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

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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No. 98-3498

IN RE: NELSON v. PILKINGTON

UNITED STATES OF AMERICA, Intervenor-Appellant.

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

BRIEF FOR THE UNITED STATES

JURISDICTION

Plaintiffs-appellees brought suit under section 4 of the Clayton Act, 15 U.S.C. § 15, and invoked the district court's jurisdiction pursuant to that section and 28 U.S.C. §§ 1331, 1337(a). Consolidated and Amended Class Action Complaint (Feb. 27, 1998) ¶¶ 2-3 (J.A. 51a) ("Complaint"). The district court issued its Order under review on July 20, 1998 (the "July 20 Order"). J.A. 456a. On August 19, 1998, the United States moved to intervene for the purpose of appealing the July 20 Order. J.A. 463a. The district court granted the United States' Motion to Intervene on September 2, 1998 (J.A. 496a), and the United States filed its Notice of Appeal on September 9, 1998. J.A. 37a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1291 because the district court's July 20 Order is final as to the United States.

Plaintiffs moved on September 18, 1998, to dismiss both this appeal and defendants' appeal in No. 98-3445 for want of jurisdiction. The United States filed its Response To Appellees' Motion For Summary Dismissal For Want Of Jurisdiction on September 25, 1998, and defendants filed their response the same day; plaintiffs replied on October 5, 1998. On October 13, 1998, the Court referred plaintiffs' motion to dismiss to this merits panel. That motion is still pending.

STATEMENT OF ISSUES

1. Whether the district court erred in ordering Libbey-Owens-Ford Co. (LOF) to identify to plaintiffs-appellees all documents shown by LOF counsel to government counsel during a leniency presentation even though (1) plaintiffs have already obtained all of the documents at issue, even if they do not know exactly which documents were shown to government counsel, and (2) the United States has asserted that identification of the documents at issue would violate the law enforcement investigatory privilege.

2. Whether the district court erred in ordering LOF to produce to plaintiffs-appellees all correspondence exchanged between LOF counsel and government counsel relating to LOF's request for leniency over the United States' objection of relevance and its assertion of privilege.

STATEMENT OF THE CASE

1. Plaintiffs-appellees in these consolidated, treble-damage, private antitrust class actions[1] are purchasers of flat glass.[2] They contend that the five major manufacturers of automotive and architectural flat glass conspired to fix prices and allocate markets between 1986-1995. Complaint ¶¶ 61-62 (J.A. 70a-71a). The five major manufacturers are AFG Industries, Inc.; Ford Motor Co.; Guardian Industries Corp.; Libbey-Owens-Ford Co. (LOF), an American company, 80% of which is allegedly owned by defendant Pilkington plc, a British company; and PPG Industries, Inc. Id. ¶¶ 36-43 (J.A. 62a-66a). Plaintiffs allege that defendants formed and maintained their conspiracy through a series of letters, conversations, and meetings, including at industry trade shows. Id. ¶ 63 (J.A. 71a-76a).

The Complaint also alleges that in "late 1995, LOF sought to avoid antitrust prosecution by applying for relief under the United States Department of Justice, Antitrust Division's Corporate Leniency Policy," but was denied such relief. Id. ¶ 63(p) (J.A. 75a-76a). In October 1997, plaintiffs in one of the pre-consolidated actions, The Lurie Companies, Inc. v. Pilkington, No. 97-1766 (W.D. Pa.), served defendants with their "First Document Request Pursuant to Rule 34." Request No. 3 therein seeks "[a]ll documents relating to any application to the Antitrust Division of the United States Department of Justice

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[1]To the best of the United States' knowledge, no class has yet been certified by the district court and the proceedings below are still in an early stage of discovery.

[2]"'Flat glass' includes glass formed in a flat shape or bent or curved for further fabrication and is used principally for windows in dwellings and commercial buildings, automobile windshields and other glass parts, architectural products, and mirrors." 59 Fed. Reg. 30,604, 30,608 (1994) (competitive impact statement in United States v. Pilkington plc, 1994-2 Trade Cas. (CCH) ¶ 70,842 (D. Ariz)).

under its Corporate Leniency Policy, with respect to any conduct or activity relating to the manufacture, marketing or sale of flat glass." J.A. 148a, 152a. We understand that all plaintiffs in the consolidated cases have now made a similar document request of defendants. Defendants have resisted such discovery.

2. The United States appeared as an amicus below opposing the discovery sought by plaintiffs based in part on the law enforcement investigatory privilege.[3] After receiving briefing and argument, the district court ordered defendants to submit the disputed documents for in camera inspection. See Order of June 3, 1998 at 6 (J.A. 449a, 454a). On July 20, 1998, the district court ordered defendants to produce to plaintiffs all of the requested materials. J.A. 456a.

3. On August 19, 1998, the United States moved to intervene for the sole and limited purpose of appealing the district court's July 20 Order. J.A. 463a. The district court granted the United States' motion on September 2, 1998, over plaintiffs' vigorous objection. J.A. 496a. This timely appeal followed. J.A. 37a. Meanwhile, defendants noticed their own appeal, No. 98-3445, of the June 3 and July 20 Orders. J.A. 35a.

