98-3498

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: NELSON v. PILKINGTON

UNITED STATES OF AMERICA,
Intervenor-Appellant.

(FULL CAPTION ON NEXT PAGE)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

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Case No. 98-3498

IN RE: FLAT GLASS ANTITRUST LITIGATION
(MDL No. 1200)

BRIAN S. NELSON, d/b/a Jamestown Glass Service; MEL'S AUTO GLASS, INC.; A. WAXMAN & CO, on behalf of itself, and all others similarly situated; DESIGNER WINDOWS, INC., on behalf of itself and all others similarly situated; MOSES MOORE ALL GLASS ASPECTS, INC., on behalf of itself and all others similarly situated; AAA GLASS, INC., d/b/a THE GLASS DOCTOR, on behalf of itself and all others similarly situated; THE LURIE COMPANIES, INC., VSTB ENTERPRISES, INC., d/b/a PERFECTO AUTO GLASS & UPHOLSTERY AND ITS SUCCESSORS; PORT CITY GLASS & MIRROR, INC., on its own behalf and on behalf of all others similarly situated; JOHN HEALY, JR.; COUNTY AUTO GLASS, INC., on behalf of themselves and all others similarly situated; GERARD J. CLABBERS, on behalf of himself and all others similarly situated; KIRSCHNER CORPORATION, INC., t/a BERWYN GLASS COMPANY, on behalf of itself and all others similarly situated; HARTUNG AGALITE GLASS CO., d/b/a HARTUNG GLASS INDUSTRIES; ALL STAR GLASS, INC., on behalf of itself and all others similarly situated; SUPERIOR WINDSHIELD INSTALLATION, INC., on its own behalf and on behalf of all others similarly situated; JOVI, INC., t/a EASTON AREA GLASS, on behalf of itself and all others similarly situated; ENGINEERED GLASS WALLS, INC., on behalf of itself and all others similarly situated; BAILES GLASS CO.; INTERSTATE GLASS DISTRIBUTORS, INC., on behalf of itself and all others similarly situated; ORLANDO AUTO TOP, INC.; MAYFLOWER SALES CO., INC., on behalf of itself and all others similarly situated; CARDINAL IG; REEDS BODY SHOP, INC.; BELETZ BROTHERS GLASS COMPANY, INC.; COMPLAST, INC.; WESTERN STATES GLASS, on behalf of itself and all others similarly sitated; GRIMES AUTO GLASS INC.; D&S GLASS SERVICES, INC.; GEORGE BROWN & SON GLASS WORKS, INC.; THERMAL CHEK, INC.; MOBILE GLASS, INC., individually and as a representative of a class

v.

PILKINGTON PLC; PILKINGTON LIBBEY-OWENS-FORD CO., INC.; AFG INDUSTRIES, INC.; GUARDIAN INDUSTRIES CORPORATION; PPG INDUSTRIES, INC.; LIBBEY-OWENS-FORD CO., INC.; ASHAI GLASS CO., LTD.; FORD MOTOR CO.; PILKINGTON HOLDINGS; ASHAI GLASS AMERICA, INC.

UNITED STATES OF AMERICA (Intervenor in D.C.)

United States of America,
Appellant

(D.C. Misc. No. 97-550)

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REPLY BRIEF FOR THE UNITED STATES

Plaintiffs cling to the *Frankenhauser* factors as the proper standard for evaluating the government's privilege claim but do not then defend the way in which the district court weighed those factors. Appellees' Brief 18-20 (Dec. 24, 1998) ("Pl. Br."). Instead, plaintiffs embark on a series of distractions by suggesting that this Court previously has rejected the law enforcement investigatory privilege and that the United States lacks standing to bring this appeal. But this Court has not rejected the privilege before, the Untied States does have standing, and the materials at issue in this case are privileged. Thus, the July 20 Order of the district court should be reversed.

I. THIS COURT HAS NOT PREVIOUSLY OPINED ON THE EXISTENCE OF THE LAW ENFORCEMENT INVESTIGATORY PRIVILEGE.

Plaintiffs contend that this Court's decisions in *United States* v. *O'Neill*, 619 F.2d 222 (3d Cir. 1980), and *Westinghouse Electric Corp.* v. *Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991), rejected the existence of the law enforcement investigatory privilege in this Circuit. Plaintiffs, however, have misread *O'Neill* and *Westinghouse*.

