices fixed by the cartel members. Mitsubishi, with full knowledge of the principles of the cartel which it helped launch, sold electrodes at prices it knew to be fixed during the entire course of the conspiracy. Mitsubishi even lobbied various cartel members to continue using Mitsubishi as a trader by noting that it was in Mitsubishi's financial interest, as an owner of graphite electrode producers, to market "in harmony" with the producers' wishes and not to create price competition.

Secrecy was key to the continued success of the cartel. Customers had to be kept in the dark about the true nature of the agreed upon-price increases, particularly as customers began to complain that the ever-escalating prices were in contrast to the non-inflationary economic environment. Mitsubishi was a large seller of electrodes and, in fact, sold its electrodes to customers while concealing the existence of the conspiracy and allowing its continuation.

Mitsubishi also concealed its knowledge of the cartel when its interest in UCAR was purchased for \$406 million in January 1995 by the Blackstone Group. Despite due diligence by the buyer, Mitsubishi concealed the true basis of UCAR's profitability and, in fact, affirmatively misrepresented that it had no knowledge of any illegal activities engaged in by UCAR.

III

LEGAL PRINCIPLES FOR AIDING AND ABETTING

The aiding and abetting statute⁷ does not create a separate offense. “It simply makes those who aided and abetted a crime punishable as principals.” United States v. Galiffa, 734 F.2d 306, 312 (7th Cir. 1984). 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. See United States v. Portac, Inc., 869 F.2d 1288, 1293 (9th Cir. 1989), cert. denied, 498 U.S. 845 (1990) (aiding and abetting a Sherman Act violation); United States v. National Dairy Products Corporation, 231 F. Supp 675, 677 (W.D. Mo. 1963) (“aiding and abetting statute is applicable to antitrust laws”). The Third Circuit Court of Appeals recently restated the Government’s burden of proof in an aiding and abetting case:

[T]o establish liability based upon an aiding and abetting theory, the government must prove (1) that the substantive crime has been committed, and (2) the defendant knew of the crime and attempted to facilitate it. In addition, we have required proof that the defendant is in some way associated with the substantive offense-- “that he participated in it as something that he wished to bring about, that he sought by his action to make it succeed.”

United States v. Garth, 188 F.3rd 99, 113 (3d Cir. 1999) (citations omitted), quoting United States v. Bey, 736 F.2d 891, 895 (3d Cir. 1984). Thus, all that is required for conviction under 18 U.S.C. § 2 is proof of the commission of the substantive crime and that the defendant, with knowledge of that crime, acted in some way with intent to facilitate it by helping bring it about. United States v. Salmon, 944 F.2d 1106, 1113 (3d Cir. 1991), cert. denied, 502 U.S. 1110

⁷ 18 U.S.C. § 2 (a) provides as follows:

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(1992); United States v. Dixon, 658 F.2d 181, 189 (3d Cir. 1981).

IV
SUBPARAGRAPHS 4(C) AND (D) OF THE INDICTMENT
ARE LEGALLY SUFFICIENT AND SHOULD NOT BE STRICKEN

Mitsubishi argues that subparagraphs 4(c) and (d) should be stricken from the Indictment as surplusage, because standing alone each states an allegation, which if proved, would be an insufficient basis from which a jury could find that Mitsubishi aided and abetted the charged conspiracy. For the reasons stated below, Mitsubishi is wrong.

A. The Indictment Is To Be Read As A Whole

Defendant's motion to strike as surplusage subparagraphs 4(c) and 4(d) of the Indictment is based entirely on the premise that they should be read in isolation from each other, in isolation from the very paragraph in which these subsections appear and in isolation from the Indictment as a whole. After so dissecting the Indictment, Mitsubishi charges that these subparagraphs are legally defective because they "relate solely to Mitsubishi's role as a trader of graphite electrodes."⁸ Mitsubishi ignores the fact that the Indictment alleges Mitsubishi was 50 percent owner of UCAR, which was a conspirator and the world's largest producer of graphite electrodes and that Mitsubishi realized over \$200 million in illegal profits through its ownership in this conspirator company.⁹ Mitsubishi further charges that "[t]he government's attempt to punish a trader merely for remaining silent and for selling manufacturers is unprecedented and contrary to

⁸ Mitsubishi Brief, p.1.

