

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

IN RE: GRAPHITE ELECTRODES (
 ANTITRUST LITIGATION (Master File No. 97-CV-4182
 (Filed: 03-03-00

MEMORANDUM OF LAW IN SUPPORT OF THE GOVERNMENT'S
MOTION TO INTERVENE AND PARTIALLY STAY DISCOVERY

I. INTRODUCTION

The United States of America ("the Government") submits this memorandum of law in support of its motion to intervene in this action and to stay until the completion of the criminal trial in United States v. Mitsubishi Corporation, Criminal No. 00-033 (E.D. Pa., Judge Katz):

- (a) all depositions except those relating to the production of documents; and
- (b) all interrogatories except those relating to the production of documents.

In essence, the Government seeks a stay on discovery of all substantive matters while allowing the parties to proceed with document discovery.

II. STATEMENT OF FACT

A. The Indictment Against
Mitsubishi Corporation

On January 19, 2000, a grand jury in the Eastern District of Pennsylvania indicted Mitsubishi Corporation for aiding and abetting a conspiracy among graphite electrode producers to fix the price of graphite electrodes in the United States and elsewhere from at least as early as March 1992 and continuing until at least June 1997. Mitsubishi Corporation is also a defendant in the civil litigation before this Court. The issues of liability in the criminal case and the civil case are virtually identical. Accordingly, a limited stay is appropriate to economize judicial resources, limit the burden on Mitsubishi Corporation in defending multiple actions, and prevent untimely disclosure of the

Government's case while still allowing the plaintiffs to proceed with their action.¹

The Government has filed similar stays in this action while the grand jury investigation was ongoing. During this time, the grand jury investigation has resulted in six corporate guilty pleas with fines imposed of over \$300 million. Three individuals have also pled guilty. These guilty pleas have also resulted in substantial resolution of the civil cases against many defendants in the case before the Court.

A trial date in United States v. Mitsubishi Corporation has been set for May 1, 2000. Considering that Mitsubishi Corporation has not yet been arraigned, it is likely that this date will be postponed. The Government will seek a trial date no later than September 11, 2000², as an expeditious resolution of the criminal trial will either lead to a resolution of the civil case against Mitsubishi or allow it to proceed without undue delay.

B. The Present Civil Litigation

The Government understands that to date, very limited discovery has been undertaken with respect to Mitsubishi Corporation. The recent indictment, however, will likely lead to increased discovery activity both for the production of documents and interrogatories and depositions on substantive matters. In the past, the Court has granted requests by the Government for limited stays which allowed discovery to proceed with respect to document production while staying discovery of interrogatories and depositions. This Court's previous orders have had the virtue of allowing the period

¹ Mitsubishi Corporation has filed a motion with this Court seeking a complete stay of all discovery pending the outcome of the criminal trial. It is the position of the Government, as it has been in past motions, that the stay should be limited to allow the plaintiffs to pursue and resolve issues of document discovery during the pendency of the stay.

² The Government's motion seeks a limited stay until the completion of the criminal trial. The Government will seek to have the criminal trial no later than September 2000.

of the stay to be productively used to resolve document production issues while protecting the interests of the Government in maintaining grand jury secrecy.

III. ARGUMENT

A. Intervention is Appropriate Under Federal Rule of Civil Procedure 24

The Court has previously granted the Government leave to intervene in this matter. Under Rule 24(a) of the Federal Rules of Civil Procedure, anyone may intervene as of right in an action when he "claims an interest relating to the property or transaction which is the subject of the action and [he] is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest" Alternatively, Rule 24(b) allows permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common "

Intervention by the Government is appropriate under both of these provisions.

The Government can demonstrate an interest in this matter which is not adequately represented and which may be impaired absent intervention. The conduct described in plaintiffs' complaint is precisely the matter under indictment in United States v. Mitsubishi Corporation. Thus, this civil case and the criminal indictment present common questions of law or fact. The Government has a compelling interest in seeing that Mitsubishi Corporation is not permitted to circumvent the discovery limitations embodied in the Federal Rules of Criminal Procedure by discovery of the Government's case in chief or of matters otherwise not discoverable in the present grand jury investigation. The Government's right to prevent premature disclosure of evidence will be irretrievably lost absent intervention and the granting of the requested stay.

Courts routinely have permitted the Government to intervene in similar situations. Judge Hutton wrote in SEC v. Mersky:

Courts have almost universally permitted the United States to intervene in actions such as the present case. Indeed, as one court to have considered the question stated, "[i]t is well established that the United States Attorney may intervene in a federal civil action to seek a stay of discovery when there is a parallel criminal proceeding, which is anticipated or already underway that involves common questions of law or fact."

Mersky, No. Civ. A. 93-5200, 1994 W.L. 22305, at *1 (E.D. Pa. Jan. 25, 1994) (quoting SEC v. Downe, No. 92 Civ. 4092, 1993 W.L. 22126, at *10 (S.D.N.Y. Jan. 26, 1993)). Cf. SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (finding government intervention appropriate to prevent civil discovery from being used to circumvent discovery in criminal matter); Twenty First Century Corp. v. LaBianca, 801 F. Supp. 1007, 1009 (E.D.N.Y. 1992) (noting appropriateness of government intervention in civil actions for the limited purpose of moving to stay discovery).

Just as this Court has done on prior occasions, it is respectfully submitted that this Court should permit the Government to intervene and exercise its right to be heard, under either Rule 24(a) or 24(b) of the Federal Rules of Civil Procedure.

