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

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

UNITED STATES' TRIAL BRIEF

The United States of America, by and through undersigned counsel, hereby submits its Trial Brief.

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I. INTRODUCTION

On June 15, 2016, a federal grand jury in Cincinnati returned an indictment charging the defendants, Tokai Kogyo Co. of Japan and its U.S. subsidiary, Green Tokai Co., with violating Section 1 of the Sherman Antitrust Act. Tokai Kogyo executive Akitada Tazumi also was indicted, but he has not appeared in this case. The Indictment charges that, beginning at least as early as March 2008 and continuing until at least August 2011, the defendants knowingly entered into and engaged in a conspiracy to allocate sales of, rig bids for, and fix, maintain, and stabilize the prices of automotive body-sealing products ("body seals") sold to Honda Motor Company Ltd. and certain of its subsidiaries and affiliates ("Honda") for installation in vehicles manufactured and sold in the United States and elsewhere, in violation of 15 U.S.C. § 1.

Voir dire is scheduled for November 3, 2017, with the trial set to begin on November 6, 2017. This brief addresses legal and evidentiary issues that may arise at trial.

II. STATEMENT OF FACTS

A. The Defendants

Defendant Tokai Kogyo is a Japanese corporation headquartered in Obu, Japan, and defendant Green Tokai, a wholly-owned subsidiary of Tokai Kogyo, is a Delaware corporation with its principal place of business in Brookville, Ohio. The defendants make and sell body seals to automobile manufacturers, including Honda. Body seals, typically made of rubber and/or plastic, are installed on automobiles to keep the

interior free from water, wind, and exterior noises. For example, body seals are installed around the door (door seals), the door opening on the vehicle body (opening seals), the windows (glass run channels), and the rear trunk or hatch (trunk lid and tailgate seals). The defendants, along with [redacted] were the main suppliers of body seals to Honda during the timeframe of the alleged conspiracy.

B. The Industry

Automobile manufacturers, like Honda, do not manufacture each component of a vehicle. Instead, they source component parts from various suppliers. The supply of auto parts to car manufacturers in the United States is a multi-billion dollar industry. Federal grand juries in Ohio, Michigan, Kentucky, and elsewhere, have been investigating collusion in the auto parts industry for several years. To date, 48 auto-parts companies and 65 executives have been charged with bid-rigging and price-fixing conspiracies in the auto parts industry. In total, more than $2.9 billion in criminal fines have been imposed. *See Kiekert AG to Plead Guilty to Bid Rigging Involving Auto Parts*, Office of Public Affairs, United States Department of Justice (Mar. 7, 2017), *available at* https://www.justice.gov/opa/pr/kiekert-ag-plead-guilty-bid-rigging-involving-auto-parts.

The conspiracy alleged in the indictment involved collusion among competitors during Honda's sourcing process for body seals. For each of its models, Honda conducts a sourcing process in conjunction with major changes to the model, which are

typically introduced every five to six years. Honda's sourcing process begins approximately three years before the new version of a model is slated for production. During the sourcing process, Honda issues requests for quotations ("RFQs") and part drawings that invite suppliers to quote competitive prices—bids—for parts. After at least one round of competitive bidding, Honda decides on what is known as the "maker layout"—the suppliers selected for each component part on a model. If selected, a supplier typically will supply the part for five to six years, until Honda introduces another major change to the model and conducts a new sourcing effort.

Honda's North American purchasing department, located in Raymond, Ohio, evaluates suppliers' bids to supply parts on Honda vehicles manufactured in North America, whether they are slated for manufacture in the United States, Mexico, or Canada. Some Honda models, including the Civic, Accord, CR-V, and Fit, are known as "global models" because they are manufactured and sold in multiple regional markets worldwide. During the charged conspiracy, Honda's North American purchasing department coordinated the sourcing process for these models with Honda in Japan. Bids were submitted to Honda's purchasing department in each global region, including the United States, and, at times, to Honda in Japan as well.

In addition to seeking competitive pricing through its sourcing process, each year Honda requests from its existing parts suppliers a price reduction—typically 3%--for parts already in mass production. Suppliers, in turn, may request an increase in prices to account for higher material costs. Honda negotiates these price adjustments separately with each supplier.

C. The Conspiracy

At trial, the government's evidence will show that the defendants were members of a conspiracy with other body-seal suppliers to suppress and eliminate competition for the sale of body seals to Honda. The conspirators agreed (1) to fix, maintain, and stabilize prices of body seals; (2) to allocate among themselves sales of body seals to Honda; and (3) to rig bids for body seals sold to Honda. To achieve the goals of the conspiracy, the defendants communicated with co-conspirators through phone calls, e-mails, and in-person meetings in the United States and Japan. They discussed the parts on upcoming models that they intended to pursue in the sourcing process, global pricing for those parts, and the terms and status of their price-adjustment negotiations with Honda.

At trial, in addition to establishing the conspirators' agreement to fix, stabilize, and maintain prices for body seals, the evidence will show that the defendants allocated sales and/or rigged bids for the supply of body seals that were included in the U.S. sourcing process for five Honda models: the 2011 Odyssey, 2011 Civic, 2012 CR-V, 2013 Accord, and 2014 Fit. For some of these models, after allocation agreements were reached through discussions between co-conspirators in Japan, employees of the Japanese parent companies would inform employees at their U.S. subsidiaries of the agreements and the price levels to submit pursuant to the agreements. In other cases, pricing information was exchanged directly between co-conspirators in the United States. The U.S. subsidiaries were instructed by their respective parent companies in

Japan to submit bids to Honda in the United States in accordance with the agreements formed in Japan, and they did.