STATEMENT OF FACTS

1. The Antitrust Division (the "Division") of the United States Department of Justice (the "Justice Department") investigates and prosecutes both civil and criminal antitrust

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[3]The United States also claimed that the documents in question were protected by the informant's privilege because, at the time, it was not publicly known who had sought leniency from the Antitrust Division. Because defendants LOF and Pilkington have now admitted that they sought leniency, the United States does not raise the informant's privilege in this appeal.

violations. Two investigations into potential price-fixing and other antitrust violations in the flat glass market are of particular relevance here. First, in December 1994, a consent decree was entered in United States v. Pilkington plc & Pilkington Holdings, Inc., 1994-2 Trade Cas. (CCH) ¶ 70,842 (D. Ariz.). That decree settled a civil investigation into licensing restrictions that allegedly restrained trade in the construction and operation of float glass plants and in float glass process technology long after Pilkington's patents had expired and the technology had passed into the public domain.[4] Among other things, the government's complaint alleged that the defendant had divided and allocated territories and thus limited the use of float glass technology. See 59 Fed. Reg. 30,604, 30,608 (1994).

Second, one or more grand juries were convened to investigate possible price fixing in the architectural and automotive flat glass markets. To date, no grand jury has issued any indictments. Declaration of Assistant Attorney General Joel I. Klein ¶ 8 (J.A. 487a, 488a-489a) ("Klein Decl.").

2. The Justice Department and Antitrust Division have received two requests for information concerning the Division's civil and criminal flat glass investigations. First, the Justice Department received a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for all documents relating to the government's civil Pilkington investigation. The Department produced numerous documents pursuant to this FOIA request.

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[4]In the late 1950s, defendant Pilkington developed a new way to produce flat glass on a commercial scale by floating molten glass on the surface of a bath of molten metal, usually tin, which is sealed with a protective atmosphere. Today, virtually all commercial flat glass is manufactured through this "float" process. See 59 Fed. Reg. 30,604, 30,608-09 (1994).

Second, in October 1997, before plaintiffs' cases were consolidated below, the Lurie plaintiffs issued a third-party subpoena duces tecum on the United States seeking all documents produced to the Department in connection with any flat glass industry investigation. Among those documents sought were any documents produced to a grand jury, produced pursuant to any Civil Investigative Demand (CID), or submitted in support of a request for immunity.

In a letter to plaintiffs' counsel in October 1997, the United States objected to the subpoena in its entirety. In addition to objecting to the subpoena on procedural grounds and noting the undue burden it imposed, the United States also objected that all of the subpoenaed documents were privileged. Specifically, the letter noted the prohibition against disclosing documents that form the basis of an ongoing grand jury investigation (see Fed. R. Crim. P. 6(e)); the law enforcement investigatory privilege (see 28 C.F.R. § 16.26(b)(5)); the Trade Secrets Act (18 U.S.C. § 1905); the statutory prohibition against producing materials obtained pursuant to a CID without the producer's consent (15 U.S.C. § 1313(c)(3)); and the deliberative process privilege. The United States also reserved the right to raise other objections if necessary.

In November 1997, the Justice Department reached agreement with plaintiffs under which the United States agreed to produce the CIDs and the correspondence relating to their scope and to retain all other documents that would be responsive to the subpoena, including the documents that are the subject of the district court's July 20 Order. In return, plaintiffs agreed to suspend enforcement of the subpoena.

3. As indicated by Assistant Attorney General Klein ("AAG Klein") in his declaration, the Antitrust Division has had some form of Corporate Leniency Policy (also known as the

"Corporate Amnesty Policy" or "Corporate Immunity Policy") since October 1978. Under the original policy, corporations that came forward with evidence of an antitrust violation before the Division had initiated an investigation could receive, at the Division's discretion, amnesty for its participation in any violation. To receive amnesty under the Division's original leniency program, a corporation had to establish that it had satisfied a seven-factor test before the Division would determine whether it would grant amnesty. Klein Decl. ¶ 9 (J.A. 489a); U.S. Dep't of Justice, Antitrust Division Grand Jury Practice Manual V-52 to V-53 (1st ed. Nov. 1991) (J.A. 215a-216a). Among those factors were "whether the Division could have reasonably expected that it would have become aware of the conspiracy in the near future if the corporation had not reported it." Id. at V-53 (J.A. 216a).

In August 1993, the Antitrust Division made three significant revisions to its Corporate Leniency Policy. First, under the new policy, amnesty is automatic if there is no pre-existing investigation by the Division and the requesting corporation satisfies five other criteria; prosecutorial discretion has been eliminated in this area. Second, leniency is now available even after the Division has begun an investigation, so long as the corporation is the first to come forward and the Division does not yet have evidence that is likely to result in a sustainable conviction against the firm. Third, if a corporation qualifies for automatic amnesty, then all officers, directors, and employees who come forward and cooperate also receive automatic amnesty.[5] Klein Decl. ¶ 10 (J.A. 489a-490a); U.S. Dep't of Justice,

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[5]In August 1994, the Division also established an individual leniency program for individuals who come forward with inculpative evidence against themselves and other individuals or corporations. Division Manual at III-103, III-105 to III-106 (J.A. 220a, 222a-223a).

Antitrust Division Manual III-103 to III-105 (3d ed. Feb. 1998) ("Division Manual") (J.A. 220a-222a).