⁹ Indictment, ¶5.

fundamental principles of criminal law.”¹⁰ This charge ignores the fact that Paragraph 4 itself alleges that Mitsubishi counseled, induced and encouraged the formation of the cartel and arranged, facilitated and provided assistance for conspiratorial meetings.

Mitsubishi’s argument fails because “[t]he indictment should be read as a whole and interpreted in a common-sense manner.”¹¹ United States v. Galati, 853 F. Supp. 152, 155 (E. D. Pa. 1994). An indictment “will be held sufficient unless ‘no reasonable construction of the indictment would charge the offense for which the defendant has been convicted.’”

United States v. Cluck, 143 F.3d 174, 178 (5th Cir. 1998), cert. denied, 525 U.S. 1073 (1999) (quoting McKay v. Collins, 12 F.3d 66-69 (5th Cir. 1994); United States v. Finn, 919 F. Supp. 1305 (D. Minn. 1995), aff’d, 121 F.3d 1157 (8th Cir. 1997), cert. denied, 522 U.S. 1113 (1998).

Moreover, “[i]n considering the sufficiency of the allegations in an indictment, ‘common sense must control,’ and the indictment must be read to include facts which are necessarily implied by the specific allegations made.” United States v. Berger, 22 F. Supp. 2d 145, 153 (S.D.N.Y.

1998).¹² Finally, by arguing that the Government can not prove that the actions set forth in subparagraphs 4(c) and (d) aided and abetted the conspiracy, Mitsubishi is pre-emptively challenging the sufficiency of the Government’s evidence but the “sufficiency of the indictment

¹⁰ Mitsubishi Brief, p.2.

¹¹ Moreover, as shown below, even reading subparagraphs 4(c) and 4(d) in isolation from the rest of the Indictment, each charges an act legally sufficient for the jury to consider as an act of aiding and abetting the charged conspiracy.

¹² The Court further stated, “The jury will be instructed at trial as to the elements of the offense If the government is unable to make this showing, defendants will be able to challenge the sufficiency of the evidence against them.” Id.

may not be properly contested by a pretrial motion on the ground that the indictment is not supported by adequate evidence.” United States v. Galati, 853 F. Supp at 155.¹³

Reading the Indictment as a whole, it is clear that Mitsubishi is not charged as a “mere trader” of electrodes. The Indictment expressly charges Mitsubishi with much more than “mere knowledge” of the illegal activity by others. The Indictment alleges that: (1) prior to and during the course of the charged conspiracy, Mitsubishi was a 50 percent owner of UCAR; (2) UCAR was a conspirator; and (3) Mitsubishi realized over \$200 million of the cartel’s illegal profits through its sale of UCAR. In this context, Mitsubishi is charged with aiding and abetting the conspiracy in a continuing course of conduct from encouraging the formation of the conspiracy through concealing its existence from customers and other for the purpose of allowing the conspiracy to continue. Accordingly, set forth more fully below, the allegations in the Indictment adequately establish a basis upon which a jury could find Mitsubishi aided and abetted the charged price-fixing conspiracy and, therefore, defendant’s motion should be denied.¹⁴

B. Mitsubishi Aided and Abetted the Charged Conspiracy by Selling Electrodes at Fixed Prices

Mitsubishi alleges that subparagraph 4(c) can not constitute a means and method of aiding and abetting the charged conspiracy because selling graphite electrodes was part of its ordinary

¹³ Nonetheless, the Government has proffered some of its case to demonstrate some of the ways in which it may be shown that the allegations set forth in subparagraphs 4(c) and (d) can form the basis for a finding by the jury that Mitsubishi aided and abetted the conspiracy.