Defendant Tokai Kogyo acted primarily through Tazumi, who was Tokai Kogyo's Assistant General Manager of Sales and was responsible for overseeing Tokai Kogyo's sales of body seals to Honda throughout the conspiracy period. Defendant Green Tokai acted primarily through [redacted], who was the General Manager at Green Tokai in Ohio and was responsible for overseeing Green Tokai's sales of body seals to Honda in the United States throughout the conspiracy period, as well as [redacted], a Tokai Kogyo employee who had been a Sales Coordinator at Green Tokai.

[redacted]

Company	Employee	Employee's Title/Role	Dates in Role
[redacted]	[redacted]	Branch Manager of Utsunomiya Sales Office	Apr. 2007 to Mar. 2012
[redacted]	[redacted]	Sales Staff at Utsunomiya Sales Office	Mar. 2011 to Apr. 2014
[redacted]	[redacted]	Sales Director	July 2002 to Feb. 2009
[redacted]	[redacted]	Sales Manager	Apr. 2006 to Feb. 2011

Nishikawa has pleaded guilty to a bid-rigging and price-fixing conspiracy involving body seals sold to automakers, including Honda, and three former Nishikawa executives have been charged for this conduct. *United States v. Nishikawa Rubber Co., Ltd.*, No. 2:16-CR-30 (E.D. Ky. Sept. 1, 2016); *United States v. Kyomoto*, No. 2:15-CR-44 (E.D. Ky. Oct. 8, 2015). Nishikawa was sentenced to pay a $130 million criminal fine, and Keiji Kyomoto, who pleaded guilty, received an 18-month prison sentence. The other two former Nishikawa executives, Mikio Katsumaru and Yuji Kuroda, have not appeared in their criminal cases. In addition, Katsumaru and Futoshi Higashida, a former president of NISCO, have also been charged with obstruction of justice. *United States v. Higashida*, No. 2:16-CR-20641 (E.D. Mich. 2016). Higashida pleaded guilty and is serving a 14-month prison sentence.

III. ELEMENTS OF THE OFFENSE

To convict the defendants of a violation of 15 U.S.C. § 1, the government must prove beyond a reasonable doubt that: (1) the conspiracy charged in the indictment existed at or about the time alleged; (2) the defendants knowingly joined the conspiracy; and (3) the conspiracy involved goods or services in interstate commerce. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) ("Acceptance . . . of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish unlawful conspiracy under the Sherman Act."); *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988) (explaining that, where alleged conduct amounts to *per se* violation of section 1 of the

Sherman Act, "the government need only prove (1) the existence of the alleged agreement and (2) that defendants knowingly entered into the conspiracy").

A. The Conspiracy Charged in the Indictment Existed at or about the Time Alleged

Section 1 of the Sherman Act, 15 U.S.C. § 1, makes it unlawful to engage in a conspiracy that unreasonably restrains trade. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 66 (1911). A conspiracy under the Sherman Act is similar to any other criminal conspiracy: a combination of two or more persons or entities engaged in concerted action to accomplish an illegal purpose or to accomplish a legal purpose by illegal means. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465–66 (1921), *superseded by statute on other grounds*. Certain types of agreements are considered *per se* violations of the Sherman Act, requiring no proof of unreasonableness, "because of their pernicious effect on competition and lack of any redeeming virtue." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *see In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 271 (6th Cir. 2014). The *per se* rule is a substantive rule of law, not merely an evidentiary presumption, that governs those restraints which the courts have "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *N. Pac. Ry. Co.*, 356 U.S. at 5; *see Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003).

In this case, the defendants are charged with knowingly entering into and engaging in a conspiracy to restrain trade by agreeing to allocate sales of, rig bids for,

and fix, maintain, and stabilize the prices of body seals sold to Honda. These types of horizontal restraints—market allocation, bid rigging, and price fixing—are "thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it actually caused." *In re Se. Milk Antitrust Litig.*, 739 F.3d at 271 (explaining that horizontal price-fixing and market-allocation agreements are *per se* illegal); *United States v. Dynalectric Co.*, 861 F.2d 722, 1988 WL 117173, at *4 (6th Cir. 1988) (unpublished table disposition) (explaining that bid-rigging agreements are *per se* illegal). Thus, at trial, the government must establish only that such an agreement existed, and need not show that it caused economic harm.

Unlike the general criminal conspiracy statute, 18 U.S.C. § 371, the Sherman Act does not require proof of an act in furtherance of the conspiracy. The conspiratorial agreement itself constitutes the complete criminal offense. *Nash v. United States*, 229 U.S. 373, 378 (1913) (holding that Sherman Act "does not make the doing of any act other than the act of conspiring a condition of liability"); *United States v. Hayter Oil Co., Inc. of Greeneville, Tenn.*, 51 F.3d 1265, 1270 (6th Cir. 1995) ("Because the price-fixing itself constitutes the crime, the government is only required to prove that the agreement existed during the statute of limitations period and that the defendant knowingly entered into that agreement."). Therefore, it is not necessary that any acts done in furtherance of the conspiracy be proved or even alleged. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) ("[I]t is likewise well settled that conspiracies under the Sherman are not dependent on any overt act other than the act of the conspiring");

Hayter Oil, 51 F.3d at 1270 ("Proof of an overt act is not required to establish a violation of § 1 of the Sherman Act").

