

**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. |) | |
| |) | Hon. Timothy S. Black |
| TOKAI KOGYO CO., LTD., <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |

DEFENDANTS' JOINT TRIAL BRIEF

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I. INTRODUCTION

A basic tenant of criminal law is “an unflinching search for truth” and the belief “that, in a battle between truth and error, truth, in an open field, will always win.” Jill Lepore, *Inquietude*, *The New Yorker*, Oct. 9, 2017, at 17. In contrast, the government’s approach to trial has been to misleadingly cherry pick evidence that might paint Defendants Green Tokai and Tokai Kogyo in a bad light and then attempt to deprive the jury of the opportunity to consider such evidence in context. The government has indicated it intends to offer evidence from all over the world, about many parts and vehicles (and potentially even automakers) beyond the three-year, five-RFQ, conspiracy targeting U.S. bidding and sales to Honda set forth in the government’s Indictment and Bill of Particulars. At the same time, the government seeks to prevent Defendants from offering evidence regarding their vertical supplier relationship with Honda as well as evidence of the foreign model design, development and bidding that the government now seeks to use to prove the alleged conspiracy. Moreover, the government’s jury instructions look to deprive the jury of the opportunity to consider the nature and competitive impact of Honda’s vertical relationships with suppliers and the meaning of disputed Japanese translations. To uncover the truth and fairly determine whether either Green Tokai or Tokai Kogyo violated Section 1 of the Sherman Act, jurors must be allowed to judge for themselves the nature of Defendants’ relationship with Honda and the meaning of disputed evidence.

A critical element to the government’s case is whether either defendant knowingly and intentionally joined a conspiracy to restrain trade with respect to certain Honda business. In an attempt to meet its burden on this intent element, the government is expected to rely on evidence that the same suppliers almost always won the same parts for the same models, as well as isolated cost estimate and other information exchanges with other suppliers. When viewed in the

context of Honda's way of doing business and its partnership with its suppliers, however, such evidence loses the patina of conspiracy the government wants the jury to infer. Evidence of Defendants' long-term collaboration with Honda in the production of Honda vehicles is critical for Defendants to explain to the jury why the governments' evidence, when viewed in full context, does not suggest any intent to conspire against Honda, but rather an intent to maintain the partnership with Honda in support of Honda's efforts to effectively compete with other car manufacturers.

Another fundamental factual issue will be whether Honda—not any alleged supplier conspiracy—determined the allocation of body sealing parts among the Defendants and other suppliers. If the government fails to prove that the alleged conspiracy somehow took this decision away from Honda, the case must be judged as a vertical agreement between Honda and its suppliers, not the horizontal agreement the government has alleged. Since such a vertical collaboration between manufacturers to produce automobiles would be judged under the rule of reason, the government's failure of proof on this point would result in a judgement of acquittal for the Defendants. In fact, the government's stated policy is that rule of reason cases are not even appropriate for criminal prosecution¹; a policy which is highlighted by the facts of the instant case.

¹ See, e.g., Thomas O. Barnett, Assistant Attorney General, *Criminal Enforcement of Antitrust Laws: The U.S. Model* (Sept. 14, 2006) (“[T]he Division focuses its criminal enforcement only on hard core violations. By focusing narrowly on price fixing, bid rigging, and market allocations, as opposed to the ‘rule of reason’ or monopolization analyses used in civil antitrust law, we have established clear, predictable boundaries for businesses. This narrow focus helps conserve prosecution and judicial resources by reducing the number of potential cases and also by reducing the complexity of proof: proving the existence of an agreement establishes the violation without the need for the detailed economic testimony common in civil antitrust actions.”), available at <https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model>.

B. The Japanese Manufacturing “Keiretsu” System

All of the government’s allegations concern Japanese companies and a business culture that is very different from U.S. business culture which the jury will need to understand in order to comprehend the complex relationship between Honda and its suppliers. Japanese culture emphasizes teamwork and consensus building, in contrast to American business culture, which tends to stress individual efforts and winner-take-all competition.

