

# JURY INSTRUCTIONS



U.S. District Judge Timothy S. Black

*United States v. Tokai Kogyo Co. and Green Tokai Co.*

Case No. 1:16-cr-63

Jury Trial – November 6, 2017

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## **GENERAL RULES**

### **Introduction**

1. Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case.
2. I will start by explaining your duties and the general rules that apply in every criminal case.
3. Then I will explain the elements, or parts, of the crime that the Defendants are accused of committing.
4. Then I will explain the defendants' position.
5. Then I will explain some rules that you must use in evaluating particular testimony and evidence.
6. And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.
7. Please listen very carefully to everything I say.

### **Jurors' Duties**

1. You have two main duties as jurors. First, you must decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.
2. Second, your duty is to take the law that I give you, apply it to the facts, and decide if the government has proved that either, both, or neither of the defendants are guilty beyond a reasonable doubt. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.
3. The lawyers have talked about the law during their arguments. But if what they said is different from what I say, you must follow what I say. What I say about the law controls.
4. Perform these duties fairly. Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way.

### **Improper Considerations**

1. Your verdict must be based solely upon the evidence developed at trial or the lack of evidence.
2. It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may have about the race or national origin of the corporate defendants or their employees and representatives. All defendants are entitled to the presumption of innocence and the government has the burden of proof, as I will discuss in a moment.
3. It would be equally improper for you to allow any feelings you might have about the nature of the crime charged to interfere with your decision-making process.
4. To repeat, your verdict must be based exclusively upon the evidence or the lack of evidence in the case.

### **Presumption of Innocence, Burden of Proof, Reasonable Doubt**

1. As you know, both defendants have pleaded not guilty to the crime charged in the indictment. The indictment is not any evidence at all of guilt. It is just the formal way that the government tells the defendants what crime they are accused of committing. It does not even raise any suspicion of guilt.
2. Instead, the defendants start the trial with a clean slate, with no evidence at all against either of them, and the law presumes that they are both innocent. This presumption of innocence stays with both defendants unless the government presents evidence here in court that overcomes the presumption, and convinces you beyond a reasonable doubt that either or both defendants are guilty.
3. This means that the defendants have no obligation to present any evidence at all, or to prove to you in any way that they are innocent. It is up to the government to prove that the defendants are guilty, and this burden stays on the government from start to finish. Unless the government convinces you beyond a reasonable doubt that a particular defendant is guilty, you must find that particular defendant not guilty.
4. The government must prove every element of the crime charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.
5. Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives. If you are convinced that the government has proved a particular defendant guilty beyond a reasonable doubt, say so by returning a guilty verdict as to that particular defendant. If you are not convinced, say so by returning a not guilty verdict.

### **Corporate Defendants**

The defendants are corporations. Like an individual, a corporation may be found guilty of a criminal offense. A corporation is entitled to the same fair trial as an individual. Corporations are entitled to the same presumption of innocence as individuals, and each corporate defendant may be found guilty only if the evidence establishes such guilt beyond a reasonable doubt. All persons, including corporations, stand equal before the law.

**Separate Consideration – Two Defendants Charged with a Single Crime**

1. The defendants, Tokai Kogyo Co., Ltd., and Green Tokai Co., Ltd., have been charged with one crime. But in our system of justice, guilt or innocence is personal and individual. It is your duty to separately consider the evidence against each defendant, and to return a separate verdict for each of them. For each defendant, you must decide whether the government has presented evidence proving that particular defendant guilty beyond a reasonable doubt.
2. Your decision on one defendant, whether it is guilty or not guilty, should not determine your decision on the other defendant.

### **Evidence Defined**

1. You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.
2. The evidence in this case includes only what the witnesses said while they were testifying under oath; the exhibits that I allowed into evidence; and the stipulations that the lawyers agreed to.
3. Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.
4. During the trial I did not let you hear the answers to some of the questions that the lawyers asked. I also may have ruled that you could not see some of the exhibits that the lawyers wanted you to see. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.
5. Make your decision based only on the evidence, as I have defined it here, and nothing else.