The 1993 revisions to the Antitrust Division's Corporate Leniency Policy make it unique, even within the Justice Department. Klein Decl. ¶ 10 (J.A. 490a). Although other divisions, such as the Tax and Criminal Divisions, have some form of leniency policy, no other division (1) provides automatic amnesty if an investigation has not begun, (2) has any policy of conferring amnesty once an investigation has already begun, or (3) offers amnesty to individuals that come forward with the corporation. But conspiracies, including conspiracies that violate Section 1 of the Sherman Act, 15 U.S.C. § 1, are difficult to detect and prosecute. Accordingly, innovative law enforcement techniques such as the Corporate Leniency Policy are necessary to enforce effectively the Sherman Act and protect American consumers. Simply stated, the Division's Corporate Leniency Policy takes advantage of the fact that a conspiracy, by definition, involves more than one person by offering strong incentives to co-conspirators who elect to cooperate with the Division.

Given the unique character of the Division's leniency program, it is not surprising that the 1993 revisions to the Corporate Leniency Policy have had a dramatic impact on enforcement. During the 14½-year period of the old leniency program (October 1978 through July 1993), 17 corporations applied for amnesty, ten successfully. Klein Decl. ¶ 11 (J.A. 490a); Gary R. Spratling, The Experience and Views of the Antitrust Division, Address Before the Nat'l Symposium on Corporate Crime in America: Strengthening the "Good Citizen" Corporation at 23-24 (Washington, D.C. Sept. 8, 1995) (J.A. 226a, 250a-251a). Since the Corporate Leniency Policy was revised in August 1993, the number of leniency

applications has gone from approximately one-per-year to one-per-month. Klein Decl. ¶ 11 (J.A. 490a). On the enforcement side of the ledger, the Division has convicted dozens of corporations and individuals and has recovered many millions of dollars in fines based on information it has received from amnesty applicants. In the last year alone, the leniency program has resulted in dozens of convictions and more than $200 million in fines. In short, the Leniency Policy is an important and highly effective law enforcement tool. Division Manual at III-103 (J.A. 220a). In fact, according to AAG Klein, the Corporate Leniency Policy "has become the Division's number one source of leads for breaking up international cartels." Klein Decl. ¶ 11 (J.A. 490a).

The Corporate Leniency Policy depends on confidentiality. The Antitrust Division holds the identity of amnesty applicants in strict confidence, much like the treatment afforded to confidential informants. Klein Decl. ¶ 12 (J.A. 490a-491a); Gary R. Spratling, Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg?, Address Before the 12th Annual Nat'l Inst. on White Collar Crime at 10 (San Francisco, Cal. Mar. 6, 1998) ("Titanic Speech") (J.A. 269a, 279a); Division Manual at III-107 (J.A. 224a). The basis for this confidentiality policy is the common-sense understanding that corporations or individuals will be unwilling to step forward unilaterally to admit their guilt if their request and the information they supply is made public for all -- most notably their competitors, customers, shareholders, and employers -- to see. Klein Decl. ¶ 12 (J.A. 491a). Thus, the Division will not publicly disclose the identity of a leniency applicant absent prior disclosure by the applicant, unless required to do so by court order in connection with litigation. Titanic Speech at 10 (J.A. 279a). Further, it is the Division's policy neither to confirm nor deny the

existence of a leniency request -- either while the application is pending or after the Division has granted or rejected the request. Klein Decl. ¶ 12 (J.A. 491a). The defense bar knows of and relies upon the Antitrust Division's policy of strict confidentiality. Indeed, most leniency applications in fact are simply oral presentations to Division counsel, generally supplemented by production of pre-existing corporate documents. Klein Decl. ¶ 13 (J.A. 491a). Before amnesty is granted, the applicant must disclose in detail all relevant facts of, and confess to its own involvement in, the conduct being reported. Thus, both the Division and any applicant for leniency rely on and expect their discussions to remain confidential.

4. Although the Complaint alleges that defendants LOF and Pilkington sought protection under the Antitrust Division's Corporate Leniency Policy in 1995, the truth or falsity of that allegation was not public when the United States submitted its amicus brief to the district court in March 1998. Since then, however, defendants-appellants LOF and Pilkington have admitted publicly that they approached the Division about obtaining leniency. See Memorandum Of Law Of Defendants Libbey-Owens-Ford Co. And Pilkington PLC In Opposition To Plaintiffs' Motion To Compel Production Of Amnesty-Related Materials at 2-3 (May 8, 1998) (J.A. 338a, 343a-344a).

In 1995, after the Division's criminal investigation into the flat glass industry had begun, LOF's counsel made contact with Antitrust Division counsel to discuss a possible request for leniency.[6] After discussing the case in general terms by telephone, LOF's counsel

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[6]There is no government-printed form to fill out when requesting leniency. Rather, in recognition of the confidential nature of requests, counsel for a potential applicant usually make oral contact with Division personnel and begin with oblique references to the market at issue in attempt to gauge the government's interest.

met in person with Division staff in June 1995 and made an oral presentation. As described by AAG Klein,

> Like many such meetings, the discussion was couched in hypothetical terms such as hypothetical proffers that might be made if LOF were granted leniency. To support its request, LOF's counsel brought several documents to the meeting. All but one of the documents shown to Division personnel were pre-existing documents generated in the ordinary course of business [by defendants]. The other document provides pricing information in the flat glass industry between 1990-1994 and appears to have been prepared specially for LOF's meeting with Division personnel.
>
> Between August and October 1995, Division personnel and LOF's counsel exchanged three letters regarding LOF's request for amnesty. The letters commented on the June meeting and the extent to which each side believed LOF had satisfied or fell short of the Division's criteria for granting amnesty at that time and what, if any, additional information was needed.

