

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

UNITED STATES OF AMERICA) Criminal No. 00-033
)
) Judge Marvin Katz
)
v.)
)
MITSUBISHI CORPORATION,) Violations: 15 U.S.C. § 1 and 18 U.S.C. § 2 (a)
)
) Filed: 9/29/00
Defendant.)

GOVERNMENT’S MOTION FOR A HEARING
ON POSSIBLE CONFLICT OF INTEREST

The United States, by its attorneys, respectfully moves this Court for a hearing concerning a possible conflict of interest that the law firm of Paul Weiss Rifkind Wharton & Garrison (Paul Weiss) may have in continuing to represent defendant Mitsubishi Corporation. The Government has discussed this issue with counsel for Mitsubishi and has been advised that the defendant is prepared to execute an appropriate waiver. Defense counsel will, however, file a response to this motion.¹

As more fully set forth in the Government’s Memorandum of Fact and Law accompanying this motion, Paul Weiss not only represents the defendant in this criminal proceeding, but also represented Mitsubishi and one of its wholly-owned subsidiaries, Mitsubishi International Corporation (MIC), in 1990 and 1991 at the time the defendant purchased 50% of UCAR Carbon Company (UCAR), a major participant in the conspiracy charged in the Indictment. To the Government’s knowledge, however, the Paul Weiss attorneys representing the defendant in the present criminal proceedings are not the same attorneys that represented it in the UCAR purchase.

¹ Defense counsel will request that any hearing on this issue be held in late October or early November to allow time for a trip to Japan to discuss the issues with the defendant in person.

It will be the Government's position at trial that the defendant formulated its plan to aid and abet the formation of a graphite electrode cartel and took steps toward that end at or about the time of its purchase of 50% of UCAR. Documents from this period which were created by the defendant will be offered to demonstrate these actions and the defendant's plan. Certain of these documents appear to have been sent to or reviewed by attorneys in the firm of Paul Weiss. In addition, the Government will offer as evidence a document sent by an official of Mitsubishi to Robert Krass, the CEO of UCAR, setting up a meeting in Tokyo which the Government will allege was a meeting in furtherance of the conspiracy. While there is no evidence that Paul, Weiss saw or approved of the fax (and the fax itself does not reference the topic of the Tokyo meeting), the defendant may well wish to call attorneys from Paul Weiss as witnesses at trial or to disclose attorney/client privileged documents thereby creating a potential conflict of interest.

The Pennsylvania Rules of Professional Conduct have been adopted in this District pursuant to Local Rule 83.6 (IV)(B). Rule 3.7(b) of the Pennsylvania Rules governing the conduct of lawyers as witnesses states:

A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 [Conflict of Interest--General Rule] or Rule 1.9 [Conflict of Interest--Former Client].

Rule 1.7(b) [Conflict of Interest--General Rule] states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after full disclosure and consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the

common representation and the advantages and risks involved.

Given the above, it would appear that a hearing is appropriate so that the defendant may be fully informed of the facts surrounding the present representation and, if appropriate, the Court may obtain from the defendant a voluntary and knowing waiver of conflict free representation and a waiver to challenge a conviction based on ineffective assistance of counsel.

Accordingly, the United States respectfully requests that the Court grant this motion.

Dated:

Respectfully submitted,

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GOVERNMENT'S MEMORANDUM OF FACT
AND LAW IN SUPPORT OF ITS MOTION FOR
A HEARING ON POSSIBLE CONFLICT OF INTEREST

I. BACKGROUND

The Indictment alleges that Mitsubishi Corporation aided and abetted a price-fixing conspiracy among the world's manufacturers of graphite electrodes which began at least as early as March 1992 and continued into June 1997. A key event in the formation of the conspiracy was the purchase by Mitsubishi Corporation of 50% of UCAR Carbon Company (UCAR) in a joint venture with Union Carbide Corporation consummated on February 26, 1991. Counsel for Mitsubishi during this transaction was the law firm of Paul Weiss Rifkind Wharton & Garrison (Paul Weiss). Mitsubishi also used its wholly-owned United States subsidiary, Mitsubishi International Corporation (MIC) in New York to aid extensively in the negotiations and subsequent management of its investment in UCAR. Paul Weiss also represented MIC with respect to the UCAR transaction. To the Government's knowledge, however, the Paul Weiss attorneys involved in the UCAR transaction are not the same attorneys presently representing the defendant in the instant matter.