In *O'Neill*, the United States Commission on Civil Rights subpoenaed various documents from the City of Philadelphia regarding police brutality. The City refused to provide the requested information on several grounds, including certain officers' fifth amendment rights, the attorney-client and work product privileges, and due process. At oral argument before the district court, the City Solicitor added a claim of "executive privilege" as well. 619 F.2d at 225. The district court ultimately denied enforcement of the subpoenas based on executive privilege. *Id.* at 224. On appeal, this Court vacated and remanded so that the district court could review the disputed documents *in camera* and make a proper privilege determination. *Id.* at 231. But in vacating and remanding, the *O'Neill* court did not reject the law enforcement investigatory privilege, as plaintiffs

contend. Rather, the court held that "the district court erred in accepting the City's claim of privilege in the *form and manner* in which it was interposed in this matter." *Id.* at 227 (emphasis added). The court found "unsatisfactory the manner in which the City has asserted its claim of privilege," because the City did so "casually" -- orally, by someone other than the department head, and without review of the particular documents in question. *Id.* at 225. Here, however, plaintiffs have never suggested that the Division's claim of privilege suffers from any similar infirmity. The United States initially offered to submit the documents *in camera* and formally to assert the privilege, but the district court did not order the government to do so. Later, the United States did submit the declaration of Assistant Attorney General Joel I. Klein, head of the Antitrust Division, who formally asserted privilege over the leniency-related documents after personally reviewing them. J.A. 487a.

To the extent that the *O'Neill* court did discuss the merits of executive privilege, such discussion merely is dicta because the court recognized that "[a]n exhaustive consideration of the parameters of executive privilege is not required here because . . . the precise claims of the City have not been fully developed." 619 F.2d at 228. The court ultimately saw no reason "to extend the scope of the

Executive Privilege *in this case* beyond the lines drawn to date by the Supreme Court," in light of the "anomaly" that the City was asserting the "public interest" against a federal commission looking into corruption in the City's police department. *Id.* at 230 (emphasis added). Thus, there is no basis for asserting that *O'Neill* forecloses recognition of the law enforcement investigatory privilege here. Indeed, the district court recognized the law enforcement investigatory privilege's existence in this case, as have other district courts in this Circuit despite *O'Neill*. *See*, *e.g.*, *Torres* v. *Kuzniasz*, 936 F. Supp. 1201, 1209 (D. N.J. 1996) (stating, after discussing *O'Neill*, "[t]he federal 'law enforcement' privilege . . . is a qualified privilege designed to prevent the disclosure of information that would be contrary to the public interest in the effective functioning of law enforcement"); *Financial Mgt. Prof'l Corp.* v. *United States*, Civ. A. No. 88-2272, 1989 WL 35425 at *6 (E.D. Pa. Apr. 11, 1989) ("[w]here the government seeks to withhold documents relevant to a civil lawsuit based upon the law enforcement privilege, it has the burden to establish for the court, with specificity, how the privilege applies to each item of information at issue," citing *O'Neill*); *Coastal Corp.* v. *Duncan*, 86 F.R.D. 514, 517, 519 (D. Del.

1980) (recognizing existence of privilege, despite *O'Neill*, but holding that privilege not properly claimed).[1]

Nor did this Court in *Westinghouse* reject the existence of the law enforcement investigatory privilege -- either expressly or "in principle." Pl. Br. 10. *Westinghouse* is easily distinguished on both its facts and law. First, *Westinghouse* addresses the attorney-client privilege and work product doctrine, not the law enforcement investigatory privilege. Indeed, *Westinghouse* does not mention "law enforcement investigatory privilege" or even "executive privilege." Second, *Westinghouse*'s failure to discuss this privilege should not come as a surprise given that neither the Department of Justice nor the Securities and Exchange Commission -- the only two entities that could have asserted the law enforcement investigatory privilege[2] -- appeared in that case, let alone claimed

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[1]Ironically, in *Frankenhauser* itself, another decision within this Circuit, the court agreed with the principle that "[e]xecutive privilege is the government's privilege to prevent disclosure of certain information whose disclosure would be contrary to the public interest" and that police investigations "are made under a veil of confidentiality and that it would contravene the public interest and would impair the functioning of the police department if the results of such investigations were disclosed." *Frankenhauser* v. *Rizzo*, 59 F.R.D. 339, 342 (E.D. Pa. 1973).