From the beginning, Honda, like other Japanese automakers, cultivated a business practice called “keiretsu,” a set of companies with interlocking business relationships. Suppliers in Honda’s keiretsu provided engineering resources to Honda and helped Honda design its vehicles, and Honda made long-term commitments to the suppliers in return. The keiretsu relationship was often formalized through joint ownership, with Honda acquiring stock or ownership of its keiretsu suppliers. Indeed, Honda continued to be a partial owner of Defendant Tokai Kogyo throughout the relevant period.

Under the keiretsu system, Honda would partner with exclusive suppliers for each part it needed. Honda would not look for parts from anyone outside the suppliers in its keiretsu, and the suppliers would not sell to any automakers other than Honda. Under this system, Honda would essentially guarantee its suppliers that they would continue to supply the parts Honda assigned them as long as they continued to meet Honda’s quality standards and comply with Honda’s cost reduction program. Honda usually awarded parts on new models to the same supplier that supplied that part on the previous model. Honda expected its suppliers to freely share technological and cost information with Honda in order to produce the best products at the lowest cost. This system worked very well for Honda for decades, because it ensured the

company had access to financially healthy, high quality suppliers who knew Honda's business and were committed to achieving their mutual success.

The keiretsu system is no longer formally in effect, and Honda's suppliers can and do bid on business for other car makers. Honda nevertheless continues to act consistent with the values laden in the keiretsu system. Honda still partners with just two or three suppliers for a particular part, and generally allocates business amongst the limited pool of suppliers. This information is widely known amongst Honda suppliers and will be shown at trial not only through alleged co-conspirator testimony but also through the testimony of Honda's own employees and Honda's documents.

C. Honda's Cost Planning and Design Collaboration with Its Suppliers

Honda and a small number of suppliers, including the Defendants, work together to design vehicles, reduce costs and improve manufacturing efficiency and quality consistently over many years—throughout the life of a vehicle and in preparation for manufacturing new models. Because Honda has a unique, collaborative relationship with its suppliers, it knows the minute details of a supplier's manufacturing costs at the design stage – well before any RFQs are released and before suppliers submit formal bids – minimizing the likelihood that supplier information exchanges carried any criminal intent.

Honda's development of the [REDACTED] will show that to cut costs, Honda offered a deal to its body sealing suppliers involved in the design process for the new model change: Honda would agree to maintain the existing suppliers' business—in some cases continuing to order the same parts from prior models—if the suppliers agreed to cumulatively reduce the costs on their existing parts by 10%.

will seek to prove are not naked price fixing agreements but acknowledgments as to which supplier would work with Honda to design and develop specific body seals for new Honda vehicles within Honda's development framework. Thus, the government's "conspiracy" theory has the causation backwards: Honda's suppliers might have understood and "agreed" which suppliers would partner with Honda on the design, costing and development of certain body seals, but that was only because Honda had *already* determined its supplier strategy for those parts and *already informed* the suppliers. These were not agreements as prohibited by the Sherman Act but rather acknowledgements of decisions already made by Honda. Evidence that Honda allocated parts between suppliers and informed the suppliers of that allocation before sourcing quotes were submitted shows there was no illegal agreement between suppliers to rig bids or allocate parts.

The critical factual question here is whether Defendants' and other suppliers' *vertical* agreements and collaboration with Honda resulted in the suppliers' largely maintaining their existing business for body sealing parts on new Honda vehicles. With a myopic view, the government alleges a purely horizontal conspiracy, which ignores Honda's involvement completely. The government has even tried to prevent Defendants from introducing evidence that will give the jury "the rest of the story" and allow it to test the conspiracy claims based on a full understanding of how Honda's supply chain works. When suppliers' joint development work is considered in the appropriate context of Honda's collaborative research, design, and production process, the procompetitive nature of their venture to help Honda design and build safe, affordable automobiles for consumers becomes clear.