### **Consideration of Evidence**

1. You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.
2. In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this an “inference.” You are allowed to make reasonable inferences. Any inferences you make must be reasonable and must be based on the evidence in the case.

### **Direct and Circumstantial Evidence**

1. Now, I am going to remind you of the difference between “direct evidence” and “circumstantial evidence.”
2. Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.
3. Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.
4. It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, or say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

## **Credibility of Witnesses**

1. Another part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness' testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.
  
2. Let me suggest some things for you to consider in evaluating each witness's testimony.
  - Ask yourself if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.
  
  - Ask yourself how good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened?
  
  - Ask yourself if there was anything else that may have interfered with the witness's ability to perceive or remember the events.
  
  - Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?
  
  - Ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose from the case, that might influence the witness's testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.
  
  - Ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did something (or failed to say or do something) at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.
  
  - And ask yourself how believable the witness's testimony was in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's

testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

3. These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe, and how much weight you think it deserves.

### **Number of Witnesses**

1. One more point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.
2. Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

### **Stipulations**

The government and the defendants have agreed, or stipulated, to certain facts. Therefore, you must accept the stipulated facts as proved. The stipulations were previously read to you, and a hardcopy will be provided to you during your deliberations.

### **Lawyers' Objections**

1. There is one more general subject that I want to talk to you about before I begin explaining the elements of the crime charged.
2. The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.
3. And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court.

## **DEFINING THE CRIME**

### **Introduction**

1. That concludes the part of my instructions explaining your duties and the general rules that apply in every criminal case. In a moment, I will explain the elements of the crime that the defendants are accused of committing.
2. But before I do that, I want to emphasize that the defendants are only on trial for the particular crime charged in the indictment. Your job is limited to deciding whether the government has proved the crime charged.
3. Also keep in mind that the possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has proved either or both of these defendants guilty. However, as I will explain shortly, because the defendants in this case are charged with conspiracy, you will need to consider the involvement of others for that limited purpose.

### **The Sherman Act**

The purpose of the Sherman Act is to preserve and encourage free competition in the marketplace by preventing unreasonable restraint of any business or industry, so that the consuming public may receive better goods and services at a lower cost.

### **The Charged Offense**

In this case, the Defendants are each charged in a one-count Indictment charging a violation of Section 1 of the Sherman Act. Specifically, the Defendants are charged with:

Conspiring 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.

The Defendants deny the charge.

### **Relevant Dates**

1. I want to first talk to you about the dates of the charged offense, as set forth in the Indictment.
2. The Indictment charges that the conspiracy began at least as early as March 2008 and continued until at least August 2011. Generally, the government does not have to prove that a conspiracy existed on those exact dates or that the conspiracy lasted for that entire period of time. But the government must prove that the conspiracy existed reasonably close to those dates.
3. However, there is a precise limit on how much time the government has to obtain an indictment after the commission of this offense. This is called the statute of limitations. In this case, the defendants were indicted on June 15, 2016, and a five year statute of limitations applies to the offense charged. This means that you cannot find a particular defendant guilty unless you find that, on or after June 15, 2011, the conspiracy existed and that, on or after June 15, 2011, the particular defendant was a member of the conspiracy. For purposes of the statute of limitations, the date of June 15, 2011 must be precise. In making your determination, you may consider evidence regarding statements and acts of the defendants and alleged co-conspirators occurring prior to June 15, 2011, insofar as the evidence tends to prove or disprove the existence of the conspiracy. However, keep in mind that you cannot find a particular defendant guilty unless you are convinced, beyond a reasonable doubt, that the particular defendant was a member of the conspiracy on or after June 15, 2011.
4. Once a conspiracy has been established, it is presumed to continue until there is an affirmative showing that its goals have been achieved or all the parties to the conspiracy have abandoned or terminated the conspiracy.

### **Elements of the Sherman Act Offense**

As previously stated, the Indictment charges the defendants Tokai Kogyo Co., Ltd., and Green Tokai Co., Ltd. with conspiracy to allocate sales, rig bids, and fix, stabilize, and maintain prices, in violation of the Sherman Antitrust Act.