¹⁴ “A mere averment in an Indictment that a defendant aided and abetted another in commission of a crime is sufficient and the determination of the question as to whether the nature, character and extent of the specific acts attributed to the defendants constituted aiding and abetting must be left to trial.” United States v. Quinn, 111 F. Supp. 870, 873 (E.D. N.Y. 1953).

business. Since it is not charged with being a member of the conspiracy, knowingly selling electrodes at fixed prices constitutes at best “mere knowledge” of the conspiracy and, thus, is legally insufficient. This argument is incorrect.

First, one need not be a member of a conspiracy to aid and abet it. United States v. Loscalzo, 18 F.3d 374, 383 (7th Cir. 1994). As the Seventh Circuit explained in Loscalzo: “The aiding and abetting statute serves to complement the substantive offense of the conspiracy. Recognizing that conspirators often employ assistants in carrying out their plans, the statute enables the Government to prosecute those who have knowingly furthered the aims of the conspiracy, but who were not members of the conspiracy.” The aim of every price-fixing conspiracy is to sell at fixed prices. Unlike defendants in the cases cited by Mitsubishi, whose conduct was merely peripheral to some crime in which they had no economic interest, Mitsubishi's efforts to sell electrodes at fixed prices as an agent for multiple conspirators went to the heart of the crime and established it as an active participant in facilitating the crime's success.¹⁵ The selling of electrodes, by one with knowledge of the conspiracy to fix prices is an act in furtherance of the conspiracy and, therefore, must logically also be an act which a jury can find sufficient basis for aiding and abetting. In United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1939), the Supreme Court rejected the notion that sales of the fixed product could not be an act in furtherance of a price-fixing conspiracy on the grounds that the sales were conducted in the normal course of a company's business. The Court rejected this argument in language that is relevant here:

¹⁵ Although the crime of price fixing is one simply of agreement with no actual sales required, sales at fixed prices maximize the crime's success.

In sum, the conspiracy contemplated and embraced, at least by clear implication, sales to jobbers and consumers in the Mid-Western area at the enhanced prices. The making of those sales supplied part of the “continuous cooperation” necessary to keep the conspiracy alive. Hence, sales by any one of the respondents in the Mid-Western area bound all.

Id. at 253 (citations omitted).

Second, an act does not have to be illegal in and of itself to constitute joining a conspiracy.

In American Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944), aff’d, 328 U.S. 781

(1946) the Court stated:

It is not essential that the various agreements, combinations, and transactions shown by the evidence--considered singly--be unlawful as in restraint of trade. So considered, they may be entirely innocent; but acts absolutely lawful in themselves may be steps in a criminal conspiracy. The Sherman Act condemns every means, no matter how novel, to accomplish the objective of carrying out a conspiracy to restrain or monopolize trade. It is not the form of the combination, or the particular means used, but the result to be achieved that the statute condemns, and it is of no importance whether the means used to accomplish the unlawful objective are, in themselves, lawful or unlawful.

Id. at 107. Therefore, the fact that selling of electrodes may have been Mitsubishi’s everyday business, this does not preclude such an act from being the basis of criminal liability when done with the intent to aid and abet a conspiracy.¹⁶

Third, even if the mere sale of a product at prices known to be fixed standing alone might be insufficient to establish a charge of aiding and abetting a conspiracy, the allegation in this case is that Mitsubishi knowingly sold electrodes at fixed prices, both counseled and encouraged

¹⁶ Mitsubishi’s argument that it was deprived of due process because the Indictment alleges it aided and abetted a conspiracy through an otherwise lawful business is similarly misplaced.