Honda's collaboration with key suppliers is not prohibited by the Sherman Act. The Sherman Act is designed to foster competition, and, consistent with that aim, Honda competes aggressively in the U.S. automobile market. Honda's integrated supply chain and close-knit supplier team allow Honda to produce and sell safe, efficient vehicles at competitive prices. Honda's gains in the automobile market came through competition with high quality and low prices. The Sherman Act does not mandate a "one size fits all" approach to manufacturing and production, especially with large, complex products like automobiles, which typically require either collaboration among different companies or vertical integration to produce. As the Supreme Court explained almost a century ago, the Sherman Act protects as sacrosanct a manufacturer's right to select suppliers and run its business as it sees fit.

The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell. The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases.

United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (internal quotation omitted) (affirming dismissal of indictment alleging vertical coordination).

Honda is not required to purchase from any specific supplier or base its purchasing decisions on price competition or competitive bidding. "The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage." *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) (holding vertical agreements must be evaluated under the rule of reason). As a private party, Honda has every right to enter long-term

development and production agreements with a single supplier for a part while still soliciting cost-reduction and design ideas from other suppliers. The evidence will show that Honda did not purchase any relevant parts on the open market or select suppliers based on open bidding or price competitions. Instead, Honda negotiated mutual supply agreements with the Defendants and other suppliers, vertical agreements that must be evaluated under the rule of reason.

Because Honda determined the allocation of the accused body sealings among the Defendants and alleged co-conspirators, evidentiary rulings and jury instructions prohibiting the jury from considering Defendants' partnership with Honda would unfairly prejudice Defendants. Ignoring the context of Defendants' long-term partnership with Honda would undermine legitimate business collaborations and long-term productive sourcing agreements like those Honda uses to manage its supply chain. Moreover, it would reduce beneficial competition in the larger market for automobiles, which the antitrust laws are supposed to promote and protect, solely because Honda elected to structure its supply chain differently than other manufacturers. Defendants must be permitted to introduce evidence of Honda's collaboration with suppliers and give the jury an alternative explanation for the alleged conspiratorial evidence.

1. Vertical collaboration between Defendants and Honda must be evaluated under the rule of reason.

Section 1 of the Sherman Act prohibits conspiracies "in restraint of trade." 15 U.S.C. § 1. Generally, restraints of trade are analyzed under the rule of reason. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 59 (1977) (noting that the rule of reason is "applied for the majority of anticompetitive practices challenged under § 1 of the [Sherman] Act"); *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) ("The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1");

State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (“most antitrust claims are analyzed under a ‘rule of reason’”). Under the rule of reason, specific market considerations are taken into account in order to determine (1) whether competition was reduced or eliminated in any relevant market and (2) whether any harm to competition outweighs the procompetitive benefits of the challenged restraint. *Continental*, 433 U.S. at 49 (“Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”); *Khan*, 522 U.S. at 10 (considering “specific information about the relevant business” and “the restraint's history, nature, and effect”).

Vertical agreements are evaluated under the rule of reason. The Supreme Court has rejected the application of the per se rule to vertical restraints, such as Honda’s agreements with suppliers, because, unlike horizontal restraints, they do not “always or almost always tend[] to restrict competition and decrease output.” *Leegin*, 551 U.S. at 894 (quoting *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)); *see also Khan*, 522 U.S. at 10 (“Per se treatment is appropriate once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it” based on “predictable and pernicious anticompetitive effects” and “limited potential for procompetitive benefit.”)(citation omitted). In many instances, vertical coordination can increase competition and lower prices to consumers by creating manufacturing and distribution efficiencies. As the Supreme Court has noted, in markets like those for automobiles where there is “[i]nterbrand competition” in the downstream market, vertical agreements are unlikely to restrict competition or harm consumers since price increases would cause consumers to switch to other brands. *Leegin*, 551 U.S. at 897.

