96-6311

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

MICHAEL HEINRICH; MASTA DISPLAYS CO.; AM-PM SALES CO., INC.; RICHARD BILLIES; SIDNEY ROTHENBERG; JOHN BILLIES; SONIA GRAPHICS; JOSE RIVERA; JOMAR DISPLAYS, INC.; MARTIN NEIER; JOEL SPECTOR; C.D. BAIRD & CO., INC.; PAUL BIELIK; RICHARD T. BILLIES, JR.; MANUFACTURERS CORRUGATED BOX CO., INC.; IRVING ETRA; SOUTHERN CONTAINER CORP.,; STEVEN GROSSMAN; DONALD KASUN; BARRY BESEN; REPUBLIC CONTAINER CORP.; STANLEY WINIKOFF; AMY WINIKOFF; WINKO NEW JERSEY, INC.,
Defendants,

VISART MOUNTING AND FINISHING CORP.; DANI SIEGEL; GENETRA AFFILIATES, INC.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

JOEL I. KLEIN
Acting Assistant Attorney General

A. DOUGLAS MELAMED
Deputy Assistant Attorney General

OF COUNSEL:

RALPH T. GIORDANO
STEVEN TUGANDER

Attorneys
U.S. Department of Justice
New York, New York

JOHN J. POWERS, III
MARION L. JETTON

Attorneys
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

MISCELLANEOUS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-6311

UNITED STATES OF AMERICA,
Appellee,

v.

MICHAEL HEINRICH; MASTA DISPLAYS CO.; AM-PM SALES CO., INC.; RICHARD BILLIES; SIDNEY ROTHENBERG; JOHN BILLIES; SONIA GRAPHICS; JOSE RIVERA; JOMAR DISPLAYS, INC.; MARTIN NEIER; JOEL SPECTOR; C.D. BAIRD & CO., INC.; PAUL BIELIK; RICHARD T. BILLIES, JR.; MANUFACTURERS CORRUGATED BOX CO., INC.; IRVING ETRA; SOUTHERN CONTAINER CORP.,; STEVEN GROSSMAN; DONALD KASUN; BARRY BESEN; REPUBLIC CONTAINER CORP.; STANLEY WINIKOFF; AMY WINIKOFF; WINKO NEW JERSEY, INC.,
Defendants,

VISART MOUNTING AND FINISHING CORP.; DANI SIEGEL; GENETRA AFFILIATES, INC.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

PRELIMINARY STATEMENT

Judge Lawrence M. McKenna of the United States District Court for the Southern District of New York entered the order appealed from in this case. The order has not been reported.

JURISDICTION

Plaintiff Philip Morris Incorporated (Philip Morris), who is not a party to this appeal, asserts that district court jurisdiction arises under 28 U.S.C. §§ 1331 and 1367, and 15

U.S.C. § 15. J.A. 197.[1] The order being appealed was entered November 18, 1996 and the notice of appeal was filed December 4, 1996. J.A. 17-18. Defendants/appellants assert that this Court has jurisdiction to review that order pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1) (D.Br. at 2). We contend, for the reasons stated below, that this Court lacks jurisdiction at this time.

STATEMENT OF ISSUES

1. Should the appeal be dismissed as moot?

2. Does Rule 6(e), Fed. R. Crim. P., create a private right of action authorizing a court to enjoin the government from violating that Rule?

3. Does this Court have jurisdiction to review the order on appeal as denial of an injunction under 28 U.S.C. § 1292(a)(1), or as an appealable collateral order?

4. Did the district court err in determining that appellants had not made a prima facie showing of a Rule 6(e) violation that would entitle them to a hearing?

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, DISPOSITION

The United States moved to intervene in this private antitrust suit brought by Philip Morris to stay certain discovery that was likely to interfere with an on-going criminal antitrust investigation and trial. J.A. 10-11, 165. Appellants Visart Mounting and Finishing Corp. (Visart), Dani Siegel (Siegel), and

---

[1] "J.A." refers to the joint appendix filed in this Court. "D.Br." refers to appellants' main brief filed in this Court.

Genetra Affiliates, Inc.(Genetra), three of the defendants in the private suit, opposed intervention and filed a cross-motion for a hearing and to enjoin the United States from further alleged violations of Fed. R. Crim. P. 6(e). J.A. 23-24. The district court permitted intervention by the United States and stayed certain discovery in an order filed July 1, 1996. J.A. 165-166, 167-169. Subsequently, on November 18, 1996, the court denied appellants' request for a show cause hearing and for an injunction against future Rule 6(e) violations by the United States. J.A. 292-293.

II. STATEMENT OF FACTS

1. In a complaint filed in January 1995, Philip Morris alleged that various defendants, including appellants, had conspired to allocate contracts for the production and supply of temporary cardboard "point of purchase" graphic displays, which are used for advertising Philip Morris products at retail locations. J.A. 1, 164. Philip Morris alleged federal and state antitrust violations, and also brought claims for common law fraud and related state law claims. J.A. 164-165. In September 1995, the United States moved to intervene in the civil action and for an order staying all depositions and answers to interrogatories until the conclusion of the government's closely-related criminal investigation and "resulting proceedings," which were being conducted in the same judicial district. J.A. 10-11, 165. The government contended that if civil discovery were not stayed, the criminal investigation and resulting proceedings

would be prejudiced because any defendants in the civil case that were subsequently indicted might obtain evidence during civil discovery that they would not be able to obtain under criminal discovery rules. J.A. 169.