[2]Deriving, as it does, from executive privilege, the law enforcement investigatory privilege may be claimed only by a governmental law enforcement agency. *Association for Women in Science* v. *Califano*, 566 F.2d 339, 343 (D.C.

privilege. Here, by contrast, the Antitrust Division appeared and formally invoked the privilege in a manner not even plaintiffs have challenged. Third, the court in *Westinghouse* was motivated by a concern that the party claiming the privilege was attempting to gain a strategic advantage over its adversary by withholding important documents. 951 F.2d at 1425, 1428-29. Here, however, the United States, holder of the privilege in question, is not plaintiffs' (or defendants') adversary and is not seeking a strategic advantage over any party in the underlying cases.

Fourth, the "central question" in *Westinghouse* was "the validity of the celebrated and controversial selected waiver theory fashioned by the Eighth Circuit . . . and resoundingly rejected by the D.C. Circuit." *Id.* at 1423 (footnote and citations omitted). Examining the purposes underlying the attorney-client privilege and the work product doctrine, the court sided with the D.C. Circuit's position and held that the selective waiver doctrine was not "necessary to encourage voluntary cooperation with government investigations." *Id.* at 1426.

Cir. 1977); *Black* v. *Sheraton Corp. of Am.*, 564 F.2d 531, 541-42 (D.C. Cir. 1977) ("the privilege asserted here shares with those typically labeled 'executive' a justification rooted in the need to minimize disclosure of documents whose revelation might impair the necessary functioning of a department of the executive branch").

Plaintiffs err, however, when they take *Westinghouse*'s rejection of the selective waiver theory as an implicit rejection of the law enforcement investigatory privilege. Indeed, there is nothing inconsistent in the two positions, as the D.C. Circuit has demonstrated -- the D.C. Circuit has both rejected the selective waiver rule for attorney-client communications disclosed in connection with government investigations, *Permian Corp.* v. *United States*, 665 F.2d 1214 (D.C. Cir. 1981); *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984), and embraced the law enforcement investigatory privilege. *Friedman* v. *Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984) ("[t]here surely is such a thing as a qualified common-law privilege, within the meaning of Fed. R. Civ. P. 26(b), for law-enforcement investigatory files") (footnote omitted). There is nothing to stop this Court from taking the same two positions.

The law enforcement investigatory privilege is hardly "new," as plaintiffs contend. Pl. Br. 8, 10-11. Rather, as stated in our opening brief, five sister circuits have expressly recognized the privilege's existence,[3] and none has

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[3] *See Friedman* v. *Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984); *In re Department of Investigation*, 856 F.2d 481, 483-84 (2d Cir. 1988); *Coughlin* v. *Lee*, 946 F.2d 1152, 1159-60 (5th Cir. 1991); *Dellwood Farms, Inc.* v. *Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997); *United States* v. *Winner*, 641 F.2d 825, 831-32 (10th Cir. 1981) (recognizing privilege but holding that not raised properly).

expressly rejected it.[4] What *Westinghouse* teaches is that one must consider the purposes underlying the privilege asserted. Brief For The United States 14, 26 (Dec. 7, 1998) ("U.S. Br."). The United States has shown -- and plaintiffs have not attempted to show otherwise -- that its assertion of the privilege here is perfectly consistent with the purposes underlying the law enforcement investigatory privilege, and is therefore consistent with *Westinghouse*. *Id.* at 26-28.

II. THE LAW ENFORCEMENT INVESTIGATORY PRIVILEGE IS FULLY APPLICABLE TO THIS CASE.

Plaintiffs take issue with the district court's recognition of the applicability of the law enforcement investigatory privilege in this case. This Court should, as did the district court, reject plaintiffs' argument.

Plaintiffs never come to grip with the fact that the United States has asserted the privilege in its own name, for its own sake. *See*, *e.g.*, Pl. Br. 13

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[4]Nor are plaintiffs correct (Pl. Br. 9 n.2) that *In re Sealed Case*, 856 F.2d 268 (D.C. Cir. 1988), is the first decision to refer explicitly to a "law enforcement investigatory privilege." The Tenth Circuit used the phrase "law enforcement investigative privilege" in 1981, *United States* v. *Winner*, 641 F.2d 825, 831 (10th Cir. 1981), and the D.C. Circuit referred to a "privilege based primarily on the harm to law enforcement efforts which might arise from public disclosure of FBI investigatory files" back in 1977, before *O'Neill*. *Black*, 564 F.2d at 541.