The Sixth Circuit has likewise confirmed that the application of the rule of reason applies to “restraints imposed by a manufacturer or supplier upon its distributors or retailers, so-called ‘vertical’ restraints, [which] are generally found to be potentially beneficial to interbrand competition.” *Beach v. Viking Sewing Mach. Co., Inc.*, 784 F.2d 746, 751 (6th Cir. 1986) (quoting *Davis-Watkins Co. v. Service Merch. Co.*, 686 F.2d 1190 (6th Cir.1982), *cert. denied*, 466 U.S. 931 (1984)).

The government argues that the case involves purely horizontal conduct, and that the bid rigging and customer allocation should be treated as per se violations. “The Court may not rely on labels applied by the government, however, and must instead analyze the substance of the allegations to determine whether the challenged conduct constitutes customer allocation in a form that has been treated by the courts as a per se violation.” *United States v. Kemp & Assocs., Inc.*, 2:16-cr-403-DS, No. 96, at 2 (D. Utah Aug. 28, 2017) (attached as Exhibit B) (citations omitted) (holding rule of reason applied to criminal customer allocation scheme); *see also In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 733-34 (8th Cir. 2014) (finding mode of antitrust analysis depended on “numerous factual questions”). The factual question of whether the supplier agreements at issue were primarily vertical or horizontal and whether they qualify for per se condemnation must be answered by the jury considering the evidence as a whole.

Because the government has alleged only a “restraint of trade” with respect to Honda’s supply chain, evidence that Honda was the source of the alleged “restraint” will prove Defendants’ innocence. *See Colgate*, 250 U.S. at 307. Evidence will show that Honda controls virtually all aspects of its long-term relationships with suppliers and structures those partnerships consistent with its former keiretsu relationships. As set forth above, Honda works with hand-

picked suppliers for decades to design and produce Honda vehicles. During the relevant period, Honda assigned suppliers to particular parts, and chose particular suppliers to design and develop particular seals for new Honda vehicles in order to closely control quality, engineering, and costs, which enabled Honda to effectively compete in the broader automotive market. Honda's vertical integration and collaboration with suppliers resulted in the purchasing and joint development activities that the government has put at issue. Some of the key aspects of Honda's collaboration that should be considered in evaluating whether either defendant unreasonably restrained trade are:

- No two suppliers sold the same part to Honda;
- None of the companies had predetermined prices for the parts they bid on or sold to Honda—they worked with Honda for many years to determine the prices;
- Honda often told suppliers which parts they would receive before the suppliers submitted sourcing quotes to Honda;
- Suppliers exchanged cost estimates with Honda at multiple, irregular times, continually developing design and cost reduction ideas for years for each part;
- Suppliers quoted based on different design specifications and Honda chose among competing designs based on suppliers' unique capabilities;
- Honda had long-term partnerships with Defendants and other suppliers and closely managed their bidding behavior; and
- Suppliers' pre-development quotes were ancillary to suppliers' long-term cost-reduction and improvement work in their agreements with Honda.

These factors show that Defendants' vertical agreements with Honda dictated the design, development and cost quotation activity underlying the government's conspiracy claims. When evaluated in context, these agreements promoted, rather than harmed, competition.

Honda's design, development, and procurement agreements with Defendants also resulted in a joint venture and long-term production collaboration with Honda and other suppliers. Many cases have recognized that joint ventures and cooperative arrangements should be assessed under the rule of reason. "Because the pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is per se unlawful under § 1 of the Sherman Act, respondents' antitrust claim cannot prevail." *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006); *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are ... not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all."). The government itself states in its Antitrust Guidelines for Collaborations Among Competitors that collaborations and "agreements jointly to produce a product sold to others" should be analyzed under the rule of reason. Fed. Trade Comm'n & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors, p. 13 (2000), attached as Exhibit C. "Participants may combine complementary technologies, know-how, or other assets to enable the collaboration to produce a good more efficiently or to produce a good that no one participant alone could produce." *Id.*