Appellants opposed intervention by the United States and the requested stay. J.A. 28. They filed a notice of cross motion in October 1995, asking for a show cause hearing and an order "enjoining the intervenor Antitrust Division * * * from making further disclosures of matters subject to grand jury secrecy and enjoining the said intervenor from seeking to stay depositions and interrogatories in this civil action, and granting such other and further equitable relief" as the court considered proper. J.A. 23-24. In an accompanying declaration filed by appellants' counsel, two specific claims were made concerning alleged violations of Rule 6(e)'s secrecy provision by government attorneys. First, the declaration cited an article in the July/August 1995 edition of a trade newspaper in which an Antitrust Division attorney had discussed the government's investigation. The declaration claimed that the article revealed matters occurring before the grand jury. J.A. 40-41, 132-133 (article's text). Second, the declaration claimed that one of the appellants had lost business to a company that was cooperating with the government, after the government spoke to appellant's customer during the summer of 1993. J.A. 42, 134-135. In a supplemental affidavit, the attorney recounted hearsay information about what a government attorney allegedly had said

to the customer about vendors "under investigation." J.A. 136-137. Finally, without claiming any actual breach of Rule 6(e) secrecy, appellants criticized the government for making public, with court consent, various plea agreements and sentencing memoranda that indicated the scope of the conspiracy. J.A. 31-39. The government filed a response (J.A. 144-163) and an accompanying ex parte affidavit, demonstrating that no Rule 6(e) violation had occurred and that appellants had failed to make out a prima facie case.

2. On June 3, 1996, a grand jury sitting in the Southern District of New York returned an indictment against appellants. Count I of that indictment charged appellants Visart and Siegel with conspiring to rig bids and allocate contracts for the supply of display materials awarded by Philip Morris in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Count II charged Siegel and Genetra with conspiring "to defraud the United States of America and the Internal Revenue Service (IRS) by impeding, impairing, defeating and obstructing the lawful governmental functions of the IRS in the ascertainment, evaluation, assessment and collection of income taxes" in violation of 18 U.S.C. § 371. Finally, Counts III and IV of the June indictment charged appellant Siegel with making false and fraudulent statements in violation of 26 U.S.C. § 7206(1). A superseding indictment filed October 29, 1996, among other things, added appellant Visart as a defendant in Count II of the indictment and charged appellant Siegel with three additional violations of 26 U.S.C. § 7206(1).

The trial in this criminal case is currently scheduled to begin June 3, 1997. In any event, appellants' status as targets of the grand jury investigation has been public knowledge since the return of the June indictment.

3. Several weeks after appellants were indicted, the district court in the civil case granted the government's motion to intervene on July 1, 1996, and stayed discovery until December 31, 1996. J.A. 15, 167-169. The stay was subsequently extended, at the government's request, to June 30, 1997. J.A. 19, 295. Appellants did not file a notice of appeal from the July order or from the subsequent order extending the stay.

In an order filed November 18, 1996, the court denied appellants' cross-motion for a show cause hearing and an order enjoining the government "from making further disclosures of matters subject to grand jury secrecy." J.A. 292-293. Without relying on the government's ex parte affidavit,[2] the court concluded that "[t]he moving defendants have not made a sufficient showing that the government has disclosed any matters that occurred before a grand jury in violation of Fed. R. Crim. P. 6(e)." J.A. 292. Addressing the two specific allegations of

---

[2] The government's ex parte affidavit in support of its answer to the Rule 6(e) allegations provided the court with information on how the investigation was being conducted, what had in fact been said to the trade newspaper reporter, and the circumstances of the conversation with the customer. Appellants demanded to see the affidavit. In its July 1, 1996, ruling on intervention, the court stated that it had not considered the affidavit and would not do so for purposes of deciding the cross-motion. J.A. 166, 169. It concluded, "[t]hus, as the document is irrelevant to a determination, it need not be turned over to the Defendants." J.A. 169; see also J.A. 166.

misconduct, the court stated "[r]evelation by the government, as prosecutor, of its -- as opposed to a grand jury's -- investigation does not violate Fed. R. Crim. P. 6(e)." Ibid. As to appellants' complaints about public release of plea agreements, the court noted that these are "presumptively to be made available to the public, see United States v. Haller, 837 F.2d 84, 85-86 (2d Cir. 1988)" and concluded that no Rule 6(e) issue was presented, as these were "(in one case) unsealed with the permission of the Court, and otherwise filed with its explicit or implicit permission." J.A. 292-293.

SUMMARY OF ARGUMENT

This appeal is frivolous. To begin with, this Court does not have jurisdiction to review the order in question. Even assuming that appellants' subsequent indictment did not moot the claim for relief they made in the district court, Rule 6(e) does not create a private right of action allowing a party to obtain injunctive relief for alleged violations of the Rule. In any event, the district court's order is plainly interlocutory and not subject to appellate review. In a civil case, discovery orders are not appealable even if phrased as a denial of an injunction. Similarly, the denial of hearing on a discovery matter in civil case is not appealable.

Finally, the court's ruling was correct. The claimed disclosures related only to the government's investigation, not to matters occurring before the grand jury. Indeed, if appellants seriously believed that Rule 6(e) had been violated by

the government, they did not have to wait until the government filed its motion in the civil case to make these allegations. Rather, they could have raised the issue earlier with a judge supervising the grand jury. Moreover, they could have also sought sanctions against the government after they were indicted from the judge assigned to their criminal case. That they instead raised the issue in a civil case in response to a government motion concerning discovery in that case strongly suggests that they were more interested in obtaining information concerning the government's investigation and its evidence against them than in litigating the merits of any alleged Rule 6(e) violation.

ARGUMENT

Appellants claim that in two instances the government improperly disclosed matters occurring before the grand jury, in violation of Fed. R. Crim. P. 6(e). They also assert that, although the government obtained proper court approvals before filing various plea agreements, the sum of these filings somehow violated Rule 6(e). Before addressing why the district court correctly concluded that these alleged Rule 6(e) violations were so insubstantial that they did not even warrant an evidentiary hearing, we will first explain why this Court does not have jurisdiction to review the order in question.