It is part of the Government's theory of the case, that at or before the time Mitsubishi began negotiations to purchase a portion of UCAR it formulated plans to aid and abet the creation

of a worldwide cartel in the graphite electrode industry and took certain actions to promote and encourage the formation of the cartel. Mitsubishi believed that as part of this plan, the UCAR purchase would put it in a position to foster cooperation between UCAR (the world's largest manufacturer of graphite electrodes), several Japanese manufacturers of electrodes whom Mitsubishi already represented, and certain of the European electrode producers.

The Government will argue that certain Mitsubishi documents relating to the UCAR transaction support the proposition that Mitsubishi intended to encourage the formation of this cartel. Some of these documents may have been reviewed by Paul Weiss. One important Government document appears to have been reviewed by Paul Weiss and incriminating language was deleted from the final version. Another incriminating document dated in 1996, after the cartel was created, was sent by an official of Mitsubishi to Robert Krass, the CEO of UCAR, and a principal conspirator setting up a conspiratorial meeting in Tokyo. The document appears to have the fax banner of the law firm of Paul Weiss across the top of the document.

These documents are among the preliminary trial exhibits disclosed by the Government to Paul Weiss. Introduction of these documents at trial very well may prompt Mitsubishi to call attorneys and employees of Paul Weiss as witnesses or to introduce documents authored by Paul Weiss or Mitsubishi during their attorney/client relationships in an attempt to present a less damaging explanation of the content of the documents, thereby creating a possible conflict between the interests of Paul Weiss and the defendant. For these reasons, the Government believes that it is essential that a hearing be held by the Court to examine the extent of this potential conflict.

II. THE DOCUMENTS

In order to demonstrate the Government's good faith belief that there may be a conflict of interest which requires a waiver from the defendant, and in order that the Court may have an appreciation of the nature of the potential conflict, the Government will describe the evidence in question in some detail.²

A. Documents of September 1991 (Exhibit A)³

In September 1991, members of Mitsubishi Corporation's UCAR project team in Tokyo drafted a letter to be sent to Union Carbide expressing the importance of the joint venture to Mitsubishi's continued sales representation for Japanese manufacturers of graphite electrodes at certain accounts in UCAR's home markets. A September 5, 1991 memorandum from Messrs. Kato and Tsutsui of Mitsubishi's UCAR project team to MIC Consulting in New York (a Mitsubishi Corporation subsidiary), forwarded the draft letter dated September 2, 1991 and asked the following: "[r]egarding the contents of this letter, I would like your assistance in having them reviewed by Paul Weiss from the antitrust law perspective. I would appreciate your revising he

² The documents described in this memorandum have been identified by the Government as likely trial exhibits which the Government believes to be admissible. In the grand jury document submission of MIC, however, there are other documents, many in Japanese, which indicate that advice was sought from Paul Weiss or 'P/W' with respect to Mitsubishi's ownership interest in UCAR. There is also a privilege log prepared by Paul Weiss during the grand jury investigation of 373 documents withheld from the grand jury by MIC on the basis of attorney/client privilege between Paul Weiss and MIC. The Government is not currently aware of any other documents which raise conflict issues, and if other documents become relevant, the conflict issues should be substantially similar to the ones raised by the documents described in this memorandum.

³ For the convenience of the Court and counsel, the Government has highlighted the relevant portions of the attached documents. These highlights do not appear in the originals.

[sic] letter, if so determined necessary, in a manner so as not to impair the effect of the letter.”⁴

(MIC 12243-NE). The draft letter reads in relevant part:

. . . [W]e anticipate that complete withdrawal of our Japanese transactions from the Home market at this point in time will lead Japanese manufacturers to abandon their hope in our strategic alliance and seek employment of competing trading firms in attempt to safeguard their own interests. In order to protect our long term mutual interests it is imperative that we manage to maintain the Japanese manufacturers at a position where our strategic alliance can exercise influence so that we can lead the industry to develop reasonable respect for their respective Home Markets.