A conspiracy is a kind of criminal partnership. It is a crime for two or more persons to conspire, or agree, to commit a criminal act, even if they never actually achieve their goal.

For you to find that either defendant is guilty of the conspiracy charged in the Indictment, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

**First:** That the conspiracy, as alleged in the Indictment, existed at or about the time alleged.

**Second:** That the defendant knowingly entered into the conspiracy.

**And Third:** That the conspiracy either affected interstate commerce or occurred within the flow of interstate commerce.

If you are convinced that the government has proved these elements, beyond a reasonable doubt, as to a particular defendant say so by returning a guilty verdict as to that particular defendant.

If you have a reasonable doubt about any one of these elements as to a particular defendant, or if you are not convinced beyond a reasonable doubt that a particular defendant was a member of the conspiracy on or after the date of June 15, 2011, then you must find that particular defendant not guilty.

Now, I will give you more detailed instructions on some of these elements and other information.

### Conspiracy

1. With regard to the first element—the existence of a conspiracy—the government must prove that two or more persons conspired, or agreed, to cooperate with each other to accomplish an unlawful purpose.
2. This does not require proof of any formal agreement, written or spoken. Nor does this require proof that everyone involved agreed on all the details. But proof that people simply met together from time to time and talked about common interests, or engaged in similar conduct, is not enough to establish a criminal agreement. These are things that you may consider in deciding whether the government has proved an agreement. But without more they are not enough.
3. Likewise, it is not unlawful for competitors to communicate and exchange business information, including prices, as long as any such sharing was not in furtherance of an agreement to allocate sales, rig bids, and/or fix prices.
4. What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people, to cooperate with each other to allocate sales, rig bids, and fix prices. This is essential.
5. A conspiracy can be proved indirectly, by facts and circumstances which lead to a conclusion that an agreement existed. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

“Knowingly” Entering Into the Conspiracy

1. If you are convinced that there was a conspiracy, then you must decide whether the government has proved that each defendant knowingly and voluntarily joined that conspiracy. You must consider each defendant separately in this regard.
2. To convict a defendant, the government must prove that the particular defendant knew the conspiracy’s main purpose, and voluntarily joined the conspiracy intending to help advance or achieve its goals.
3. This does not require proof that a defendant knew everything about the conspiracy, or everyone else involved, or that the defendant was a member of it from the very beginning. Nor does it require proof that a defendant played a major role in the conspiracy, nor that the defendant’s connection to it was substantial. A slight role or connection may be enough, as long as there is sufficient evidence to establish that connection beyond a reasonable doubt.
4. But proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make that defendant a conspirator, unless the defendant knowingly joined the conspiracy first. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. But without more they are not enough.
5. A defendant’s knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that the defendant knew the conspiracy’s main purpose. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

### Knowledge and Acts of a Corporation

1. Under the law, a corporation speaks and acts only through its agents. Agents include the corporation's directors, officers, employees, or others acting on its behalf.
2. In order for a corporation to be legally responsible for the acts or statements of its agents, you must find that the agent was acting within the scope of employment.
3. Acts done within the scope of employment are acts performed for the benefit of the corporation and directly related to the performance of duties the agent has general authority to perform.
4. To be acting within the scope of the agent's employment, the agent first must have intended that his act would produce some benefit to the corporation. However, the agent's acts or statements do not need to have actually resulted in any benefit to the corporation. Also, as long as the agent intended to benefit the corporation in some manner, the fact that the agent may also have acted for other reasons as well, such as for his own personal benefit, is of no consequence.
5. Finally, a corporation is not capable of conspiring with its own agents to restrain trade. Through its agents, however, it is capable of conspiring, with outside persons or other corporations, to restrain trade.