Klein Decl. ¶¶ 13-14 (J.A. 491a).[7] Although the Complaint alleges that LOF's request for leniency was denied (J.A. 76a), the actual disposition of that request remains confidential.

5. After receiving briefing and oral argument, including that of the United States, the district court reviewed the disputed documents in camera. On July 20, the district court granted plaintiffs-appellees' motion to compel production of the documents. After briefly addressing and rejecting the argument that disclosure of the leniency-related materials would violate grand jury secrecy (J.A. 457a), the district court devoted the bulk of its decision to a discussion of the law enforcement investigatory privilege. July 20 Order at 2-6 (J.A. 457a-461a). First, the district court implicitly decided that the privilege applied even though the documents in question were sought from the defendants, not the government. Next, the district court set out (J.A. 458a) to apply the factors first enunciated in Frankenhauser v.

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[7]The documents shown at the meeting, together with the post-meeting correspondence, are referred to as "leniency-related materials" in this brief.

Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973). Balancing the ten Frankenhauser factors, guided heavily by its interpretation of this Court's decision in Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991), the district court held that disclosure was warranted. Along the way, the district court interpreted Westinghouse as holding that privileges are unnecessary to obtain cooperation with government investigations and that the government's claim of privilege must overcome a heavy presumption favoring disclosure. July 20 Order at 4, 6 (J.A. 459a, 461a).

STATEMENT OF RELATED CASE

This appeal is related to No. 98-3445, In re Nelson v. Pilkington plc, Libbey-Owens-Ford Co. and Pilkington plc, appellants. On October 21, 1998, the Court consolidated this appeal with No. 98-3445 for the purposes of a consolidated briefing schedule and for disposition. The United States is not aware of any other related case.

STANDARD OF REVIEW

Determining the applicability and proper scope of the law enforcement investigatory privilege is a question of law over which this Court exercises plenary review. United States v. Liebman, 742 F.2d 807, 809 (3d Cir. 1984) (reviewing claim of attorney-client privilege). 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. Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1125 (7th Cir. 1997); Tuite v. Henry, 98 F.3d 1411, 1415 (D.C. Cir. 1996).

SUMMARY OF ARGUMENT

1. The district court correctly recognized the existence of the law enforcement investigatory privilege on the facts of this case but misapplied the privilege as a matter of law and abused its discretion in weighing plaintiffs' need for the disputed documents against the government's interest in nondisclosure.

The district court erred by focusing exclusively on the effect disclosure would have on the Antitrust Division's investigation into the flat glass industry, thereby ignoring the impact disclosure in this case would have on future investigations. In addition, in weighing plaintiffs' supposed need for the documents against the government's claim of privilege, the district court erred by considering only the factors enunciated in Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973), which were never intended to be exhaustive. The district court failed to take into account the atypical nature of this privilege dispute, including that the United States is not plaintiffs' adversary in litigation and seeks no strategic advantage over plaintiffs.

Even if the Frankenhauser factors were the proper standard, the district court abused its discretion in the way it applied the factors to the facts of this case. The district court gave too little weight to the government's interest in nondisclosure, particularly the facts that (1) disclosure of the leniency-related materials would cause a serious, detrimental impact on future law enforcement efforts by breaching the prospect of confidentiality in the Antitrust Division's Corporate Amnesty Policy, and (2) the law enforcement investigatory privilege retains force when an investigation has continued for some time, and even when the investigation ends. Moreover, the district court attributed undue significance to the fact that plaintiffs brought their suit against defendants in good faith, and overestimated plaintiffs'

professed need of the leniency-related materials by plaintiffs, particularly in light of the fact that plaintiffs have already received most of the materials through ordinary discovery.

2. The district court also erred by considering itself bound by this Court's decision in Westinghouse v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991). Westinghouse did not consider the law enforcement investigatory privilege at all, focusing instead on the attorney-client privilege and work product doctrine -- two privileges not at issue in this case. Moreover, if Westinghouse teaches anything applicable to this case, it is that one must consider whether the claim of privilege falls within the purposes underlying the privilege at issue. Here, the purposes underlying the law enforcement investigatory privilege fully support the United States' assertion of privilege over the leniency-related materials in this case.

ARGUMENT

I. THE LAW ENFORCEMENT INVESTIGATORY PRIVILEGE PRECLUDES DISCLOSURE OF THE LENIENCY-RELATED MATERIALS AT ISSUE IN THIS CASE.

The district court erred as a matter of law and improperly weighed the Frankenhauser factors on the facts of this case. First, in examining the law enforcement investigatory privilege, the district court improperly focused exclusively on the effect disclosure would have on the current investigation, and generally ignored the impact on future investigations. Second, the district court abused its discretion in concluding that plaintiffs' need for the documents in question outweighed the law enforcement privilege.