* * *

The current major task of UCAR Carbon is to improve the financial structure and performance. In addition to the various rationalization measures and improvements in the supply and demand balance, development of an orderly market condition and coordination of competition is vital to securing the long term stability and health of our strategic alliance in the best interests of all.

(MIC 12247-48-NE) (emphasis added).

A revised letter was signed and sent to Union Carbide dated September 11, 1991. The letter still referred to (a) the need to continue to sell for the Japanese manufacturers or it would lead to these manufacturers using other Japanese trading firms; and (b) the need to maintain those relationships in order to obtain synergy benefits. However, it no longer mentioned that the manufacturers would “abandon hope in our strategic alliance”, that the joint venture needs to lead the industry “to respect their respective home markets” and that “development of an orderly market condition and coordination of competition is vital.” (MIC 08937-38).

Other intervening documents suggest that the draft letter was, in fact, reviewed by Paul Weiss. A September 9, 1991 fax from Mr. Kato in Tokyo to MIC Consulting in New York reads

⁴ This portion of the document is in Japanese, and the above quote is the Government’s translation of the sentence. The words “Paul Weiss”, however, do appear in English. The Government has attached its translations to the relevant documents appended to this Memorandum.

as follows: “Thank you for your communication dated September 6. Today I received a response from P/W that it would comment by tomorrow. Thank you for your cooperation.” (MIC 12296). According to the privilege log produced by Mitsubishi, there are also memoranda withheld as privileged in which Paul Weiss provided advice to Mr. Kato on September 9, 1991 (MIC 12290-96) and September 10, 1991 (MIC 12287), as well as a September 10, 1991 fax from Mr. Kato to Paul Weiss (MIC 12288-89).

B. Hart-Scott-Rodino Notification and Report Form Attachment (Exhibit B)

In November 1990, pursuant to its obligations under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, and the rules promulgated thereunder, 16 C.F.R. §§ 801.1 et seq., Mitsubishi Corporation submitted documents to the Federal Trade Commission and the Antitrust Division, United States Department of Justice, in connection with the proposed purchase of 50% of UCAR. Among the documents called for in the Premerger Notification and Report Form were studies, surveys, analyses, and reports prepared by or for officers or directors evaluating the transaction with regard to marketing or competitive issues pursuant to Item 4(c) of the Form. See 52 Fed. Reg. 7084, 7094. Mitsubishi submitted two documents in response to Item 4(c), one of which was an application by Mitsubishi’s Carbon Division to the Special Investment Committee of Mitsubishi for approval of the investment in UCAR dated October 9, 1990. However, another version of this document bearing the same date was distributed to members of Mitsubishi’s investment committee on October 3, 1990 and was not submitted with the Notification and Report Form. The alternate version contains a number of paragraphs and subparagraphs not contained in the proposal which accompanied the Notification and Report Form and which the Government believes contains incriminating statements reflecting Mitsubishi’s

collusive intent and actions. Among the statements edited out of the Proposal were the following:

3. Our Aim and Strategy

* * *

- . . . [W]e shall promote the establishment of a structure for concerted actions and the qualitative improvement of the industry that each company has long awaited. We shall aim at achieving a reasonable level of profit by promoting improvement of market conditions.
- We can use this J/V as a good opportunity to specifically promote rationalization and a reorganization of the industry in Japan information that is advantageous to Mitsubishi, mainly centered around Mitsubishi-affiliated manufacturers (Mitsubishi Kasei, Tokai Carbon, SEC).

* * *

4. Strategy After Investment/Specific Method for Improving UCAR Performance

* * *

(2) Our role

- Coordination with Japanese and European carbon manufacturers, such as SIGRI (Hoechst), through transactions of carbon raw materials and products.

* * *

(3) Sales strategy

* * *

- Strive to avoid excessive competition in quality and technical services.

