05-1480

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STOLT-NIELSEN, ET AL.
Plaintiffs-Appellees,
v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(Honorable Timothy J. Savage, Jr.)

REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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INTRODUCTION AND SUMMARY OF ARGUMENT

By November 22, 2002, SNTG knew that its illegal conduct was likely to be the subject of a Division criminal investigation. SNTG hired experienced counsel to ask the Division to grant it, and its executives, leniency. Indeed, SNTG's board – at the request of Samuel Cooperman, a senior SNTG official who was involved in the conspiracy (JA468) – authorized counsel to seek leniency from the Division without waiting for counsel to conduct an investigation and offer his legal advice. JA316, 332.

But SNTG realized it was not eligible to receive leniency. The Division's Leniency Program requires leniency applicants to have taken prompt and effective action to terminate their part in the illegal activity being reported upon discovery. JA77, 79, 392. SNTG had discovered the illegal activity being reported at least nine months before its board authorized a leniency application. But rather than end its participation in the illegal conduct, SNTG had re-affirmed its participation in the conspiracy and had taken steps to hide its continued involvement. US Br. 10-17.

Because the truth would have denied SNTG leniency, SNTG lied. Specifically, it lied in the leniency Agreement about having taken prompt and effective action to terminate its involvement in the conduct being reported upon its

initial discovery. To cover-up its lie, SNTG both provided false information and withheld evidence concerning its continued involvement in the conspiracy.

The district court nonetheless took the extraordinary step of permanently enjoining the Division from indicting SNTG or its executives. As the District of Columbia Circuit has explained, case law reveals no instance of a court enjoining "a federal prosecutor's investigation or presentment of an indictment." *Deaver v. Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987). And every court that has interpreted a non-prosecution agreement has held that a plaintiff may not litigate a defense to a proposed indictment in a pre-indictment civil proceeding. Plaintiffs can assert their claim that the Agreement precludes their prosecution post-indictment, assuming they are indicted, which provides an adequate remedy at law precluding injunctive relief. *United States v. Kenny*, 462 F.2d 1230 (3d Cir. 1972).

Plaintiffs offer no justification for the district court's unique order. The cases they rely on do not address the exercise of prosecutorial discretion in a particular federal grand jury investigation and are fully consistent with *Deaver*. In contrast, the injunction entered here infringes the exclusive authority granted in the Constitution to the Executive Branch to determine whether a particular criminal case should be filed. *Deaver*, 822 F.2d at 68-71.

Plaintiffs' claim that the Division "waived" its irreparable injury argument with respect to preliminary injunctive relief – as opposed to permanent injunctive relief (JA613-14) – simply ignores the Division's point, which was that the district court erred when it attempted to justify "judicial resolution" (JA30) of plaintiffs' breach of agreement defense before indictment because it believed that plaintiffs would otherwise suffer "irreparable consequences." JA31. Given that the district court reached and relied upon an irreparable injury finding to justify a pre-indictment "judicial resolution" (JA30) of a defense to an unfiled criminal case, the court did not treat the issue as waived. In any event, the government is entitled to explain why the reasons the court relied on are wrong as a matter of law. *Younger v. Harris*, 401 U.S. 37, 46 (1971).

Plaintiffs, like the district court, incorrectly focus on when SNTG's outside counsel, Nannes, concluded that SNTG violated the antitrust laws. But the issues are when did SNTG itself discover the conduct it reported to the Division, and did SNTG take prompt and effective action to terminate its involvement in that conduct. In fact, the evidence, mostly ignored by both plaintiffs and the district court, establishes that O'Brien, SNTG's former general counsel and antitrust compliance officer, discovered the anticompetitive conduct at least nine months

before SNTG retained Nannes. But rather than terminating the conduct then, SNTG took steps to conceal its continued involvement in the conspiracy.

Finally, while plaintiffs claim that they complied with the Agreement's cooperation requirement, they ignore the evidence they withheld, its significance, and the false information SNTG provided. Notwithstanding that SNTG's senior executives were aware of the fact, plaintiffs never disclosed that the conspiracy continued well after March 2002. A conspiracy's full scope and duration are critical not only to understanding and correctly charging the offense, but also in calculating the appropriate sentence (U.S.S.G. § 2R1.1) and victim harm. Any claim that the Division received the "benefit of the bargain" is belied by the fact that plaintiffs' failure to cooperate fully and truthfully compelled the Division to make substantial assistance downward departure motions for SNTG's co-conspirators to obtain the information plaintiffs withheld. After the Division suspended SNTG's cooperation under the Agreement, it negotiated plea agreements calling for substantial assistance departures with two corporate co-conspirators and three of their executives who revealed that the conspiracy continued to operate secretly until November 2002.

