IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	Criminal No. 00-033
	)	
v.	)	Judge Marvin Katz
	)	
MITSUBISHI CORPORATION,	)	Violations: 15 U.S.C. § 1 and 18 U.S.C. § 2 (a)
	)	
Defendant.	)	Filed: 02-08-01

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 29(a)

Defendant has moved for a judgment of acquittal pursuant to Fed.R.Crim.P. 29(a). Because Defendant has failed to meet its burden under Rule 29(a), its Motion should be denied.

I. LEGAL STANDARD WHEN CONSIDERING A MOTION FOR JUDGMENT OF ACQUITTAL

The standard for granting a motion for acquittal was well stated in *United States v. Cerilli*, in which the Court said:

> A trial judge can grant a motion for judgment of acquittal only when the evidence as a whole is insufficient to support a conviction as a matter of law . . . . However, where there is evidence upon which a jury may reasonably base and find guilt beyond a reasonable doubt, the trial judge can not intrude on the function of the jury as the trier of fact. The evidence need not be of such overwhelming magnitude that the jury must inevitably find guilt beyond a reasonable doubt; there need only be sufficient, legal evidence which when viewed in a light most favorable to the government, a jury can reasonably and in good faith make a finding of guilt beyond a reasonable doubt.

418 F.Supp. 557, 565 (W.D. Pa. 1976)(citations omitted). See also *United States v. Boatwright*, 425 F.Supp. 747, 749-50 (E.D. Pa. 1977); *United States v. Miah*, 433 F.Supp. 259, 264 (E.D. Pa. 1977), *aff'd*, 571 F.2d 573 (3d Cir. 1978).

In making its determination, "[the Court] must view the evidence in a light most favorable to the government; it is not for the trial judge to assess the credibility of witnesses, nor to weigh the evidence, nor to draw inferences of fact from the evidence." *United States v. Cohen*, 455 F.Supp. 843, 851-52 (E.D. Pa. 1977), *aff'd*, 594 F.2d 855 (3d Cir. 1979), *cert. denied*, 441 U.S. 947 (1979) (citations omitted). The Court's powers in considering a motion for acquittal are not as broad as when considering a motion for a new trial, "for it is not for a judge, ruling on a motion of acquittal, to assess the credibility of witnesses, weigh the evidence, or draw inference of fact from the evidence." *United States v. Morris*, 308 F.Supp. 1348, 1351 (E.D. Pa. 1970).

A conviction may be based on circumstantial evidence. The circumstantial evidence "need not be inconsistent with every conclusion but that of guilt, as long as the circumstantial evidence provides the jury with a basis upon which to find the defendant guilty beyond a reasonable doubt." *United States v. Miah*, 433 F.Supp. at 264 (*citing United States v. Giuliano*, 263 F.2d 748 (3d Cir. 1976)).

II.
THE EVIDENCE IS SUFFICIENT FOR A GUILTY VERDICT

The Government has presented sufficient evidence for a reasonable jury to find, beyond a reasonable doubt, that Defendant aided and abetted a conspiracy to fix prices among graphite electrode producers. The existence of the conspiracy has been proved beyond any doubt. The Government must also show that the Defendant had knowledge of the crime. Over ten Mitsubishi executives and sales people were identified as having knowledge of the conspiracy. While the defense may argue that such knowledge was only "rumor," the record is more than sufficient for the jury to disregard such characterization. In any event, Ichiro Fukushima, the individual

Mitsubishi assigned to oversee UCAR's operation as Mitsubishi's UCAR Team Project Leader, actually attended price-fixing meetings. This alone is sufficient to attribute knowledge and participation to Mitsubishi, his employer. Furthermore, Fukushima reported back to numerous Mitsubishi executives concerning meetings he attended. Fukushima reported fact, not rumor. The evidence of Mitsubishi's knowledge of the conspiracy is overwhelming. Any contention by Defendant that it was not responsible for Fukushima's aiding and abetting the cartel is wrong as a matter of law and is a question for the jury.[1]

The Government must also show that having knowledge of the cartel, Defendant associated itself with the venture as something it wished to help succeed. The Government has produced sufficient evidence for the jury to find that the Defendant aided and abetted the conspiracy in at least the following ways: (1) encouraging and promoting the formation of the conspiracy, (2) providing assistance for conspiratorial meetings and facilitating communications among conspirators, (3) selling graphite electrodes on behalf of conspirators at prices it knew to be fixed, and (4) concealing the existence of the conspiracy from customers and others to allow the conspiracy to continue.

Below are brief summaries of evidence concerning various ways in which Defendant aided and abetted the conspiracy. They are not intended to be comprehensive, but are sufficient to meet the standards of Rule 29(a).