The law enforcement investigatory privilege is an invention of the common law. Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1124 (7th Cir. 1997); Friedman v.

Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984). The privilege serves "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." In re Department of Investigation, 856 F.2d 481, 484 (2d Cir. 1988). The privilege is admittedly a "qualified" one: the "public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information." In re Sealed Case, 856 F.2d 268, 272 (D.C. Cir. 1988). Thus, for plaintiffs to overcome the privilege, they must show a "'necessity sufficient to outweigh the adverse effects the production would engender.'" Black v. Sheraton Corp. of America, 564 F.2d 531, 545 (D.C. Cir. 1977) (citation omitted). Moreover, contrary to the district court's approach,[8] at least one court recently found a "pretty strong presumption against lifting the privilege." Dellwood Farms, 128 F.3d at 1125 (emphasis added).

As the district court noted, this Court has not previously ruled on the existence of the law enforcement investigatory privilege.[9] July 20 Order at 3 (J.A. 458a). Five sister circuits

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[8]See July 20 Order at 6 (J.A. 461a) ("in the context of public investigations, the public interest rarely outweighs plaintiffs' 'right to every man's evidence'") (internal citation omitted).

[9]In United States v. O'Neill, 619 F.2d 222 (3d Cir. 1980), the City of Philadelphia "alluded to" a "governmental" privilege in its brief and attempted to claim "executive privilege" at oral argument. Id. at 225. This Court found "unsatisfactory the manner in which the City ha[d] asserted its claim of privilege." Id. at 225. See also id. at 228 ("[a]n exhaustive consideration of the parameters of executive privilege is not required here because as discussed previously, the precise claims of the City have not been fully developed").

have expressly recognized the privilege,[10] and the United States is unaware of any court of appeals that has expressly rejected its existence. The court below correctly recognized the existence of the law enforcement investigatory privilege and its applicability to the facts of this case, but erred in concluding that plaintiffs' need for the documents outweighed the harm caused by disclosure.

In balancing plaintiffs' and the United States' interests, the district court failed to take into account the special nature of this privilege claim. This is not a typical fight over privileged documents. Unlike most cases, in which the party asserting the privilege seeks to withhold information from its opponent, the United States is not plaintiffs' adversary and has no interest in the outcome of the underlying suit. We seek no strategic advantage over plaintiffs-appellees. Rather, the United States' only interest in asserting the privilege in this case was to protect the integrity of our flat glass investigation and the future efficacy of our Corporate Leniency Policy. The Corporate Leniency Policy is critical to the Division's ability to break up conspiracies that continue to hurt American consumers, and maintaining the confidentiality of leniency-related documents is a critical element of the policy.

In examining whether plaintiffs-appellees' need for the leniency-related documents outweighed the government's interest in nondisclosure, the district court considered the ten

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[10]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).

factors[11] first enunciated in Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973), and subsequently utilized by other courts. See, e.g., Tuite v. Henry, 98 F.3d 1411, 1417 (D.C. Cir. 1996); Coughlin, 946 F.2d at 1160; In re Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 688 (N.D. Ga. 1998). The ten factors are:

> (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; (10) the importance of the information sought to the plaintiff's case.

Frankenhauser, 59 F.R.D. at 344. Although the district court relied on the Frankenhauser factors exclusively, other courts have recognized that the list is merely "illustrative" or "helpful." Sealed Case, 856 F.2d at 272; Friedman, 738 F.2d at 1342. In fact, the Seventh Circuit recently upheld a claim of the law enforcement investigatory privilege without any reference to the Frankenhauser factors. See Dellwood Farms, 128 F.3d at 1125-28. Nevertheless, because the district court considered each of the Frankenhauser factors, the United States will explain the ways in which the district court erred in doing so.

First Factor. The district court stated that "disclosure will have minimal impact on the government's efforts" to investigate crimes. July 20 Order at 4 (J.A. 459a). In fact,

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[11] "[E]xclusive reliance on one factor does not satisfy the 'essential balancing process.'" Tuite, 98 F.3d at 1418 (internal citation omitted).

disclosure of leniency-related documents during the pendency of an investigation could seriously jeopardize the criminal investigation and will deter individuals from providing information in future cases. Price-fixing conspiracies are inherently difficult to detect and prosecute. Many cartels go on for years before they are detected, if ever. Klein Decl. ¶ 9 (J.A. 489a). Cooperation by a co-conspirator, through provision of documents and/or testimony, is often vital to the successful conclusion of a price-fixing investigation. The Leniency Policy is intended to induce the cooperation of co-conspirators and, as already demonstrated (see pp. 8-9 above), has been successful in that regard. To receive amnesty, a corporation or individual must come forward unilaterally, confide its culpability to the Department of Justice, and inculpate one or more other participants in the conspiracy. Co-conspirators named by the applicant quickly become targets of the Department's investigation. Most often, the co-conspirators do not know that the applicant has sought amnesty, let alone which documents have been shown to the Department, what proffers have been made, and which corporations or individuals have been named. Public disclosure of such information would alert co-conspirators to the scope, focus, and strength of the Department's investigation. The risk that disclosure of amnesty-related documents poses to an ongoing investigation is very real. Klein Decl. ¶¶ 19-20 (J.A. 492a-493a). Plaintiffs in civil suits do not "have a right to force the government to tip its hand to criminal suspects and defendants by disclosing the fruits" of its investigation. Dellwood Farms, 128 F.3d at 1125.