I. INJUNCTIVE RELIEF WAS NOT APPROPRIATE

1. SNTG[1] argues that the plain language of the Agreement gives it a right to pre-indictment review. SBr. 48-50. But the Agreement expressly allows the Division to void it and criminally prosecute SNTG "without limitation" if the Division determines that SNTG violated it (JA74), and contains no provision authorizing pre-indictment review of the Division's decision to void it. Of course, if SNTG is indicted, it can raise any valid defense post-indictment. For this reason, SNTG's argument (SBr. 45) "that the government cannot unilaterally determine" whether it breached the Agreement is irrelevant. If SNTG is indicted, it can ask the district court to adjudicate its contractual defense. If it is not indicted, it has no complaint.

No court has ever forced the United States to litigate a breach of an agreement not to charge or prosecute a defendant pre-indictment, or reversed a conviction simply because the United States did not seek a pre-indictment determination of whether a defendant had breached a plea agreement. US Br. 34-37. SNTG's attempts to avoid this unbroken line of precedent are unpersuasive.

[1]References to arguments made by SNTG also include any related argument made by Wingfield.

SNTG interprets the Agreement to mean it cannot be indicted. The Supreme Court rejected SNTG's argument almost 100 years ago in *Heike v. United States*, 217 U.S. 423, 431 (1910). In *Heike*, the plain language of an immunity statute stated that "[n]o person shall be prosecuted" who testified or produced evidence pursuant to that statute. The defendant argued "that the complete immunity promised is not given unless the person entitled to the benefits of the act is saved from prosecution, for . . . if the act is to be effective it means not only immunity from punishment, but from prosecution as well." 217 U.S. at 431. The Supreme Court rejected this argument holding "that the statute does not intend to secure to a person making such a plea immunity from prosecution, but [only] to provide him with a shield against successful prosecution, available to him as a defense." *Id.* The language in the Agreement is indistinguishable from that in the statute at issue in *Heike*.

Similarly, in *United States v. Kenny*, 462 F.2d 1230, 1232 (3d Cir. 1972), this Court reversed an order enjoining a state court prosecution even though the district court had relied on express language in an immunity statute providing that an immunized witness could not be prosecuted. This Court held that the defendant should raise his statutory defense in the state court criminal case. *Id.* Finally, as previously noted (US Br. 35-36), every other court of appeals that has interpreted

an agreement not to "charge" or "prosecute" a defendant has agreed that such language only precludes a successful prosecution, not an indictment.[2]

Relying on *United States v. Meyer*, 157 F.3d 1067 (7th Cir. 1998), and *United States v. Verrusio*, 803 F.2d 885 (7th Cir. 1986), SNTG claims "that if the defendant's benefit of the bargain was not to be indicted, then due process would have required a pre-indictment hearing on the alleged breach." SBr. 47. In fact, the agreements at issue in both *Meyer* (157 F.3d at 1076-77) and *Verrusio* (803 F.2d at 886-87 & n.1) contained express promises not to "charge" the defendants. Nevertheless, the Seventh Circuit rejected defendants' claims that they were entitled to a pre-indictment hearing on the breach of promise issue, noting that the benefit of the defendants' bargains "was to avoid the risk of conviction." *Meyer*, 157 F.3d at 1077 (citing *Verrusio*).

SNTG argues that *Meyer* and *Verrusio* are distinguishable because "in both of those cases the defendants entered into their immunity agreements after they had already been indicted." SBr. 47. That argument ignores the express provisions of both bargains – a promise not to "*file* any additional known charges or newly discovered charges." *Meyer*, 157 F.3d at 1077 (emphasis added). The

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[2] *United States v. Minn. Mining & Mfg. Co.*, 551 F.2d 1106 (8th Cir. 1977) (SBr. 43), involved a post-indictment interpretation of a promise not to prosecute.

defendants in those cases thus claimed unsuccessfully the same alleged right SNTG claims – a right to a pre-indictment hearing before charges are filed.[3]

While the Seventh Circuit has stated in *dicta* that the "preferred procedure" (*id.*) in breach of promise cases is a pre-indictment hearing, this *dicta* is unpersuasive. Even assuming there are cases in which that procedure is preferable,[4] the Seventh Circuit has never made it the "required procedure" or addressed the separation of powers or grand jury implications of such a holding.