UCAR to fix prices with competitors, and then facilitated conspiratorial meetings. Reading the Indictment as a whole, the jury surely could find that Mitsubishi's sales at the resulting fixed prices constituted an effort to further the goals of the conspiracy.¹⁷

Fourth, the cases relied upon by Mitsubishi do not support its position on this issue. In fact, United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. 1989), cert. denied, 493 U.S. 901 (1989), cited by the defendant, supports the Government's position. In Pino-Perez, the Court noted that the "mere fact of leasing a boat to a person known to be a drug trafficker would not be enough to make [the defendant] guilty of aiding and abetting a drug kingpin." 879 F.2d at 1235. The Court went on to say, however, that in the proper circumstances, such conduct could, in fact, constitute the basis for an aiding and abetting charge: "It depends on what [the defendant] knows and what he wants: Does he want the kingpin's enterprise to succeed or is the kingpin just another customer? If he does want the enterprise to succeed, there is no anomaly in holding him liable as an aider and abettor." Id. Likewise, in this case, the Government is entitled to prove and the jury is entitled to find that Mitsubishi's sale of electrodes at prices it knew to be fixed was part of its effort to help the alleged conspiracy succeed.

Defendant's reliance on United States v. Zafiro, 945 F.2d 881 (7th Cir. 1991), aff'd, 506 U.S. 534 (1993), is similarly misplaced. In Zafiro, the Court stated that mere knowledge of a

¹⁷ Mitsubishi argues that it would be unfair to require a trader who learns of a conspiracy among manufacturers to either discontinue selling the product or report the violation to the authorities. This argument clearly has no merit where, as here, the defendant "learned" about an illegal agreement (which it encouraged) by attendance at cartel meetings it helped set up in order for it to profit. Moreover, even where a sales manager is told by his boss that a price-fixing agreement has been reached and he is to sell at the fixed price, it is not a valid legal defense that he was simply doing as he was instructed because knowledge of the conspiracy and even a single act in furtherance thereof is a sufficient basis for legal liability.

crime is not sufficient to support a charge of aiding and abetting. Id. at 887. The Court noted that “[a] clerk in a clothing store who sells a dress to a prostitute knowing that she will be using it in plying her trade is not guilty of aiding and abetting” because “[i]f the clerk didn’t make the sale, [the prostitute] would buy, at some trivial added expense in time or money, an equivalent outfit from someone ignorant of her trade.” Id. An aider and abettor must want the enterprise to succeed and “[t]he boost to prostitution brought about by selling a prostitute a dress is too trivial to support an inference that the clerk actually wants to help the prostitute succeed in her illegal activity.” Id.

Mitsubishi argues that its activities were no different from the clerk in the clothing store and that its sale of electrodes at prices it knew to be fixed was of no benefit to the alleged price-fixing conspiracy because the co-conspirator manufacturers simply could have sold the electrodes themselves or found another trading company. This argument fails for several reasons. First, equating reorganization of a multi-million dollar worldwide distribution network with walking across the street to buy a dress is fact-finding, reserved for the province of the jury. Second, unlike the clerk's minimal relationship to the prostitute and disinterest in the prostitute’s success, Mitsubishi was a major worldwide trader of graphite electrodes and had ownership interests in three of the named co-conspirators, including a half interest in the largest. Mitsubishi, therefore, had a significant financial interest in the success of the crime.¹⁸ Indeed, Mitsubishi’s

¹⁸ See United States v. Hess, 691 F.2d 984, 988 (11th Cir. 1982) (a fence does not automatically become a conspirator by purchasing stolen property but a fence who holds himself out as a place to dispose of stolen goods is a conspirator). The Government will produce evidence that Mitsubishi held itself out as a distributor who could promote cooperation among the producers, including those in which it had ownership interests.

profitable return on its investment in the electrode industry was directly tied to the continued success of the charged conspiracy in selling graphite electrodes at artificially high fixed prices.

