

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: 01/05/01
Defendant.

**GOVERNMENT’S REPLY TO
DEFENDANT’S TRIAL MEMORANDUM**

Preliminary Statement

As instructed by the Court, the Government is filing a response to the issues raised by the defendant in its trial brief.

A. Court Appointed Interpreter

The United States and Mitsubishi Corporation have agreed upon a recommendation to the Court for an appointed interpreter. A motion seeking the Court’s approval of an interpreter who has been interviewed by the parties and is mutually acceptable will be filed shortly. The parties agree that the jury should be instructed that the Court appointed interpreter does not carry any greater weight solely because of this designation than an expert witness either the Government or defense may call. A preliminary statement to be read to the jury will be submitted for the Court’s consideration.

Mitsubishi proposes that where either the Government or defense foreign language expert or “checker” disagrees with the Court appointed translator, the checkers and Court translator should confer to determine whether they can come to a mutually agreeable translation. This

procedure, if used sparingly, may be the best way to clarify a witness's testimony clearly for the jury. If, however, objections to translations are frequent, and conferences among the translators fail to provide agreement, it may be too disruptive of a witness's testimony to proceed in this fashion. It may be more efficient and orderly to present the witness's testimony uninterrupted to the jury. If the translator for either the Government or defense does not agree with the Court translator, he/she can testify at a later time. Such matters are clearly within the sound discretion of the Court to regulate the presentation of the case to the jury.

B. Authenticity and Admissibility of Documents

As Mitsubishi notes, it has not stipulated to the authenticity or admission of any documents and has reserved its right to make appropriate objections as documents are individually offered at trial. (Defendant's trial brief p.4.) The United States has briefed the relevant legal theories regarding authenticity, agency and other issues pertinent to the admissibility of documents in its trial brief.

C. Lay Opinion Testimony

Mitsubishi contends that lay opinion testimony from cooperating witnesses should not be admitted. (Defendant's trial brief p.4.) Lay opinion testimony, however, may be admitted when it is both "rationally based on perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Fed. R. Evid. 701. Under the rule a witness cannot give his interpretation to "straightforward, potentially legitimate statements." *United States v. Dicker*, 853 F.2d 1103, 1110 (3d Cir. 1988). Thus, the Court of Appeals in *Dicker* held that a customs agent should not have been allowed to explain that the

defendant's potentially legitimate reference to export certificates was really a reference to "phony documents" when the defendants was clear. *Id.* Conversely, in *United States v. DePiri*, 778 F.2d 963 (3d Cir. 1986) a witness was permitted to testify as to his understanding of tape recorded conversations because the language on the tapes was "sharp and abbreviated, composed with unfinished sentences and *punctuated with ambiguous references to events that are clear only to Martin [the defendant] and his audience.*" *Id.* at 977 (emphasis added). Should either party seeks to obtain lay opinion testimony, it will be for the Court to decide whether the conditions of Rule 701 have been met.¹

D. Use of Leading Questions

1. Adverse Parties

The Government in its trial brief has set forth several circumstances under which leading questions may be used such as when a witness is identified with an adverse party. The Government intends to call several witnesses who are either employees of Mitsubishi or Mitsubishi affiliates. These witnesses are identified with an adverse party under Fed.R.Evid. 611(c), are presumed hostile and leading questions may therefore be used.

2. Cooperating Witnesses

The Government will also be calling witnesses who will be testifying pursuant to cooperation agreements between the Government and their employers whereby the individuals

¹ The Government notes the above cited cases refer to whether a witness can offer an interpretation of a conversation that was tape recorded. These cases bear no relation to the separate principle that a witness can testify to the substance of a conversation even if he cannot presently recollect the exact words used. See Government's trial brief at pages 35-38.

will not be prosecuted in return for their cooperation. Such witnesses, of course, are not presumed hostile. However, the mere existence of a cooperation agreement with the Government does not preclude a finding by the Court that the witness can be treated as hostile depending on circumstances which may develop at trial. Circumstances such as the witness's (or his company's) exposure in civil lawsuits, the witness's business or financial ties to Mitsubishi, and/or the witness's evasiveness at trial may justify the use of leading questions. Whether trial circumstances establish the witness as hostile is within the sound discretion of the trial court even if the witness is testifying pursuant to a cooperation agreement with the Government.

3. Foreign Language Witnesses

The Court may also permit the use of leading questions with witnesses who speak a foreign language. The Government has cited numerous cases in its trial brief which support such discretion by the trial court. The Government is not seeking carte blanche authority to question every foreign language witness completely through leading questions. However, circumstances may arise during the course of trial which may, in the sound judgment of the Court, warrant the use of leading questions.

E. Translations of Japanese Documents

The Government's only reply to this section is to note that Mitsubishi has not provided the Government with any translations of foreign language documents it may use at trial. The Government respectfully requests that the defendant produce such documents to the Government at the earliest possible time in order that the Government may review the translation. The Government reserves the right to object to the use of any foreign language document that has not

been produced to the Government in advance and/or to request a delay or continuance in order to review any translation that Mitsubishi may use that the Government has not had time to review.

Dated:

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

This is to certify that on the 5th day of January 2001, a copy of the Government's Reply to Defendant'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

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