Nonetheless, the government intends to introduce evidence of the defendants' overt acts to prove the existence of the conspiracy. Any overt act for which the government chooses to introduce evidence does not need to be illegal itself if it was an act committed in forming or furthering the conspiracy. *Iannelli v. United States* 420 U.S. 770, 785 n.17 (1975) ("[T]he [overt] act can be innocent in nature, provided it furthers the purpose of the conspiracy."). This includes: the co-conspirators' sharing of sensitive business information even if unconnected to an alleged bid-rigging agreement; attempts, even if unsuccessful, to reach additional agreements; and efforts to conceal their conduct. *See United States v. Jerkins*, 871 F.2d 598, 602–03 (6th Cir. 1989) ("It is a basic tenet of conspiracy law that an overt act in furtherance of a conspiracy need not be illegal itself." (citations omitted)); Sixth Circuit Pattern Criminal Jury Instructions, Committee Commentary 7.14 (2017) ("The Sixth Circuit recognizes defendants' flight, concealment of evidence and implausible stories as evidence which allows an inference of guilty knowledge." (citing *United States v. Jackson*, 55 F.3d 1219, 1226 (6th Cir. 1995)).

Additionally, proof of an overt act performed in furtherance of the conspiracy within the statute of limitations period demonstrates the continued existence of the conspiracy. *Hayter Oil*, 51 F.3d at 1270. Once the conspiracy is established, it is presumed to continue until there is an affirmative showing that the defendants have abandoned it or withdrawn. *Id*.

B. The Defendants Knowingly Joined the Conspiracy

To prove that the defendants violated the Sherman Act with the requisite intent, the government must prove that the defendants, through their authorized employees, knowingly entered the charged conspiracy with a consciousness of its general nature, extent, and objective. *Blumenthal v. United States*, 332 U.S. 539, 556–67 (1947). To act "knowingly" means to be aware of the nature of the conduct and not act through ignorance, mistake, or accident. *See United States v. Lawson*, 780 F.2d 535, 542 (6th Cir. 1985). A corporation is liable for the acts of its employees and agents that were done within the scope of their employment and with some connection to the furtherance of the business. *See United States v. Carter*, 311 F.2d 934, 943 (6th Cir. 1963); *Cont'l Baking Co. v. United States*, 281 F.2d 137, 148–50 (6th Cir. 1960); *United States v. Peterson*, 188 F.3d 510, 1999 WL 685917, at *12 (6th Cir. 1999) (unpublished table disposition); *Trollinger v. Tyson Foods, Inc.*, No. 4:02-CV-23, 2007 WL 1091217, at *4 (E.D. Tenn. Apr. 10, 2007); *United States v. Halpin*, 145 F.R.D. 447, 449–50 (N.D. Ohio 1992).

C. The Conspiracy Involved Goods or Services in Interstate Commerce

At trial, the government must prove that the defendants' conspiratorial conduct involved goods or services in interstate commerce. The government can satisfy this element either by showing (1) that the conspirators' business activities relating to products that were subject to the conspiracy took place in interstate commerce (the "in commerce" approach) or (2) that the conspirators' business activities, if local in nature, were likely to have a substantial effect on an activity in interstate commerce (the "effect on commerce" approach). *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S.

232, 242 (1980); *Sarin v. Samaritan Health Ctr.*, 813 F.2d 755, 758 (6th Cir. 1987); *Stone v. Wm. Beaumont Hosp.*, 782 F.2d 609, 613-14 (6th Cir. 1986).

The government plans to satisfy the interstate-commerce element through the "in commerce" approach. In other words, the government will show that the conspirators' business activities related to the sale of body seals took place in interstate commerce. Under the "in commerce" approach, so long as the conspirators' business activities are in interstate commerce, the magnitude of the activities' effect on commerce need not be proved. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 785 (1975). Rather, the element is satisfied if (1) a conspirator traveled across state lines in connection with the sale of body seals, (2) the products themselves traveled across state lines, *or* (2) payments for the products traveled across state lines. *See N.L.R.B. v. Fainblatt*, 306 U.S. 601, 605 (1939) (concluding that transportation of materials across state lines to be processed involves interstate commerce); *Ware & Leland v. Mobile Cty.*, 209 U.S. 405, 412 (1908) (explaining that negotiating where goods are to be shipped from one state to another is interstate commerce); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 242 (1899) ("[A] sale for delivery beyond the state makes the transaction a part of interstate commerce.").