SNTG claims that because the Division "participated voluntarily in" the hearing, it cannot challenge the "legitimacy" of that hearing. SBr. 49-50. In fact, the hearing was held over the Division's express objection. *See* Memorandum In Support of Government's Response In Opposition To Plaintiffs' Motion For A Pre-Indictment Hearing, filed March 5, 2004. JA5, DE 9. In that Memorandum,

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[3]Moreover, the non-prosecution agreement in *United States v. Bailey*, 34 F.3d 683 (8th Cir. 1994), was signed prior to indictment. *Id.* at 685. The court held that the government's promise "not to prosecute" Bailey gave him only the benefit of avoiding "the inherent risk of conviction and punishment as a result of the trial," not "a right 'not to be tried.'" *Id.* at 690-91.

[4]*See United States v. Bielak*, 660 F. Supp. 818 (N.D. Ind. 1987). For example, the United States might voluntarily seek a pre-indictment determination that a defendant violated a court-approved plea agreement when there is little risk that grand jury secrecy would be compromised or its investigation unduly delayed. This case does not involve a court-approved plea agreement (US Br. 42), grand jury secrecy remains an issue, and the pre-indictment hearing has delayed the grand jury's investigation since April 2004.

the Division argued that SNTG was not entitled to either a hearing or to injunctive relief, citing, among other cases, *Deaver* and *Younger*. Once the Court decided to have a hearing notwithstanding the Division's opposition, the Division participated subject to its prior objection. But that participation does not change the fact that a pre-indictment hearing was improper. Similarly, while the Division, at the district court's request (JA28, 51, 644), agreed not to seek an indictment to allow the court time to decide the case, that common courtesy did not waive the Division's objections both to the hearing itself and to plaintiffs' claims. The Executive Branch should not be penalized for respecting a judicial request after properly lodging its objection.

Finally, SNTG claims that the grand jury investigation was not impeded. SBr. 50-51. But any decision that "saddle[s] a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States v. Dionisio*, 410 U.S. 1, 17 (1973). The minitrial in this case, and the resulting delay, is exactly the sort of disruption the Supreme Court held should not occur. *Id.*; *United States v. Calandra*, 414 U.S. 338, 343-52 (1974).

2. SNTG asserts that "there are numerous cases in which federal courts have enjoined federal prosecutions." SBr. 35. But those cases suggest no reason

to exempt SNTG from the "[t]he traditional rule" that a court of equity "had 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' and therefore could not enjoin criminal proceedings." *Deaver*, 822 F.2d at 68, (quoting *In re Sawyer*, 124 U.S. 200, 210 (1888)). "Departing somewhat from this rule around the turn of the century, the Supreme Court in certain cases permitted federal courts to issue injunctions against *state* court criminal proceedings that threatened federal constitutional rights." *Deaver*, 822 F.2d at 68; *see* SBr. 38-39. But "[m]ore recently . . . the Court, troubled by notions of comity, tightened the criteria for granting federal injunctions that interfere with state criminal proceedings, holding that the 'cost, anxiety, and inconvenience of having to defend against a single criminal prosecution' are not recognized as irreparable injuries justifying an equitable remedy." *Deaver*, 822 F.2d at 69, (quoting *Younger*, 401 U.S. at 46); *Lui v. Comm'n, Adult Entm't, DE*, 369 F.3d 319, 325 (3d Cir. 2004). Thus, since *Younger*, "the Supreme Court has upheld federal injunctions to restrain state criminal proceedings only where the threatened prosecution chilled exercise of First Amendment rights." *Deaver*, 822 F.2d at 69.[5]

[5]The two district court decisions cited by SNTG (SBr. 39) both involved First Amendment issues and, in any event, both decisions allowed the government to file a single (as opposed to multiple) criminal case against alleged

While comity concerns are not raised here, *Deaver* explains that equally important considerations – including federal criminal procedure, and the final judgment rule – compel the conclusion that a federal court should not enjoin a federal criminal proceeding. *Id.* at 69-71. SNTG attempts to dismiss *Deaver*, asserting that it was decided without "full briefing." SBr. 44. In fact, the court ordered and considered "supplemental briefs" (822 F.2d at 68) before deciding the case.

