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

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

DEFENDANTS' RESPONSE TO GOVERNMENT'S TRIAL BRIEF

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On October 16, 2017, with only three weeks before the commencement of trial, the government filed a trial brief which contained significant evidentiary issues that should have been properly raised in pretrial motions *in limine* or at least brought to the attention of the Court and the Defendants as defense counsel did at the evidentiary hearing on October 13, 2017. *See* Docket 165; *see also* Hrg. Tr. at 116-117. Because of the nature of the evidentiary issues, as discussed more fully in the following response, Defendants Tokai Kogyo Co., Ltd. and Green Tokai Co., Ltd. are grateful for the opportunity to be heard by the Court and would welcome further discussion on these matters at the final pretrial conference if the Court deems it productive.

A. The Use of Leading Questions On Direct Should be Limited, If Allowed At All

The use of leading questions is a matter left to the Court's discretion. *See e.g., U. S. v. Shoupe*, 548 F.2d 636, 641 (6th Cir. 1977); *Jordan v, Hurley*, 397 F.3d 360, 363 (6th Cir. 2005) (in considering Ohio Rule of Evidence 611(C), quoted *Shoupe*, 548 F.2d at 641); *U. S. v. Ajmal*, 67 F.3d 12, 16 (2nd Cir. 1995); *U. S. v. Rodriguez-Garcia*, 983 F.2d 1563, 1570 (10th Cir. 1993) (a leading question may be asked of an adult witness with communication problems). The Court is respectfully encouraged to make a decision about the government's use of leading questions on a witness-by-witness basis and not give the government *carte blanche* to use leading questions in the examination of each and every foreign language speaking witness. Giving the government blanket permission to use leading questions with its foreign language witnesses will essentially mean that the jury will hear only the prosecutors testifying as to their version of the alleged conspiracy, depriving the jury of hearing the details of the alleged crime from the alleged co-conspirators. Moreover, the government has offered no factual basis recognized by the Sixth Circuit which could justify its leading the Japanese witnesses who will be aided by interpreters

of its own choosing. To allow the government to lead its Japanese witnesses on direct based on the record as it stands would come dangerously close to, if not actually, violating Defendants Confrontation Clause rights. *See* U.S. CONST. VI.

The government cites *Jordan v. Hurley*, because it is a Sixth Circuit case that *cites* another case wherein a prosecutor led a foreign witness on direct. *See* Trial Br. at 24 Page ID 2879. However, the government glosses over the essential details and differences of the case it cites. Importantly, *Jordan*, did not involve a prosecutor leading a foreign language witness but rather a prosecutor leading a rape victim with Downs Syndrome on direct – so the witness' mental faculties were impaired, a condition which is not a salient factor in this case. 397 F.3d at 362-363. Furthermore, the case cited in *Jordan* which comes factually closer to the instant case, involved a Pakistani witness who spoke Urdu and no English so he testified through the use of an interpreter at trial. *Ajmal,* 67 F.3d at 16. The witness, however, was apparently so soft spoken and the interpreter had difficulty translating from Urdu into English and English into Urdu that the jurors were having trouble following and *the judge* suggested that the prosecutor lead the witness. *Id.* at 15. Again, such circumstances have not presented themselves in the instant case.

Moreover, a witness-by-witness decision on the use of leading questions is especially appropriate in this case because some of the government's witnesses have been questioned or interviewed by government investigators and/or government attorneys six (6) or more times. *See* Chart of Government Interviews, attached hereto as Exhibit A. There should be little or no risk of a foreign language speaking witness, who has been interviewed before trial multiple times by the government, needing the assistance of leading questions "to develop the witness' testimony." Fed. R. Evid. 611(c). Indeed, the passage of time and the exclusive access the government has had to these witnesses should have allowed the government to fully prepare these witnesses to

understand the line of questioning they will face at trial. The government's professed concern that their witnesses will "mistakenly provide an answer that does not respond to the question" is particularly perplexing given that the witnesses will presumably be answering questions that have been asked of them several times over and will be responding to open-ended questions wherein they are able to describe the facts and circumstances of the alleged conspiracy *in their own words*. As defense counsel has previously raised, these particular witnesses have been consistently inconsistent with their statements about the Defendants involvement in the alleged conspiracy. *See e.g.*, Docket 144 at pp. 23-24, Page IDs 2209-2210.

Given the aforementioned, Defendants urge the Court to limit the government's use of leading questions on direct and only after a substantive showing of need in accordance with the

Federal Rules of Evidence and Sixth Circuit case law. Letting the government ask leading questions in the examination of each and every foreign language speaking witness before the Court decides that leading questions are "necessary to develop [a] witness' testimony" could constitute an abuse of discretion by the Court. (Fed. R. Evid. 611(c)).