I. THE REQUEST FOR RELIEF IS MOOT, AND THE APPEAL SHOULD BE DISMISSED

Appellants seek review of the district court's order denying their demand for a show cause hearing and for an "order enjoining

the government (an intervenor) from making further disclosure of matters subject to grand jury secrecy." J.A. 292 (footnote omitted). Appellants had asserted, as the basis for the hearing and injunctive relief, that "public disclosure by the Antitrust Division of confidential information in the criminal investigation and matters subject to grand jury secrecy have caused substantial economic harm to defendants in this civil action." Memorandum of Law of Defendants * * * In Support of Cross-Motion for Equitable Relief ("D. Mem. Law") (Dkt. Entry No. 107) at 28-29 (citing Declaration ¶ 31 (J.A. 42-43) and attached Ex. P). The "public disclosures" of which appellants complained were the alleged disclosure that appellants were the subject of a grand jury investigation; and the claimed "economic harm" was injury to appellants' business reputation. See J.A. 31-42.

In order for a federal court to retain jurisdiction over a case, an actual controversy must exist "'at all stages of review, not merely at the time the complaint is filed.'" Prins v. Coughlin, 76 F.3d 504, 506 (2d Cir. 1996) quoting Preiser v. Newkirk, 422 U.S. 395, 40[1] (1975)). A case is moot when the problem sought to be remedied has ceased, and where there is no reasonable expectation that the wrong will be repeated. Ibid. Injunctive relief looks to the future and is designed to deter. Accordingly, if the conduct at issue has been discontinued and cannot recur, there is no need for a court to intervene and grant injunctive relief because the case has become moot. See 11A C.A. Wright et al., Federal Practice and Procedure § 2942, at 47-48

(2d ed. 1995) ("Wright"); see also, e.g., Hsu v. Roslyn Union Free School District No. 3, 85 F.3d 839, 850 n.3 (2d Cir. 1996) (suit was moot as to injunctive relief because plaintiff had graduated; dispute involved a school club), cert. denied, 117 S. Ct. 608 (1996); Campbell v. Greisberger, 80 F.3d 703, 705-706 (2d Cir. 1996)(request for injunctive relief against New York Bar concerning question in bar application was moot where the question had been discontinued and there was no reason to believe it would be reinstated); Blalock v. United States, 844 F.2d 1546, 1552 (11th Cir. 1988)(appellant alleged that prosecutor told appellant's competitor that grand jury was likely to indict appellant soon; injunction against prosecutor could not issue because appellant failed to show that further injury was likely to occur).

Appellants' demand for hearing and injunctive relief is now moot because they have been indicted. Their former status as targets of a criminal investigation is now public information, and no further economic injury could result from future disclosure that they were formerly under investigation by a grand jury. Any prospective customer need only obtain a copy of the indictment to determine what appellants are alleged to have done. Moreover, much of the government's evidence concerning appellants has been or will become public as a result of discovery in the criminal case and the trial that is scheduled to begin in June. Accordingly, the disclosure (and economic injury) of which appellants complained is not capable of repetition, and their

appeal should be dismissed as moot. See S.R. Mercantile Corp. v. Maloney, 909 F.2d 79, 81 (2d Cir. 1990)(district court ordered government to disclose alleged grand jury documents belonging to appellant; appellants' appeal of order was moot because government had disclosed the documents in question pursuant to the district court order).

II. THE DISTRICT COURT DID NOT HAVE THE POWER TO GRANT INJUNCTIVE RELIEF TO A PRIVATE PARTY

Appellants asked the district court to review their allegations that Rule 6(e) had been violated. See United States v. Rioux, 97 F.3d 648, 662 (2d Cir. 1996); Finn v. Schiller, 72 F.3d 1182, 1187, 1189-1190 (4th Cir. 1996). However, rather than asking the court to hold the government in contempt, the express remedy provided in Rule 6(e), appellants instead demanded injunctive relief.

In our view, any claim that the government had violated Rule 6(e) would more properly have been raised with the judge supervising the grand jury or with the judge subsequently assigned to the criminal case.[3] This is particularly true since many of the events in question occurred long before appellants belatedly raised the issue in the civil case. However, whatever the forum in which appellants raised the Rule 6(e) issue, they requested a form of relief that the district could not grant.

---

[3] We are not arguing in this brief that the district court in the civil case had no authority to determine if appellants had made a prima facie showing of a Rule 6(e) violation. But assuming it did, it also had the discretion to refer the issue to a judge more familiar with the grand jury investigation or the subsequent criminal case.

Specifically, district court had no authority to grant them the injunctive relief they requested because Rule 6(e) does not create any private right of action for injunctive relief. Finn, 72 F.3d at 1186, 1187-1189; In the Matter of Grand Jury Investigation, 748 F. Supp. 1188, 1198-1206 (E.D. Mich. 1990). Accordingly, they have no right to appeal from the denial of an injunction that the district court could not grant.[4]

In determining whether a federal statute[5] creates a private right of action, the "central inquiry" is whether its authors "intended to create, either expressly or by implication, a private cause of action." Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979); see also Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979). The first task is to consult the language of the statute itself. Touche Ross & Co, 442 U.S. at 568. Rule 6(e)(2) provides: "No obligation of secrecy may be imposed on any person except in accordance with

---

[4] Since appellants did not request that the government be held in contempt for violating Rule 6(e), we will not address, and this Court does not have to decide, whether there is a private right of action under Rule 6(e) for contempt. The Fourth Circuit has concluded that there is not. Finn v. Schiller, 72 F.3d at 1187-1189. See also Blalock, 844 F.2d at 1552-1562 (Tjoflat, J. and Roettger, J. specially concurring); In the Matter of Grand Jury Investigation, 748 F. Supp. at 1198-1206. But see Barry v. United States, 865 F.2d 1317, 1321-1323 (D.C. Cir. 1989); Blalock, 844 F.2d at 1550-1551 (following binding 5th Circuit precedent); In re Grand Jury Investigation (Lance), 610 F.2d 202, 212 (5th Cir. 1980).