IV. LEGAL ISSUES RELATED TO THE OFFENSE

A. *Per Se* Unlawful Agreements Cannot be Legally Justified or Excused

Defendants cannot legally justify or excuse their conspiratorial conduct with claims that the prices they charged were reasonable or that they were motivated by good intentions. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101 n.23

(1984); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–22 (1940); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 44 (1930); *Cont'l Baking Co. v. United States*, 281 F.2d 137, 143–44 (6th Cir. 1950) ("[A]ny evidence of justification or reasonableness after [a price-fixing agreement] has been established is properly excluded in a Sherman Act case."). In fact, because the conspiracy alleged in this case is *per se* illegal, the defense may not offer evidence of purportedly pro-competitive justifications for the conspiracy, nor may they offer evidence that prices would have been the same absent the conspiracy. *Socony-Vacuum*, 310 U.S. at 221-222; *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 271 (6th Cir. 2014) (explaining that, once the *per se* rule is applied, "no consideration is given to the intent behind the restraint, to any claimed pro-competitive justifications, or to the restraint's actual effect on competition"); *United States v. Dynalectric Co.*, 861 F.2d 722, 1988 WL 117173, at *4 (6th Cir. 1988) (unpublished table disposition) (explaining th*per se* violations, including bid rigging, do not require proof of a restriction on output or raising of prices).

The prohibition on evidence of justification or reasonableness precludes defenses that (1) the conspiracy was reasonable in light of the sourcing practices of the victim, Honda, (2) the conspiratorial conduct was necessary to the defendants' profitability or continued viability, and (3) the conspiracy was a response to Honda's purchasing power. *See, e.g., Socony-Vacuum*, 310 U.S. at 218 ("[N]o showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."); *Barber-Coleman Co. v. Nat'l Tool Co.*, 136 F.2d 339, 343 (6th Cir. 1943) (same); *Cont'l Baking Co.*, 281 F.2d at 144 ("A defendant cannot say 'I have entered

into a price-fixing agreement, but the prices fixed are reasonable ones dictated by economic pressures.'"). "The Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Socony-Vacuum*, 310 U.S. at 222.

B. Specific Intent Need Not Be Proved

The government need not prove that the defendants had a specific intent to restrain trade or knowledge that the restraint would likely result in anti-competitive effects. *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988). Requiring that "intent go further and envision actual anticompetitive results would reopen the very questions of reasonableness which the *per se* rule is designed to avoid." *Id*. (quoting *United States v. Koppers*, 652 F.2d 290, 296 n.6 (2d Cir. 1981)). Nor does the government need to show that the defendants knew that what they were doing was illegal. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 582 (2010) ("[T]he general rule [is] that mistake or ignorance of law is no defense . . . . We have long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'" (citations omitted)); *Duffey v. Pope*, No. 2:11-cv-16, 2012 WL 4442753, at *13 (S.D. Ohio Sept. 25, 2012) (explaining that mistake or ignorance as to law is no defense to charge that defendant acted "knowingly") (citing *Jerman*, 559 U.S. at 581).

C. *Per Se* Unlawful Agreement Need Not be Explicit or Formal

The evidence need not show that the members of the conspiracy entered into an express or formal agreement or that they directly stated (either orally or in writing) the

object or purpose to be accomplished. *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809–810 (1946); *Direct Sales Co. v. United States*, 319 U.S. 703, 714 (1943); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226–27 (1939); *United States v. Barger*, 931 F.2d 359, 369 (6th Cir. 1991). Indeed, "[a] tacit or material understanding among the parties to a conspiracy is sufficient to establish the agreement . . . ." *United States v. Hughes*, 505 F.3d 578, 593 (6th Cir. 2005) (quoting *United States v. Walls*, 293 F.3d 959, 967 (6th Cir. 2002)). Thus, the government's evidence must show that the conspirators, explicitly or tacitly, came to a mutual understanding to try to accomplish an unlawful common plan—in this case, to suppress and eliminate competition for the sale of body seals to Honda. *See United States v. Paramount Pictures*, 334 U.S. 131, 142 (1948); *Am. Tobacco Co.*, 328 U.S. at 810; *Interstate Circuit*, 306 U.S. at 226–27.

D. Minor Participation in a Conspiracy Is Sufficient to Prove Guilt

A defendant can be held liable for participating in an illegal conspiracy even if the defendant has only a minor role in it. "Every member of a conspiracy need not be an active participant in every phase of the conspiracy, so long as he is party to the general conspiratorial agreement." *United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986) (citation and quotation marks omitted). A defendant's connection to the conspiracy may be slight, as long as it is proved beyond a reasonable doubt. *United States v. Bentancourt*, 838 F.2d 168, 174 (6th Cir. 1988).

E. The Government Need Not Prove Each Mean, Method, or Participant, or the Duration of the Conspiracy

The government is not required to prove all of the means or methods alleged in the indictment. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–22 (1940); *see also United States v. Kartman*, 417 F.2d 893, 894 (9th Cir. 1969) (holding an unproven allegation in indictment to be "surplusage . . . unnecessary for the government to prove" when allegation is unrelated to an element of charged crime). The government also need not prove the participation of all the alleged co-conspirators. *Weiss v. United States*, 103 F.2d 759, 760 (3d Cir. 1939). Finally, because the conspiratorial agreement itself is the complete offense, *see, e.g.*, *Nash v. United States*, 229 U.S. 373, 378 (1913) *United States v. Hayter Oil Co., Inc. of Greeneville, Tenn.*, 51 F.3d 1265, 1270 (6th Cir. 1995), the government is not required to prove that the conspiracy lasted for the duration of the time period alleged in the indictment. *Pittsburgh Plate Glass Co. v. United States*, 260 F.2d 397, 401 (4th Cir. 1958); *Cooper v. United States*, 91 F.2d 195, 198 (5th Cir. 1937).