B. Allowing an Alleged Co-Conspirator, With Memory Issues, to be Led on Direct to Offer His Opinion As to the Ultimate Issue in Fact Is An Affront to the Constitution

Defendants are concerned that the government's trial brief appears to be setting up a trial in which the jury will only hear the evidence and testimony of the government instead of those who have already admitted their part in the alleged conspiracy. This concern is amplified by the government's desire to allow foreign language witnesses to give *opinion* testimony about the existence of an illegal agreement when the government has stated that those same witnesses may be confused on direct, may have faulty memories, and may need to be impeached by the government. *See* Trial Br. at 20 Page ID 2875; *see also* Trial Br. at 24 Page ID 2879, 18 Page ID 2876, 26 Page ID 2881.

The government cites a Seventh Circuit case, *U. S. v. Baskes*, 649 F.2d 471, 479 n. 5 (7th Cir. 1980), contending that "the term agreement has a 'well-established lay meaning[ ]' to which lay witnesses may testify." Trial Br. at 17-18 Page ID 2875-76. In *Baskes* however, the district court sustained government objections to questions asked *by the defense* of an alleged co-conspirator as to whether the witness "unlawfully, knowingly and wilfully [*sic*] conspire[d] to defraud the United States together with" the other defendants." 649 F.2d at 478. The sustained objection was affirmed on appeal because witness opinions as to the legal implications of conduct are neither admissible nor helpful to the jury. *Id.* The quote from the government's trial brief is attributable to a footnote in *Baskes* where the Seventh Circuit acknowledged a different case, *U. S. v. Standard Oil Co.*, 316 F.2d 884 (7th Cir. 1963), where the Seventh Circuit found it

was error for the trial court to prevent the defendants from testifying as to whether there was an agreement in an alleged price-fixing case. *Baskes,* 649 F.2d at 479, n.5.

Again, while Sixth Circuit jurisprudence counsels allowing witness testimony, even where it is mixed fact and opinion, based on the facts and circumstances of the alleged crime, Defendants concern is that the witnesses testifying for the prosecution give testimony that is based on their own recollection of events. *See U.S. v. Graham,* 856 F.2d 756, 759 (6th Cir. 1988) (undercover agent allowed to testify that defendant asked him for a bribe, not a voluntary contribution to the Sheriff's re-election campaign where defendant was charged with using a telephone with the intent to bribe the sheriff); *Cont'l Baking Co. v. U.S.,* 281 F.2d 137, 143 (6th Cir. 1960)(witness giving factual testimony, not opinions, as to whether they witnessed or heard an agreement while present at certain meetings).

While it may be true that "agreement," "understanding," "promise," or "commitment" all "have well-established lay meaning[s]" in the English language, the same is not necessarily true in another language; particularly the Japanese language. The potential for misunderstanding or confusion is especially problematic when a number of witnesses, who might be asked if there was an "agreement," "understanding," or "promise" will testify with the aid of a translator and be led on direct by the prosecutor because the witness "will misunderstand the question." Trial Br. at 24 Page ID 2879. The government not should be permitted to have it both ways.

At a minimum, the government should be required to first establish that the words "agreement," "understanding," or "promise," have well-established meanings in the Japanese language that are equivalent to the well-established meaning in the English language. This should be done through traditional means of direct testimony and not through leading questions. If the government can meet this initial threshold, then and only then should the Court allow

witness testimony within the confines of Sixth Circuit case law. However, the government should not be permitted to lead foreign language speaking witnesses to agree with the government that there was an agreement, understanding or promise in this case.

C. The Government Overreaches in Regards to ██████████

The government says that it "plans to call witnesses who will testify pursuant to their ██████████." Trial Br. at 27 Page ID 2885 (emphasis added). Further, that the government will: 1) reference alleged ██████████ in its opening statement, 2) elicit testimony about t██████████ at trial and finally, 3) admit the plea agreement into evidence – all under the guise of allowing the jury to properly assess the witness' motivations for testifying and credibility. *Id.* at 27-28 Page ID 2885-2886. The government's reference to the ██████████ ██████████ ██████████ shows its fundamental misunderstanding of its own contract with ██████████ the Federal Rules of Evidence and prevailing case law. Trial Br. at 6 Page ID 2864.