[5] The last sentence of Rule 6(e) was added by statute in 1977. Pub. L. 95-78, § 2(a), 91 Stat. 319 (1977). The Federal Rules are generally construed in the same manner as statutes. See, e.g., Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 123-124 (1989); 3 (Supp.) Norman J. Singer, Sutherland Statutory Construction § 59.09, at 20 (5th ed. 1996).

this rule." It then concludes: "A knowing violation of Rule 6 may be punished as a contempt of court." The rule makes no mention of "impos[ing] * * * obligation[s] of secrecy" by means of an injunction, and it certainly makes no mention of a private right to obtain injunctive relief against Rule 6(e) violations. If anything, the Rule suggests that contempt is the only method of enforcing an obligation of secrecy. Clearly, the language of Rule 6(e) does not expressly provide a private right of enforcement by injunction. Finn, 72 F.3d at 1188-1189.

Nor is there any indication in the history of Rule 6(e) that the Rule provides a private right of injunctive relief. Finn, 72 F.3d at 1188-1189; see also Touche Ross & Co., 442 U.S. at 571, 575-576 (appropriate to consult legislative history in determining existence of private right of action). At common law, violation of a grand juror's oath of secrecy was a contempt (Blalock, 844 F.2d at 1556-1557 (Tjoflat, J. & Roettger J., specially concurring); 2 Sara S. Beale & Wm. C. Bryson, Grand Jury Law and Practice § 7.02, at 5 (1986)), and Rule 6(e), as originally promulgated, codified the common law rule of grand jury secrecy (Fed. R. Crim. P. 6(e) (U.S.C.A.), Advisory Committee Notes, 1944 Adoption). The original version of Rule 6(e) did not include the present last sentence, which states that knowing violations may be punished as contempt; that sentence was added in 1977 to "allay fears" that other changes made to the Rule in that year (relating to provision of grand jury materials to other government personnel for use in criminal law

enforcement) would "lead to misuse of the grand jury to enforce non-criminal Federal laws." S.Rep. 95-354, 95th Cong., 1st Sess. 7 (1977). Thus, neither Rule 6(e) as originally promulgated, nor the legislative history of the 1977 clarifying amendment, makes any mention of a private right of action for injunctive relief. "[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." Touche Ross & Co., 442 U.S. at 571. Further, where a statute or rule expressly provides a particular remedy -- here, contempt -- "'a court must be chary of reading others into it.'" Meghrig v. KFC Western, Inc., 116 S. Ct. 1251, 1256 (1996) (quoting Transamerica Mortgage Advisors, Inc., 444 U.S. at 19); see also Cort v. Ash, 422 U.S. 66, 79-80 (1975) (suggesting caution in reading a private right of action into a criminal statute).

The practical consequences of implying a private right to injunctive relief confirm that such a right was not contemplated by Rule 6(e)'s authors. First, there is no need to enjoin the government (or others) to do what is already required by rule. If the government fails to comply with Rule 6(e), a court has the power, granted by the Rule, to impose a contempt sanction; no prior notice in the form of an injunction is needed. Further, injunctions historically have not been issued to prevent crimes, since such injunctions are viewed as superfluous and contradictory of the sanction imposed by the legislature for the crime. See 11A Wright § 2942, at 70-71. In this case, for example, if the requested injunction were imposed, the government

would merely be ordered to carry out its existing legal obligation of complying with Rule 6(e), a superfluous instruction. And confusion would result in the event of a violation, as to whether punishment would be one contempt sanction, for violation of Rule 6(e) -- or two, for violation of Rule 6(e) and the injunction. Structurally, then, Rule 6(e) does not lend itself to private injunctive relief.

Further, a private right of action for injunctive relief against the Antitrust Division -- the relief requested in this case (J.A. 23) -- raises issues of sovereign immunity. The Fifth Circuit has held, subsequent to Lance, that sovereign immunity bars a suit against a branch of the U.S. government to enjoin a violation of Rule 6(e). McQueen v. Bullock, 907 F.2d 1544, 1550-1551 (5th Cir. 1990)(no statute "even remotely suggest[s]" that United States has agreed to be sued for Rule 6(e) violations), cert. denied, 499 U.S. 919 (1991).

A private right of action for injunctive relief under Rule 6(e) would also create other problems, and even invite the abuse of the Rule. If allegations are made of Rule 6(e) violations occurring in the course of a government criminal investigation, the government may respond with a filing describing how the investigation was in fact conducted in order to show that grand jury secrecy has not been violated. Such a response will often involve confidential matters of great interest to the targets of the grand jury, and will be filed ex parte. The court must then decide, as it was asked to do in this case (see J.A. 169),

whether the government must give the complaining entity access to this filing. If the complaining entity is viewed as an actual party to the matter (rather than as a citizen bringing the matter to the court's attention), its claim of a right to view the confidential material is far more compelling. And the temptation for individuals and companies that are under investigation to make unfounded claims of Rule 6(e) violations in order to obtain access to such ex parte filings is correspondingly greater.