Accordingly, any information sharing or agreement to bid consistent with Honda's previously expressed desire in terms of maker layout and development was ancillary to the larger procompetitive agreement to partner and collaborate with Honda and other suppliers on the design and development of Honda vehicles. Ancillary restraints also must be assessed under the rule of reason. *See, e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) ("To be ancillary, and hence exempt from the per se rule, an agreement must be

subordinate and collateral to a separate, legitimate transaction... [for instance] in the sense that it serves to make the main transaction more effective in accomplishing its purpose.”); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 190 (7th Cir. 1985) (“The reason for distinguishing between ‘ancillary’ and ‘naked’ restraints is to determine whether the agreement is part of a cooperative venture with prospects for increasing output. If it is, it should not be condemned per se.”). Antitrust laws should not be used to prevent innovative or alternative business collaborations, which often benefit competition and should be evaluated under the rule of reason. *Kemp*, Exhibit C at 3 (applying rule of reason to an “unusual” agreement “affecting a small number of [customers]” because it “would not necessarily restrict competition or decrease output, but instead contained efficiency-enhancing potential”).

2. Any uncertainties as to whether the jury should be permitted to consider the circumstances of the claimed restraint and its reasonableness are resolved in favor of the Defendants in a criminal trial.

The 5th and 6th Amendments “require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277–278 (1993)). While evidentiary issues and the mode of analysis used to assess a claimed restraint of trade under the Sherman Act are legal issues, they are based upon critical factual questions that the jury must answer. *See, e.g., Wholesale Grocery Prods.*, 752 F.3d at 733-34. Because the government’s conspiracy allegations are inextricably intertwined with Honda’s collaborative partnerships with suppliers, the jury must be permitted to consider the history and rationale of Honda’s new model development collaboration.

The rule of lenity further compels this conclusion. “The rule that penal laws are to be construed strictly ... is founded on the tenderness of the law for the rights of individuals; and on

the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820); *see also Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."). The rule of lenity applied to criminal statutes requires clarity in what they prohibit, and Section 1 of the Sherman Act is hardly a model of clarity. The ambiguity is compounded by the government's approval of joint research and development and production collaborations as potentially procompetitive in the 2000 Antitrust Guidelines. Evidence of the procompetitive reasons for the partnership between Defendants and Honda in the production of the vehicles the government has accused should inform the jury's evaluation of the alleged conspiracy.

The Defendants' supplier agreements and new-model development work with Honda were closely managed and determined by Honda, and the evidence shows Honda had no concerns with how the Defendants participated in the vertical collaboration. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. Competing Translations Are a Factual Issue for the Jury.

English and many European languages share common traits and history. They also share common context and sentence structures. They share the same alphabet. The Japanese language comes from an entirely different tradition. It lacks the clarity, precision and structure familiar to European languages. Japanese is based on separate experiences, values and shared understandings. Unlike French, Spanish, German or other European languages, Japanese cannot be easily translated into English. There are not literal or precise interpretations of many Japanese concepts, and the language, itself, is vague and relies on shared inferences from speakers and listeners. In fact, Japanese does not even use the same characters as English. Accordingly, attempts to translate Japanese into English are subject to significant interpretive difficulties. *See, e.g., United States v. Nippon Paper Indus.*, 62 F. Supp. 2d 173, 182-183, n.16 (D. Mass. 1999) (noting that, “in Japanese, sentences often don’t have a subject, ... Japanese history is longer than our history is[, and] there’s some shared values that the Japanese have and are understood through history, culture and language ... and can be difficult to understand for a non-native”).

When it comes to the documents at issue in this case, the difficulty in translating from Japanese to English is exacerbated by the nature of the documents. Most of the Japanese documents included on the parties’ exhibit lists are notes, PowerPoint presentations, or emails. The context and meaning of these informal writings would need to be inferred based on the shared experiences of those writing it and reading it in Japanese. While the parties worked diligently and reached compromise on translations of many Japanese documents likely to be exhibits at trial, in other cases, the appropriate interpretation remains disputed.