V. OTHER EVIDENTIARY ISSUES LIKELY TO ARISE AT TRIAL

A. Evidence of Co-Conspirators' Communications Predating the Charged Conspiracy is Admissible

The Sixth Circuit has held "that evidence of a conspirator's actions, even though they may have occurred before the beginning of the conspiracy alleged in the indictment, are nevertheless admissible as proof of motive or intent, touching upon the conspiracy charged in the indictment." *United States v. Enright*, 579 F.2d 980, 988 (6th Cir. 1978) (citations omitted). Thus, evidence of conduct predating the charged

conspiracy is not barred by Federal Rule of Evidence 404(b) where it is offered as "background" evidence—evidence that "has a causal, temporal or spatial connection with the charged offense." *United States v. Hardy*, 228 F.3d 745, 748 (6th Cir. 2000). Admissible background evidence typically consists of evidence that "is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense." *Id.* (citation omitted); *see United States v. Clay*, 667 F.3d 689, 698 (6th Cir. 2012).

At trial, the government intends to offer evidence of the defendants' and their co-conspirators' communications—e-mails, phone calls, and in-person meetings—that predates March 2008, the beginning of the charged conspiracy period. These communications involve sales allocation and other anticompetitive conduct related to the conspirators' seeking to supply body seals to Honda.

Proof of these communications is precisely the kind of background evidence permitted by Sixth Circuit precedent. Although the communications predate the charged conspiracy period, they are not barred by Rule 404(b) because the communications are a prelude to the charged offense, are directly probative of the charged offense, arise from the same events as the charged offense, form an integral part of the witnesses' testimony, and complete the story of the charged offense. *See Clay*, 667 F.3d at 698; *Hardy*, 228 F.3d at 748. In short, this evidence is admissible because it provides background necessary to the jury's understanding the context of and motives for the conspiracy charged in the indictment. (For a more detailed discussion of this

issue, see Doc. No. 131, United States' Pretrial Notice of Intent to Use Intrinsic-Acts Evidence That Is Also Admissible Under Rule 404(b), PageID 1974–76.)

B. Permissibility of Circumstantial Evidence to Prove a Sherman Act Conspiracy

Because of the secret and often sophisticated nature of conspiracies, courts allow conspiracies to be inferred from circumstantial evidence which may reasonably be interpreted as showing participation in a common plan. *United States v. Hughes,* 505 F.3d 578, 593 (6th Cir. 2007); *see also United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). "Circumstantial evidence alone can sustain a guilty verdict . . . [and such] evidence need not remove every reasonable hypothesis except that of guilt." *Hughes*, 505 F. 3d at 592 (quoting *United States v. Stone*, 748 F.2d 361, 362 (6th Cir. 1984)). Evidence is admissible as long as it assists in proving that a conspiracy existed and that the defendant knowingly joined the conspiracy. *Id*.

C. A Co-Conspirator May Testify about the Existence of an Agreement

The defendants' co-conspirators may testify as to whether an "agreement," "understanding," or "promise" to allocate sales of, to rig bids for, and to fix, maintain, and stabilize prices for body seals was reached in this case. Under Federal Rules of Evidence 701, a lay witness may testify to his opinions that are "rationally based on the perception of the witness" and "helpful to . . . the determination of a fact in issue" so long as the opinions are "not based on . . . specialized knowledge." And the term agreement has a "well-established lay meaning[ ]" to which lay witnesses may testify. *United States v. Baskes*, 649 F.2d 471, 479 n.5 (7th Cir. 1980); *see also United States v. Misle*

Bus & Equip. Co., 967 F.2d 1227, 1234 (8th Cir. 1992). The Sixth Circuit and other courts of appeals have routinely permitted lay witnesses to testify as to whether an agreement was reached, and, if so, what the witness understood the agreement to be. *See, e.g., United States v. Graham*, 856 F.2d 756, 759–60 (6th Cir. 1988) (concluding that district court properly admitted co-conspirator's statement about his understanding that defendant would provide campaign contributions to county sheriff's re-election campaign in exchange for sheriff overlooking illicit activities); *Cont'l Baking Co. v. United States*, 281 F.2d 137, 143 (6th Cir. 1950) (emphasizing importance of witness's testimony regarding whether an agreement to fix the prices of bakery products was reached); *United States v. Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963) ("[W]itnesses in antitrust cases have uniformly been permitted to testify concerning the existence of agreements and understandings.").

D. Indefiniteness of Recollection is Not a Bar to Admissibility

The indictment alleges that the defendants participated in a conspiracy lasting from at least as early as March 2008 until at least August 2011. As such, witnesses in this case may testify to conversations and events dating back six or more years. Some of these witnesses may qualify their testimony by saying, "I think," "I believe," or "to the best of my recollection." These qualifications go to the weight of the testimony, not its admissibility. *See United States v. Hickey*, 917 F.2d 901, 904–05 (6th Cir. 1990) (holding that juror could reasonably believe that witness perceived course of events despite inconsistencies in his testimony and possibility that his perception was sometimes impaired due to his admitted drug addiction); *Hallquist v. Local 276, Plumbers &*

Pipefitters Union, 843 F.2d 18, 24 (1st Cir. 1988) ("The extent of a witness' knowledge of matters about which he offers to testify goes to the weight rather than the admissibility of the testimony.").