In view of all these circumstances, there is no reason to believe that Rule 6(e)'s authors contemplated a private right to seek injunctive relief. Accordingly, while the district court could consider appellants' claims of Rule 6(e) violations, its consideration of these claims did not make appellants a party to the Rule 6(e) inquiry. The district court had no power to enter an injunction in their favor, and, accordingly, appellants have no jurisdictional basis on which to pursue this appeal.

III. EVEN IF A PRIVATE PARTY HAS A CAUSE OF ACTION FOR ENFORCEMENT OF RULE 6(E), THIS ORDER CANNOT BE APPEALED BEFORE FINAL JUDGMENT

Even assuming that appellants' request for a hearing and injunctive relief is not moot and that Rule 6(e) authorizes them to seek injunctive relief, the district court's order in this case is not reviewable as a "final decision" or as an order denying injunctive relief.

The district court's decision to deny appellants any relief with respect to their claim that the government had violated Rule 6(e) is plainly interlocutory and not final. "A judgment is

considered final when the trial court has conclusively adjudicated all the issues before it and there remains nothing left for it to do but execute the order." Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, 1175 (2d Cir. 1995), cert. denied, 116 S. Ct. 1351 (1996). In this case, the merits of the civil complaint remain unresolved and, therefore, the district court's order cannot be considered final.

Nor is the order reviewable as a final collateral order. See generally Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). In the Midland Asphalt case, both this Court and the Supreme Court had no difficulty concluding that a pre-trial order in a criminal case denying a motion to dismiss an indictment for alleged violations of Rule 6(e) was not immediately appealable as a collateral order. United States v. Midland Asphalt Corp., 840 F.2d 1040, 1045-1046 (2d Cir. 1988), aff'd 489 U.S. 794 (1989). This Court based its decision on its view that post-trial review is available of an order denying a motion to dismiss an indictment for violation of Rule 6(e). 840 F.2d at 1046.

While Midland Asphalt was a criminal case, its rationale compels the conclusion that the order at issue in this case is not reviewable as a collateral order. To fall within the limited class of final collateral orders, which are immediately appealable, an order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand

v. Livesay, 437 U.S. 463, 468 (1978). If, as this Court held in Midland Asphalt,[6] allegations that Rule 6(e) have been violated are reviewable on appeal from a final judgment, then a district court order rejecting those allegations is not "effectively unreviewable on appeal from a final judgment" (Coopers & Lybrand, 437 U.S. at 468 (footnote omitted)), and "a Rule 6(e) challenge does not qualify for immediate review under the collateral order doctrine." 840 F.2d at 1046 (footnote omitted).

There is no reason to treat criminal and civil cases differently with regard to appeal of Rule 6(e) claims. Indeed, any other result would circumvent the clear limitation that this Court and the Supreme Court have placed on interlocutory appeals in criminal cases, by allowing resourceful defendants, like appellants in this case, to assert Rule 6(e) allegations in civil cases in the hope of obtaining immediate appellate review. Accordingly, the collateral order doctrine does not permit appellate review of the order in question.

Nor is the district court's order reviewable as a denial of an injunction pursuant to 28 U.S.C. § 1292(a)(1) (D.Br. 2, 20 n.1). This Court has made clear that merely styling a request as a demand for an injunction is not enough to invoke that statute.

---

[6] The Supreme Court did not decide whether the order was not appealable on the basis of this Court's rationale or because, under the rationale of United States v. Mechanik, 475 U.S. 66 (1986), the order "cannot be said to 'resolve an important issue completely separate from the merits of the action.' Coopers & Lybrand [v. Livesay, 437 U.S. 463,] 468 [1978]." Midland Asphalt Corp v. United States, 489 U.S. 794, 799-800 (1989).

As Judge Friendly said in International Products Corp. v. Koons, 325 F.2d 403, 406 (2d Cir. 1963)(footnote omitted):

> We think it better, in line with our prior decisions, to continue to read § 1292(a)(1) as relating to injunctions which give or aid in giving some or all of the substantive relief sought by a complaint * * * and not as including restraints or directions in orders concerning the conduct of the parties or their counsel, unrelated to the substantive issues in the action, while awaiting trial.

At issue in Koons, a diversity case, was an order enjoining the defendants and their attorneys from publishing or disclosing to any third party anything contained or referred to in depositions in the action or in documents produced or submitted to the court, concerning certain payments made to officials of South American governments. The moving affidavit claimed that the described material could embarrass the moving party if made public and would be contrary to the best interests of U.S. foreign policy. The State Department officially supported the order to limit disclosure. Appellants, claiming constitutional and statutory errors, appealed the discovery order under 28 U.S.C. § 1292(a)(1). 325 F.2d at 404-405 & n.1. This Court concluded that the order was not appealable either as an injunction or under the collateral order doctrine. 325 F.2d at 406-407.

This Court consistently has followed Koons in subsequent cases, holding that district court orders regulating confidentiality of documents and depositions during civil litigation are not appealable under section 1292(a)(1), since they do not give or aid in giving the substantive relief sought by the complaint, but rather regulate the conduct of the

litigation. See, e.g., Fonar Corp. v. Deccaid Services, Inc., 983 F.2d 427, 430 (2d Cir. 1993)(protective order, which did not purport to grant any of the ultimate relief sought, denied interim review); Bridge C.A.T. Scan Assocs. v. Technicare Corp., 710 F.2d 940, 943-944 (2d Cir. 1983)(order prohibiting disclosure of proprietary data contained in an exhibit to the complaint was not an appealable injunction under § 1292(a)(1)); Xerox Corp. v. SCM Corp., 534 F.2d 1031, 1031-1032 (2d Cir. 1976)(discovery orders regarding privilege claims are not subject to interlocutory appeal); see also Ronson Corp. v. Liquifin Aktiengesellschaft, 508 F.2d 399, 401 (2d Cir. 1974)(injunction regarding collateral matters not appealable under § 1292(a)(1)); 9 James Wm. Moore, Federal Practice ¶ 110.20[1] at 218 (2d ed. 1996).

