IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: FLAT GLASS ANTITRUST LITIGATION	MISC. NO. 97-550 MDL NO. 1200 HON. DONALD E. ZIEGLER

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE OPPOSING DISCOVERY OF AMNESTY-RELATED MATERIALS

STATEMENT OF INTEREST

The United States has principal responsibility for enforcing the federal antitrust laws. A very important investigative tool in the government's antitrust enforcement effort is the Antitrust Division's Corporate Amnesty Policy. At issue in this private antitrust case is whether information concerning an application for amnesty is subject to discovery. The resolution of this issue may have a direct impact on the government's enforcement of the antitrust laws. Moreover, the United States has already objected, on the basis of privilege, to a subpoena served on it in this case that would have required it to disclose whether an amnesty application was made and, if so, to produce information about it. Accordingly, the United States has a strong interest in the proper determination of this matter. At the hearing March 6, 1998, this Court, in response to a letter from government counsel to one of the defense attorneys in this case, indicated that it would be willing to consider the government's views on this discovery issue. Hrg. Tr. 23.

STATEMENT OF THE CASE

1. Plaintiffs in these consolidated, treble-damage, private antitrust suits are purchasers of flat glass. They contend that the five major manufacturers of automotive and architectural flat

glass conspired to fix prices and allocate markets between 1986-1995. Consolidated and Amended Class Action Complaint (Feb. 27, 1998) ¶¶ 61-62 ("Complaint"). 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. Plaintiffs allege that defendants formed and maintained their conspiracy through a series of letters, conversations, and meetings, including at industry trade shows. Id. ¶ 63. The Complaint further 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. Id. ¶ 63(p). The United States understands that the consolidated suit is still at a very preliminary stage and that no class has yet been certified.

On October 10, 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 under its Corporate Leniency Policy, with respect to any conduct or activity relating to the manufacture, marketing or sale of flat glass." We understand that all the other plaintiffs have now made a similar document request of defendants. Defendants have resisted such discovery, thus necessitating resolution by this Court.

2. The Antitrust Division (the "Division") of the United States Department of Justice (the "Department") investigates and prosecutes both civil and criminal antitrust violations. Two Division investigations are relevant to the discovery issue in this case. First, on December 22, 1994, a consent decree was entered in United States v. Pilkington plc & Pilkington Holdings Inc., CIV. 94-345, 1994-2 Trade Cas. (CCH) ¶ 70842 (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.[1] 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. 30604, 30608 (1994). Second, the Division is currently conducting a grand jury investigation into allegations of anticompetitive conduct in the flat glass industry.[2]

3. The Division has received two requests for information concerning its civil and criminal flat glass investigations. First, a request was received by the Division under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for all documents relating to the government's Pilkington investigation and case. The Division has produced numerous documents pursuant to this request and may produce additional documents in the future.

Second, on October 7, 1997, before the flat glass cases were consolidated in this Court, the Lurie plaintiffs issued a third-party subpoena duces tecum addressed to 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 dated October 20, 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));

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[1]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. 30604, 30608-09 (1994).

[2]The Department ordinarily does not disclose its ongoing grand jury investigations. Fed. R. Crim. P. 6(e). In this case, however, we note the existence of this grand jury investigation because the parties already have acknowledged its existence.

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 early November 1997, the United States and the Lurie plaintiffs negotiated an agreement concerning this subpoena. Under the terms of this agreement, 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. In return, plaintiffs agreed to suspend enforcement of the subpoena.

4. The Antitrust Division has had a Corporate Amnesty Policy (also known as the "Corporate Leniency 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 amnesty program, a corporation had to establish that it had satisfied a seven-factor test before the Division would determine whether or not it would grant amnesty. U.S. Dep't of Justice, Antitrust Division Grand Jury Practice Manual V-52-53 (1st ed. Nov. 1991) (attached as Exhibit 1). 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.

In August 1993, the Division made three significant revisions to its Corporate Amnesty 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. See U.S. Dep't of Justice, Antitrust Division Manual III-103-05 (3d ed. Feb. 1998) ("Division Manual") (attached as Exhibit 2). Second, amnesty is now available even after the Division has begun an investigation, as 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.[3] See id. at III-105.