A. <u>Defendant Encouraged and Promoted Formation of the Conspiracy</u>

The documentary evidence alone is sufficient to prove Defendant encouraged and

[1] Defendant has suggested in Court that Mitsubishi can only be held responsible if Hiroshi Kawamura knew of or participated in the scheme. This contention also is wrong as a matter of law.

promoted the formation of the conspiracy.[2] GX-105.9 shows that several high ranking Mitsubishi employees recommended acquiring part ownership in UCAR with the "aim and strategy" to "promote the establishment of a structure for concerted actions" in the graphite electrode industry. That same document shows Mitsubishi had not even waited to acquire UCAR before obtaining the agreement of two manufacturers, Tokai Carbon and Mitsubishi Kasei, who "already confidentially expressed their intention to 'aggressively back up MC.'"

Other documents also show Mitsubishi's plan to encourage and promote industry collusion during the period it evaluated the benefits of acquiring UCAR. GX-103 is a recommendation of a Mitsubishi official that Mitsubishi not acquire UCAR without "securing the cooperation of the top [executives] of Japanese manufacturers," identifying several Japanese manufacturers who later participated in the conspiracy. GX-105.2 contains two Mitsubishi memoranda that were widely circulated at high levels. The memoranda demonstrate Mitsubishi's awareness that its plan for the proposed UCAR joint venture might violate the law. They state, "Under the U.S. Antitrust Act, the establishment of the J/V itself is not a problem, but it may become a target in the process of promoting cooperation and harmony in the industry. We must really recognize this risk." In GX-117, another Mitsubishi memorandum discussing the proposed acquisition, the author wrote, "Yesterday, when Executive Vice-President Atsushi Yamamoto and Division General Manager Shinozaki confidentially notified the top executive of Showa Denko, Japan's largest electrode maker, they were given a promise of maximum cooperation; this indicates smooth progress with the industry scheme, but we are concerned about the news

[2] Many of the documents in evidence are certified translations from Japanese. While Defendant may contest these translations, for purposes of its motion the translations must be considered accurate.

media's breaking the story [of the joint venture]." Show Denko later participated in the conspiracy.

GX-3 shows that immediately after acquiring its ownership interest in UCAR, Mitsubishi officials visited graphite electrode manufacturers to discuss its plan to promote collusion. The document memorializes statements made by three Mitsubishi officials during a visit to manufacturer SEC Carbon (which later participated in the conspiracy) and contains numerous entries showing that Defendant promoted formation of the conspiracy. Among the statements made to SEC Carbon by the three Mitsubishi officials one day after acquiring its UCAR interest are:

1. "UCAR would like to make policies on volume, pricing, etc., . . . through discussions with Japanese manufacturers. It will take retaliatory actions . . . against anyone who cannot keep promises made in such discussions."

2. "In the future, [MC] will also finalize the talks with SIGRI to build a structure, which enables us to cooperate. **If SIGRI, UCAR and the Japanese manufacturers take a joint step, we can control the world market.** [MC] intends to approach GL, CGG, etc., but 'MC' considers them minor after all." (emphasis added)

3. "Until now, even if discussions were held with foreign manufacturers, the implementation aspect did not always go well or prices collapsed in some cases as they became suspicious of one another. [MC] thinks it can prevent these from happening by allowing [the manufacturers] to fully utilize MC.

While Defendant may offer benevolent interpretations of these documents, the jury may reasonably reject Defendant's interpretations. In the context of Defendant's motion for acquittal, the evidence must be viewed in the light most favorable to the Government.

There is also testimonial evidence that Defendant promoted the conspiracy. Robert Krass, UCAR's President, testified that prior to the conspiracy's inception, but after Mitsubishi acquired

its interest in UCAR, Mitsubishi arranged for him to meet with UCAR's Japanese competitors. At those meetings, the participants discussed ways in which the competitors could cooperate to reduce industry capacity and increase prices. Krass testified that Mitsubishi later encouraged him to get to know his competitors, and that Mitsubishi's conduct influenced his decision to go to the London price-fixing meeting. Krass also testified he knew that Yorizo Kimura visited European producers to encourage cooperation and that he believed that if he did not meet with competitors, Mitsubishi would continue to do so. After the conspiracy was formed, Mitsubishi continued to encourage Krass to meet with his Japanese competitors and regularly arranged meetings for him, prepared him for those meetings, and escorted him to those meetings. This continued to the very last price fixing meeting in November 1996.

Tokai and SEC Carbon executives testified about meetings they had with Kimura regarding Mitsubishi's acquisition of UCAR. Tokai and SEC Carbon were concerned with Mitsubishi's new role in the industry and considered dropping it as a trader. During their meetings, Kimura promoted industry-wide cooperation and argued that maintaining Mitsubishi as their trader would facilitate higher pricing. While those witnesses claimed Kimura's activities did not influence them to attend the London meeting, their testimony is unrefuted that as a result of these efforts to promote collusion, the Japanese manufactures agreed not to drop Mitsubishi as their trader. The Japanese manufacturers' agreement to maintain Mitsubishi as a trader after Mitsubishi acquired its interest in UCAR created a condition that facilitated formation of the conspiracy the following year and led, as Mitsubishi had claimed it would, to higher prices.