Confidentiality of the leniency process is "critical" to its success. Klein Decl. ¶ 18 (J.A. 492a). The existence of a request for leniency, and all information provided therein, are held in strict confidence by the Antitrust Division. Leniency negotiations are conducted "with

the express understanding that those negotiations will remain confidential." Id. ¶ 12 (J.A. 490a). The lack of a written confidentiality agreement should not be fatal to a claim of privilege. Dellwood Farms, 128 F.3d at 1127.

The district court was under the mistaken impression that LOF -- and other defendants -- would still cooperate with the Antitrust Division because of the opportunity to receive amnesty from prosecution. July 20 Order at 4 (J.A. 459a). But the facts relating to the Division's Corporate Leniency Policy simply are otherwise.[12] Counsel for LOF has stated that LOF would not have come forward in this case without a promise of confidentiality, a sentiment the Division has found echoed in "numerous" other cases. Klein Decl. ¶ 12 (J.A. 491a). Conspiring corporations clearly have decided that they would rather take their chances getting caught and prosecuted than to approach the government voluntarily, seek leniency, and have their cooperation exposed for all to see. From the law enforcement perspective, this is a bad result because it means that active conspiracies will continue undetected, to the detriment of American consumers.

The danger in permitting discovery of LOF's leniency materials is that, once successful, "denial of the privilege would itself lead to routine disclosure." In re Department of Investigation, 856 F.2d 481, 486 (2d Cir. 1988) (permitting withholding of report under law enforcement privilege despite previous leaks regarding its contents). Successful discovery in one case will "invariably lead" to routine requests for leniency materials in future cases.

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[12]Apparently, similar facts were not, or could not be, claimed in Westinghouse, on which the district court relied. July 20 Order at 4 (J.A. 459a) (citing Westinghouse, 951 F.2d at 1426).

Klein Decl. ¶ 18 (J.A. 492a). As AAG Klein explains, such an event would have disastrous effects on the enforcement abilities of the Antitrust Division:

> If the oral or written give-and-take between the applicant and the Division is discoverable in private litigation, fewer corporations would be willing to come forward and admit their culpability through an amnesty application and those that do would be less likely to be fully forthright. Enforcement of the antitrust laws would suffer in two ways. First, if the number of amnesty applications declines, many conspiracies will go undetected and unremedied. Second, if amnesty negotiations are discoverable and applicants are less forthcoming with information, it would be more difficult for the Division to test the applicant's story and the Division would receive less useful information for its investigation.

Klein Decl. ¶ 20 (J.A. 493a-494a).

Second Factor. Now that LOF has admitted that it approached the Antitrust Division to seek leniency, we agree with the district court that this factor is inapplicable to this case.

Third Factor. Similarly, we do not view the third factor to be critical here.

Fourth Factor. The district court recognized that the fourth factor weighed against disclosure because the "materials contain both facts and evaluations," but gave this factor little weight because "the DOJ's method of evaluation is . . . public knowledge." July 20 Order at 4-5 (J.A. 459a-460a). The district court erred in giving this factor so little weight. The correspondence between Division personnel and LOF's counsel contain the government's evaluation of some of the information provided by LOF. Such evaluations could be highly valuable to co-conspirators in assessing the strength of information provided by LOF to the Division. That is precisely the sort of information the law enforcement investigatory privilege was intended to protect.

Fifth Factor. The United States agrees with the district court that plaintiffs in this case are not actual or potential defendants in the Antitrust Division's flat glass investigation. In our

view, however, this factor focuses too narrowly on who is requesting the information rather than on who may ultimately obtain the information. If plaintiffs can obtain leniency-related materials now through discovery, then other defendants would be able to obtain the materials from plaintiffs through their own discovery. See, e.g., Dellwood Farms, 128 F.3d at 1124 (giving FBI tapes to private plaintiffs "means that these tapes will also be made available to the defendants in the civil suits, some of whom are also targets of the government's as yet uncompleted grand jury investigations"). Thus, one of the bases for the privilege -- keeping the information out of the hands of targets and potential targets of the investigation -- would be circumvented completely.

Sixth Factor. The district court recognized that the existence of an ongoing criminal investigation weighed against disclosure, but gave this factor "insignificant force" because of the "length of the investigation." July 20 Order at 5 (J.A. 460a). There is no basis for such discounting. The fact that the Division conducts its criminal investigations thoroughly and deliberately should not count against the Division's claim of privilege. Antitrust investigations are complex matters that often consume a large amount of time and government resources. Plaintiffs' haste to proceed is not a basis for vitiating the privilege protecting leniency-related materials. "The victim of a crime cannot force the government to prosecute the criminal; equally he cannot say to the government, 'Speed up your investigation, or get out of the way, because I want to seek a civil remedy.'" Dellwood Farms, 128 F.3d at 1125.