Interstate Commerce Requirement

1. The third and final element is that the alleged conspiracy must involve interstate commerce. The government must prove beyond a reasonable doubt that the conspiracy charged in the indictment either occurred in the flow of interstate commerce or affected interstate commerce in goods and/or services.
2. The term interstate commerce includes the transaction of business across a state line or the movement of a person, product, material, or money across a state line in connection with a business transaction. Interstate commerce does not include sales that are made entirely outside the United States and which do not involve shipment into the United States. The conspiracy charged in the indictment occurred in the flow of interstate commerce if, for example, at least one defendant or one coconspirator crossed state lines in carrying out the charged conspiracy, a body sealing product subject to the conspiracy was transported across state lines, or a payment for a body sealing product subject to the conspiracy crossed state lines. If you find that any such conduct occurred, the interstate commerce element is satisfied and the size of any such transaction is of no significance.
3. It is not required that each member of the conspiracy affected interstate commerce. Proof of interstate commerce as to one member of the conspiracy satisfies this element as to any other member, including each defendant.
4. Additionally, as to the interstate commerce element, the parties have reached the following stipulation, which you must accept as proved:

Defendants Tokai Kogyo Co., Ltd. (“Tokai”) and Green Tokai Co., Ltd. (“GTC”) deny that the conspiracy alleged in the indictment existed, and deny that Tokai manufactured, sold, or marketed any relevant products in the United States during the relevant period. However, defendants Tokai and GTC, along with the United States of America, hereby stipulate that GTC’s and NISCO’s sales activities related to the products alleged to be subject to the alleged conspiracy occurred in the flow of interstate commerce.

### Inapplicable Defenses

1. It is not necessary for the government to prove that the defendants knew that an agreement or conspiracy to allocate sales, rig bids, or fix prices, as charged in the Indictment, is a violation of the law. Thus, if you find beyond a reasonable doubt from the evidence in this case that the defendant knowingly joined a conspiracy to allocate sales, rig bids, or fix prices, as charged, then the fact that the defendant believed in good faith that what was being done was not unlawful is not a defense.
2. Moreover, practices such as allocating sales, rigging bids, and fixing prices, are considered to lack any redeeming competitive purpose, and are therefore considered unlawful without elaborate inquiry into the precise harm they have caused or the business excuse for their use.
3. Therefore, the following considerations are no defense to the charge in the Indictment: the intent behind agreeing to restrain competition; any pro-competitive justifications for such restraint; the agreement's actual effect on competition; economic reasonableness; ignorance of the law; impossibility of success, if the defendants were unaware of such impossibility; or knowledge of impossibility of success that the defendants gained after joining the conspiracy. Impossibility of success may only be considered to the extent that you find a defendant did not enter into the conspiracy, because the defendant already knew success was impossible.

### Allocating Sales, Bid Rigging, and Fixing, Stabilizing, and Maintaining Prices

The Indictment alleges that the defendants violated the Sherman Antitrust Act by agreeing to:

1. Allocate sales;
2. Rig bids; and
3. Fix, maintain, and stabilize prices.

The government does not have to prove all three of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt of any one of these ways is enough. In order to return a guilty verdict, all twelve of you must agree that at least one of these has been proved; however, all of you need not agree that the same one has been proved.

The agreement is the crime, even if it was never carried out or was carried out unsuccessfully. Similarly, the conspiracy is unlawful even if it did not extend to all products sold by the conspirators or did not affect all of their customers.

#### *Allocating Sales*

A conspiracy to allocate sales is an agreement or understanding between two or more persons not to compete for certain business. Sales allocation exists, for example, where two or more persons agree not to compete for sales of specific products.

#### *Bid Rigging*

A conspiracy to rig bids is an agreement between two or more persons to eliminate, reduce, or interfere with competition for a job or contract that is to be awarded on the basis of bids. Bid rigging may be an agreement among competitors about the prices to be bid, who should be the successful bidder, who should bid high, who should bid low, or who should not bid; or any other agreement with respect to bidding that affects, limits, or avoids competition among them.

Competitors may bid the same price, choose not to bid, or submit a high or low bid, and those acts alone do not constitute bid rigging or violate the Sherman Act, unless you find beyond a reasonable doubt that such activity was done pursuant to an agreement to affect, limit, or avoid competition.