While Japanese documents present special difficulties for interpretation and translation at trial, prior decisions addressing disputed interpretations offer a clear guide for addressing these

issues while protecting the rights of the Defendants. The courts of appeals agree on the appropriate manner to present translation issues to the jury in a criminal case:

‘Initially, the district court and the parties should make an effort to produce an “official” or “stipulated” transcript, one which satisfies all sides. If such an “official” transcript cannot be produced, then each side should produce its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version.

This procedure is well suited to cases such as that before us, where the transcript is an English translation of a foreign language conversation. ***Such a procedure does not tie a defendant to an “official” transcript prepared by the prosecution, nor does it “usurp” the factfinder's function.*** If there is a dispute as to the contents of a foreign language recording the burden will lie with the respective parties to present transcripts or other evidence to support their version of the conversation.’

United States v. Briscoe, 896 F.2d 1476, 1491–92 (7th Cir. 1990) (emphasis added) (quoting *United States v. Llinas*, 603 F.2d 506, 509-10 (5th Cir.1979)) (addressing transcript translating recorded conversation); *see also United States v. Garcia*, 20 F.3d 670, 673 (6th Cir. 1994) (holding that defendant must offer “an alternative translation” to preserve objections).

“It is the duty of the factfinder to resolve such conflicts and to ascertain what weight and meaning to ascribe to the competing translations.” *Chen v. New Trend Apparel, Inc.*, 8 F. Supp. 3d 406, 443 (S.D.N.Y. 2014) (citing *In re Audibility of Certain Recorded Conversations*, 691 F. Supp. 588, 601 (D. Conn. 1988) (Where, “as here, there is a dispute about which of the transcripts and/or translations is accurate, it is for the jury to decide which of the transcriptions and translations—if either—to credit.”)).

While witness testimony might establish the appropriate translation of disputed Japanese documents, many of the authors of the disputed documents are expected to testify in Japanese through an interpreter at trial—introducing many of the same difficulties with their testimony we

have experienced interpreting Japanese documents. The imprecise relationship between English and Japanese will likely leave factual questions for the jury regarding the appropriate translation of exhibits, their meaning, and their relevance to the charges against the Defendants. “In such situations, it is for the jury to decide which interpretation is correct.” ABA Model Jury Instructions in Criminal Cases 4.C.14. (2009); *see also* Seventh Circuit Federal Criminal Jury Instructions § 3.18, Foreign Language Recordings/Transcripts in English (1999) (“Whether a transcript is an accurate translation, in whole or in part, is for you to decide.”). The difficulty in translating Japanese into English was appropriately addressed in this manner during the *Nippon Paper* antitrust criminal trial in Massachusetts. “Where the contested issues involved language, ... the jury was given the evidence of both translations.” *Nippon Paper*, 62 F. Supp. 2d at 182-183 (finding disputed translations relevant to admissibility of alleged co-conspirator statements and sufficiency of government’s evidence). Since the meaning of Japanese documents will be a critical factual question at trial, the jury must be permitted to hear evidence of competing translations and decide the issue.

C. Defendants Must Present Clear, Independent Evidence of Japanese-Speaking Witnesses’ Prior Inconsistent Statements to Meaningfully Impeach Their Testimony.

Many of the government’s key trial witnesses made statements during pretrial interviews that contradict the government’s theory of the case and even contradict their own prior statements. *See* Chart of Inconsistent Witness Statements, attached hereto as Exhibit E. Traditionally, Defendants would use cross-examination to probe a witnesses’ general character for truthfulness and explore potential biases, even using prior inconsistent statements to impeach a witness when available. *See e.g.*, Fed. R. Evid. 608 and 609. The instant case, however, presents a potentially challenging situation because many of the government’s witnesses do not

speak English and will be testifying through a Japanese interpreter. Because the Japanese language is so different from the English language—in that many words that exists in the Japanese language do not have English equivalents or that the Japanese language does not always use subjects or pronouns in each sentence—the witnesses’ admission or denial of a prior inconsistent statement may not be clear to the jury.

