UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America, Plaintiff, *v.* **Tokai Kogyo Co., Ltd.**, and **Green Tokai Co., Ltd.**, Defendants.	Case No. 1:16cr63 Judge Timothy S. Black

United States' Opposition to Defendants' Motion for Judgment of Acquittal

The sole argument advanced by the defendants in their motion for judgment of acquittal is that they cannot be found guilty of violating the Sherman Act (15 U.S.C. § 1) unless the government proves beyond a reasonable doubt that there was a "three-party agreement"—i.e., a "conspiratorial agreement between Tokai Kogyo/Green Tokai, Nishikawa/NISCO, and TG/TGNA." (Doc. No. 221, Defs.' Mot. for Judgment of Acquittal, PageID 4818–19.) The defendants do not dispute that there is sufficient evidence that they joined an illegal agreement with their competitors, Nishikawa and NISCO. (*Id.* at PageID 4820.) Rather, they maintain that the government must prove that TG/TGNA also were co-conspirators because the United States has so alleged. (*Id.* at PageID 4819.)

The defendants' argument is wrong as a matter of law. *See United States v. Andrews*, 895 F.2d 1415, 1990 WL 12099 (6th Cir. 1990) (unpublished table disposition). In *Andrews*, the defendant was convicted of a two-person conspiracy even though three

conspirators were named in the indictment. *Id.* at *4. He sought to overturn his conviction on the ground that "the indictment, when explained by the bill of particulars, was at variance with the crime for which he was convicted." *Id.* The Sixth Circuit rejected that argument, explaining that, because the government had proved the conspiracy alleged in the indictment (i.e., a conspiracy to distribute drugs), it was irrelevant that "one of the members named on the indictment was not shown to be a member of the conspiracy." *Id.* (citing *United States v. Bowers*, 739 F.2d 1050 (6th Cir. 1984)). The court explained that "[a]ny other result would lead to a complex mess where any time one member of a conspiracy was not convicted, all other members would be granted new trials, regardless of the clarity of their membership in the conspiracy." *Andrews*, 1990 WL 12099, at *4.

The legal principle illustrated by *Andrews*—that a defendant can be properly convicted of a conspiracy even if some of the named co-conspirators are not shown to have been members of the conspiracy—is consistently applied in the Sixth Circuit and elsewhere. *See United States v. Piccolo*, 723 F.2d 1234, 1239 (6th Cir. 1983) ("[I]t is the grand jury's statement of the existence of the conspiracy agreement rather than the identity of those who agree which places the defendant on notice of the charge he must be prepared to meet." (citation and internal quotation marks omitted)); *United States v. Lopez*, 6 F.3d 1281, 1288 (7th Cir. 1993) ("The government does not have to prove with whom the defendant conspired, but only that the defendant joined the alleged agreement."); *United States v. Davis*, 679 F.2d 845, 851 (11th Cir. 1982) (affirming conspiracy conviction where "evidence showed a conspiracy with fewer people, of

shorter duration, and in a smaller area" because "none of the essential elements was altered" and "[t]he existence of the conspiracy agreement rather than the identity of those who agree is the essential element to prove conspiracy").

The defendants' contention that they cannot be convicted of a conspiracy unless the government proves the involvement of *every* known co-conspirator also is at odds with the well-accepted principle that a defendant may be convicted of a conspiracy even if the identity of all co-conspirators is unknown. *See United States v. Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991) ("A defendant may be indicted and convicted despite the names of his co-conspirators remaining unknown, as long as the government presents evidence to establish an agreement between two or more persons, a prerequisite to obtaining a conspiracy conviction." (citations omitted)); *Rogers v. United States*, 340 U.S. 367, 375 (1951) ("[T]wo persons are required to constitute a conspiracy, but the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown."); *United States v. Harris*, 8 F.3d 943, 946 (2d Cir. 1993) ("[I]t is well settled law that an individual need not know the identities of all coconspirators in order to be found guilty of being a member of the conspiracy.").

The defendants do not discuss—or even cite—any of the multitude of cases that foreclose their argument.[1] Instead, they point to *United States v. General Electric Co.*,

[1] In addition, the defendants misstate the evidence when they assert that "[n]one of the government's witnesses testified that there was a conspiratorial agreement between Tokai Kogyo/Green Tokai, Nishikawa/NISCO, and TG/TGNA." (Doc. No. 221, Defs.' Mot. for Judgment of Acquittal, PageID 4819.) To the contrary,

869 F. Supp. 1285 (S.D. Ohio 1994), for the proposition that the government must prove facts that are "not an essential element of the government's case." (Doc. No. 221, Defs.' Mot. for Judgment of Acquittal, PageID 4819.) But the statement that the defendants rely on is taken out of context, and *General Electric* does not apply here. In that case, General Electric was charged "with conspiracy to raise the list prices of its industrial diamonds with co-defendant DeBeers" in violation of the Sherman Act. *See Gen. Elec.*, 869 F. Supp. at 1228. The government had alleged that an employee of a General Electric subsidiary had provided advance pricing information to a man named Liotier. *Id.* at 1289. General Electric maintained that Liotier was acting on behalf of a General Electric *customer*, not on behalf of DeBeers. *Id.* The court concluded that General Electric could not be convicted unless the government proved that Liotier was an agent of DeBeers. But the court reached this conclusion because DeBeers was "the only General Electric competitor mentioned in the indictment" and "[w]ithout DeBeers there could not, by definition, be a conspiracy to fix prices." *Id.* at 1301. Thus, *General Electric* stands only for the uncontroversial proposition that the government must prove a conspiracy between at least two competitors to establish a Sherman Act violation. The United States has done so here. Indeed, the court has found by a preponderance of the evidence

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Mr. Nakamichi testified that TG also was a participant in the conspiracy, and that in November 2008 the three companies agreed to continue to have the parts they had from earlier models without competition. (*See* Tr. of Day 2 of Jury Trial, at 73, 82; Tr. of Day 4 of Jury Trial, at 63.) Likewise, Mr. Matsushita testified that Nishikawa reached an agreement in Japan with Toyoda Gosei and Tokai Kogyo for the CR-V. (Tr. of Day 7 of Jury Trial, at 20.) That testimony is corroborated by U.S. Trial Exhibit 80, a CR-V pricing spreadsheet from Green Tokai's files that contains U.S. prices for all three companies.

that a conspiracy existed and that the defendants were members of it. (Tr. of Day 10 of Jury Trial, at 97–100.) Thus, the evidence at trial, viewed in a light most favorable to the government, is more than sufficient to sustain convictions against both defendants.

Accordingly, the United States respectfully requests that the Court deny the defendants' motion for judgment of acquittal.

Respectfully submitted,

/s/ L. Heidi Manschreck
L. Heidi Manschreck
Andre M. Geverola
Matthew J. McCrobie
Chester C. Choi
Zoran Tasic
Trial Attorneys
U.S. Department of Justice
Antitrust Division
209 S. La Salle Street, Suite 600
Chicago, IL 60604
(312) 984-7200

Dated: November 21, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which electronically notifies counsel for the defendants who have appeared in this matter.

Respectfully submitted,

/s/ Zoran Tasic
Zoran Tasic
Trial Attorney
U.S. Department of Justice
Antitrust Division
209 S. La Salle Street, Suite 600
Chicago, IL 60604
(312) 984-7200
Zoran.Tasic@usdoj.gov