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

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | CASE NO. 1:16-CR-63 |
| v. | ) | |
| | ) | |
| TOKAI KOGYO CO., LTD., *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

**MEMORANDUM IN SUPPORT OF DEFENDANTS' JOINT MOTION FOR AN ORDER DIRECTING THE GOVERNMENT TO PROVIDE AN ENRIGHT PROFFER ON OR BEFORE AUGUST 31, 2017**

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## TABLE OF AUTHORITIES

Defendants Tokai Kogyo Co., Ltd. and Green Tokai Co., Ltd., by and through counsel, respectfully move this Court to order the Government, on or before August 31, 2017, to provide a written proffer detailing each proposed co-conspirator statement and providing sufficient information to demonstrate that the Government can, and will, fulfill each of the *Enright* elements as to any statement to be offered into evidence under Rule 801(d)(2)(E) ("Motion"). Fed. R. Evid. 801(d)(2)(E); *U.S. v. Enright*, 579 F.2d 980, 986 (6th Cir. 1978). In support of this Motion, state as follows:

## I. BACKGROUND

On October 29, 2013, [redacted] of the Federal Bureau of Investigation showed up at [redacted] at 6:00 am, along with two attorneys from the Antitrust Division of the Department of Justice. They proceeded to question the [redacted] for defendant Green Tokai for over four hours (without counsel), in English which is not his native language[1] and thus began the Government's three-year long excavation into the inner-workings of family-owned and operated Green Tokai and Tokai Kogyo. Tokai Kogyo was established in 1947 by the Kimura family and has been owned by the family since that time. It manufacturers plastic automotive molding products, rubber automotive sealing products, seats and cushions, and electric parts for numerous auto makers in Japan, including Honda, Isuzu, Mazda, Mitsubishi, Nissan, Suzuki, and Toyota. Most of Tokai Kogyo's sales to Honda are molding products. Tokai Kogyo owns an American subsidiary named Green Tokai. Green Tokai manufactures plastic automotive molding products

[1] It does appear an interpreter was also present.

and rubber automotive sealing products which are sold to numerous auto makers with manufacturing plants in the United States, including Honda, Toyota, Nissan, and Subaru.

The government's investigation culminated in the Indictment of Tokai Kogyo, one of its employees, Akitada Tazumi, and Green Tokai on June 15, 2016. *See* Docket No. 1. The one count indictment alleges a far-reaching, complex conspiracy beginning in or around March 2008 and ending around August 2011. *Id.* at ¶10. The government alleges that they knowingly agreed to "allocate sales of, to rig bids for, and to fix, stabilize, and maintain prices of automotive body sealing products sold to Honda in the United States and elsewhere" in violation of the Sherman Antitrust Act. *Id.* at 4 ¶11. The Indictment references "[o]ther corporations and individuals," "co-conspirators" and "others known and unknown to the Grand Jury" who were not made defendants in the Indictment but who were involved in the conspiracy. *See, e.g. Id.* at ¶¶ 5, 7, 8, 10, 12. The Indictment also specifies that the particular body sealing parts that the alleged co-conspirators sold to Honda at coordinated prices were "body-side opening seals, door-side weather-stripping, glass-run channels, trunk lids, and other smaller seals." *Id.* at ¶ 7. Defendants are also aware from the government's Rule 16 productions that Honda and its suppliers often have different internal names for those same body sealing parts. For example, a door seal can also be referred to as a front/rear outer seal or a front/rear door weatherstrip depending on the supplier or even the particular Honda model.

The Indictment generally alleges the conspiracy was carried out through events, meetings, RFQS, and parts sold to Honda primarily in the United States. *Id.* at ¶¶ 3, 7, 8, 10,

12(a), 12(b), 12(d), 12(g), 13. The government also provided the Defendants with a Bill of Particulars[2] which adds a layer of complexity to the case by adding into the mix:

- [redacted];
- [redacted];
- [redacted]; and
- [redacted].

Based on the government's allegations, the conspiracy involved actions in Japan, the United States, [redacted], and at least five different types of body sealing products – the combination of these details alone will undoubtedly be challenging for a jury to follow and comprehend.