The Government will prove at trial that Mitsubishi knew that its role as a worldwide trader would enable it to facilitate the price-fixing agreement and that it actively promoted that role. This intent is evident from Mitsubishi's own documents. In a letter dated June 13, 1990 to Robert Kennedy, Chairman of Union Carbide, arguing that Mitsubishi should remain a trader for the Japanese manufacturers while it was a 50 percent owner of UCAR, Mr. Yamamoto, Executive Vice-President of Mitsubishi wrote:

We do not believe that a rational market, one that would sustain the values we have discussed, can be maintained without Mitsubishi being able to bring to the joint venture not only its marketing skills but also its relationships with the Japanese manufacturers it now represents. We believe that only with those relationships preserved will the profit margins and sales volume of the joint venture be adequate to meet the current UCAR CARBON projections. In short, those relationships are, we believe necessary ingredients to the synergy that is the essence of the proposed joint venture.

In sum, the allegation in subparagraph 4(c) is legally sufficient and will be supported by sufficient evidence at trial from which a jury could conclude that Mitsubishi's sale of electrodes at prices it knew to be fixed was done to promote the success of the conspiracy and to aid and abet the charged conspiracy under applicable Third Circuit law.

**C. Mitsubishi Aided and Abetted the Conspiracy
By Concealing the Existence of the
Conspiracy from Customers and Others
To Allow the Continuation of the Conspiracy**

Mitsubishi argues that an agent's concealment of a conspiracy from its customers and others to allow the conspiracy to continue can not constitute aiding and abetting and that

subparagraph 4(d) of the Indictment must, therefore, be stricken. This argument is incorrect. Mitsubishi fails to address this allegation in the context of the entire Indictment which alleges Mitsubishi had a role as half-owner of UCAR; that Mitsubishi was the agent for three conspirator companies; and that Mitsubishi had a role in encouraging and facilitating the conspiracy as alleged in Paragraphs 4(a) and 4(b) of the Indictment.

The Indictment refers to two distinct instances of concealment, “from customers and others,” both for the purpose of allowing the conspiracy to continue, and the jury may consider these separately.

First, the Indictment alleges that not only did Mitsubishi sell electrodes to customers at prices it knew to be fixed, as discussed above, but Paragraph 4(d) further alleges that Mitsubishi concealed the existence of the conspiracy from customers in order to allow the conspiracy to continue. Because sales of electrodes at enhanced prices “supplied part of the ‘continuous cooperation’ needed to keep the conspiracy alive,” Socony Vacuum, 310 U.S. at 253, it follows that selling electrodes at fixed prices and while concealing the existence of the conspiracy can be acts in furtherance of the conspiracy. This is particularly true when the seller was not simply a passive participant, but encouraged and facilitated the illicit agreement and had an economic interest in its success.¹⁹ While Paragraph 4(d) is in some respect redundant with Paragraph 4(c), the jury may find that by concealing the conspiracy, Mitsubishi helped facilitate the conspiracy's success and so “the defendant is in some way associated with the substantive offense-- ‘that he

¹⁹ Mitsubishi, in fact, took title to the electrodes it sold on behalf of Tokai, Showa Denko and SEC and was free to sell at whatever price it saw fit, although clearly the manufacturers wanted Mitsubishi to sell at the price set by the cartel.

participated in it as in something that he wished to bring about, that he sought by his action to make it succeed.” United States v. Garth, 188 F.3d at 113 (citations omitted). This is especially true where, as here, the Government will prove that Mitsubishi received a share of the illegal overcharges. Had Mitsubishi been indifferent to the conspiracy's success (or indeed was hurt by its success as escalating prices made dealings with customers more difficult), Mitsubishi might have told customers about the collusion, especially those who were irate with continued price increases. Instead, Mitsubishi aligned itself with the cartel through its concealment of the cartel from customers; an additional act the jury can consider, in the context of all of its other actions in furtherance of the conspiracy, when determining whether Mitsubishi aided and abetted the conspiracy.²⁰

