

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

UNITED STATES OF AMERICA,	:	Case No. 1:16-cr-63
	:	
vs.	:	Judge Timothy S. Black
	:	
TOKAI KOGYO CO., LTD. (1),	:	
GREEN TOKAI CO., LTD. (2),	:	
	:	
Defendants.	:	

**FINAL PRETRIAL ORDER**

This criminal case came before the Court on October 27, 2017 at 10:30 a.m. for a Final Pretrial Conference. Attorneys Heidi Manschreck, Matt McCrobie, Andre Geverola, Chester Choi, and Zoran Tasic (for the Government), and Ralph Kohnen, Meena Sinfelt, Larry Mackey, Brad Love, Neal Brackett, Kendall Millard, and Chad Ziepfel (for Defendants Tokai Kogyo Co. (1) and Green Tokai (2) (collectively, “Defendants”)), participated.

**TRIAL**

*Voir Dire*: November 3, 2017 at 10:00 a.m. in Courtroom #1, Room 805

Jury Trial: November 6, 2017 at 9:30 a.m. in Courtroom #1, Room 805

**CHARGES**

Indictment (Doc. 1)		
<b>1</b>	15 U.S.C. § 1	Per Se Violation of Section 1 of the Sherman Antitrust Act <i>Conspiracy to allocate sales of, rig bids for, and to fix, stabilize, and maintain prices of automotive body sealing products, in unreasonable restraint of interstate and foreign trade</i>

**MOTIONS**

Defendant’s Motion *in Limine* to Exclude Testimony and Documents Regarding Pricing Sales Outside the U.S. (Docs. 135, 136) was GRANTED IN PART and DENIED IN PART, for the reasons stated on the Record.

The Court DEFERS ruling on the Government’s Motion to Exclude the Testimony of Defendants’ Proposed Expert (Docs. 120, 121) until after the Government’s case-in-chief.

By separate Notation Order, the Court has ordered the Government to file a response to Defendants’ Motion *in Limine* to Exclude Defective and Untrustworthy Government Exhibits (Doc. 174) on or before Wednesday, November 1, 2017 at 5:00 p.m., with Defendants’ reply due by Thursday, November 2, 2017 at 3:00 p.m.

## SUBSTANTIVE ISSUES

### Trial Briefs

#### *Per Se Violation*

The Court emphasized and reiterated that this case involves, in substance, allegations of a *per se* violation of the Sherman Antitrust Act. Accordingly, the Rule of Reason standard shall not apply, and Defendants will not be permitted to present arguments and evidence tailored specifically to the Rule of Reason and otherwise inapplicable to a *per se* violation.

#### *Disputed Translations*

The Court stated its intent to submit the remaining disputed translations to the two court interpreters, in order to determine whether one or both of the parties' competing translations is objectively reasonable, giving due consideration to the context of the disputed text and any ambiguity inherent in the Japanese language.

The parties must provide the Court with all additional disputed translations no later than Tuesday, October 31, 2017.

#### *Enright Ruling*

The Court ruled that co-conspirator statements made in furtherance of the conspiracy will be conditionally admitted, based on the *Enright* proffer (Doc. 166) and subject to the Government demonstrating, during its case-in-chief, the admissibility of the statements. The Court will issue an order, by separate entry, memorializing its *Enright* ruling.

*Prior Consistent Statements*

The Court ruled that evidence of prior consistent statements will not be admitted.

*Prior Inconsistent Statements*

The Court ruled that, if a witness, while testifying, acknowledges a prior inconsistent statement, no extrinsic proof may be presented. Further, the Court reiterated that statements contained in MOIs and 302s are not a witness' 'prior statements' (unless the witness adopted as his own the statement contained in the report), and thus while the reports may be used to refresh the witness' recollection, any statements contained in the report may not be used for impeachment as a prior inconsistent statement.

*The Government May Not Lead Its Own Witnesses*

The Court ruled that the Government may not lead its Japanese witnesses. Some leeway may be given if confusion arises and permissible attempts to clarify do not resolve the witness' confusion. In such instances, the Government must seek the Court's permission to ask limited leading questions to resolve witness confusion.

*Admissibility of the Plea Agreement*

The Court ruled that the corporate plea agreement will not be admitted at trial, unless the defense was to open the door. The parties have agreed to work on a stipulation regarding the plea agreement, which stipulation shall be presented to the Court prior to the start of trial.

*The Government May Impeach of Its Own Witnesses*

The Court ruled that the Government may impeach its own witnesses, if and when appropriate.

*Metadata*

The Court DEFERS ruling on the metadata issue and has ordered the Government to brief the issue of admissibility of metadata relating to the Excel spreadsheets, on or before Wednesday, November 1, 2017 at 5:00 p.m., with Defendants' reply due by Thursday, November 2, 2017 at 3:00 p.m.

**Notice of the Government's Intent to Present Rule 404(b) Evidence**

By separate Notation Order, the Court ordered Defendants to file a post-*Enright* response to the Government's Rule 404(b) notice, on or before Wednesday, November 1, 2017 at 5:00 p.m., with the Government's reply due by Thursday, November 2, 2017 at 3:00 p.m.

**Severance of Remaining Co-Defendant, Akitada Tazumi (3)**

The parties agreed that co-Defendant Tazumi, who has not yet appeared in this case, should be severed from this action for purposes of trial, and should not be identified as a co-Defendant. Defendants further requested that co-Defendant Tazumi's name be removed from the Indictment, to avoid confusion to the jury. The Court ORDERS that: (1) co-Defendant Tazumi is SEVERED for purposes of trial; (2) co-Defendant Tazumi shall not be identified as a defendant in this case; (3) the charges against co-Defendant Tazumi shall remain pending; and (4) in the event the Indictment is provided to the jurors during deliberations, any references to co-Defendant Tazumi will be redacted from the jurors' copy.