None of the cases in SNTG's lengthy string cite (SBr.37-41) involves a post-*Younger* situation comparable to this case. SNTG relies primarily on cases challenging a statute or regulation as unconstitutional on its face. SBr. 38-40. But plaintiffs mounting such a facial challenge might suffer irreparable injury if the statute chills the exercise of their constitutional rights, and thus may not have an adequate remedy at law in a criminal proceeding. Such cases are frequently filed "immediately after the President sign[s] the statute" (*Reno v. American Civil Liberties Union*, 521 U.S. 844, 861 (1997)), and do not focus on how the Executive Branch exercised its prosecutorial discretion during a particular on-going investigation. Accordingly, such cases do not involve the separation of powers issues raised by the district court's action.

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pornographers.

Nor do other attacks on the constitutionality or validity of some statute or regulation raise those issues in the absence of any interference with a particular on-going grand jury investigation or criminal trial.[6] In contrast, this case falls comfortably within the traditional rule announced in *Sawyer* because there are no constitutional rights at issue, SNTG has an adequate remedy at law if it is indicted, and the district court's injunction directly barred the Executive Branch from exercising its prosecutorial discretion in connection with an on-going criminal investigation.

3. SNTG's contention (SBr. 29) that the Division "waived" its irreparable injury argument ignores the record and the district court's reasoning. We addressed the issue of irreparable injury in our opening brief (US Br. 26-30) because the district court justified (JA30-31 & n.8) its decision by claiming that a

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[6]*Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) (SBr. 39, 44), involved the validity of a regulation excluding fisherman from certain waters. "[A] case to test the regulation [was] arranged for the opening day of the fishing season." 337 U.S. at 97. Thus, the "test" case did not interfere with an on-going grand jury investigation. Moreover, the Court noted that plaintiffs had the burden of showing "that they are without an adequate remedy at law and will suffer irreparable injury unless enforcement of [an allegedly] invalid regulation is restrained." *Id.* at 98. In *Majuri v. United States*, 431 F.2d 469, 473 (3d Cir. 1970) (SBr. 35), defendants in a criminal case filed a post-indictment injunction case challenging the constitutionality of the federal loansharking statute at issue in their criminal case. Both cases were assigned to the same district court judge who dismissed the civil complaint. This Court affirmed. Nothing in this Court's opinion endorses SNTG's expansive view of the power of district courts to enjoin criminal cases.

post-indictment determination that an indictment had been "wrongfully secured . . . would be too late to prevent the irreparable consequences." JA31. The court also held that SNTG had "incriminated itself." JA32. We observed that both statements are contrary to controlling Supreme Court precedent and, as a matter of law, cannot justify enjoining an indictment. US Br. 27, 30.

Rather than defend the district court's error, SNTG seeks to change the subject by arguing that the issue of irreparable injury was waived at the hearing. SBr. 29-34. But the transcript pages SNTG cites (JA613-14) show only that the parties were agreeing that since the hearing was no longer on a preliminary injunction (*compare* JA205 *with* JA255) the parties did not need to address the irreparable injury element of a preliminary injunction. Thus, SNTG's argument ignores the district court's express justification for holding a pre-indictment hearing, and why that justification is wrong. As the Division had previously argued to the district court, SNTG's irreparable injury evidence – evidence concerning the alleged impact of an indictment on SNTG's finances – was insufficient *as a matter of law* to establish a right to a pre-indictment hearing on a defense to a yet to be filed indictment. JA274, 1010. Notwithstanding the exchange cited by SNTG (JA613-14) or the court's opinion referring to it (JA29), the district court reached the issue without indicating it was waived by the parties.

Moreover, SNTG also argues in this Court that it should not be forced to bear the expense of defending itself post-indictment, and that an indictment might have an adverse effect on its finances. SBr. 32-33. But this does not distinguish SNTG from any other corporation or individual who is the subject or target of a grand jury investigation. "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940); *Deaver*, 822 F.2d at 69. Any other rule would "encourage a flood of disruptive civil litigation" by plaintiffs claiming they should not be forced to bear the expense of defending themselves in a criminal case because they will suffer financial injury. *Deaver*, 822 F.2d at 71. SNTG also claims that it has "expos[ed] itself to a multitude of treble-damage private actions and committ[ed itself to paying] restitution." SBr. 42. But SNTG "exposed itself" by violating the antitrust laws and has only itself to blame for its crime and the consequences of its crime.[7]

Finally, SNTG argues that it "waived important constitutional rights by entering the Amnesty Agreement," citing the Fourth Amendment. SBr. 42-43.