B. The Limited Stay Requested By
The Government Should be Granted

During the graphite electrode grand jury investigation, the Court has previously granted limited stays of discovery such as the one now proposed by the Government. The case for a limited stay becomes even more compelling once an indictment has been issued.

The Supreme Court established long ago that a district court has the power to stay proceedings in one action until the disposition of another. Landis v. North Am. Co., 299 U.S. 248, 254 (1936). According to the Court, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Id.

In determining whether to grant a stay, the Court must weigh five competing interests:

- (1) the interests of the plaintiffs in proceeding expeditiously . . . ;
- (2) the burden which . . . the proceedings may impose on the defendants;
- (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources;
- (4) the interest of persons not parties to the civil litigation; and
- (5) the interest of the public in the pending civil and criminal litigation. Golden Quality Ice Cream Co. v. Deerfield Speciality, 87 F.R.D. 53, 56 (E.D. Pa. 1980).

The United States seeks a limited stay at this time to prevent Mitsubishi Corporation from circumventing the discovery to which it is entitled under The Federal Rules of Criminal Procedure.

In SEC v. Mersky, No. Civ. A. 93-5200, 1994 W.L. 22305 (E.D. Pa., January 25, 1994) the Court, at the government's request, granted a stay in a civil action when there was a parallel criminal investigation saying:

The United States' interest in preventing the defendants from circumventing the limited discovery available in the criminal proceeding is substantial. As Judge Wisdom stated in Campbell v. Eastland, judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to another. 307 F.2d 478, 487 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963). Citing Eastland, numerous courts have recognized the great weight to be accorded the United States' interest in obtaining a stay of civil discovery pending the resolution of criminal proceedings.

Id. at *4 (citations omitted).

In Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963), a defendant in a fraud prosecution sought discovery in a civil action he had filed seeking a tax refund. The Court ruled that civil discovery should have been stayed until after disposition of the civil case. Id. at 488. The Campbell court's principal concern was that, absent a stay, civil discovery might enable a

defendant in parallel criminal and civil cases to obtain discovery that would be impermissible under the criminal rules: “A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery” Id. at 487.

Other courts similarly have recognized the risks of subverting the limits of criminal discovery as a legitimate basis for stay in civil discovery. See, e.g., United States v. Mellon Bank, 545 F.2d 869, 873 (3d Cir. 1976) (possibility that defendant might improperly exploit civil discovery to advance criminal case argued in favor of a stay in civil case); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1213 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974) (“civil discovery is not intended to be a ‘back door’ method of accomplishing criminal discovery”) (citation omitted); United States v. One 1967 Buick Hardtop Electra, 304 F. Supp. 1402, 1403 (W.D. Pa. 1969) (criminal defendant should not be permitted through use of civil discovery to secure that to which he is entitled under the Rules of Criminal Procedure); United States v. Maine Lobsterman’s Ass’n, 22 F.R.D. 199, 201 (D. Me. 1958) (defendants in criminal [antitrust cases] cannot properly take advantage of companion civil case to obtain prosecution evidence not otherwise available to defendants).

The Government’s request for a limited stay is fully supported by precedent and will protect the public interest in a fair criminal trial. The stay will also likely save considerable judicial resources (as have past stays in this matter) and minimize the burden on Mitsubishi Corporation in defending multiple actions. By excluding from the requested stay production of documents, the Government has also tried to recognize the interests of the plaintiffs in moving forward. Document discovery alone will afford the plaintiffs a wealth of material to examine to gain additional facts concerning Mitsubishi Corporation’s alleged role in the conspiracy.

IV. CONCLUSION

For the reasons stated herein, the Government respectfully requests that its motion for intervention and a limited stay of discovery be granted.

Dated:

Respectfully submitted.

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ORDER

Upon consideration of the Motion of the Government to Intervene and Partially Stay Discovery and the Memorandum in Support thereof, it is hereby Ordered that the motion be and is hereby granted:

1. to permit the Government to intervene in this civil action; and
2. to stay until the completion of the criminal trial in United States v. Mitsubishi Corporation, Criminal No. 00-033 (E.D. Pa.):
 - (a) all depositions except those relating to the production of documents; and
 - (b) all interrogatories except those relating to the production of documents.

So Ordered this day of March 2000.

UNITED STATES DISTRICT JUDGE

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

IN RE: GRAPHITE ELECTRODES (
 ANTITRUST LITIGATION (Master File No. 97-CV-4182
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GOVERNMENT'S MOTION TO
INTERVENE AND PARTIALLY STAY DISCOVERY

The United States of America ("the Government"), pursuant to Rule 24 of the Federal Rules of Civil Procedure, hereby moves this Court for an Order permitting the Government to intervene in this civil action.

The Government also moves this Court for an Order to stay until the completion of the criminal trial in United States v. Mitsubishi Corporation, Criminal No. 00-033 (E.D. Pa.):

- (a) all depositions except those relating to the production of documents; and
- (b) all interrogatories except those relating to the production of documents.

On January 19, 2000, Mitsubishi Corporation was indicted for participating in the graphite electrodes cartel which is the subject of this civil action. As set forth in the accompanying memorandum of law, a partial stay of discovery is appropriate to balance the needs of the plaintiffs to proceed with their action while preventing an undue burden on Mitsubishi and

inappropriate discovery of the Government's case.

Dated:

Respectfully submitted,

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