In this case, appellants raised their Rule 6(e) claim primarily in the context of seeking to block the stay of civil discovery that the United States was seeking. Their argument was that the government had violated Rule 6(e) and therefore should not be permitted to seek a stay of discovery in the civil case. D.Mem.Law at 4-22. In addition, they sought the order prohibiting disclosure of confidential Rule 6(e) materials that is at issue on this appeal. The district court's ruling denying this latter order did not "give or aid in giving some or all of the substantive relief sought by a complaint"; rather it "concern[ed] the conduct of the parties or their counsel, unrelated to the substantive issues in the action, while awaiting

trial." Koons, 325 F.2d at 406 (footnote omitted). The court sought only "to regulate disclosures by [a party] during the course of the litigation." Bridge C.A.T. Scan Assocs., 710 F.2d at 944. Thus, like the order in Koons, the order here is not immediately appealable, but must await final judgment in the civil case.

IV. THE DISTRICT COURT PROPERLY DENIED APPELLANTS' RULE 6(E) MOTION

If this Court does reach the merits of this appeal, it should affirm the district court's correct ruling that appellants had not made out a prima facie case that the government had violated Rule 6(e).[7]

"Before a court will order a hearing on a possible breach of the Grand Jury Secrecy Rule, the defendant must establish a prima facie case of a violation of * * * [Rule] 6(e)." United States v. Rioux, 97 F.3d at 662 (post-trial appeal from denial of motion to dismiss indictment). Where the complainant relies on media accounts to establish a prima facie violation (ibid.):

> the court should examine, among other factors: (1) whether the media reports disclose matters occurring before the grand jury; (2) whether the media report discloses the source as one prohibited under Rule 6(e); and (3) evidence presented by the government to rebut allegations of a violation of Rule 6(e).

To the extent, however, that the media report "discusse[s] federal 'investigations' without actually discussing matters

---

[7] This Court reviews district court decisions regarding Rule 6(e) disclosure for abuse of discretion. United States v. John Doe, Inc. I, 481 U.S. 102, 116 (1987); In re Grand Jury Subpoena, 72 F.3d 271, 275 (2d Cir. 1995).

before the grand jury," the defendant fails to make out a prima facie case. Ibid.

As Rioux indicates, Rule 6(e) is violated only if "matters occurring before the grand jury" are disclosed; and the defendant has the burden to show that this has happened. See also, Barry v. United States, 865 F.2d 1317, 1321 (D.C.Cir. 1989)(initial burden of proof is on complainant). Rule 6(e) does not cover all information developed during the course of a grand jury investigation, but rather only information that would reveal the strategy or direction of the grand jury's investigation, the nature of evidence produced before the grand jury, the views expressed by members of the grand jury, or anything else that actually occurred before the grand jury. See, e.g., DiLeo v. Commissioner of Internal Revenue, 959 F.2d 16, 19-20 (2d Cir.), cert. denied, 506 U.S. 868 (1992); Senate of the Commonwealth of Puerto Rico v. United States Department of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987); Anaya v. United States, 815 F.2d 1373, 1378-1380 (10th Cir. 1987); United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 53-54 (2d Cir. 1960). Information that does not reveal the "inner workings" of the grand jury is not covered by Rule 6(e). S.R. Mercantile Corp. v. Maloney, 909 F.2d at 83.

This Court has already applied these principles in Rioux to hold that the government may speak publicly about its own investigation without violating Rule 6(e), provided it does not "actually discuss[] matters before the grand jury." Rioux, 97

F.3d at 662.[8] The same conclusion has been reached by other circuits. Barry, 865 F.2d at 1320 (newspaper reports that "mention law enforcement officials only in connection with 'investigations' underway that were not explicitly linked to the grand jury proceedings" -- such as a report quoting the U.S. Attorney "as indicating that a long-running secret probe of federal and local contracts was continuing" -- do not make out a prima facie case); In re Grand Jury Investigation (Lance), 610 F.2d 202, 217 nn.5, 6 (5th Cir. 1980)(Rule 6(e) does not apply, inter alia, to disclosures that the government would not decide whether to seek an indictment until after the impending election; that the government had attempted to plea bargain with a Lance associate in return for his testimony against Lance in a criminal proceeding; or that a "source familiar with the grand jury inquiry" felt that there would not be a tax action brought against Lance for use of a bank airplane).

Appellants point to two specific incidents that they allege make out a prima facie violation of Rule 6(e). But, as the district court correctly determined, appellants failed to make out a prima facie case because, like certain of the media reports in Rioux, the government revealed only "its -- as opposed to a

---

[8] Appellants cite United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) to show that 6(e) materials cannot be used in civil litigation except in compliance with Rule 6(e). D.Br. 15-17. While this is clearly correct, Sells is of limited relevance to this case because it involved a request for permission to disclose matters occurring before the grand jury; this case, by contrast, involves the question whether disclosure occurred.

grand jury's -- investigation" (J.A. 292) and thus did not violate Rule 6(e).

1. Trade magazine article. Appellants claim that an article appearing in the July/August 1995 edition of the P-O-P Times (text at J.A. 132-133), a newspaper for the point-of-purchase trade, shows that a government attorney disclosed matters occurring before the grand jury to that newspaper's reporter. D.Br. 9-10, 21-22. That article, however, nowhere refers to any grand jury or any matter occurring before a grand jury, such as the identity of any grand jury witness, or testimony given before the grand jury, or the name of any grand jury target. Rather, the article describes only the government's investigation.