Every conspiracy to rig bids is an unreasonable restraint of trade or commerce, regardless of the motives of the parties or any economic justification. This is because the aim and result of every bid-rigging agreement, if successful, is the elimination of one form of competition. Therefore, if you find that there was a conspiracy as charged in the Indictment, it does not matter whether the prices paid to the defendants or any co-conspirators were reasonable or unreasonable; high or low; fair or unfair.

*Fixing, maintaining, and stabilizing prices*

A conspiracy to fix prices is an agreement or mutual understanding between two or more competitors to fix, control, raise, lower, maintain, or stabilize the prices charged, or to be charged, for products or services. A price-fixing conspiracy is commonly thought of as an agreement to establish the same price; however, prices may be fixed in other ways. For example, prices are fixed if conspirators agree on the range or level of prices. They are fixed because they are agreed upon. Thus, any agreement or understanding to raise or lower a price, to stabilize prices, to set a price or price range, or to maintain a price is illegal. If you find that a price-fixing conspiracy has been established, it does not matter whether the prices agreed upon were high, low, reasonable, or unreasonable.

Unindicted, Unnamed, or Separately Tried Co-Conspirators

Now, some of the corporations and people who may have been involved in these events are not on trial in this case. This does not matter. There is no requirement that all members of a conspiracy be charged and prosecuted, or tried together in one proceeding.

### Venue

Now, some of the events that you have heard about happened in other places. There is no requirement that the entire conspiracy take place here in the Southern District of Ohio. The Southern District of Ohio encompasses roughly the entire southern portion of the State of Ohio (starting just north of Columbus). It includes the cities of Raymond, Brookville, and Marysville, among others.

However, for you to return a guilty verdict on the conspiracy charge, the government must convince you that some act in furtherance of the conspiracy took place here in the Southern District of Ohio.

Unlike all the other elements that I have described, this is a fact that the government only has to prove by a preponderance of the evidence. This means the government only has to convince you that it is more likely than not that some act in furtherance of the conspiracy took place here.

Remember that all the other elements I have described must be proved beyond a reasonable doubt.

## **DEFENSE**

### **Defense Position**

That concludes the part of my instructions explaining the elements of the crime. Next I will explain the defendant's position.

Defendants Tokai Kogyo Co., Ltd. and Green Tokai Co., Ltd. deny the charge.

Tokai Kogyo and Green Tokai deny that they were parties to any illegal agreement with their competitors.

## **SPECIAL EVIDENTIARY MATTERS**

### **Introduction**

That concludes the part of my instructions explaining the elements of the crime and the defendant's position. Next I will explain some rules that you must use in considering some of the testimony and evidence.

### **Defendants' Right Not to Testify or Present Evidence**

1. A defendant has an absolute right not to testify or present evidence. The fact that the defendants, through their corporate representatives, chose not to testify cannot be considered by you in any way. Do not even discuss it in your deliberations.
2. Remember that it is up to the government to prove each of the defendants guilty beyond a reasonable doubt. It is not up to the defendants to prove they are innocent.

### **Testimony of a Witness Under Grant of Immunity**

You have heard the testimony of Yasutaka Nakamichi, Yoshinori Miyaoka, and Yuji Matsushita, employees of Nishikawa Rubber and NISCO.

As the Court previously instructed, these three witnesses were given immunity in exchange for their testimony here at trial. What that means is that the government may not use against the witnesses either their testimony, or any information derived directly or indirectly from their testimony, to later prosecute them, except for the crime of perjury or making false statements, arising out of their testimony.

Additionally, you heard evidence that the government previously extended similar protections prior to these witnesses travelling to the United States to cooperate in interviews with the government.

In September 2016, the government entered into an agreement that it would not bring criminal charges against these witnesses for any violation of the Sherman Antitrust Act related to automotive body sealing products, committed before September 1, 2016, if the witnesses cooperated fully and truthfully with the United States in this case, as well as the investigation and prosecution of any and all related cases.

Under the terms of the September 2016 agreement, the witnesses' cooperation obligation included cooperating fully and truthfully with the United States, without falsely implicating any person or intentionally withholding any information, which would void the non-prosecution agreement and further expose the witnesses to other criminal charges.