The revisions to the Amnesty Policy have had a dramatic impact on enforcement. During the 14½-year period of the old amnesty program (October 1978 through July 1993), 17 corporations applied for amnesty, ten successfully. See 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 Sponsored by the U.S. Sentencing Commission, at 23-24 (Washington, D.C. Sept. 8, 1995) (attached as Exhibit 3). Since the Amnesty Policy was revised in August 1993, the number of amnesty applications has gone from approximately one-per-year to one-per-month. 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 Mar. 6, 1998) ("Titanic Speech") (attached as Exhibit 4). 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 received from amnesty applicants. In the last six months alone, the amnesty program has resulted in nearly a dozen convictions and more than $100 million in fines. Gary R. Spratling, The Corporate Leniency Policy: Answers to Recurring Questions, Address Before the American Bar Ass'n Antitrust Section 1998 Spring Meeting, at 1 (Washington, D.C., to be given Apr. 1, 1998) (attached as Exhibit 5). In short, the Amnesty Policy is an important and highly effective enforcement tool. Division Manual at III-103.

The Amnesty Policy depends on confidentiality. The Division holds the identity of amnesty applicants in strict confidence, much like the treatment afforded to confidential

[3]In August 1994, the Division also established an individual amnesty program for individuals who come forward with inculpative evidence against themselves and other individuals or corporations. Division Manual at III-103, 105-06.

informants. Titanic Speech at 10; Division Manual at III-107. 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. Thus, the Division will not publicly disclose the identity of an amnesty applicant, absent prior disclosure by the applicant, unless required to do so by court order in connection with litigation. Titanic Speech at 10. Further, it is the Division's policy neither to confirm nor deny the existence of an amnesty application -- either while the application is pending or after the Division has granted or rejected the application. Id. Indeed, most amnesty applications in fact are simply oral presentations to Division personnel, generally supplemented by production of pre-existing corporate documents. 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 amnesty rely on and expect their discussions to remain confidential.

ARGUMENT

Consistent with its long-standing policy, the United States neither confirms nor denies in this brief the existence of an amnesty application related to the flat glass industry investigation.[4] Nevertheless, to preserve both the secrecy and effectiveness of the corporate Amnesty Policy, the United States opposes plaintiffs' request for information relating to any amnesty application that may have been made. In our view, any documents, statements, or presentations specially created or made on behalf of an amnesty applicant in connection with its amnesty application, and any documents created by or statements made by Department of Justice personnel in response to such an application (collectively "amnesty-related materials"), are privileged

[4]See Afshar v. Department of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983) ("even if a fact . . . is the subject of widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage").

pursuant to the law enforcement investigatory privilege, the informer's privilege, and strong policy considerations.

The Department's objection is limited to documents that may have been specially created -- or statements that may have been specifically made -- in connection with an amnesty application. This includes both statements made by the applicant to the Department and responses made by the Department to the applicant. The Department does not object to the discovery (from private parties) of pre-existing documents that may have been specifically brought to the attention of the Department as part of an amnesty application. In other words, under the Department's view, any pre-existing documents shown to the Department as part of an amnesty application would be discoverable from the applicant, but the requesting party could not force the applicant to specifically identify which documents had been shown to the Department as part of the amnesty application. Cf. Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 868-70 (D.C. Cir. 1981) (broad scope of secrecy surrounding grand jury proceedings needed to effectuate purposes).

Should the Court desire, the United States is prepared to make an ex parte, in camera submission in which it will either confirm or deny the existence of an amnesty application relating to the flat glass investigation and, if there has been an amnesty application, to make a formal claim of privilege if the Court views that as necessary.

I. AMNESTY-RELATED MATERIALS ARE PROTECTED FROM DISCOVERY BY THE LAW ENFORCEMENT INVESTIGATORY 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 Dep't of Investigation of City of New York, 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); United States v. O'Neill, 619 F.2d 222, 227 (3d Cir. 1980) ("the party who seeks the information must show the need for it so that the court can 'balance on one hand the policies which give rise to the privilege and their applicability to the facts at hand against the need for the evidence sought to be obtained in the case at hand'") (quoting Riley v. City of Chester, 612 F.2d 708, 716 (3d Cir. 1979)); see also Sealed Case, 856 F.2d at 272 (citing as illustrative ten factors identified in Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa. 1973)). Thus, plaintiffs must show a "'necessity [for production of the information] 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). In the context of amnesty-related materials, that balance tilts decidedly toward nondisclosure.