Complicating that situation further will be the government's introduction and use of multiple statements of alleged co-conspirators as evidence at trial pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence against the defendants. As such, the government is tasked with the burden of proving not just that the conspiracy existed but that each Defendant knowingly joined the conspiracy with the same criminal purpose and also that any statements made by co-conspirators were made in furtherance of the conspiracy so as to qualify as non-hearsay. The court is similarly tasked with determining whether such statements satisfy Rule 801(d)(2)(E) and

[2] Attached hereto as Exhibit A.

[3] This model is sometimes referred to by American Honda and the suppliers as the "[redacted]" interchangeably.

will be admissible at trial. That determination will be both critical and difficult, given the complexities that are evident from the Indictment and as explained above.

Defendants broached this subject with the government prior to filing this Motion and requested that it voluntarily provide the written *Enright* proffer. The government initially declined stating that it intended to request conditional admittance of the co-conspirator statements subject to the government proving up the conspiracy by the close of their case-in-chief, but today suggested that it might reconsider its position and offered to discuss the issue further.[4] Because the government's case appears to so heavily rely on hearsay evidence without independent corroboration, there is a significant risk for undue prejudice that cannot be cured by an instruction from the Court. Accordingly, Defendants respectfully request that the Court order the government to provide, by no later August 31, 2017, a written *Enright* proffer specifically detailing each proposed co-conspirator statement and providing sufficient information to demonstrate that the government can, and will, fulfill each of the elements as to any statement to be offered into evidence under Rule 801(d)(2)(E). Early attention to these statements by the parties and the Court will streamline the trial proceedings, minimize juror confusion and relieve time pressures on the eve of a trial of significant complexity.

## II. **ARGUMENT**

The Sixth Circuit grants broad discretion to district court judges to determine the manner and means by which to structure trials in order to balance the government's burden of proof while protecting defendant's from inadmissible hearsay, there is no hard and fast rule. *See generally United States v. Vinson,* 606 F.2d 149 (6th Cir. 1979); *Enright*, 579 F.2d 980.

[4] Defendants will inform the Court should their Motion be mooted through further discussions with the government.

However, Federal Rule of Evidence 104 "requires a preliminary determination by the trial judge as to the admissibility of the declaration of a co-conspirator" before the statement can be presented to the jury. Fed. R. Evid. 104(a); *Enright,* 579 F. 2d at 984-985; *Visnon* 606 F. 2d at 152. Specifically, *Enright* dictates that before the government can introduce co-conspirator statements, it must show by a preponderance, that "(1) that a conspiracy existed, (2) that the defendant against whom the hearsay is offered was a member of the conspiracy, and (3) that the hearsay statement was made in the course and in furtherance of the conspiracy." *Vinson,* 606 F.2d at 152; *Enright*, 579 F. 2d at 983, 986; *see also Bourjaily v. United States,* 483 U.S. 171, 175 (1987); *United States v. Conrad*, 507 F.3d 424, 429 (6th Cir. 2007); *United States v. Childs*, 539 F.3d 552, 559 (6th Cir. 2008); *United States v. Damra*, 621 F.3d 474, 492 (6th Cir. 2014). "Since *Bourjaily*, all circuits addressing the issue have explicitly held absent *some* independent, corroborating evidence of defendant's knowledge of and participation in the conspiracy, the out-of-court statements remain inadmissible" and the Sixth Circuit's "acquiescence to this rule is evidenced by [its] mention of existing independent evidence whenever this issue arises." *United States v. Clark*, 18 F.3d 1337, 1341-1342 (6th Cir. 1994) (emphasis in original; footnotes omitted). Therefore, where the Government fails to meet its burden to prove by a preponderance of the evidence that there is a conspiracy, or that Defendants and the declarant are part of that conspiracy, or that the statement was made in furtherance of the conspiracy, then the statements are inadmissible hearsay.

While a judge's discretion includes conditionally admitting hearsay statement's subject to later demonstration of their admissibility, Defendants assert that this procedure, particularly in the instant case, runs a high risk of prejudice and, inevitability, that the jury will be exposed to

inadmissible evidence that no instruction from the Court will possibly be able to cure the defect or allow the jury to compartmentalize the tainted evidence so as to ensure Defendants a fair trial. Moreover, as explained above, the government's case-in-chief is more than likely to rely upon the uncorroborated testimony of alleged co-conspirators. By the Court ordering the government to provide a written proffer specifically detailing each proposed co-conspirator statement and providing sufficient information to demonstrate that the government can, and will, fulfill each of the *Enright* elements as to any statement to be offered into evidence under Rule 801(d)(2)(E), the Court will greatly limit the evidentiary issues that will arise during the course of trial, thereby making trial more efficient and streamlined.[5] In a case where more than half of the government's witnesses will be native Japanese speakers who will require an interpreter for their testimony, resolving as many potential evidentiary issues as possible in advance of trial will limit disruptions during witness testimony and assist the jury in understanding the evidence to be presented. Accordingly, and for the reasons explained more fully within, Defendants request that the Court exercise its discretion to order the government to meet its initial burden regarding the co-conspirator evidence it intends to offer at trial by providing a written proffer of evidence no later than August 31, 2017.