* * *

(5) Relationship with Japanese Manufacturers

- Maintaining a good relationship between MC and the Japanese carbon industry is quite necessary for achieving the goals of this J/V; Mitsubishi Kasei and Tokai Carbon have already confidentially expressed their intention to “aggressively back up MC.” Moreover, Showa Denko, SEC and others are seeking a powerful leader in the industry and desire the establishment of an orderly system for the industry.

* * *

8. Synergy and Rippling Effect

* * *

- We expect to achieve operating profits that exceed UCC projections from 1994, as shown above, by means of the following synergy effect. . . .⁵
Increase in electrode sales prices through improved market conditions supported by coordination in and qualitative improvement of the industry, and expansion in UCAR product sales by MC.

* * *

(MIC 08681-82).

The Government is not aware of any evidence that Paul Weiss made these changes, and Paul Weiss did not submit the Premerger Notification and Report Form. However, since Paul Weiss counseled Mitsubishi through this transaction, it may have evidence concerning why the deletions were made. Documents created during this period of time were redacted from MIC's response to a grand jury subpoena on the basis of attorney/client privilege. Again, Mitsubishi undoubtedly will want to present evidence that the Government's interpretation of these documents is incorrect (these particular documents are written largely in Japanese), but that may involve testimony or documentation from Paul Weiss.

C. Fax of October 22, 1996 (Exhibit C)

On October 22, 1996, Ichiro Fukushima, the General Manager of Mitsubishi's Carbon Business Development Department, sent a fax to Robert Krass, the CEO of UCAR, trying to arrange a meeting for Krass in Tokyo. (UCAR-001072-SW). While the fax itself contains no overt reference to conspiratorial activity, the Government will show that the meeting this fax helped set up turned out to be a conspiratorial meeting that was, in fact, held in Tokyo in November 1996. The fax banner at the top of the document indicates that the fax was sent by Fukushima to Krass from the law offices of Paul Weiss.

⁵ This introductory statement and all of the headings except for "(5) Relationship with Japanese Manufacturers" were not deleted from the version of the proposal submitted with the Premerger Notification and Report Form.

III. LEGAL PRINCIPLES

Under the Sixth Amendment, the defendant has a right to effective assistance of counsel. See, e.g., Burger v. Kemp, 483 U.S. 776, 781-82 (1987); Cuyler v. Sullivan, 446 U.S. 335, 343 (1980); Holloway v. Arkansas, 435 U.S. 475, 481 (1978). The right to counsel under the Sixth Amendment includes the right to be represented by an attorney who is free from conflict of interest. See United States v. Stout, 723 F. Supp. 297, 303 (E.D. Pa. 1989).

The Pennsylvania Rules of Professional Conduct, which have been adopted by this Court (see Local Rule 83.6(IV)(B)) set forth the circumstances under which a lawyer may properly act as an advocate at trial when members of his firm may be called as witnesses. Rule 3.7(b) of the Pennsylvania Rules governing the conduct of lawyers as witnesses states:

A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 [Conflict of Interest--General Rule] or Rule 1.9 [Conflict of Interest--Former Client].

Rule 1.7(b) [Conflict of Interest--General Rule] states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after full disclosure and consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Given Paul Weiss' extensive representation of the defendant and one of its wholly-owned subsidiaries during the defendant's purchase of 50% of UCAR (an event which the Government intends to show was central to the charges in this case) and its receipt and review of at least one

of the incriminating documents and possibly others set forth in this memorandum, the Government believes that it is essential that the Court hold a hearing on the issue of possible conflict. As the Court for this Circuit stated in Government of Virgin Islands v. Zepp, 748 F.2d 125, 139 (3d Cir. 1984):

Normally, the trial court should conduct an evidentiary hearing or factual inquiry to determine whether disqualification is appropriate and should inquire into the nature of the conflict and the client's awareness of the conflict. The court should also determine whether there has been a waiver of the conflict, whether the waiver was effective or whether a waiver was possible.

IV. CONCLUSION

For the reasons set forth in the Memorandum, it is respectfully requested that the Government's Motion for a Hearing on Possible Conflict of Interest be granted.

Dated:

Respectfully submitted,

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