The government's interest in maintaining the confidentiality of amnesty-related materials is clear and strong. First, disclosure of amnesty-related documents during the pendency of an investigation could seriously jeopardize the criminal investigation. Price-fixing conspiracies are inherently difficult to detect and prosecute. 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 Amnesty Policy is intended to induce cooperation of co-conspirators and, as the enforcement figures we previously cited demonstrate (see p. 6, supra), the Amnesty Policy has been very successful. To take advantage of the Amnesty Policy, 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.[5] 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, Inc. v. Cargill, Inc., 128 F.3d 1122, 1125 (7th Cir. 1997).

Second, disclosure of amnesty-related materials would chill future participation in the amnesty program. Because amnesty excuses a serious violation of the law, applications for amnesty are viewed critically. Department officials question the applicant at length, review any documents provided by the applicant, and otherwise test the applicant's story to ensure that the applicant has satisfied the criteria for amnesty. Candor between the applicant and the Department is essential. Like the policy underlying Federal Rule of Evidence 408,[6] confidentiality of amnesty negotiations is necessary to encourage full and frank discourse. Affiliated Mfrs, Inc. v. Aluminum Co. of America, 56 F.3d 521, 526 (3d Cir. 1995); 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").

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[5]Even when a particular investigation ends, the privilege does not end because disclosure of privileged information may jeopardize future investigations of the same industry. See Black v. Sheraton Corp. of America, 564 F.2d 531, 546 (D.C. Cir. 1977) ("[w]e reject plaintiff's contention that the public interest in nondisclosure can be disregarded simply because the principal investigation involved here has apparently been concluded").

[6]Rule 408 provides: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount." Fed. R. Evid. 408.

If the oral or written give-and-take between the applicant and the Department 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. See Titanic Speech at 11 (through the Amnesty Policy, "[t]he Division receives cooperation on a significant matter which is likely to result in convictions and heavy criminal sentences that otherwise might not have been possible") (emphasis added). Second, if amnesty negotiations are discoverable and applicants are less forthcoming with information, it would be more difficult for the Department to test the applicant's story and the Department would receive less useful information for its investigation. The Department depends on the confidentiality of amnesty negotiations to make the Amnesty Policy work.

To the extent that confidentiality is critical to the effectiveness of the Amnesty Policy, it matters not whether plaintiffs obtain amnesty-related materials from the files of the Department or the files of the amnesty applicant. As noted above, the Department has already objected to a subpoena from a plaintiff in this case that would have required it to produce amnesty-related materials, if any exist in Department files. But amnesty-related materials -- both those specially created by the applicant and those created by the Department -- are just as confidential in the hands of the applicant itself. Amnesty negotiations are conducted with the express understanding that those negotiations will remain confidential. Regardless whether the applicant receives or is denied amnesty, it has little incentive to "go public" with the facts of its application and thereby incur reprisals by customers, competitors, co-conspirators, shareholders, or employers.

Against the government's powerful interest in keeping amnesty-related materials privileged, plaintiffs' "need" for them is weak. The relevance of amnesty-related materials to plaintiffs' suits is doubtful. To the extent that amnesty-related materials may exist, they address

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).

Amnesty-related materials, although marginally helpful to a private plaintiff's case, are not necessary for that case, nor does a plaintiff suffer prejudice by being denied them. Any pre-existing documents that might evidence a price-fixing conspiracy (e.g., notes of a meeting among defendants discussing prices) are fully available to a plaintiff from a defendant as part of regular document discovery. The Department does not claim a privilege over pre-existing documents, only documents that were generated by the applicant or the government as part of the amnesty application process. Denial of amnesty-related discovery merely forces a plaintiff to sort through the documents it receives from a defendant in order to locate any "silver bullets" -- it will not be handed such documents on a silver tray. Likewise, a plaintiff is free to depose any person about any defendant's role in a conspiracy -- but questions about what might have been said during any amnesty negotiations with the Department of Justice should be barred for the same reasons that such evidence would be inadmissible at trial. Fed. R. Evid. 408.

