UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA v. TOKAI KOGYO CO., LTD., *et al.,* Defendants.	Case No. 1:16-CR-63 Hon. Timothy S. Black (U.S.D.J.) Hon. Karen L. Litkovitz (U.S.M.J.)

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL

In its Opposition to Defendants' Motion for Judgment of Acquittal [Dkt. 227], the government contends that it can convict Defendants of any conspiracy with any number of co-conspirators, so long as it involves an agreement to rig bids and fix prices. Essentially, the government contends that it is not required to prove the three-party conspiracy alleged in its own Bill of Particulars. This argument is wrong, and blatantly ignores the fact that a Bill of Particulars limits the government's proof at trial. *See United States v. Haskins*, 345 F.2d 111, 114 (6th Cir. 1965) ("When a bill of particulars has been furnished, the government is strictly limited to the particulars which it has specified, i.e., the bill limits the scope of the government's proof at the trial.").

The government is bound by its Indictment and Bill of Particulars, which clearly charge a three-party conspiracy between Tokai/Green Tokai, Nishikawa/NISCO, and TG/TGNA. The government's charged conspiracy involves all six companies that supply body sealing parts to Honda conspiring together to allocate the maker layouts and raise prices in the United States. Even viewing the evidence in the light most favorable to the government, no rational trier of fact could find that there was any three-party conspiracy that originated in Japan and migrated to the

United States. Instead, **if** the jury believes the testimony provided by the government's Japanese witnesses, the most the jury could find is that Nishikawa had an agreement with Tokai, and then Nishikawa had a separate agreement with TG. That is not the conspiracy charged in the Indictment and Bill of Particulars.

The government's Opposition also cites to *United States v. Andrews*, 895 F.2d 1415 (6th Cir. 1990) purportedly for the "legal principle" 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." (Dkt 227 at 2, Page ID 4963). This is misleading, and ignores the Sixth Circuit's application of the variance doctrine. *Andrews*, 895 F.2d at *4.

The Sixth Circuit recognizes two forms of modification to indictments: amendments and variances. If this case were to go to the jury and a guilty verdict was returned, then that guilty verdict could only stand if the Court finds that the deviation in proof is neither an amendment nor a prejudicial variance. Amendments occur "when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed on them." *United States v. Ford,* 872 F.2d 1231, 1235 (6th Cir. 1989) (citations and quotation marks omitted). An amendment that alters the terms of the indictment is considered *per se* prejudicial and warrants reversal of a conviction, because it "directly infringe[s] upon the Fifth Amendment guarantee" that a defendant is held answerable only for charges levied by a grand jury. *Id.* The government's changing theory of this case has impermissibly altered the Indictment and Bill of Particulars and created a moving target at which the Defendants and the jury must aim. The grand jury indicted a three-party conspiracy, not a series of ad-hoc, model-based, parts-based, or two-party agreements as testified to by the

government's witnesses. *See* Trial Tr. Day 7 21:16-24; Day 2 58:9-16. Accordingly, the government has improperly amended the Indictment, and a judgment of acquittal is required.

By contrast, variances occur "when the charging terms of an indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *Id.; see also United States v. Hathaway,* 798 F.2d 902, 910–11 (6th Cir. 1986). Based on a defendant's Sixth Amendment right to be informed of the nature of an accusation against him or her, a variance constitutes reversible error if the defendant can prove it affected his or her "substantial rights," because it either prejudiced his defense, the fairness of trial, or the indictment's sufficiency to bar subsequent prosecutions. *Hathaway,* 798 F.2d at 910 (citing *Ford,* 872 F.2d at 1235); *United States v. Rios*, 842 F.2d 868, 872-73 (6th Cir. 1988) ("If an indictment alleges one conspiracy, but the evidence can reasonably be construed only as supporting a finding of multiple conspiracies, the resulting variance between the indictment and the proof is reversible error if the [defendant] can show that he [is] prejudiced thereby.") (quoting *United States v. Warner*, 690 F.2d 545, 548-49 (6th Cir. 1982)); *see also United States v. Griffith*, No. CRIM. 13-20894, 2015 WL 2062768, at *1 n.1 (E.D. Mich. May 4, 2015), *aff'd*, 663 F. App'x 446 (6th Cir. 2016) ("Entry of a judgment of acquittal is a proper remedy if the Court finds that a prejudicial variance…has occurred.") (citing *United States v. Kuehne,* 547 F.3d 667, 683 (6th Cir.2008); *Epstein v. United States,* 174 F.2d 754, 763 (6th Cir. 1949); 2A Fed. Prac. & Proc.Crim. § 466 (4th ed.); *United States v. Ford,* 872 F.2d 1231, 1234–37 (6th Cir. 1989); *United States v. Eaton,* 501 F.2d 77, 80 (5th Cir. 1974); and *United States v. Camiel,* 689 F.2d 31, 40 (3d Cir. 1982).

Even if the Court were to analyze this case under the variance rubric, judgment of acquittal is still required because Defendants have been substantially prejudiced by the

government's moving target. Defendants spent significant resources to defend against an alleged three-party conspiracy involving TG and TGNA. Those resources appear wasted, as the government's own witnesses now say that TG and TGNA was not involved in the conspiracy with Tokai and Green Tokai.

Furthermore, Defendants have been substantially prejudiced at trial. As the old saying goes, you never get a second chance to make a first impression. Opening statements during a jury trial – especially a jury trial that is going to last a long time and involve a large volume of evidence – are absolutely vital. It is counsel's first opportunity to build credibility with the jury by telling the jury what the evidence is going to look like.

Defense counsel's opening statement promised to the jury that the government was going to try to prove one conspiracy involving all six companies. This promise was based on the allegations made by the government in the Indictment and the Bill of Particulars. Then, as the government puts on its case, the jury learned that the government was actually alleging an agreement between Tokai and Nishikawa conceived in Japan, but that its witnesses would testify to various two-party agreements, possibly on an ad-hoc, model-by-model and part-by-part basis. That change in the theory makes it look like defense counsel lied to the jury. And that too substantially prejudices Defendants.

Defendants have been ambushed. Defendants prepared their case to defend against a three-party conspiracy involving all the major suppliers for body sealing parts to Honda. Defendants made what turned out to be false promises to the jury about what the evidence will look like and what the government was claiming. Defendants have been prejudiced, and a judgment of acquittal is warranted.

DATED this 22nd day of November, 2017

Respectfully submitted,

/s/ Meena T.Sinfelt

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CERTIFICATE OF SERVICE

I hereby certify that on November 22nd, 2017, I electronically transmitted the foregoing *Defendants' Reply in Support of Motion for Judgment of Acquittal* to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel who have appeared in this matter.

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