Viewed together, the documentary and testimonial evidence sufficiently shows Defendant planned to promote collusion, met with Japanese and German manufacturers in an effort to

implement its plan, then encouraged UCAR to engage in the conspiracy that was formed in London. The evidence further shows that Mitsubishi facilitated the conspiracy's formation. This evidence, viewed in the light most favorable to the Government, is sufficient for the jury to reasonably find that Mitsubishi encouraged and promoted formation of the conspiracy.[3]

B. Defendant Provided Assistance for Conspiratorial Meetings and Facilitated Communications Among Conspirators

Krass testified that Fukushima set up meetings he had with Japanese conspirators regarding the conspiracy. Various documents corroborate his testimony (GX-236, 260, 262, and 267). Krass also testified that Fukushima, in addition to arranging meetings with Japanese competitors, briefed him on issues that might come up at conspiratorial meetings. GX-220 is a written set of talking points prepared by Fukushima for Krass in preparation for such a meeting. Krass testified that he received similar briefings on other occasions.

Yamazaki, of Tokai, testified that during the conspiracy he used Fukushima to deal with Krass because Fukushima and Krass had a good relationship. He also noted that Fukushima acted as a translator at various conspiratorial meetings, which obviously facilitated communication among the Japanese and American conspirators. Fukushima's role as translator occurred during both the period he worked at UCAR and translated at the first London meeting, and the later period after he had returned to Mitsubishi. There is sufficient evidence to show Fukushima acted as Mitsubishi's agent even during the period he worked at UCAR. Fukushima was assigned temporarily to UCAR at Mitsubishi's insistence, continued to accrue benefits at Mitsubishi during

[3] Defendant may claim that its plan to promote cooperative pricing in the graphite electrode industry in 1990 and 1991 did nothing to encourage formation of the actual conspiracy in 1992, but that issue is for the jury.

that period, and would have received a pay supplement from Mitsubishi had his UCAR pay been less than his Mitsubishi pay.

Viewing the evidence in the light most favorable to the Government, there is sufficient evidence for a jury to find that Mitsubishi facilitated meetings and communications in furtherance of the conspiracy.

C. Defendant Sold Graphite Electrodes for Conspirators at Prices it Knew to be Fixed

Mitsubishi was the largest graphite electrode trader in the world and sold electrodes for four of the conspirators--UCAR, Tokai, SEC Carbon, and Showa Denko. As set forth above, knowledge of the price-fixing conspiracy was widespread at Mitsubishi. Fukushima testified that Mitsubishi made very few sales at prices below those set by the manufacturers whose product it sold. Okabe testified that Mitsubishi rarely sold SEC Carbon electrodes for less than SEC's price plus normal commission.

Although Kenichi Koyanagi, a Mitsubishi trader, said he was repeatedly told about the conspiracy (which he characterized as "rumor") but that he ignored the market prices and discounted continually, his testimony conflicts with that of Fukushima and Okabe and is uncorroborated by any documentation. In any event, Mr. Koyanagi ultimately admitted that he did not gain market share by discounting but only maintained existing market share, which was one of the tenets of the conspiracy. Koyanagi also conceded Mitsubishi did not discount to its U.S. customer, Raritan Steel, although he claimed Raritan Steel did not mind paying high prices.

Viewing the evidence in the light most favorable to the Government, there is sufficient evidence for the jury to reasonably find that Mitsubishi sold electrodes at prices it knew to be fixed.

D. Defendant Concealed the Existence of the Conspiracy from Customers and Others to Allow the Conspiracy to Continue

As set forth above, numerous Mitsubishi employees knew of the graphite electrode conspiracy which Mitsubishi promoted and facilitated. It is undisputed that no one employed by Mitsubishi ever revealed the conspiracy's existence to any customer to whom Mitsubishi sold electrodes, to the Blackstone Group to whom Mitsubishi sold its share in UCAR in 1995, or to Union Carbide, Mitsubishi's partner in the UCAR joint venture. Had Mitsubishi disclosed the conspiracy's existence to any of those companies, its disclosure would have threatened the existence of the conspiracy. Defendant itself has made much of the fact that if Union Carbide had been aware of the cartel, the conspiracy would have ended.

Viewing the evidence in the light most favorable to the Government, there is sufficient evidence for the jury to reasonably find that Mitsubishi knew of the conspiracy and concealed it in order to maintain its existence.

III.
CONCLUSION

The evidence, when viewed in the light most favorable to the Government, is sufficient for a jury to find beyond a reasonable doubt that Defendant aided and abetted the alleged conspiracy in each of the ways identified above. Consequently, Defendant's motion should be denied.

Dated:

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 8th day February 2001, a copy of the Government's Memorandum in Opposition to Defendant's Motion for Judgment of Acquittal Pursuant to Federal Rule of Criminal Procedure 29(a) has been hand delivered to counsel of record for the defendant as follows:

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