The Indictment also alleges Mitsubishi aided and abetted the cartel by concealing the conspiracy from “others.” The United States intends to prove that Mitsubishi received most of its share of the illegal proceeds of this cartel by virtue of its sale, through a leveraged buyout, of its ownership in UCAR to the Blackstone Group. In order to “cash out,” Mitsubishi had to conceal from the Blackstone Group, and any other potential buyers, that the basis of UCAR's profitability was its ability to set non-competitive prices in concert with its competitors. The evidence will show that despite due diligence by the Blackstone Group, Mitsubishi concealed the existence of the cartel which had illegally boosted UCAR’s earnings and profits. Mitsubishi concealed the cartel not just through omissions of material facts, but through outright misrepresentation that Mitsubishi had no knowledge of any illegal activity by UCAR. Had Mitsubishi disclosed the truth

²⁰ A person’s efforts to assist in the concealment of a conspiracy may support an inference that he joined it. United States v. Freeman, 498 F. 2d 569, 576 (2d Cir. 1974).

to the Blackstone Group or other prospective purchasers, the life of the conspiracy likely would have been cut short.

Given the context in which evidence of Mitsubishi's concealment will be introduced, it may be reasonable for the jury to conclude that Mitsubishi's concealment of the conspiracy from both electrode customers or potential purchasers of UCAR was done at least, in part, for the purpose of furthering the goals of the conspiracy and not exclusively for some other reason.

Mitsubishi cites several cases for the proposition that, absent a legal duty, mere failure to disclose criminal activity by a third party is not unlawful. These cases do not support Mitsubishi's challenge to the Indictment. First, the Indictment alleges much more than mere non-disclosure. In fact, the Indictment alleges concealment by a defendant who encouraged and promoted the formation of the conspiracy, facilitated its operation and profited from its continued success. Second, the cases relied on by Mitsubishi are so factually distinguishable as to have no relevance to this Indictment.

Mitsubishi first cites United States v. Seitz, 952 F. Supp. 229 (E.D. Pa. 1997) as being on point. Seitz, a title insurance company representative, was charged with aiding and abetting a crime of concealment of funds from the Resolution Trust Corporation by a co-defendant, Spano, a real estate developer. Seitz, at the direction of Spano, set up an escrow account with proceeds realized by Spano from various real estate transactions. At a later date Seitz, again at Spano's instruction, closed the escrow accounts and returned the money to Spano. Neither Spano nor Seitz notified the RTC of the closings they conducted or of the money held in the escrow account. The District Court, troubled by the notion that Seitz could be convicted of concealing assets of

from the RTC when he never even had any dealings with the RTC or legal duty to report, noted “It is critical to the point at issue that the Government cites only inactions for its allegation that Seitz is a criminal.” Id. at 234. The Court further stated:

It is notable that the Government does not allege that Seitz borrowed any money from Bell or the RTC. Nor does the Government allege that Seitz had any sort of contractual agreement or privity with those entities--or, indeed, that he ever had *any* contact with them.”

Id. at 235 (emphasis in original). The Court, after setting forth the standard for aiding and abetting, agreed with defendants contention that “there is nothing in Count Six to suggest that Carl Seitz stood to benefit financially or in any other way from the concealment of the escrow accounts from the RTC or Bell Savings Bank or that he did any act that furthered the concealment.” Id. at 237. Finally, the Court noted that:

The indictment alleges nothing more than that Seitz sat at the settlement table and conducted closings for a company that insured buyers’ titles. It does not allege he violated any ‘official or public duty owed to the government or public at large.’ It does not allege that Seitz ‘willfully participated’ in, or even knew about, Spano’s crimes.

Id. at 238 (citations omitted). In contrast, the Indictment in this case alleges many of the factors the District Court felt were fatally absent in Seitz. The Indictment alleges that Mitsubishi encouraged the formation of the charged scheme, facilitated its execution and, in fact, had contractual dealings with the defrauded parties (the customers) by selling electrodes to them at knowingly fixed prices, and in connection with those sales, further aided and abetted the conspiracy by concealing the existence of the conspiracy for the purpose of allowing its successful continuation.