The September 2016 agreement, however, does not protect the witnesses against charges for any prior acts of perjury, making a false statement, obstruction of justice, contempt, or conspiracy to commit such acts; although, as previously stated, their testimony during this trial cannot be used in any such prosecution, except for the crime of perjury or making false statements, arising out of their testimony. It is in the discretion of the government to determine, in good faith, whether any of these witnesses have violated the September 2016 agreement.

The government is permitted to make these types of promises and agreements with witnesses. But you should consider the testimony of those witnesses—Yasutaka Nakamichi, Yoshinori Miyaoka, and Yuji Matsushita—with more caution than the testimony of other witnesses. Consider whether their testimony may have been influenced by the government's promises.

You are not to convict the defendants based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

### **Preparation of Witnesses**

1. During the trial, you have heard testimony that attorneys and law enforcement agents interviewed certain witnesses in order to prepare them for trial. This conduct is not improper.
2. Indeed, both parties have the right to speak with witnesses in the course of preparing for trial, and it is proper to do so as long as the preparation does not involve instructing or suggesting that the witness testify dishonestly.

### **Summaries and Other Materials**

1. During the trial you saw counsel use or create summaries, charts, or drawings, which were shown to you at the time to assist in the presentation and understanding of the evidence. However, this material is not itself evidence and must not be considered as proof of any facts.
2. During the trial you also saw summary evidence in the form of charts, drawings, and calculations, which were marked as exhibits and admitted (in addition to the material they summarize), because the summaries may assist you in understanding the evidence that has been presented. However, the admitted summary itself is not evidence of the material it summarizes. The summary is only as valid and reliable as the underlying material it summarizes.

## Foreign Language Testimony and Translated Documents

1. During the course of trial, several witnesses testified in Japanese. During the witnesses' testimony, the official court interpreters were present to translate the questions posed by counsel into Japanese and then translate the responses given by the witness into English.
2. Also during the course of trial, a number of documents that were written in Japanese, either in whole or in part, were admitted into evidence. For your benefit, the documents were translated into English, and you were presented with both the Japanese original and the English translations.
3. As you were previously instructed, there are four Japanese words relevant to this case for which there are two possible, objectively reasonable translations. Those words are shoken, kitokuken, seigo, and chosei. When one of these four words appears in a document, both possible translations are indicated by a slash. Whether these words appear in a document or were spoken by a witness during testimony, it is up to you to decide, based on the testimony and the evidence, the meaning of the word, as it was used by the person who spoke it or wrote it, at the time they spoke or wrote it.

I will now read the four words to you again and explain the two possible, objectively reasonable translations for each:

**Shoken:** can mean either “existing business” or “commercial rights”

- Literal translation is closer to “commercial rights”
- The accepted industry jargon may be “existing business”

**Kitokuken:** can mean either “obtained business” or “existing business”

- Literal translation is closest to “vested right”
- In this context “obtained business” and “existing business” are not unreasonable, since those are the ‘vested rights’ in this context.

**Seigo:** can mean either “coordinate” or “adjust”

- Literal translation is closer to “coordinate”
- But “adjust” is not unreasonable in this context

**Chosei:** can mean either “coordinate” or “adjust”

- Literal translation is closer to “adjust”
- But “coordinate” is not unreasonable in this context

## **DELIBERATION AND VERDICT**

### **Introduction**

1. That concludes the part of my instructions explaining the rules for considering some of the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room, and your possible verdicts.
2. The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions, and will speak for you here in court.
3. Once you start deliberating, do not talk to anyone – not Mrs. Seibert, not me, not anyone except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to Mrs. Seibert, who will then bring your written question to me. Any questions or messages normally should be sent to me through your foreperson. Once I receive your written question or message, I will respond as soon as I can. I might have to talk to the lawyers about what you have asked, so it might take me some time to get back to you. In the meantime, please continue your deliberations while you wait to hear back from me, if you are able to do so.
4. One more thing about messages. Do not ever write down or tell anyone, including me, how you stand on your votes. For example, do not write down or tell anyone that you are split 6-6, or 8-4, or whatever your vote happens to be. That should stay secret until you are finished.