A plea agreement between the government and a corporation is an agreement between the government and the corporation, *not* between the government and any individual witness. This basic principle is acknowledged by the government when it asserts that ██████████ ██████████ ██████████ ██████████ ██████████ *Id* at 27 Page ID 2885 (emphasis added). Significantly, that assertion makes clear that an individual witness is not obligated to do anything pursuant to the corporation's guilty plea; only the corporation is bound by the plea agreement (*e.g.*, "use its best efforts to secure the full, truthful, and continuing cooperation of certain of its employees"). To the extent the government's Trial Brief suggests or intimates that any individual is bound by

the terms of the government's plea agreement with the individual's corporate employer it is in error.

Defendants acknowledge that a corporate representative, with appropriate authority and knowledge, *may* be able to testify as to a relevant plea agreement as noted in the case cited in the government's Trial Brief. *See U. S. v. Hayter Oil Co., Inc. of Greenville, Tenn.,* 51 F.3d 1265, 1269 (6th Cir. 1995).

While a prosecutor may properly refer to a plea agreement of a *testifying witness,* such circumstances are not present in the instant case since none of the witnesses set to testify pled guilty to a related crime. *See U. S. v. Owens,* 426 F.3d 800, 806 (6th Cir. 2005) ("When a defendant attacks *the credibility of a government witness* for signing a plea agreement, the prosecution is entitled to refer to the agreement in rebuttal.") (emphasis added); *U. S. v. Mongham*, No. 07-4161, 2009 U.S. App. LEXIS 27411 at **9-10 (6th Cir. Dec. 16, 2009) (unpublished) (citing *Owens,* 426 F.3d at 806).

Trial Br. at 28 Page ID 2886 *citing U.S. v. Benson*, 591 F.3d 491, 498 (6th Cir. 2010); *U. S. v. Lombardo*, 2014 U.S. App. LEXIS 18333 **31 (6th Cir. Sept. 19, 2014)

(unpublished). As a general proposition, Defendants do not take issue with the propositions that these cases represent. However, Defendants do take issue with, and will oppose, any effort to ask questions about or introduce into evidence a plea agreement that a testifying witness is not qualified to give testimony about. In spite of quoting the *Benson* case, the government appears to ignore specific language from that case: "guilty pleas [of a co-defendant or co-conspirator] may be introduced into evidence *if the co-defendant or co-conspirator testifies* at trial." *Benson,* 591 F.3d at 498 (emphasis added). If a co-defendant, or a co-conspirator to whom the specific guilty plea relates, does not testify at trial, there is no basis for questions about, or the admission into evidence of the specific plea agreement. [1] *Id.*

[redacted]. [redacted]

[redacted].

D. Indefiniteness of Recollection is a Bar to Admissibility Where it Reveals a Complete Lack of Foundation

Other than expert testimony under Rule 703, Rule 602 permits testimony by a witness regarding "a matter *only if* evidence is introduced *sufficient to support a finding* that the *witness*

[1] [redacted].

has personal knowledge of the matter." Fed. R. Evid. 602 (emphasis added). The evidence proving "personal knowledge may consist of the witness's own testimony." *Id.* The Defendants do not dispute the notion that a witness' inability to recall particular details of an event or a conversation does not preclude the witness from testifying about the event or conversation, so long as the prosecution has laid the appropriate foundation for the testimony (*e.g.,* the witness has personal knowledge of the event or conversation by having been present at the meeting or participating in the conversation). However, the case cited by the government is inapposite, to the Defendants knowledge, since the witness' memory issues in *Hickey* were attributable to an admitted drug addiction. *U.S. v. Hickey,* 917 F.2d 901, 904-905 (6th Cir. 1990). The government has not made Defendants aware of any such affliction which would affect any of the government's witnesses' recall ability at trial.

Defendants acknowledge that Rule 602 does not have a particularly high threshold for admitting testimony, but the Federal Rules of Evidence do nonetheless require a foundational basis for all testimony. The Court is respectfully encouraged to be mindful of, and sensitive to, any government attempt to lower the bar under Rule 602 even more by way of leading questions of Japanese speaking witnesses, impeaching any of those witnesses who give unsatisfactory "yes" or "no" answers to those questions, and then being permitted to introduce prior consistent statements of those witnesses. The combination of those events would lead to the prosecution being able to get a witness to testify about an event or conversation which the witness genuinely and sincerely does not recall rather than testifying about an actually recalled event or conversation. Such a scenario would be tantamount to the prosecution testifying.

E. Impeachment of Its Own Witnesses

Even though the government moved *in limine* to prevent the Defendants from impeaching its witnesses with prior inconsistent statements (Docket 127), the government now asserts that

because

Trial Br. at 23 Page ID 2881.