("in this case, as in *Westinghouse*, a 'privilege' was claimed by a *private litigant* . . .") (emphasis added); *id.* at 15 (alleging that the Justice Department "seek[s] to protect the interests of the defendant wrongdoers rather than plaintiffs, who are the victims of defendants' conspiracy"). The United States has intervened to protect *its* enforcement efforts, to preserve *its* Corporate Leniency Policy, and to defend *its* privilege. It is highly unusual for the United States to appear in a private antitrust suit in the district court, particularly on a discovery issue, let alone to then intervene and appeal. The fact that we have done so here demonstrates the seriousness with which we take this issue and the concern we have for protecting our privilege and amnesty program. Plaintiffs never dispute the fact that the United States has followed the procedural requirements of *O'Neill* and has claimed privilege in the proper manner. Once the United States asserted privilege, it was the district court's duty to weigh the plaintiffs' professed need for the disputed documents against the harm that disclosure would cause. The district court set out to do just that. The only questions in this case are whether the district court applied the proper standard in conducting that

weighing and whether it abused its discretion in reaching the conclusion that it did.[5] Those questions are addressed in the next section.

The law enforcement investigatory privilege exists to protect the integrity of the investigatory process -- both current and future investigations.[6] That purpose is furthered by shielding from discovery the leniency-related documents in this case in part because it preserves the confidential nature of the leniency program. Plaintiffs question the confidential aspect of the leniency process by noting that the original version of the 1993 Corporate Leniency Policy did not mention confidentiality, and that there was no confidentiality agreement in this

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[5]"The existence and scope of a privilege are questions of law . . . ." *In re Grand Jury*, 821 F.2d 946, 952 (3d Cir. 1987). The district court's determination that the privilege is outweighed by plaintiffs-appellees' need on the facts of this case is reviewed for an abuse of discretion. *Tuite* v. *Henry*, 98 F.3d 1411, 1415 (D.C. Cir. 1996).

[6]Plaintiffs also contend (Pl. Br. 7, 30) that the United States is no worse off by their discovery than if LOF simply had posted the disputed the documents on the internet. Plaintiffs misapprehend the nature of the government's concern. The Division's Corporate Leniency Policy is put at risk by the *forced* disclosure of leniency-related materials from either the government or the leniency applicant. Future defendants will be deterred from cooperating with the Justice Department only by the chance their cooperation *involuntarily* will be made public, not if LOF or some other applicant volunteers the information. The reasons are analogous to the rules surrounding grand jury secrecy, which prohibit the government or the grand jurors from discussing a witness's testimony, but do not prevent the witness from appearing on television to repeat verbatim what he or she said to the grand jury. Fed. R. Crim. P. 6(e)(2).

case. Pl. Br. 14. But confidentiality agreements rarely are obtained in plea negotiations, and "failing to be careful . . . is not by itself a compelling reason for stripping a person of his privilege." *Dellwood Farms, Inc.* v. *Cargill, Inc.*, 128 F.3d 1122, 1127 (7th Cir. 1997). Indeed, in *Dellwood Farms*, the court upheld the government's claim of privilege over FBI tapes the Justice Department had played for defense counsel as part of plea negotiations, even though the government had not "impos[ed] any restriction on the use that the lawyers might make of the information they gleaned from the tapes." *Id.* at 1124. Here, confidentiality has always been a hallmark of the Corporate Leniency Policy, even if the policy itself did not always state so in writing (the current version of the policy does explicitly provide for confidentiality (J.A. 224a)). Through speeches by Division officers and oral assurances to those who have approached Division counsel, amnesty negotiations have always been conducted with "the express understanding that those negotiations will remain confidential," Klein Decl. ¶ 12 (J.A. 490a), and plaintiffs are unable to point to any leniency applicant who did not have an expectation of confidentiality.