If plaintiffs want to simplify their search for information relevant to their case, there is a simple solution that would not require disclosure of any privileged information. Specifically, plaintiffs could ask this Court to postpone this case until after the Department finishes its investigation. A conviction against defendants would prove the liability portion of a civil

plaintiff's case. See 15 U.S.C. § 16(a). Even an acquittal would prove useful because private plaintiffs would be free to ride the evidentiary coattails of the government's case. Waiting until after criminal proceedings also reduces the risk that defendant deponents will assert their Fifth Amendment rights when deposed by plaintiffs. In short, any harm to plaintiffs "can easily be cured by postponing the civil trial."[7] Dellwood Farms, 128 F.3d at 1128. Plaintiffs' haste to proceed is not a basis for vitiating the privilege over amnesty-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.'" Id. at 1125.

The public interest in nondisclosure is far greater than plaintiffs' need for any amnesty-related materials that may exist. Accordingly, amnesty-related materials should be protected under the law enforcement investigatory privilege.

II. AMNESTY-RELATED DOCUMENTS ARE ALSO PROTECTED FROM DISCOVERY BY THE INFORMER'S PRIVILEGE.

Closely related to the law enforcement investigatory privilege is the confidential source or "informer's" privilege. This common-law privilege protects individuals who provide information or assistance to law enforcement officers. Roviaro v. United States, 353 U.S. 53, 59 (1957).[8] The purpose of the privilege is "the furtherance and protection of the public interest in

[7]We wish to emphasize, however, that even after the conclusion of any criminal case, in order not to impair the future effectiveness of the Amnesty Policy (see pp. 11-12, supra), we would still object to plaintiffs' discovery of any amnesty-related materials that had not become public during the prosecution. Our point in the text is merely that postponing the civil trial until after the government's case provides an easy way for the plaintiffs to take advantage of the government's investigation without interfering directly with an ongoing investigation.

[8]Amnesty-related materials would also be exempt from disclosure under FOIA pursuant to Exemption 7. See 5 U.S.C. § 552(b)(7)(D) (exempting from disclosure "records or information compiled for law enforcement purposes . . . [if it] could reasonably be expected to disclose the identity of a confidential source, including . . . any private institution which furnished information on a confidential basis, and, in the case of . . . information compiled by a criminal law enforcement authority in the course of a criminal investigation . . ., information furnished by a confidential source") (emphasis added). Thus, under Exemption 7, not only the identity of the (continued...)

effective law enforcement" based on the "common-sense notion that individuals who offer their assistance to a government investigation may later be targeted for reprisal from those upset by the investigation." Dole v. Local 1942, IBEW, 870 F.2d 368, 372 (7th Cir. 1989); United States v. Green, 670 F.2d 1148, 1155 (D.C. Cir. 1981) (privilege "may encourage other citizens to supply information concerning the commission of crimes"). The privilege is "applicable in civil as well as criminal cases" and, in fact, is "arguably greater" in civil cases because "not all constitutional guarantees which inure to criminal defendants are similarly available" in civil cases. Dole, 870 F.2d at 372; In re Search of 1638 E. 2d St. Tulsa, Okla., 993 F.2d 773, 774-75 (10th Cir.), cert. denied, 510 U.S. 870 (1993); United States v. One 1986 Chevrolet Van, 927 F.2d 39, 43 (1st Cir. 1991). Because of the significant policy considerations supporting the privilege, the government "is granted the privilege as of right" and "need not make a threshold showing that reprisal or retaliation is likely." Dole, 870 F.2d at 372. Moreover, the threat of reprisal need not be physical; "the privilege also recognizes the subtler forms of retaliation such as blacklisting, economic duress and social ostracism." Id. Like the law enforcement privilege, the informer's privilege is "qualified," i.e., "[t]he party opposing the privilege may overcome it upon showing [that] his need for the information outweighs the government's entitlement to the privilege." Id. at 373.

