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November 13, 2017

The Honorable James Donato
United States District Judge
Courtroom 11, 19th Floor
United States Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102

Re: *United States of America v. Matsuo Electric Company Limited*, No. 17-cr-00073-JD

Dear Judge Donato:

The United States respectfully submits this letter response to the Court's Order re: Speedy Trial Act, 18 U.S.C. § 3161. (Dkt. 40.) The government has reviewed defendant Matsuo's November 6, 2017 letter brief (Dkt. 43) and agrees that the time period between May 24 and October 25, 2017 was automatically excluded pursuant to 18 U.S.C. § 3161(h)(1)(G) because the Court was considering the parties' plea agreement. Moreover, by the plain language of the Speedy Trial Act, 18 U.S.C. § 3162, any Speedy Trial Act issue was waived by Matsuo.

Matsuo's letter brief describes the relevant factual history. In short, the Court continued the May 24 change of plea hearing in order to receive additional information from the parties that would allow the Court to meaningfully consider the February 7, 2017 plea agreement. (*See* Dkt. 43 at 1-2.)

At the October 25 hearing, after Matsuo's corporate representative entered a guilty plea, the government raised the issue of excluding time under the Speedy Trial Act for (i) the time between the initial May 24 change of plea hearing until the October 25 continuation of that hearing, and (ii) from the October 25 hearing until the sentencing scheduled for February 28, 2018. The Court correctly identified that, because Matsuo had pled guilty, "there is no longer any Speedy Trial Act issue." (10/25/2017 Tr. at 21:14-15.) The Court went on to ask the parties if the Speedy Trial Act period had lapsed, and the government stated that it had. (Tr. 21:22-24.)

Although more than 70 days had passed since Matsuo's initial appearance, the government incorrectly stated that time had "lapsed." (Tr. 21:22-24.) Under the Speedy Trial Act, the 70-day period had not lapsed because the time between the May 24 and October 25 hearings was automatically excluded under 18 U.S.C. § 3161(h)(1)(G) while the Court

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considered the parties' plea agreement. (*See* Dkt. 43 at 2-3); *see also* *Bloate v. United States*, 559 U.S. 196, 203-204 (2010) (“[Some] delays are automatically excludable, *i.e.*, they may be excluded without district court findings. . . . The eight subparagraphs in subsection (h)(1) address the *automatic excludability* of delay generated for certain enumerated purposes.”) (emphasis added).

Moreover, even if there had been a Speedy Trial lapse, Matsuo waived its right to move to dismiss because it did not do so prior to entering its guilty plea. Under 18 U.S.C. § 3162(a)(2), failure to bring a defendant to trial within the Speedy Trial Act time limits results in dismissal of an information, “on motion of the defendant.” That same provision states, “[f]ailure of the defendant to move for dismissal prior to . . . entry of a plea of guilty . . . shall constitute a waiver of the right to dismissal.” *See also* *Zedner v. United States*, 547 U.S. 489, 502-503 (2006) (section 3162(a)(2) provides for “retrospective waiver” by a defendant of “a completed violation of the Act (by declining to move to dismiss before the start of trial or the entry of a guilty plea)[.]”). Here, Matsuo entered its guilty plea and that guilty plea was accepted by the Court. At no time before Matsuo's entry of a guilty plea did Matsuo move to dismiss. Matsuo, therefore, waived any Speedy Trial violations (of which there were none). 18 U.S.C. § 3162(a)(2).¹

In conclusion, because the October 25 hearing was a “continuation” of the May 24 hearing, the time between the May 24 and October 25 hearings was automatically excluded while the Court considered the parties' plea agreement. Moreover, any Speedy Trial Act issue was waived because Matsuo entered a guilty plea.

Sincerely,

/s/

Jacklin Chou Lem
Trial Attorney
DOJ Antitrust Division

¹ At the October 25 hearing, the government and the Court agreed that the consequence for a Speedy Trial Act violation is dismissal. (10/25/2017 Tr. at 22:16-22.) However, although the sanction for violation of the Speedy Trial Act is dismissal of the indictment, it is not necessarily dismissal with prejudice. 18 U.S.C. § 3162(a)(2) provides that, in deciding whether to dismiss with or without prejudice, the court shall consider a variety of factors including the seriousness of the offense and the facts and circumstances that led to the dismissal. Here, time has not lapsed. But even if it had, consideration of the Section 3162(a)(2) factors would not merit dismissal with prejudice.