Federal Rule of Evidence 602 requires only that a witness have personal knowledge of the matter about which they testify. *United States v. Franklin*, 415 F.3d 537, 549 (6th Cir. 2005) (citing Fed. R. Evid. 602). In the Sixth Circuit, the threshold for admitting testimony under Rule 602 is lenient: "testimony should not be excluded for lack of personal knowledge unless no reasonable juror could believe that the witness had the ability and opportunity to perceive the event that he testifies about." *Id.* (quoting *Hickey*, 917 F.2d at 904). Absolute precision or certainty regarding all of the details of events about which a witness testifies is not required. *See id.* (concluding that witness's testimony about conversations with defendant were admissible despite witness's inability to remember precisely when those conversations occurred or what defendant said); *United States v. Bruce*, 142 F.3d 437, 1998 WL 165144, at *4 (6th Cir. 1998) (unpublished table disposition) (concluding that witness testimony regarding content of conversation was admissible despite witness's being unable to identify participants); *see also United States v. Joy*, 192 F.3d 761, 767 (7th Cir. 1999) (holding that "inferences reached from a witness's observations need not reach the level of absolute certainty to be admissible"); *M.B.A.F.B. Fed. Credit Union v. Cumis Ins. Soc'y Inc.*, 681 F.2d 930, 932 (4th Cir. 1982) ("Rule 602 . . . does not require that the witness' knowledge be positive or rise to the level of absolute certainty.").

Similarly, testimony based on imperfect or imprecise recollection is admissible over an objection that it is "opinion" or "speculation" whenever the witness either observed or participated in the conduct about which he is testifying. The witness's lack of definitiveness goes to the evidentiary weight of the testimony and is for the jury to evaluate. *Franklin*, 415 F.3d at 549; *Hickey*, 917 F.2d at 905; *see also United States v. Lena*, 497 F. Supp. 1352, 1362 (W.D. Pa. 1980) (concluding that defects in recollection are proper subjects for cross-examination but do not render testimony inadmissible).

E. Introduction of Prior Consistent Statements

The government may introduce prior consistent statements of a witness as substantive evidence when offered (1) to rebut an express or implied charge of recent fabrication, improper influence, or motive, as long as the prior statement was made before the supposed motive to lie arose; or (2) to rehabilitate a witness after his credibility has been impeached on another ground. Fed. R. Evid. 801(d)(1)(B)(i), (ii); *United States v. Ledbetter*, 184 F. Supp. 3d 594, 597–98 (S.D. Ohio 2016) (citing *United States v. Trujillo*, 376 F.3d 593, 611 (6th Cir. 2004)). Examples of the latter use—which was added to Rule 801(d)(1)(B) for clarity in 2014—include prior statements that are used to rebut charges of faulty memory or inconsistency. Fed. R. Evid. 801(d)(1)(B), Advisory Comm. Notes, 2014 Amendments; *see also United States v. Denton*, 246 F.3d 784, 789 (6th Cir. 2001) (approving admission of prior consistent statements to rehabilitate witness, where prior statements were allegedly inconsistent); *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 729–30 (6th Cir. 1994) (same). The trial judge is

accorded broad discretion in determining the admissibility of evidence under Rule 801(d)(1)(B). *United States v. Hamilton*, 689 F.2d 1262, 1273 (6th Cir. 1982).

F. Government May Use Leading Questions with Foreign Witnesses on Direct Examination

The government intends to call witnesses whose native language is Japanese and will require an interpreter for their testimony. The government may ask these witnesses leading questions on direct examination to minimize the risk that they will misunderstand the question or that they will mistakenly provide an answer that does not respond to the question. *See Jordan v. Hurley*, 397 F.3d 360, 362 (6th Cir. 2005) ("Federal courts have . . . found that leading questions on direct examination are permissible in questioning certain witnesses, including . . . a foreign witness testifying through a translator . . . ." (citations omitted); *see also United States v. Rodriguez-Garcia*, 983 F.2d 1563, 1570 (10th Cir. 1993) (concluding that district court did not abuse discretion by allowing government to ask leading questions of its witness who testified in foreign language through interpreter); *United States v. Olivo*, 69 F.3d 1057, 1065 (10th Cir. 1995) (same). Federal Rule of Evidence 611(c) specifically provides that leading questions are allowed "to develop" the testimony of the witness. When a witness "does not appreciate the tenor of the desired details," it is within the court's discretion to allow leading questions. *United States v. Ajmal*, 67 F.3d 12, 16 (2d Cir. 1995) (citations and internal quotation marks); *see also United States v. Mulinelli-Navas*, 111 F.3d 983, 990 (1st Cir. 1997) (explaining that where witness "was, at times, unresponsive or

showed a lack of understanding," prosecutor could use leading questions to develope coherent testimony).