United States v. Matthews, 787 F.2d 38 (2d Cir. 1986), also involves facts so dissimilar from those alleged in this Indictment that it lends no support to defendant's position. First, unlike this case, Matthews did not involve aiding and abetting, but was decided under federal securities law. Matthews was convicted of violating disclosure provisions of the Securities Exchange Act by failing to disclose in proxy materials that he was involved in a conspiracy to violate state bribery laws. The Government did not allege any financial loss to the corporation on whose Board Matthews was elected, and the case involved no allegation of self-dealing or financial gain to Matthews. Id. at 49. In holding that under these facts of this case, non-disclosure did not constitute a violation of federal securities law, the Court emphasized the lack of self-dealing by the defendant or loss to the corporation.²¹ Not only does Matthews not involve aiding and abetting, the rationale of the Matthews Court, that liability for non-disclosure would not attach where no financial gain is alleged, clearly distinguishes it from this case where it is alleged that concealment took place to further a conspiracy from which the defendant received a share of the illegal gain.

As discussed above, in each of the cases cited by the defendant, a failure to disclose where there was no legal duty to do so was the only basis for the charge against the defendant. This is in

²¹ The Court cited the Ninth Circuit's holding in Gaines v. Haughton, 645 F.2d 761,799 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982) where the Court stated:

Absent *credible allegations of self-dealing* by directors or dishonesty or deceit which inures to the direct, *personal benefit of the directors* . . . we hold that director misconduct of the type traditionally regulated by state corporate law need not be disclosed in proxy solicitations for director elections. This type of mismanagement, *unadorned by self dealing*, is simply not material or otherwise within the ambit of the federal securities laws. (Emphasis added.) Matthews, 787 F.2d at 48.

stark contrast to this case in which it is alleged that the defendant took an active role in facilitating the crime and had an economic interest in its success, and that concealment was merely one aspect of its pattern of conduct in promoting the crime. Moreover, the cases cited by defendant do not suggest that such concealment can not be considered as part of a course of conduct to determine whether the defendant associated itself with the crime and in some way facilitated it for the purpose of promoting its success.

Likewise, collusive pricing schemes can constitute fraud on customers; a “plan or course of action intended to deceive others, and to obtain by false or fraudulent pretenses, representation or promises, money or property from the persons so deceived.” United States v. Horton, 847 F.2d 313, 320 (6th Cir. 1988). Fraud counts are often charged in connection with an illegal bidding scheme because the customer is deceived into believing there is competition when, in fact, there has been a secret collusive scheme to cheat the customer out of money.²² In United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir. 1990), the defendant was charged with wire fraud in connection with a proposed scheme to rig bids to General Motors. The Court held that the alleged collusive bidding scheme properly set forth the elements of a wire fraud offense. Id. at 236. While these cases are not directly on point, they do establish that a defendant who sells goods pursuant to a collusive pricing scheme can properly be charged with fraud. It is the seller’s

²² See e.g. United States v. Washita Construction Co., 789 F.2d 809, 818 (10th Cir. 1986) (we hold the defendant’s collusive bidding practices constitute a scheme or artifice to defraud); United States v. Walker, 653 F.2d 1343, 1347 (9th Cir. 1981); cert. denied, 455 U.S. 908 (1982) (collusion among bidders at timber auctions constituted fraud); United States v. Seville, 696 F. Supp. 986, 992 (D. N.J. 1988) (agreement among bidders at bankruptcy auction not to competitively bid was conspiracy to defraud United States).

concealment from the buyer of the fact that the price quoted is not, in fact, a competitive price, but one that had been determined by collusion as among the apparent competitors that perpetrates the fraud.