### **Experiments, Research, Investigation and Outside Communications**

1. Remember that you must make your decision based only on the evidence that you saw and heard here in court.
2. During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, or computer, the Internet, any Internet service, any text or instant messaging service, any app, any Internet chat room, blog, or website—all of this includes, but is not limited to, Twitter, Snap Chat, Instagram, Facebook, Google+, LinkedIn, or YouTube, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case, and you may not do any form of outside research. You can only discuss the case in the jury room with your fellow jurors during deliberations, pursuant to my instruction. I expect you will inform me immediately if you become aware of another juror's violation of these instructions.
3. The reason that you are not permitted to conduct outside research or to communicate with anyone other than each other about the case is because it is important that you decide this case based solely on the evidence presented in this courtroom. Information available in reference materials, the news, on the Internet, or through social media might be wrong, incomplete, inaccurate, or misleading. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result, which would require the entire trial process to start over.

### **Unanimous Verdict**

1. Your verdict as to each defendant, whether it is guilty or not guilty, must be unanimous.
2. To find a defendant guilty, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves that defendant's guilt beyond a reasonable doubt.
3. To find a defendant not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt.
4. Either way, guilty or not guilty, your verdict must be unanimous.

### **Duty to Deliberate**

1. Now that all the evidence is in and once the closing arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach a unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.
2. But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that--your own vote. It is important for you to reach a unanimous agreement, but only if you can do so honestly and in good conscience.
3. No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.
4. Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved either, both, or neither of the defendants guilty beyond a reasonable doubt.

### **Punishment**

1. If you decide that the government has proved a defendant guilty, then it will be my job to decide what the appropriate punishment should be.
2. Deciding what the punishment should be is my job, not yours. It would violate your oaths as jurors to even consider the possible punishment in deciding your verdict.
3. Your job is to look at the evidence and decide if the government has proved either, both, or neither defendant guilty beyond a reasonable doubt.

## Verdict Form

1. I have prepared a verdict form that you should use to record your verdict. The forms read as follows:

**(See Verdict Form)**

2. If you unanimously decide that the government *has* proved the charge against a particular defendant beyond a reasonable doubt, say so by having your foreperson mark “guilty” on the form, as to that particular defendant. If you decide unanimously that the Government *has not* proved the charge against a particular defendant beyond a reasonable doubt, or that the Government has failed to prove beyond a reasonable doubt that a particular defendant was part of the alleged conspiracy on or after June 15, 2011, say so by having your foreperson mark “not guilty” on the form, as to that particular defendant. Each of you should then sign the form and put the date on it. The foreperson is responsible for keeping the verdict form secure, and to ultimately provide it to the Court as instructed.

**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.,	:	
and GREEN TOKAI CO., LTD.,	:	
	:	
Defendants.	:	

**VERDICT FORM**

As to the charge of violation of the Sherman Antitrust Act, 15 U.S.C. § 1, WE, THE JURY, find the defendant **TOKAI KOGYO CO., LTD.:**

**GUILTY:** \_\_\_\_\_ **NOT GUILTY:** \_\_\_\_\_

As to the charge of violation of the Sherman Antitrust Act, 15 U.S.C. § 1, WE, THE JURY, find the defendant **GREEN TOKAI CO., LTD.:**

**GUILTY:** \_\_\_\_\_ **NOT GUILTY:** \_\_\_\_\_

\_\_\_\_\_  
Foreperson/ Juror # \_\_\_\_\_

\_\_\_\_\_  
Juror # \_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

**Verdict Limited to Charge Against These Defendants**

Remember that each defendant is only on trial for the particular crime charged in the indictment. Your job is limited to deciding whether the government has proved the crime charged as to each defendant.

### **Juror Notes**

1. Remember that if you elected to take notes during the trial, your notes should be used only as memory aids. You should not give your notes greater weight than your independent recollection of the evidence. You should rely upon your own independent recollection of the evidence or lack of evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impression of each juror.
2. Whether you took notes or not, each of you must form and express your own opinion as to the facts of the case.

### **Court Has No Opinion**

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the government has proved the defendants guilty beyond a reasonable doubt.