Plaintiffs also make the novel argument that the law enforcement investigatory privilege does not apply because leniency requests are protected by

the informer's privilege. Pl. Br. 14. Plaintiffs, of course, offer no court decision to support their claim of privilege displacement. The United States is unaware of any legal proposition holding that because some document is protected by one privilege, it necessarily cannot be protected by another privilege as well. The law enforcement investigatory privilege and the informer's privilege have different purposes, *Association for Women in Science* v. *Califano*, 566 F.2d 339, 343 (D.C. Cir. 1977) (discussing both privileges generally), and will not always cover the same circumstances.

In addition, plaintiffs argue that the law enforcement investigatory privilege cannot be claimed when LOF controls the documents. Pl. Br. 13. It is clear, however, that the law enforcement investigatory privilege retains force even when the documents are not in the government's hands. In *In re Polypropylene Carpet Antitrust Litigation*, 181 F.R.D. 680 (N.D. Ga. 1998), the Justice Department inadvertently gave documents related to an ongoing criminal investigation to defendants in a private suit. The defendants then produced those documents to the civil plaintiffs. *Id.* at 683-84. When it learned what had happened, the Justice Department asserted the law enforcement investigatory privilege over the documents and sought their return from both the plaintiffs and

defendants and a protective order "safeguarding the confidentiality of the documents." *Id.* at 686. The district court upheld the applicability of the privilege over the documents in private parties' hands and found that the harm of their disclosure outweighed plaintiffs' professed need for the documents. *Id.* at 688-89.

Finally, plaintiffs' suggestion that "discovery of the *written* Amnesty Documents in this case will have no effect on 'most leniency applications' in the future" is without merit. Pl. Br. 14. Plaintiffs distort our initial brief by omitting the following italicized portion: "most leniency applications in fact are simply oral presentations to Division counsel, *generally supplemented by production of pre-existing corporate documents*." U.S. Br. at 10 (emphasis added). Thus, the circumstances here are *typical* of a leniency presentation, not extraordinary. LOF's counsel made an oral presentation to Division counsel and supplemented its presentation with documents. A ruling by this Court that the materials are not privileged will mean that in future cases, fewer or no documents will be brought to presentations, making it more difficult for the Division to assess a defendant's proffer, thereby undermining the effectiveness of the Corporate Leniency Policy. *See id.* at 20; Klein Decl. ¶ 20 (J.A. 493a-494a). There also is no basis for

excluding from the privilege's scope the post-meeting correspondence exchanged between LOF and Division counsel. Reducing thoughts to writing helps to crystalize their meaning, sharpens the focus of any future plea negotiations, and is an efficient way to communicate. Such actions should not be penalized by withholding privilege.[7]

III. THE DISTRICT COURT ERRED IN BALANCING PLAINTIFFS' NEED FOR THE DOCUMENTS AGAINST THE HARM THAT DISCLOSURE WOULD BRING.

In balancing plaintiffs' and the government's interests, the district court relied solely on the factors articulated in *Frankenhauser* v. *Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973). J.A. 458a. Plaintiffs defend the district court's approach without refuting the proposition that those factors were never intended to be exhaustive and were not designed to cover the present facts. *See Frankenhauser*, 59 F.R.D. at 344 ("the ingredients of the test will vary from case to case"); *Sealed Case*, 856 F.2d at 272 (factors are "illustrative"); *Tuite*, 98 F.3d at 1417

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[7]Plaintiffs also mischaracterize the government's contention with respect to the identification of the pre-existing documents as a "work product" claim. Pl. Br. 15. The United States has made no claim with respect to work product. We have asserted privilege over the identification of the pre-existing documents -- though not the documents themselves -- as part of preserving the confidentiality of the leniency process that is part and parcel of our law enforcement investigatory privilege claim.

("[n]eed in the context of the law enforcement investigatory privilege is meant to be an elastic concept"). The United States does not contend that the *Frankenhauser* factors are wholly inapplicable to this case; rather, we contend that those factors are ill-suited to be the *only* measure of weight under the circumstances presented here. As discussed already, this dispute differs from the ordinary privilege fight because the United States has no stake in the underlying litigation, is not plaintiffs' adversary, and does not seek a strategic advantage over anyone. Thus, this case is more analogous to *Dellwood Farms*, which did not rely on the *Frankenhauser* factors, than to *Westinghouse* or *Frankenhauser* itself.