The article begins by making clear that it is describing the government's investigation: "Describing it as an 'on-going investigation,' the federal government continues to seek indictments against P-O-P industry officials on a variety of antitrust charges." J.A. 132 (emphasis added). The article describes guilty pleas already entered in an "on-going investigation by the Antitrust Division," and states that a Division attorney had said that "[m]ore indictments are probable"[9] and that "[t]his is an ongoing investigation * * *

---

[9] The government's publicly filed Memorandum in Opposition makes clear that the Division attorney likely was misquoted, and in fact stated that "more charges" (not "more indictments") would be brought. The reporter may not have understood the distinction between indictments and informations. Two informations were in fact filed in September. J.A. 154. Elsewhere in the article, the reporter correctly refers to "charges." The district court

More charges will be brought against others in the future. We're always busy on this case." Ibid. The article next describes in some detail public charges and guilty pleas as of late June 1995. J.A. 132-133. The article notes that most pleas are pursuant to cooperation agreements with federal officials, and quotes the government lawyer as saying: "The plea agreements we have signed with several of the defendants cite information that relates to additional crimes that the government acknowledges the defendants won't be prosecuted for." The article then states, without attribution, that "[i]n those agreements, however, the actions of other companies and individuals arise, and those are being investigated." The article quotes the government attorney as "add[ing]" "[t]here are a whole host of names floating out there in the plea agreements." The attorney is quoted as refusing to comment on newspaper reports that "[o]ther major New York-based companies in consumer goods fields" are under investigation, but as stating "[t]here are different phases of this investigation under way at all times. * * * The cooperation of some defendants is leading us to others, and the investigation will continue for some time."

Whether the article is taken as a whole or parsed sentence-by-sentence, the government attorney was discussing only the government's investigation, and was doing so only in general

---

could consider the government's explanation in deciding if appellants had made out a prima facie case. See Rioux, 97 F.3d at 662 (court should consider "evidence presented by the government to rebut allegations of a violation of Rule 6(e)").

terms. When asked to provide individual company names, the attorney refused.[10] The reference, of which appellants make much (D.Br. 10), to "a whole host of names floating out there in the plea agreements" is a reference only to the direction of the government's investigation, and the source of its leads. Similarly, the attorney's statement that "more charges will be brought" is a statement of the government's intention. The attorney merely said it was the government's intention to seek to institute unspecified charges against unspecified individuals at an unspecified time in the future. Under Rioux, as well as Barry and Lance, those statements are not a violation of Rule 6(e) because they do not disclose matters occurring before the grand jury.

2. Statement to Customer. Appellants also assert (D.Br. 12-14, 26-27), relying on their counsel's hearsay statements contained in declarations filed with the district court, that the government violated Rule 6(e) by making disclosures to a former customer of appellant Genetra. But again, even assuming that the conversation occurred as related in the declaration, no violation of Rule 6(e) occurred, because the government is not alleged to have revealed more than the course of its own investigation.

---

[10] Appellants assert (D.Br. 23) that the government failed to deny that the Division attorney's references were to "subjects and targets of the grand jury investigation." This is incorrect; the government's memorandum discusses this issue at length, asserting that the P-O-P article "contains no information relating to matters occurring before the grand jury." See, e.g., J.A. 153-156.

The declaration by appellants' counsel in support of their Rule 6(e) motion alleged that Genetra was removed from a list of vendors after a customer talked with a Division attorney. The declaration did not recount anything about the substance of the alleged conversation between the customer and the government attorney. J.A. 42. The declaration, however, referred to a second declaration filed under seal (Exhibit O, text at J.A. 134-137), prepared by the same counsel. That declaration, in recounting the alleged conversations,[11] referred to vendors "under investigation" (J.A. 136), but did not specify whether this was the grand jury's investigation or the government's investigation.

On their face, appellants' allegations do not show a breach of Rule 6(e), since Rule 6(e) permits the government to talk about its own investigations. The government responded to these allegations with a supplemental affidavit disclosing "the context and full scope and purpose of this particular communication." J.A. 157. This affidavit ultimately was not relied upon by the court because the court did not consider it necessary to resolution of the dispute (J.A. 169). The government also paraphrased the affidavit in its public filing, stating that the

---

[11] Appellants did not file an affidavit by the person who actually talked to the government attorney, nor explain why such an affidavit could not be obtained. They did not even reveal their source's name in the declarations. The government urged the district court not to rely on counsel's hearsay statements, citing United States v. Frank, 225 F. Supp. 573, 575 (D.D.C. 1964) (affidavit in support of motion alleging 6(e) violation which was based on hearsay was insufficient in face of government affidavit based on direct knowledge). J.A. 157 (n.2).

material in the affidavit "makes clear that the government attorney did not disclose any matters occurring before the grand jury" and that "the communications with the industry representative were made solely for purposes related to its criminal investigation." The government further stated that the appellants' assertion that the government had divulged information about its investigation to reward a company that had cooperated with the government was "entirely baseless and offensive." J.A. 157.

Under these circumstances, the district court properly concluded that appellants had failed to make a prima facie case of a Rule 6(e) violation. The burden was on appellants to show that the government had revealed matters relating to the grand jury proceedings. Counsel's declaration, if grand jury matters had in fact been revealed, could have so stated. However, the declaration referred only to "investigation[s]." In these circumstances, as the court correctly observed (J.A. 292), "[r]evelation by the government, as prosecutor, of its -- as opposed to a grand jury's -- investigation does not violate [Rule] 6(e)."