Defense counsel expects that the trial testimony from the government’s witnesses will be inconsistent with their pretrial statements, and thus intends to question the witnesses on their contradictions after laying a proper foundation. Prior inconsistent statements—especially those recorded in 302s and MOIs—are one of the most commonly used and most effective methods of impeaching government witness. “[T]he Supreme Court’s Sixth Amendment jurisprudence leaves no question about a criminal defendant’s right under the Confrontation Clause to ‘impeach, i.e., discredit, the [state’s] witness[es].’... As a result, constitutionally adequate confrontation must include the meaningful opportunity to challenge the state’s witnesses for ‘prototypical form[s] of bias.’... A witness’s own inconsistent statements are among these ‘prototypical forms of bias’ because they ‘undoubtedly provide[] valuable aid to the jury in assessing [witnesses’] credibility.’” *Blackston v. Rapelje*, 780 F.3d 340, 348–49 (6th Cir.), *cert. denied*, 136 S. Ct. 388, 193 L. Ed. 2d 449 (2015) (citations omitted). So long as the cross-examining attorney has a good faith reason to believe that the witness made the prior inconsistent statement, the attorney is permitted to ask the witness whether she/he made the statement. *See Rush v. Illinois Cent. R.R. Co.*, 399 F.3d 705, 720 (6th Cir. 2005) (“defense counsel’s question which incorporated the prior statement is a traditional means of confronting a witness with a

prior inconsistent statement.”); *United States v. Musgrave*, Crim No. 3:11-cr-183, Civ. No. 3:14-cv-101, 2015 WL 12516174, *4 (S.D. Ohio Mar. 13, 2015)

As an initial matter, if a witness cannot remember and confirm whether he made the prior inconsistent statement, then, with a proper foundation laid, defense counsel may use the 302/MOI to refresh the witnesses’ recollection. Fed. R. Evid. 612; *Musgrave*, 2015 WL 12516174 at *4 (noting “trial counsel appropriately attempted to use the report to refresh his collection”).

While this Court’s holding in *Musgrave* prohibits direct admission of the 302 or MOI containing the prior inconsistent statement when the witness denies having made the statement, it does not prohibit the defense from calling as a witness the investigator to whom the prior inconsistent statement was made, and then asking the investigator whether the witness made the prior inconsistent statement.³ See *Rush*, 399 F.3d at 722-23 (“The foundational prerequisites of Rule 613(b) require only that the witness be given an opportunity, at some point, to explain or deny the prior inconsistent statement and that the opposing party be given the opportunity to examine the statement.”); *United States v. Sisto*, 534 F.2d 616, 622 (5th Cir. 1976) (“It is hornbook law that evidence of prior inconsistent statements of a witness may be admitted to impeach that witness. The prior statements may have been oral and unsworn, and ‘the making of the previous statements may be drawn out in cross-examination of the witness himself, or if on cross-examination the witness has denied making the statement, or has failed to remember it, the making of the statement may be proved by another witness.’”) (citing McCormick on Evidence § 34 (1972)); see also *United States v. Yarrington*, 634 F.3d 440, 448 (8th Cir. 2011) (“[Witness

³ In anticipation of this issue, Defendants conferred with the government who has accepted trial subpoenas for six federal employees or FBI Agents who either wrote an MOI or 302 pertaining to a witness expected to testify for the government.

2]’s testimony about [Witness 1]’s prior statements was clearly inconsistent with [Witness 1]’s trial testimony that he had never talked to [Witness 2] about cooperating in [the defendant]’s case...[Witness 1] denied making *any* statements to [Witness 2] about cooperating in [defendant]’s case. Accordingly, [Witness 2]’s testimony should have been permitted as extrinsic evidence of a prior inconsistent statement in order to impeach [Witness 1].”)