A. **As an initial threshold, the government must demonstrate that there was a conspiracy and that both defendants Tokai Kogyo and Green Tokai were members of the conspiracy.**

The first two requirements for admission of a proposed co-conspirator's statement demand proof of an actual conspiracy between both the declarant and the defendant against

[5] As the Court is aware, more than half of the government's witnesses will be native Japanese speakers who will require an interpreter for their testimony. Defendants are attempting in good faith to identify as many potential evidentiary issues as they can in advance of trial which may be ripe for disposition, or, at a minimum, suitable for setting a procedure for dealing with trial objections so as to limit disruptions during witness testimony.

whom the statement is offered, including a "participatory link" between the conspiracy and the defendant. *Conrad,* 507 F.3d. at 429; *Clark,* 18 F. 3d at 1341. Furthermore, "[be]cause hearsay is presumptively unreliable, sufficient independent and corroborating evidence of [the defendant's] knowledge and participation in the conspiracy must be produced to rebut and overcome the presumed unreliability of the proffered out-of-court statement." *Conrad,* 507 F. 3d at 429 *citing Clark* ,18 F. 3d at 1342 (holding that sufficient "independent evidence is not merely a scintilla, but rather enough to rebut the presumed unreliability of hearsay").

Additionally, a statement is not admissible under Rule 801(d)(2)(E) unless the declarant and the defendant both knowingly join the same conspiracy *with the same criminal purpose. Blumenthal v. United States*, 332 U.S. 539, 557 (1947); *see also United States v. Franklin*, 608 F.2d 241, 246 (6th Cir. 1979) (quoting *Blumenthal*).

In *Kotteakos v. United States*, the Supreme Court explained that the trial court failed to consider whether each individual defendant had in effect knowingly joined in a single conspiracy *with agreement of a common purpose*. 328 U.S. 750, 754-55 (1946). The trial court's failure to determine whether each individual defendant had the requisite knowledge to be considered a member of a single conspiracy violated the Constitution's most basic safeguards. In some of its strongest language, the Supreme Court considered the court's failure to be among the most severe:

> [T]he proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but it is not the criminality of mass conspiracy. *They do not invite mass trial by their conduct. Nor*

> *does our system tolerate it. That way lies the drift toward totalitarian institutions.* True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.

*Id.* at 773 (emphasis added). Accordingly, the government's burden – particularly in a case such as this, with multiple defendants, unindicted co-conspirators, and complex and multifaceted allegations – is a high one.

### B. The government must also demonstrate that the statements in question were made in furtherance of the conspiracy.

The third fundamental requirement for admissibility of a co-conspirator statement is to prove that the statements the government seeks to introduce were made "in furtherance of" the conspiracy. *United States v. Maliszewski,* 161 F.3d 992, 1007 (6th Cir. 1998). Only statements that "promote the objectives of the conspiracy" are considered to meet the "in furtherance of" requirements. *See Conrad*, 507 F.3d at 430. For example, the Sixth Circuit has found that "casual conversations about past events" are not in furtherance of the conspiracy. *See United States v. Darwich*, 337 F.3d 645, 658 (6th Cir. 2003). "Unless the declarant 'is seeking to induce [the listener] to deal with the conspirators or in any other way to cooperate or assist in achieving the conspirators' common objective, *the declaration is inadmissible*." *United States v. Foster*, 771 F.2d 7871, 880 (9th Cir. 1983) (internal citations omitted) (emphasis added).[6]

[6] Because "[s]tatements in furtherance of a conspiracy [can] take many forms, including statements that keep a coconspirator apprised of another's activities, induce continued participation, or allay his fears" it is essential that the statements be considered separately and not in broad groups or categories. *United States v. Kelsor*, 665 F.3d 684, 694 (6th Cir. 2011).