G. Use of English Translations for Foreign-Language Documents

The government intends to offer into evidence Japanese-language documents and their English translations. The English translations have been provided to the defendants. The government and the defendants have stipulated to the accuracy of certain translations but were unable to reach agreement with respect to others. In the event of a dispute between the parties as to the correct English translation of a Japanese document, the defense must articulate a basis for the dispute and provide an alternate translation that can then be assessed by the Court. *United States v. Liddell*, 64 F. App'x 958, 963 (6th Cir. 2003) (concluding that district court didn't abuse discretion by admitting in evidence English translations of foreign-language transcripts when defendants did not point to specific inaccuracies or offer alternative translation); *United States v. Martinez*, 21 F. App'x 338, 339-40 (6th Cir. 2001) (same); *United States v. Garcia*, 20 F.3d 670, 673 (6th Cir. 1994) (same).

It is also proper for the jury to retain the English translations in addition to the Japanese-language documents during the testimony and deliberations. *See, e.g., United States v. Chavez-Alvarez*, 594 F.3d 1062, 1069 (8th Cir. 2010) (concluding that English translation of transcript of Spanish-language recording was properly admitted and made available during deliberations because English-speaking jury would not have been able to understand content of recordings without translation); *United States v. Valdez*, 186 F. App'x 508, 511 (5th Cir. 2006) (explaining that English translation of

transcription of Spanish-language recording was properly admitted and made available during deliberations to aid jurors in understanding recording); *United States v. Abonce-Barrera*, 257 F.3d 959, 962 (9th Cir. 2001) (concluding that Spanish-language tape recordings and their English translations were properly given to jury during trial and deliberations); *United States v. Ulerio*, 859 F.2d 1144 (2d Cir. 1988) (concluding that district court didn't abuse discretion in admitting English translations of Spanish telephone conversations or allowing jury to retain translations during deliberations where defendants conceded accuracy of translations); *United States v. Adams*, 759 F.2d 1115 (3d Cir. 1985) (concluding that transcripts of audio recordings were properly admitted in evidence because transcripts were "useful aid to the jurors"). In this case, the jury will have no meaningful way to evaluate much of the documentary evidence during deliberations unless it is permitted to receive and consider the English translations of those documents. Because the English translations would aid the jury in its deliberations, they should be admitted into evidence along with the original Japanese documents.

H. Government May Impeach Its Own Witnesses

The government plans to call witnesses who were employed by the defendants' co-conspirator companies. The co-conspirator companies are now defendants in a private civil action pending in the Eastern District of Michigan for their conspiratorial conduct. Thus, some witnesses may be motivated to minimize the scope and effect of their conduct to protect their current or former employers. Accordingly, the government may find it necessary to impeach some of its own witnesses. *See United*

States v. Hauter, 838 F.2d 472, 1988 WL 7414, at *4 (6th Cir. 1988) (unpublished table disposition) (concluding that government was permitted to impeach its own witness who "by virtue of being a long-time employee [of the defendant], had a motive to slant his testimony in favor of the [defendant]").

Federal Rule of Evidence 607 permits the government to impeach its own witness and Rule 613(b) permits a witness's prior inconsistent statement to be admitted as impeachment evidence, so long as "the witness is given the opportunity to explain or deny the statement and an adverse party is given the opportunity to examine the witness about it." *United States v. Moore*, 495 F. App'x 680, 686 (6th Cir. 2012) (quoting Fed. R. Evid. 613(b)); *United States v. Letner*, 273 F. App'x 491, 495–96 (6th Cir. 2008) (same).

The Sixth Circuit and other courts of appeals have routinely permitted the government to impeach its own witnesses, so long as it does not do so "merely to get in evidence that is otherwise inadmissible." *See e.g.*, *Moore*, 495 F. App'x at 686–87 (finding no abuse of discretion in district court's allowing government to introduce prior inconsistent statements regarding defendant's prior use of crack cocaine to impeach government's witness); *United States v. Richardson*, 421 F.3d 17, 40 (1st Cir. 2005) (affirming district court's decision to permit government to preemptively impeach its own witness by introducing witness's guilty plea from another case); *United States v. Gilbert*, 57 F.3d 709, 711–12 (9th Cir. 1995) (concluding that government could impeach its own witnesses where government had evidence of their prior inconsistent statements and impeachment was not primary purpose in questioning witnesses).

I. Admissibility of Defendant Green Tokai's Documents and Related Metadata

The government intends to introduce records of defendant Green Tokai, including (1) electronic documents and e-mails produced by Green Tokai pursuant to a grand jury subpoena and (2) electronic metadata produced by Green Tokai for some of these documents. The electronic documents and e-mails that the government seeks to introduce are admissible statements of defendants Tokai Kogyo and Green Tokai and may be used as evidence against either of the defendants under Rule of Evidence 801(d)(2)(D) and (E). The documents were created by employees of Tokai Kogyo and Green Tokai pursuant to their responsibilities as employees of the defendants, and during and in furtherance of the conspiracy. *See Cont'l Baking Co. v. United States*, 281 F.2d 137, 148–49 (6th Cir. 1950).

The government may also seek to introduce into evidence electronic metadata associated with certain documents. Metadata is "data that describes and gives information about other data" and provides "information describing the history, tracking, or management of an electronic document." *See United States v. Beckham*, 624 F. App'x 909, 915 n.2 (6th Cir. 2015) (citation and internal quotation marks omitted); *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 565–66 (D. Md. 2007). Metadata "describes how, when and by whom [information about a particular data set] was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information)." *Loraine*, 241 F.R.D at 566 (internal quotation marks omitted).