All amnesty applications involve informers. The raison d'etre of the amnesty program is to encourage individuals and corporations to come forward, admit their own participation in an antitrust conspiracy, and cooperate with the Department of Justice by identifying their co-conspirators so that the Department may investigate and prosecute as appropriate. Understandably, individuals and corporations are far less likely to come forward if their identity

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(...continued)
confidential source is withholdable, but the information provided by the source as well. See Manna v. United States Dep't of Justice, 51 F.3d 1158, 1167 (3d Cir.) (if "a source provided information under an express assurance of confidentiality or under circumstances from which an assurance of confidentiality can reasonably be inferred, then all information provided by the source is protected") (emphasis in original), cert. denied, 116 S. Ct. 477 (1995).

as an informant will then become public, even with the carrot of amnesty hanging in front of them. "The most effective means of protection, and by derivation the most effective means of fostering citizen cooperation, is bestowing anonymity on the informant, thus maintaining the status of the informant's strategic position and also encouraging others similarly situated who have not yet offered their assistance." Dole, 870 F.2d at 372; see also Green, 670 F.2d at 1155 ("the availability of the privilege preserves the usefulness of those who have aided the police in law enforcement and may encourage other citizens to supply information concerning the commission of crimes").

Thus, plaintiffs face a heavy burden in overcoming the government's entitlement to a privilege encompassing both the identity of its informants and any information by which they might be identified. They have not satisfied that burden in this case.

III. PLAINTIFFS' RELIANCE ON WESTINGHOUSE IS MISPLACED.

In arguing that information concerning amnesty negotiations is subject to discovery in a private antitrust case, plaintiffs apparently rely on the Third Circuit's decision in Westinghouse Electric Corp. 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 or the informer's privilege. Rather, the Westinghouse court addressed whether a party that discloses information protected by two privileges not relied on by the government here -- the attorney-client privilege and the work-product doctrine -- in order to cooperate with a government investigation thereby waives those privileges only as against the government, or also as against any third party in civil litigation. Id. at 1417. In holding that Westinghouse had in fact waived its privileges, 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 investigatory privilege and the informer's privilege.

Disclosure of amnesty-related materials between an amnesty applicant and the Division obviously does not waive the two privileges that protect that material from discovery. The very purpose of those privileges is to protect the integrity of ongoing investigations and to ensure the flow of information to law enforcement officials in future investigations. Withholding amnesty-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. 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, thereby increasing the effectiveness and efficiency of law enforcement efforts. Disclosure of confidential information is almost inherent in settlement or plea negotiations, and "denial of the privilege would itself lead to routine disclosure." Dep't of Investigation of City of New York, 856 F.2d 481, 486 (2d Cir. 1988) (permitting withholding of report under law enforcement privilege despite previous leaks regarding its contents).

Similarly, protecting amnesty-related materials from discovery furthers the purpose of the informer's privilege, which is intended to induce individuals to come forward with information of crimes without the fear of reprisals that public disclosure of their informing activities would bring. Amnesty applicants are always informers of others' illegal acts.

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 amnesty applications should remain confidential. And third, plaintiffs' failure to discover amnesty-related materials, if any exist, does not harm them. As already pointed out, plaintiffs are free to pursue other avenues of discovery and are also free to delay their civil suit until the conclusion of the government's criminal investigation and thereby take advantage of any documents or testimony that are made public as a result, or to capitalize on any convictions that occur. See Dellwood Farms, 128 F.3d at 1127. Thus, Westinghouse's rationale has no application to the two privileges relied on by the government 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 "a pretty strong presumption against lifting the privilege" in general, a presumption made even stronger by the pendency, as here, of an ongoing criminal investigation. Id. at 1125. Moreover, the court found that "no rights of the plaintiffs were invaded by the government's assertion of its law enforcement investigatory privilege," and that any harm suffered by plaintiffs could be cured simply by delaying their civil suit until the conclusion of any criminal proceedings. 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.

* * *

The government's need for confidentiality of amnesty-related materials is tied directly to its enforcement responsibilities. "Fundamentally [plaintiffs] are asking the district court to mediate between their desire to expedite their civil litigation and the government's conduct of its criminal investigation. That is not a proper judicial role." Dellwood Farms, 128 F.3d at 1125. The government's assertion of privilege is legitimate and should be respected.

CONCLUSION

For the foregoing reasons, plaintiffs' discovery request for amnesty-related materials should be denied.

Respectfully submitted,

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March 26, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 1998, I caused the foregoing Brief For The United States As Amicus Curiae Opposing Discovery Of Amnesty-Related Materials to be served by FedEx or by U.S. Mail to the following counsel at the following addresses:

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