Plaintiffs' attempt to distinguish *Dellwood Farms* is particularly unavailing.[8] Plaintiffs contend that the Seventh Circuit reversed the district court because the lower court there had not reviewed the disputed tapes *in camera* and was unduly concerned with the flow of its docket. Pl. Br. 19. The *very next sentence* after the passage quoted by plaintiffs, however, refutes any suggestion that that was the basis for the court of appeals's decision:

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[8]For example, plaintiffs completely ignore the Seventh Circuit's admonition that "there ought to be a pretty strong presumption against lifting the [law enforcement investigatory] privilege," *Dellwood Farms*, 128 F.3d at 1125.

> But these factors of the district court's evaluation of the subpoena are *not at the heart* of our concern with the ruling. The *heart of our concern* is with the principle that the control of criminal investigations is the prerogative of the executive branch, subject to judicial intervention only to protect rights -- and no rights of the plaintiffs were invaded by the government's assertion of the law enforcement investigatory privilege.

Dellwood Farms, 128 F.3d at 1126 (emphasis added). The same concerns should have animated the district court's evaluation of the privilege claim here.

As to the balancing itself, assuming that *Frankenhauser* is the proper measure, plaintiffs never directly rebut the government's factor-by-factor analysis. *See* U.S. Br. 17-25. Instead, plaintiffs claim generally that their "need" should be given "substantial weight," that they will not be able to establish the facts to prove their case without the privileged documents, that discovery of these documents may "save years of litigation," and that discovery in antitrust cases should be granted liberally. Pl. Br. 21-23. None of these reasons, however, merits rejection of the government's privilege claim.

It is unclear what plaintiffs mean when they contend that their "need" for the documents should be given "substantial weight." Pl. Br. 21. To the extent plaintiffs are arguing that their "need" should be considered independent of the *Frankenhauser* factors they espouse, they are mistaken. The whole point of the balancing exercise -- with or without the *Frankenhauser* factors -- is to determine

whether plaintiffs' "need" for the documents outweighs the harm that will ensue from their disclosure. *Tuite* v. *Henry*, 98 F.3d 1411, 1417 (D.C. Cir. 1996) ("a party's 'need' for subpoenaed documents is determined by weighing numerous factors"); *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988) ("[t]he public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information. The process of identifying and weighing the competing interests cannot be avoided") (citations omitted); *Frankenhauser*, 59 F.R.D. at 344 ("when executive privilege is asserted, the court must balance the public interest in the confidentiality of governmental information against the needs of a litigant to obtain data"). To the extent that plaintiffs are suggesting that the last of the *Frankenhauser* factors -- "the importance of the information sought to the plaintiff's case" (*Frankenhauser*, 59 F.R.D. at 344) -- merits extraordinary weight, they are again mistaken: "exclusive reliance on one factor does not satisfy the 'essential balancing process.'" *Tuite*, 98 F.3d at 1418 (internal citation omitted).

Plaintiffs' supposed "need" for the privileged documents is weak. There are two types of documents at issue: (1) documents that were shown to Division counsel at LOF's leniency presentation, which LOF has already produced to

plaintiffs as part of a larger production but has not specifically identified as such; and (2) post-meeting correspondence exchanged between LOF and government counsel relating to LOF's request for leniency. As for the correspondence, the only "need" plaintiffs articulate is to see whether those letters "contain[] admissions of oral communications or secret meetings which would be difficult to establish without the correspondence." Pl. Br. 21. But the correspondence do not contain any such admission, and the district court did not find otherwise. Instead, the correspondence merely relate to the factors the Division has determined should guide its prosecutorial discretion. Given that the correspondence would never be admissible at trial (*see* Fed. R. Evid. 408, 410), plaintiffs' "need" is one step removed -- the correspondence would be discoverable only because it may lead to the discovery of other admissible evidence. Fed. R. Civ. P. 26(b). Such a tenuous "need," however, cannot overcome the damage to enforcement programs that would ensue from the discovery of correspondence relating to plea negotiations. In the balancing of interests, "need" is more than mere "relevance." *Collins* v. *Shearson/American Express, Inc.*, 112 F.R.D. 227, 229-30 (D.D.C. 1986)