While English-speaking witnesses might be meaningfully impeached with prior inconsistent statements through cross-examination alone, where foreign language testimony is unclear or difficult for a jury to understand and interpret, testimony of other witnesses or other extrinsic evidence of the prior statements clarifies and emphasizes the inconsistencies. Thus, extrinsic evidence is necessary for meaningful confrontation and impeachment of witnesses speaking only Japanese and testifying through an interpreter.

The Sixth Circuit has noted that “[t]he circuits are split on whether a criminal defendant is entitled to introduce extrinsic evidence of a prior false or inconsistent statement when the witness admits at trial that she made the statement and that it was false.” *United States v. Whalen*, 578 Fed. App’x 533, 541 (6th Cir. 2014) (unpublished) (citations omitted) (noting that “[t]his court has never taken sides in the debate”). In the *Gordon* decision, the Supreme Court specifically addressed the need for defendants to present extrinsic evidence to clarify and emphasize impeachment with prior inconsistent statements:

We hold that the accused is entitled to [present extrinsic evidence of prior inconsistent statements], not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the [statements’] impeaching weight and significance. Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters. The alleged contradictions to this witness’ testimony relate not to collateral matters but to the very incrimination of [defendants].

Except the testimony of [Marshall] be believed, this conviction probably could not have been had.

Gordon v. United States, 344 U.S. 414, 420-21 (1953) (reversing conviction based on exclusion of extrinsic evidence of prior inconsistent statements). The Supreme Court strongly cautioned against any “curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.” *Id.* at 423.

Since the government’s case against Defendants will likely rest on confusing and contradicted testimony of cooperating witnesses that do not speak English and testify through an interpreter, extrinsic evidence of those witnesses’ prior inconsistent statements constitutes “relevant and important facts bearing on the trustworthiness of crucial testimony.” *Gordon*, 344 U.S. at 423. Moreover, the prior inconsistent statements Defendants plan to address “relate not to collateral matters but to the very incrimination of [defendants].” *Id.* at 421; Exhibit E. Where a witness’ testimony is clear and he has been successfully confronted with impeaching prior inconsistent statements, Defendants will not seek to offer cumulative extrinsic evidence of those statements. But where confrontation and impeachment of Japanese witnesses is unclear and confusing for the jury, Defendants must be permitted to offer extrinsic evidence of prior inconsistent statements to safeguard their Sixth Amendment rights.

IV. CONCLUSION

What the Defendants want most and deserve is a case which is fairly tried and clearly presented to members of the jury who will decide their fate. The Court is obviously of a like mind. As the fact-finders in this case, the jurors must be trusted to make choices – choices about whose testimony they believe and choices about which documents presented to them as evidence are important and what those documents really mean. The jurors must also be allowed to

consider and understand the true nature of the business and cultural relationship between those accused of criminal behavior and their alleged victim. The jurors cannot reasonably be expected to fairly decide this case in the vacuum the government suggests. They must be allowed to decide this case within the rubric which includes correct statements of the law.

The trial of this case will be complicated and difficult for all involved. It will be complicated because of the technical nature of the products involved, their unique research and development evolution, and their incorporation into even more complicated automobiles. It will be difficult because of the very different languages and cultures that will intersect before the jurors very eyes. And, it will be complicated and difficult because of the ambiguous federal criminal statute(s) the jurors will be asked to apply. But, this case will not be too complicated or difficult for the jurors to decide if they are allowed to use their common sense (which juries consistently do when given the chance in defense counsel's experience), and if they are trusted with choices to make about what testimony and evidence they may see, hear, consider and decide. Giving the jurors more options to consider in deciding what a document really says or about what a Japanese-speaking witness really meant, will make their job easier not harder. It will allow them to decide the facts from a broader, fairer array of options.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, I electronically transmitted the foregoing *Defendants' Joint Trial Brief* 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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