3. Publicly filed documents. Finally, appellants complain about the government's motions to place plea agreements in the public record, as well as its public filing of sentencing memoranda. D.Br. 6-9, 10-11, 16, 22-25.[12] Appellants do not

[12] Appellants also claim (D.Br. 4) that the civil action was a "direct result" of the alleged Rule 6(e) violations. This assertion is false. According to the complaint, Philip Morris

claim that any Rule 6(e) material was disclosed by the plea agreements; indeed these plea agreements were each filed with the consent of the presiding district court, as appellants admit (D.Br. 6-7). But they suggest something sinister in these filings claiming that they were intended perhaps as a set-up for the P-O-P (or some similar) article, so that the government could easily reveal to the public the course of investigations by referring to these plea agreements when asked by reporters.

The district court correctly rejected this argument. As the district court observed (J.A. 292-293), there is nothing sinister about making the text of plea agreements public, particularly after obtaining the consent of the presiding court. This Court has held that plea agreements are presumptively to be made available to the public. United States v. Haller, 837 F.2d 84,

---

began its investigation on its own in 1989, after receiving an anonymous complaint. This resulted in the discharge of employees Michael Heinrich and Louis Cappelli in September 1991. J.A. 225-230; see also J.A. 116-117. Philip Morris then contacted the Antitrust Division in early 1992 with the evidence it had developed (J.A. 230) and the Division commenced an investigation. Cappelli's counsel thereafter contacted Philip Morris in April 1993 in an attempt to settle any civil claims that Philip Morris might have had against him. J.A. 231. Cappelli eventually, in February 1994, entered into a settlement agreement with Philip Morris, pursuant to which he provided information to it on "previously unknown details concerning the bid-rigging and bribery conspiracy." J.A. 233. A salesman for a supplier, John Clemence, also approached Philip Morris to discuss settling civil claims, and reached a settlement which involved providing information to Philip Morris on the conspiracy. J.A. 233-234. Appellants are simply wrong is asserting (D.Br. 3-4) that Philip Morris "began this civil suit only after the Antitrust Division made Cappelli and Clemence available to it for interviews concerning the facts underlying the criminal case and this lawsuit." Clemence and Cappelli were free to speak to anyone they chose, and they apparently spoke to Philip Morris for their own personal reasons, to settle civil liabilities.

86-87 (2d Cir. 1988). The right of public access to public trials and pretrial hearings, and related documents, "is the rule, and it is a rare and exceptional case where it does not apply." United States v. Cojab, 996 F.2d 1404, 1407-1408 (2d Cir. 1993). Indeed, the Division generally files its plea agreements on the public record. Further, under the rationale of these cases, it is proper to file in the public record government sentencing memoranda, provided they do not reveal grand jury matters or statutorily protected confidential information.

Second, as we have already shown, Rule 6(e) does not regulate the government's public disclosure of the course of its own investigations, provided the government does not, in the process, disclose matters occurring before the grand jury. Rioux, 97 F.3d at 662. With this qualification, if the government wishes to discuss its investigation publicly, or file plea agreements publicly, Rule 6(e) simply does not apply.[13]

Finally, as a factual matter, the plea agreements and sentencing memoranda cited by appellants revealed nothing about matters occurring before the grand jury. They make no mention of who the targets or subjects of any grand jury investigation are or will be, or the direction of the grand jury investigation. Of the plea agreements cited by appellants in support of their 6(e)

---

[13] Appellants claim that the Fourth Circuit in Finn v. Schiller remanded the case because the prosecutor had publicly filed a "sweeping statement of fact" alleging violations by unindicted individuals. D.Br. 24. It appears, however, that the district court in Finn did not hear the merits, and the remand was ordered to consider the complainant's allegations for the first time. 72 F.3d at 1185, 1186, 1189 n.7, 1191.

motion, only the Bert Levine plea agreement mentions any appellant by name. See J.A. 88-94 (text). That agreement states that the government will not prosecute Levine for past sales or supplying of cash or false invoices involving appellant Genetra (J.A. 90). That statement reflects only the government's decision (and promise) not to prosecute, and in no way discloses what occurred before the grand jury. In addition, the sentencing memorandum for Richard Billies and Sidney Rothenberg (J.A. 108-122) refers to appellant Visart's role in the conspiracy; but the document nowhere suggests that this information is taken from grand jury materials or otherwise recounts matters occurring before the grand jury.[14]

In short, none of the materials cited by appellants reveals matters occurring before the grand jury and relating to appellants, and therefore, appellants have no basis under Rule 6(e) for complaining about public references by Division attorneys to these materials.

---

[14] At his sentencing, Rothenberg referred to his dealings with Visart (J.A. 125-126), but he was speaking from his own experience. Similarly, sentencing memoranda in Levine's and Berger's cases refer to what was said about Visart at allocutions in other cases (J.A. 129, 131), but this is not grand jury material.

CONCLUSION

For the reasons stated above, the appeal should be dismissed. If this Court reaches the merits of the appeal, the district court's order should be affirmed.

Respectfully submitted.

JOEL I. KLEIN
Acting Assistant Attorney General

A. DOUGLAS MELAMED
Deputy Assistant Attorney General

JOHN J. POWERS, III
MARION L. JETTON

Attorneys
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3680

OF COUNSEL:

RALPH T. GIORDANO
STEVEN TUGANDER

Attorneys
U.S. Department of Justice
New York, New York

MARCH 1997

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 1997, I caused two copies of the foregoing BRIEF FOR APPELLEE UNITED STATES OF AMERICA to be served by overnight courier upon:

Ronald E. DePetris, Esq.
DePetris & Bachrach
620 Fifth Avenue
New York, New York 10020

MARION L. JETTON
Attorney
Antitrust Division
Department of Justice
Washington, D.C. 20530

(202) 514-3680