Plaintiffs' "need" for the identification of the documents shown to Division counsel is even weaker. LOF has already produced to plaintiffs all of the documents that it showed to Division counsel at the leniency presentation, but has not specially identified those documents. Plaintiffs never deny that they have already gone through, or soon will go through, *all* of defendants' document production anyway as part of their search for relevant documents.[9] As in *Polypropylene Carpet*, "no evidence suggests that Plaintiffs cannot obtain the *factual information* contained in the documents from alternative sources," namely, the documents themselves. 181 F.R.D. at 688 (emphasis added). Thus, plaintiffs' vague claim of streamlining and saving time and money not only is insufficient as a matter of law,[10] but also illusory as a matter of fact. Moreover, plaintiffs are in no worse position by the government's assertion of privilege than if they had never known about LOF's leniency request or if LOF had never

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[9]"Plaintiffs will have an abundance of documents, data, and sworn testimony from which to prove their case. The importance of the few . . . documents at issue here thus pales in comparison to the evidence Plaintiffs have amassed, and will continue to amass, which may support their claims." *Polypropylene Carpet*, 181 F.R.D. at 689.

[10]The assertion that "disclosure will save a litigant time and expense is insufficient to show the requisite need where the evidence can be obtained through ordinary discovery or other routine avenues of investigation." *Cullen* v. *Margiotta*, 811 F.2d 698, 715 (2d Cir. 1987).

requested leniency; they would still have the same documents they have now. Plaintiffs assert that their search is for a "needle in a haystack" (Pl. Br. 22) -- in other words, they want their work done for them, at the expense of the Division's enforcement program.[11] But the "privilege will not yield to permit a mere fishing expedition, nor upon bare speculation that the information may possibly prove useful." *Dole* v. *Local 1942, IBEW*, 870 F.2d 368, 373 (7th Cir. 1989) (discussing informer's privilege). Plaintiffs are entitled to the pre-existing documents that were shown to the Division -- but have already received them. Plaintiffs are neither entitled nor "need" anything more.

IV. THE UNITED STATES HAS STANDING TO BRING THIS APPEAL.

Finally, plaintiffs' challenge to the United States' standing to appeal (Pl. Br. 28-31) merits little discussion. Plaintiffs add no new arguments to their Motion For Summary Dismissal For Want Of Jurisdiction (dated September 18, 1998). Accordingly, the United States refers the Court to the government's response to that Motion, dated September 25, 1998.

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[11]The United States is also confident that plaintiffs can overcome any reluctance on the part of witnesses to be candid. Pl. Br. 22. Plaintiffs in *Polypropylene Carpet*, represented by some of the same counsel as plaintiffs here, were rebuffed in their attempt to make the same argument. *See Polypropylene Carpet*, 181 F.R.D. at 688 n.4.

In essence, plaintiffs confuse the merits of the government's position with the United States' standing to bring this appeal. Although the district court's July 20 Order did not require the United States to produce any documents, it rejected the government's claim of privilege over those documents. The injury the United States has suffered is the denial of its privilege claim. The district court recognized the government's interest when it granted the United States' motion to intervene. J.A. 496a. Plaintiffs' argument in this Court regarding standing merely is another attempt to thwart the government's intervention in this case. But the district court already granted the Motion to Intervene, over plaintiffs' objection, and plaintiffs chose not to appeal that decision. Plaintiffs plainly disagree with the merits of the government's position, but that does not mean the United States lacks standing to be heard in this Court.

CONCLUSION

For the foregoing reasons, the district court's Order of July 20, 1998, permitting discovery of the leniency-related materials, should be reversed.

Respectfully submitted,

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January 19, 1999

CERTIFICATE OF BAR MEMBERSHIP

Counsel for appellant United States of America are attorneys with the United States Department of Justice, Antitrust Division. As we understand the Court's longstanding practice, as federal government attorneys we are not required to be specially admitted to practice before the bar of this Court.

January 19, 1999

Adam D. Hirsh

CERTIFICATE UNDER RULE 32(a)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B) and that the foregoing brief contains approximately 4628 words, as calculated by the word processing program used to generate the brief.

January 19, 1999

Adam D. Hirsh

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 1999, I caused two copies of the foregoing Reply Brief For The United States to be served by FedEx overnight delivery or U.S. Mail, as indicated, to the following counsel at the following addresses:

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