Finally, Mitsubishi itself acknowledges that if there is a duty to disclose information, failure to do so, standing alone, can be sufficient basis for finding liability based on aiding and abetting. The evidence in this case will show that Mitsubishi did breach a duty to disclose by concealing the existence of the conspiracy. First, in the \$406 million sale of its ownership of UCAR to the Blackstone Group, the Government will prove that Mitsubishi failed to disclose the illegal conspiracy upon which the UCAR profits (and thus the sale price) were based. Not only did Mitsubishi fail to disclose its knowledge of the cartel, the evidence will show that Mitsubishi affirmatively misrepresented that it had no knowledge of any illegal activities engaged in by UCAR at the time of the sale. The materiality of this misrepresentation may form the basis for the jury to conclude that Mitsubishi's deceit did violate a duty to disclose in connection with the sale of its UCAR stock.

V **CONCLUSION**

Taken as a whole, the Indictment adequately sets forth a basis upon which the jury could find that Mitsubishi aided and abetted the charged graphite electrode cartel.²³ Mitsubishi is not

²³ Even if the Court should grant Mitsubishi's motion to strike subparagraph 4(c) and (d) as a whole, there is no basis for dismissal of the Indictment as defendant suggests in footnote 5 of its motion. As Mitsubishi must concede, Paragraphs 4(a) and (b), which allege that Mitsubishi aided and abetted the charged conspiracy by encouraging its formation and actively facilitating illegal meetings and communications, adequately state a legal basis for the Indictment. As the Court in United States v. Milestone, 626 F.2d 264, 269 (3d Cir.), cert. denied, 449U.S. 920

charged as a “mere trader” nor as someone with mere knowledge of a crime, but as a corporation which associated itself with the criminal venture and participated in it as something that it wished to bring about and sought by its actions to make it succeed. Given its knowledge of the crime, ownership interest in a conspirator, and financial interest in the success of the crime, Mitsubishi’s activities in knowingly selling electrodes at illegally set prices and concealing that fact from customers and others are alone, sufficient allegations that Mitsubishi purposefully aided and abetted the crime of price fixing and wished to bring about its success. Moreover, Mitsubishi’s activities must be viewed in the context of its other activities including its encouraging the formation of the cartel and facilitating meetings and other communications among conspirators. This pattern of conduct, including the conduct cited in subparagraphs 4(c) and (d), are legally sufficient allegations of aiding and abetting. For all these reasons, the Indictment is legally

(1980) stated, “First, Bain prohibits any amendment that transforms an indictment from one that does not state any offense into one that does The second improper alteration is seen in any change that tends to increase the defendant’s burden at trial.” (Citations omitted.) Here, as in Milestone, if defendant’s motion to strike surplusage is granted, the “effect of the Court’s action [would be] to narrow, rather than expand, the issues defendant [is] called upon to meet.” Id. at 269.

sufficient as returned and Mitsubishi's motion to strike should be denied.

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
)
) Judge Marvin Katz
)
MITSUBISHI CORPORATION,) Violations: 15 U.S.C. § 1 and 18 U.S.C. § 2 (a)
)
) Filed: 05/23/00
Defendant.

MOTION TO DENY DEFENDANT’S REQUEST TO STRIKE

The Government hereby moves this Court for an Order denying defendant’s request to strike subparagraphs 4(c) and (d) of the Indictment. In support of this motion, the Government submits the accompanying Memorandum of Law.

Dated:

Respectfully submitted,

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ORDER

AND NOW, this day of 2000, upon consideration of Mitsubishi Corporation's
Motion to Strike Subparagraphs 4(c) and 4(d) of the Indictment and The Government's
Memorandum in Opposition to the Motion to Strike, it is hereby Ordered that:

The Motion is Denied.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA) Criminal No. 00-033
)
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MITSUBISHI CORPORATION,) Violations: 15 U.S.C. § 1 and 18 U.S.C. § 2 (a)
)
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Defendant.

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of May 2000, a copy of the Government's Motion to Deny Defendant's Request to Strike, Memorandum in Support of Motion, and proposed Order, has been mailed to counsel of record for the defendant as follows:

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