Indeed, the law enforcement investigatory privilege is valid even after the government's investigation concludes, with or without an indictment.[13] In Black, despite a ten-year lag between the investigation and litigation in question, the court expressly "rejecte[d] plaintiff's contention that the public interest in nondisclosure can be disregarded simply because the principal investigation involved here has apparently been concluded." 564 F.2d at 546. See also Tuite v. Henry, 181 F.R.D. 175, 181 (D.D.C. 1998) ("[w]hile the public interest in nondisclosure may lessen somewhat at the conclusion of a criminal investigation, it does not dissipate entirely"). Such continuation of the privilege is justified for two reasons. First, in order to serve its purpose of encouraging cooperation with law enforcement investigations, the privilege must be preserved, even after the conclusion of the particular investigation. Witnesses will be less likely to provide full and frank information to investigators if they know that the information will eventually become public.[14] Second, the law enforcement investigatory privilege is based in part on the need to "safeguard the privacy of individuals involved in an investigation." Department of Investigation, 856 F.2d at 484. Preserving the privilege after an investigation ends helps protect the reputation of those who may have been targets of the investigation, or who were named by the cooperating witnesses, but who were not indicted, so they "will not be held up to public ridicule." Douglas Oil Co. v. Petrol Stops

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[13]Not all investigations result in an indictment, even when a corporation or individual has come forward and requested leniency.

[14]Such reluctance may be especially acute if a witness knows that his or her identity and information will become public regardless whether an indictment is brought.

N.W., 441 U.S. 211, 218-19 (1979) (discussing purposes underlying grand jury secrecy); United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 & n.6 (1958) (same).

Seventh Factor. The United States agrees that the seventh factor is inapplicable because no interdepartmental disciplinary proceedings are involved.

Eighth Factor. The district court determined not only that plaintiffs had brought their suit in good faith, but also that this factor "tips the balance decidedly in favor of disclosure." July 20 Order at 5 (J.A. 460a). The United States has no reason to doubt that plaintiffs' suits were brought in good faith, but the district court misunderstood the import of this factor. This factor ensures that, if plaintiffs' suits were not brought in good faith, disclosure would certainly be denied. The converse, however, is not true. Good faith is presumed unless otherwise shown, and if good faith merited the weight accorded it by the district court, disclosure would be required in almost every case.

Ninth Factor. The district court considered this factor in favor of disclosure because it thought that plaintiffs could secure the requested information only from LOF or the Antitrust Division. July 20 Order at 5 (J.A. 460a). The bulk of the materials at issue are pre-existing corporate documents that were brought by LOF's counsel to the meeting with Division personnel.[15] Klein Decl. ¶ 13 (J.A. 491a). To the best of our knowledge, each of these documents has already been produced by defendants to the plaintiffs as part of regular document discovery. What has not been provided to plaintiffs is a special index identifying

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[15]In addition, plaintiffs also seek the three letters of correspondence exchanged between LOF counsel and Division personnel after the meeting. We agree that these letters are available only from LOF's counsel or us, but argue that plaintiffs' need for them is weak and easily outweighed by the other factors.

which documents were shown to the government. Denial of leniency-related discovery merely forces plaintiffs to sort through the documents they receive from defendants in order to locate any "silver bullets" rather than receiving them on a silver tray. As with any sophisticated plaintiff in a complex case, plaintiffs most assuredly will go through defendants' entire document production anyway in an effort to find useful documents. Plaintiffs are put in no worse situation by the government's assertion of privilege here -- they will get the same corporate documents either way -- but the government's enforcement program will be much worse off if the privilege is denied.

Tenth Factor. The district court considered the privileged materials "important, if not essential" to plaintiffs' case. July 20 Order at 5-6 (J.A. 460a-461a). The court's opinion does not identify which materials it considered to be so important, or why. The pre-existing corporate documents may be important to plaintiffs but, as already explained, are not being denied to them. The United States has not asserted privilege over the corporate documents themselves, only the requirement that they be specially identified. Demanding identification of which documents were shown to prosecutors, rather than the documents themselves, can hardly be a compelling need of plaintiffs.

As to the post-meeting correspondence, plaintiffs have not identified why such documents are necessary to their case. The correspondence relates to the factors that the Division has determined should guide the exercise of its prosecutorial discretion. How the Division has elected to exercise its prosecutorial discretion with respect to a particular amnesty applicant has little relevance to the merits of a private antitrust case filed against that applicant. In any event, in the required balancing of interests, "need" is more than mere "relevance."

> When an agency properly claims that documents are privileged, . . . the Court . . . must look beyond the issue whether the documents sought are simply relevant. If that were the only test, the rules of privilege would be relatively meaningless -- especially since discovery normally extends not only to relevant matter but also to material that may lead to the discovery of relevant matter. . . . Relevance is not enough.

Collins v. Shearson/American Express, Inc., 112 F.R.D. 227, 229-30 (D.D.C. 1986). In the give-and-take inherent in negotiating plea agreements, crystallizing one side's thoughts by putting them on paper should be expected and encouraged;[16] making such correspondence discoverable, however, would have the opposite effect.

At bottom, plaintiffs contend that because the leniency-materials are relevant and the law enforcement privilege is not absolute, they are entitled to the documents. Such arguments, however, render the privilege meaningless.

> While plaintiffs' desire to uncover the information directly from the [documents sought] is understandable and perhaps the most efficient means to obtain this information, evidentiary privileges are not designed to further litigation efficiency. Instead, privileges generally cause both delay and consume judicial resources in resolving claims of privilege that arise both at trial and during discovery, aspects of litigation which most rules of evidence seek to minimize. By protecting relationships and values outside the courtroom, privileges demonstrate that even though the search for truth is of critical importance in the litigation process, it is not necessarily paramount to all other interests of society.