The duration of the alleged conspiracy is also critically important on this point because "out-of-court statements made *after* the conclusion of the conspiracy are not made 'in furtherance of the conspiracy,' and are thus not admissible under the co-conspirator exception." *Conrad*, 507 F.3d at 430 (emphasis in original) (citing *United States v. Martinez*, 430 F.3d 317, 327 (6th Cir. 2005); *United States v. Payne*, 437 F.3d 540, 546 n.4 (6th Cir. 2006) ("[i]t is crucial that the conspiracy be ongoing . . . ");*United States v. Cross,* 928 F.2d 1030, 1052 (11th Cir. 1991) (clearly erroneous for Court to admit "statements [which] were admissions after the conspiracy had effectively ended, and as such, were not made 'in furtherance of that conspiracy'"). Similarly, a statement made *before* the conspiracy is not admissible because it was not made during the conspiracy. *See United States v. Garcia*, 13 F.3d 1464, 1473 (11th Cir. 1994) (clearly erroneous for Court to admit statement "made prior to the formation of a conspiracy involving Garcia"); *Childs*, 539 F.3d at 559 ("the requirement that out-of-court declarations by a co-conspirator be shown to have been made while the conspiracy is in progress arises only because the declaration would otherwise be hearsay").

C. **The case charged by the government illustrates precisely why an *Enright* proffer well in advance of trial is necessary.**

The advantage of an *Enright* proffer by the government to meet its initial burden prior to trial is that it "clearly avoids 'the danger . . . of injecting the record with inadmissible hearsay in anticipation of proof of a conspiracy which never materializes.'" *Vinson,* at 152-53 (quoting *U.S. v. Macklin*, 573 F.2d 1046, 1049 n.3 (8th Cir. 1978)). The government has been investigating this conspiracy for over three years, has had the benefit of numerous cooperating witnesses, and has conducted [redacted] the government should be held to its proof for the admissibility of co-

conspirator statements well in advance of trial. As the Supreme Court stated in *Kotteakos*, the offense of conspiracy "is perhaps not greatly different from others when the scheme charged is tight and the number involved small. But as it is broadened to include more and more, in varying degrees of attachment to the confederation, the possibilities for miscarriage of justice to particular individuals become greater and greater." 328 U.S. at 776; *see also Dennis v. United States*, 384 U.S. 855, 873 (1966) ("A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants.")

In a case such as this one, where the Government has alleged a conspiracy that originated in Japan and was orchestrated from Japan but relates to alleged price fixing agreements for "[redacted]"[7] an *Enright* proffer well in advance of trial will help avoid such a miscarriage of justice. It will ensure that the Court has sufficient time and evidentiary support to make informed rulings on the complicated question of which statements will be admissible and against which Defendant.

The most obvious example of why an early submission and consideration of the government's *Enright* proffer is necessary relates to defendant Green Tokai. Defendant Green Tokai has been charged as a corporate defendant for violating the Sherman Antitrust Act but none of its Executives or employees were indicted, [redacted]. Based on the Defendants' review of the government's Rule 16 production, the admissibility of the following statements with respect to, but not limited to, Green Tokai, will need to be addressed:

[7] Ex. A at 2.

- [redacted];
- [redacted]
- [redacted];
- [redacted]

and

- [redacted].

These examples and the many others that likely exist demonstrate why it is practical and sound approach to require the Government to provide its *Enright* proffer early on, allowing the Court and Defendants to respond in a meaningful way. The Court will appreciate having sufficient time to review the proffer and make determinations on the admissibility of (Defendants predict) a significant number of statements such as those listed above before trial. Accordingly, Defendants submit that an earlier deadline of August 31, 2017 would be appropriate and ensure an efficient and just trial schedule on the current schedule.

## III. CONCLUSION

For the foregoing reasons, Defendants respectfully move this Court to require the government, by no later than August 31, 2017, to provide a written pre-trial proffer specifically detailing each proposed co-conspirator statement and providing sufficient information to demonstrate that the Government can, and will, fulfill each of the *Enright* elements as to any statement to be offered into evidence under Rule 801(d)(2)(E).

DATED this 28th day of July, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 28, 2017, I electronically transmitted the foregoing *Memorandum in Support of Defendants' Joint Motion for an Order Directing the government to Provide an Enright Proffer to Defendants On or Before August 31, 2017* 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.

*/s/ Meena T. Sinfelt*
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