### **Joint Representation**

The Court previously took under advisement whether Defendants would be permitted two attorneys addressing jurors at *voir dire*, two opening statements, two opportunities to examine witnesses, and two closing arguments.

As to *voir dire*, the Court will allow two attorneys to conduct *voir dire* on behalf of Defendants jointly.

As to opening statements, the Court rules that, as Defendants are jointly represented and presenting a coordinated defense, Defendants shall be permitted to present one opening statement by one attorney.

As to examination of witnesses, each Defendant, through counsel, shall be permitted to individually examine each witness, as long as Defendants avoid redundant questioning. Further, if the two co-defendants undertake separate examination as to any witness, all questions must be ‘defendant-specific.’ In other words, Defendants will not be permitted to use separate examinations as a second bite at the apple.

The Court DEFERS ruling on whether Defendants will be permitted two closing examinations until after the Court has seen the defense presentation.

### **TRIAL SCHEDULE**

*Voir dire* will commence at 10:00 a.m. on November 3, 2017. After a jury is selected, the Court will recess for the remainder of the day, and trial will resume with opening statements at 9:30 a.m. on November 6, 2017.

The trial is anticipated to last four weeks or less: November 6 to December 1, 2017. The Government estimates that it will require approximately six days for its case in chief, and the defense estimates needing no more than eight days.

Trial will begin at 9:30 a.m. each morning and conclude for the day at 4:30 p.m., with the exception of the following days: November 7, 2017 – start at 10:45 a.m.; November 10, 2017 – no court; November 22, 23, 24 – no court; November 27 – no court.

Each day, the Court will recess for 15 minutes once at approximately 10:30 a.m. and again at approximately 2:45 p.m., with a 75 minute lunch break at approximately 12:00 p.m. The Court intends to maintain a consistent schedule, although the timing and length of lunch breaks and recesses may vary depending on the flow of the trial.

In order to allow adequate time to resolve any outstanding issues, and unless otherwise instructed, counsel shall be present in the courtroom at 9:00 a.m. on the morning of *voir dire* and on the first day of trial (November 3 and 6, 2017), and no later than 9:15 a.m. each morning thereafter. Further, counsel should typically endeavor to return from lunch 5-10 minutes earlier than the jury.

## **WITNESSES**

The parties have provided their witness lists. Witnesses shall be EXCLUDED, with the exception of the Government's case agent, Special Agent Charles Sampson, and its head paralegal, Helen Nissan.

## **OPENING STATEMENTS**

The Government shall have up to 45 minutes to present its opening statement; Defendants shall have up to 45 minutes for one attorney to present their joint opening statement. Heidi Manschreck will give the opening statement on behalf of the Government; Neal Brackett will give the opening statement on behalf of both Defendants.

## **STIPULATIONS**

The parties have already provided the Court with some stipulations as to translations and the authenticity of certain evidence. Further, the parties are working toward a stipulation as to the ‘interstate commerce’ element. The parties are reminded that any stipulations must be made in writing, signed by all counsel, and filed with the Court. Counsel shall prompt the Court to read the stipulations at the appropriate point during the presentation of the evidence.

## **JENCKS AND BRADY MATERIAL**

The Government represents that Jencks and Brady material has been provided. Further, the Government has an ongoing duty to supplement.

Defendants intend to review emails and provide *Jencks* material, as appropriate.

## **PROPOSED JURY INSTRUCTIONS & VERDICT FORMS**

The parties have filed proposed Jury Instructions and verdict forms. (Docs. 160, 161). All objections to any filed proposed instructions must be in writing, must include

citations to authority, and must be filed no later than **November 13, 2017**. Failure to object to a proposed instruction will constitute waiver of objection. The parties will have the opportunity to submit further objections to any additional instructions tendered at a later time.

The Court will provide its draft jury instructions to all parties after the Government's case-in-chief.

The Court will hold a charge conference after the close of all evidence.

### **JUROR QUESTIONNAIRES**

Copies of all juror questionnaires were provided to counsel on October 20, 2017.

### **VOIR DIRE**

The Government shall be permitted up to 45 minutes for *voir dire*. Defendants shall jointly be permitted to share up to 45 minutes for *voir dire*, which may be conducted by up to two attorneys. Andre Geverola will conduct *voir dire* for the Government; Ralph Kohlen and/or Meena Sinfelt will conduct *voir dire* on behalf of Defendants. Questions should be directed to the entire panel, with individual follow-up questions permitted.

### **CHALLENGES**

The Court and the parties agree to impanel twelve jurors and three alternate jurors. The three alternates will not be identified as such to the jury. Pursuant to Fed. R. Crim. P. 24(c)(4), the parties are entitled to two additional peremptory challenges for the

alternate jurors. The additional peremptory challenges may not be used to strike a member of the voting jury.

The number of peremptory challenges allowed are as follows:

Peremptory Strikes:	Government: 6	Defendants: 10 (total)
Alternate Strikes:	Government: 2	Defendants: 2 (total)

If either party chooses to “pass” on exercising its peremptory challenge in the order prescribed, that side has thereby forfeited the challenge. Should both parties consecutively “pass” on exercising their peremptory challenges within the same round, the jury selection process will end and the jury will be impaneled as comprised at that time.

**EXHIBITS**

The parties have already provided their exhibits to the Court, including hard copy exhibit binders and all exhibits in electronic format.

**IT IS SO ORDERED.**

Date: 10/31/2017

s/ Timothy S. Black  
 Timothy S. Black  
 United States District Judge