Tuite, 181 F.R.D. at 185. The public interest in nondisclosure far outweighs plaintiffs' need for the leniency-related materials in question. Accordingly, the documents should be protected under the law enforcement investigatory privilege.

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[16]See, e.g., Fed. R. Evid. 408, 410.

II. THE WESTINGHOUSE DECISION DOES NOT CONTROL THIS CASE.

Plaintiffs and the district court rely heavily on this Court's decision in Westinghouse v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991). Such reliance, however, is misplaced.

Westinghouse did not address the law enforcement investigatory privilege, at issue here. Rather, the Westinghouse court addressed whether a party that discloses information protected by two privileges not at issue here -- the attorney-client privilege and the work-product doctrine -- in order to cooperate with a government investigation can nevertheless assert those privileges when exactly the same information is subpoenaed by a third party in civil litigation. Id. at 1417. In holding that Westinghouse had in fact waived its privileges as against third parties, the court focused heavily on the purposes underlying the attorney-client privilege and the work-product doctrine. See, e.g., id. at 1424-25 (selective waiver "has little to do with the privilege's purpose") (internal quotation omitted); id. at 1425 (court refuses "to go beyond the policies underlying the . . . privilege"); id. at 1427 (analysis of work-product doctrine "must begin with a review of the purpose underlying" it); id. at 1429 ("a party who discloses documents protected by the work-product doctrine may continue to assert the doctrine's protection only when the disclosure furthers the doctrine's underlying goal") (emphasis added). Thus, any decision regarding waiver here must take into account the purposes underlying the law enforcement privilege.

Disclosure of leniency-related materials between an applicant and the Division does not waive the law enforcement investigatory privilege. The very purpose of that privilege is to protect the integrity of ongoing investigations and to ensure the flow of information to law

enforcement officials in future investigations. Withholding leniency-related materials from discovery thus serves these purposes by preventing the public disclosure of important information regarding the scope and focus of an ongoing investigation and protecting the integrity of future investigations. Specifically, withholding the materials from discovery furthers the purpose of the law enforcement investigatory privilege of promoting full and frank discussions in settlement and plea negotiations,[17] thereby increasing the effectiveness and efficiency of law enforcement efforts. Disclosure of confidential information is inherent in settlement or plea negotiations, and, as already mentioned, "denial of the privilege would itself lead to routine disclosure." In re Department of Investigation, 856 F.2d 481, 486 (2d Cir. 1988) (permitting withholding of report under law enforcement privilege despite previous leaks regarding its contents); Klein Decl. ¶ 18 (J.A. 492a).

Nor is Westinghouse's concern that nondisclosure would be antithetical to the adversary system and would give a strategic advantage over a civil opponent, Westinghouse, 951 F.2d at 1428-29, applicable here. First, the United States, which is the entity asserting the privilege, is not plaintiffs' adversary and does not seek any strategic advantage over plaintiffs. Second, there is no suggestion that the United States has acted in bad faith in adhering to its consistent position that leniency applications should remain confidential. And third, plaintiffs' failure to

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[17]See Affiliated Mfrs, Inc. v. Aluminum Co. of America, 56 F.3d 521, 526 (3d Cir. 1995) (discussing similar purpose underlying Fed. R. Evid. 408); 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 408.02 (2d ed. 1997); see also M/A-Com Info. Sys., Inc. v. U.S. Dep't of Health & Human Servs., 656 F. Supp. 691, 692-93 (D.D.C. 1986) (FOIA request for documents exchanged during unsuccessful effort to settle debarment action denied because "it is in the public interest to encourage settlement negotiations in matters of this kind and it would impair the ability of HHS to carry out its governmental duties if disclosure of this kind of material under FOIA were required").

discover leniency-related materials does not harm them. As already pointed out, plaintiffs have received all of the pre-existing corporate documents that were shown to the government. See Dellwood Farms, 128 F.3d at 1127. Thus, Westinghouse's rationale has no application to the privilege asserted here.

By contrast, the issues in Dellwood Farms are very similar to those found here. There, plaintiffs in a private antitrust suit sought audio and video tapes that the Department of Justice had made during a criminal investigation. The Department withheld the tapes under the law enforcement investigatory privilege even though it had, during the investigation and plea negotiations, played some of the tapes to counsel representing the outside directors of one of the corporations under investigation; had allowed counsel to take notes on the tapes; but had not obtained an express confidentiality agreement or protective order from counsel. Id. at 1124. The Seventh Circuit upheld the Department's claim of privilege. Id. at 1125-27. The court found that "no rights of the plaintiffs were invaded by the government's assertion of its law enforcement investigatory privilege." Id. at 1126, 1128. The Seventh Circuit also specifically addressed Westinghouse's analysis of selective waiver and concluded that permitting the government to withhold the tapes under the law enforcement investigatory privilege was not contrary to the teachings of Westinghouse. Id. at 1126-27.

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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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.

Adam D. Hirsh

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December 1998, I caused two copies of the foregoing Brief of the United States to be served by FedEx overnight courier or U.S. Mail, as indicated, to the following counsel at the following addresses:

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