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The Sixth Circuit case cited by the government for the proposition that it can impeach its own witnesses, is not applicable in the instant case. Trial Br. at 23-24 Page ID 2881-2881; *U. S. v. Haueter*, 838 F.2d 472, 1988 U.S. App. LEXIS 1413 *11 (6th Cir. Feb. 3, 1988) (unpublished). The defendant in *Haueter* complained that the District Court erred in permitting the government to impeach one of its witnesses with a prior inconsistent statement. 1988 U.S. App. LEXIS 1413 at *1. The Court said that "[t]he government note[d] that the truck driver, by virtue of being a long-time employee, had a motive to slant his testimony in favor of the [defendant], and [the Court saw] no error in letting the government try to impeach the credibility of the witness." *Id.* at *11. Because that situation is so different than this case, *Haueter* is distinguishable.

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The government's position on this point, like its position on others, is concerning in light of the government's simultaneous request that it be permitted to ask leading questions of Japanese-speaking witnesses. It appears that the government wants to be able to ask leading questions of some of its witnesses, and at the same time, be able to impeach those witnesses. If the government is permitted to ask leading questions of a witness, and thereby elicit "yes" or "no" answers, the government should not also be allowed to impeach that same witness if it does not like the "yes" or "no" answer it gets. There should be little or no need to impeach a witness giving "yes" or "no" answers to leading questions unless the prosecutor has been 'sloppy' in formulating the questions or just does not like the witness' answer. A situation where the prosecution is permitted to ask leading questions and then turn around and impeach that witness with, say, a prior inconsistent statement, comes dangerously close, if not crosses the line, to "subterfuge" on the part of the government. The Court is respectfully encouraged to be mindful of, and sensitive to, government attempts to impeach any of its witnesses, if the government is permitted to ask that witness leading questions. The Defendants submit that this is especially 'thin ice' with the issues present in translating English to Japanese, and Japanese to English.

In addition, in light of the length of time devoted by the government to its investigation of this matter, and the number of times it has interviewed its own Japanese-speaking witnesses, there should be little or no opportunity for impeachment of those witnesses. The Court is respectfully encouraged to be especially mindful of, and sensitive to, government attempts to impeach any of its witnesses, who have been interviewed multiple times by the government prior to trial.

F. Introduction of Prior Consistent Statement/F.R.E. 801(d)(1)(B)

Defendants understand the government's trial brief to be outlining the normal, allowable procedures of rehabilitation after a witness' credibility is attacked on cross-examination pursuant

to the Federal Rules of Evidence. *See* Trial Br. at 20-21 Page IDs 2878-2879. Defense counsel has also confirmed that while the government may attempt to rehabilitate its witnesses with prior consistent statements, it will *not* be seeking to introduce documents reflecting those statements into evidence. Assuming that defense counsel's understanding is still accurate, Defendants have no further comments in this regard**.**

G. Metadata Admissibility is a Complicated Issue Requiring Expert Testimony

The government raises in its brief that it would like to introduce certain metadata associated with certain electronic documents of Green Tokai into evidence at trial. Defendants do not disagree with the government's assessment of the importance and use of metadata as evidence. Trial Br. at 25-26 Page ID 2883-2884. Metadata also includes:

> all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records.[] [E]xamples of metadata for electronic documents include: a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it).

Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 547 (D. Md. 2007). When the government first expressed its intent to introduce metadata associated with electronic documents, Defendants objected and questioned who would be testifying about the documents and specifically testifying about the metadata. Defendants have received no response. Due to the complicated and technical nature of metadata, particularly as it exists in its natural form, any testimony about metadata or more appropriately the metadata summaries the government has created must be introduced by a qualified forensics expert. The deadline for expert notices has passed and the

government has failed to provide any such notice to the defense. In addition, even if a forensic expert were to testify as to the metadata summaries, the government's current witness list still appears devoid of any witness with sufficient knowledge to testify as to the foundation of how the various documents were forensically collected. Defendants have concerns and intend to pose objections to emails from alleged co-conspirators where, on the mere face of the documents produced to the defense, important questions about the documents' authenticity and reliability remain. Based on the face of the documents and information known to defense counsel, it appears that the government abdicated its responsibility to collect authentic and reliably sourced business records to certain alleged coconspirators. Many emails, on their face, reference attachments which were never produced to the defense, because per the government," if we did not get the attachment then you did not get the attachment." Many emails, on their face, miss content, dates and names of recipients and senders. Again, the government blindly accepted whatever the competitor companies gave them and ignored obvious and serious questions about the fundamental reliability of such documents.

DATED this 23rd day of October, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2017, I electronically transmitted the foregoing *Defendants' Response to the Government's Trial Brief* to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all counsel who have appeared in this matter.

__*/s/ Meena T. Sinfelt*______
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