The government intends to introduce metadata concerning electronic documents that Green Tokai produced from its files in response to a grand jury subpoena. The metadata fields the government intends to introduce include: (1) File name; (2) Author; (3) Company; (4) Date Created; (5) Date Printed; and (5) Folder Label (the file path). These metadata fields are automatically associated with each document by computer software.

The metadata fields that the government seeks to introduce are relevant and probative of, among other things, the document's authorship, when the documents were modified, and where the documents were stored. *See, e.g.*, *United States v. Powers*, 364 F. App'x 979, 981 (6th Cir. 2010) (explaining how, in child pornography case, metadata located on defendant's computer indicated where images had been stored and when those images were modified); *1st Fin. SD, LLC v. Lewis*, No. 2:11-CV-00481, 2012 WL 4761931, at *2 (D. Nev. Oct. 5, 2012) (finding that metadata from Microsoft Word documents was relevant and had probative value in determining who authored documents). Moreover, computer-generated metadata of the type the government intends to introduce is admissible as non-hearsay because it is not a statement of a declarant. *See, e.g.*, *Patterson v. City of Akron, Ohio*, 619 F. App'x 462, 479–80 (6th Cir. 2015) (explaining that report containing raw data generated automatically by machine and showing date, time, and duration of stun-gun shots administrated by user was not statement made by declarant and thus was not hearsay).

J. The Government May Introduce into Evidence and Elicit Testimony Concerning Corporate Plea Agreement

At trial, the government plans to call witnesses who will testify pursuant to their corporate employer's plea agreement, which requires the cooperation of its employees. Specifically, the corporate plea agreement requires the employer to use its best efforts to secure the full, truthful, and continuing cooperation of certain of its employees. Cooperating employees covered by the agreement—including some of the government's witnesses—received the benefit of non-prosecution in exchange for their agreement to cooperate, when called upon by the United States, by testifying "fully" and "truthfully." In the corporate plea agreement, the government also agreed that it would jointly recommend a specific sentence (a criminal fine) under Federal Rule of Criminal Procedure 11(c)(1)(C).

Because testimony concerning the witnesses' cooperation obligations under the corporate plea agreement will assist the jury's assessment of the witnesses' credibility, the Court should allow the government to question its witnesses on direct examination about the plea agreement of their employer, and to introduce the agreement into evidence as an exhibit. This will assist the jury in learning the specific provisions of the agreement applicable to the government's witnesses, thereby allowing the jury an accurate understanding of some of the motivations affecting the testimony of the government's witnesses. If the jury does not understand the reasons why the witness is testifying, the jury may be left with a false impression of the witness's motives after

cross-examination. To preview this evidence for the jury, the Court should also allow the government to refer to the agreement in its opening statement.

The Sixth Circuit has approved the introduction and reference to corporate plea agreements at trial. *See United States v. Hayter Oil Co., Inc. of Greenville, Tenn.*, 51 F.3d 1265, 1269 (6th Cir. 1995) (concluding that government was permitted to call vice president of oil company to testify about company's guilty plea); *see also United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1232 (8th Cir. 1992) (approving admission in evidence of guilty pleas and plea agreements with corporate co-conspirator in bid-rigging trial). The Sixth Circuit "condones [the] reasonable use by the prosecution" of a plea agreement, even where the defense does not mention it first. *United States v. Owens*, 426 F.3d 800, 806 (6th Cir. 2005). "A prosecutor may 'refer to the plea agreement of a testifying witness . . . [,] elicit testimony about its terms, attack the credibility of the witness because of it and even refer to the plea agreement of a government witness in an attempt to deflect defense counsel's use of the agreement to attack the witness's credibility.'" *United States v. Henry*, 545 F.3d 367, 380 (6th Cir. 2008) (quoting *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999)). Not only may the government refer to such a plea agreement, but it may also introduce it into evidence if the "co-conspirator testifies at trial, for purposes of assessing the witness's credibility." *United States v. Benson*, 591 F.3d 491, 498 (6th Cir. 2010). Introduction of the entire agreement—including provisions requiring the witness to tell the truth—on direct examination "permits the jury to consider fully the possible conflicting motivations underlying the

. . . testimony" and is not improper bolstering. *United States v. Townsend*, 796 F.2d 158, 163 (6th Cir. 1986).

While a co-conspirator's guilty plea is properly admitted to assist the jury in assessing credibility, it is not admissible as substantive evidence of the defendant's guilt. *Benson*, 591 F.3d at 498. To ensure that the plea agreement is admitted only for a proper purpose, the court may give a limiting instruction after admitting a plea agreement. *Id.*

For these reasons, the Court should permit the government during its case-in-chief to introduce in evidence the corporate co-conspirator's guilty plea and testimony regarding that plea agreement. The government should also be allowed to comment on the guilty plea and the plea agreement during its opening statement and closing arguments. The government intends to use this relevant evidence to: minimize the risk that the jury will be misled into inferring that the government is trying to conceal information related to witnesses' testimony; explain why witnesses are testifying and admitting their culpability; and present its case in an orderly, measured, and balanced fashion.

VI. CONCLUSION

The United States respectfully submits this trial brief to identify potential issues that may arise at trial, and to assist the Court in resolving them.

Respectfully submitted,

/s/ L. Heidi Manschreck

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties by operation of the Court's electronic filing systems.

Respectfully submitted,

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

Dated: October 16, 2017