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[7]Wingfield's claims of harm (WBr. 58-60) are also wrong for the same reasons. Moreover, months before his arrest, the *Wall Street Journal* published an article describing at length Wingfield's participation in the conspiracy, relying on lengthy quotes from Wingfield's 2000-2001 e-mails and business journals it had obtained independently. JA166-70.

But as previously explained (US Br. 42), the Agreement contains no waiver of any of SNTG's constitutional rights including whatever Fourth Amendment rights it may have. Moreover, SNTG has never been served with a search warrant. And while it has been served with subpoenas (after its cooperation obligation was suspended), it never waived its right to make any lawful objection to a subpoena. Thus, any suggestion that SNTG was in some way "injured" through "waiver" of rights and therefore suffered irreparable injury is simply wrong.[8]

II. SNTG AND WINGFIELD EACH BREACHED THE AGREEMENT

Not every criminal that violates the Antitrust laws is eligible to receive leniency under the Division's Corporate Leniency Policy. Rather, there are several prerequisites that any applicant must satisfy before it can qualify for leniency. The prerequisite at issue here requires the applicant to take prompt and effective action to terminate its part in the illegal conduct upon discovering it. The applicant must represent that it satisfied this and another prerequisite to make it eligible to receive leniency. The conditional agreement makes the representations subject to verification by the Division. US Br. 5-8. The applicant

[8]Wingfield has not signed any agreement with the Division and has not produced any evidence directly to the Division. JA268. Thus, he has not waived any of his rights and cannot claim "injury" resulting from SNTG's production of corporate documents that may have been in his possession. *See infra* pp. 27-28.

must also pledge to provide "full, continuing and complete cooperation." *Id*. When it signed the conditional Agreement at issue here, SNTG made those representations and promises. US Br. 13; JA44 ¶¶57, 64.

The Division voided the Agreement because the evidence established both that SNTG's misrepresentation made it ineligible to receive leniency, and that SNTG failed to provide the "full, continuing and complete cooperation" required by the Agreement. Thus, SNTG's suggestion that the Division has treated it unfairly is false. Until this case, no leniency applicant had ever lied to the Division about its eligibility for leniency. This separates SNTG from the well over 100 applications for leniency (almost all of which were granted) that the Division has received since revising its Leniency Policy in 1993. Scott Hammond, An Overview of Recent Developments In Criminal Enforcement 8-10 (Jan. 10, 2005) at http://www.usdoj.gov/atr/public/speeches/207226.pdf. Indeed, the Division has every incentive to treat leniency applicants fairly and grant leniency to those that qualify because the Leniency Program produces so many of its convictions and is its "most effective generator of international cartel cases." *Id.* at 8-9.

Rather than determining when SNTG first discovered the conduct it reported to the Division (*e.g.*, whether O'Brien discovered that conduct by

February 2002), the district court instead incorrectly focused on what SNTG's outside counsel Nannes learned after he was retained by SNTG nine months later. It then ignored the cooperation obligation the Agreement imposed on SNTG.

1. SNTG argues that the "lynchpin of the Division's theory" that SNTG had breached the Agreement is a "misrepresentation by Nannes that [SNTG] had discovered and terminated its role in the conspiracy 'in or about March 2002,'" and that the district court found that Nannes had made no such representation. SBr. 52-53. SNTG's argument ignores the plain language of the Agreement and the Division's argument. Under the Agreement, the issues are when did SNTG discover the conduct it later reported to the Division and what did it do about it "upon discovery." JA73. While SNTG now claims that the Division is trying to impose "an additional obligation on [SNTG]" (SBr. 53), the only obligations the Division has ever sought to impose on SNTG are those expressly stated in the Agreement. Indeed, when he met with the Division on December 4, 2002, Nannes plainly understood that SNTG's eligibility for leniency depended on when *SNTG* discovered the conduct being reported and what it did in response.

Nannes acknowledged that the issue at the December meeting was "what the company did after Mr. O'Brien learned about the antitrust conduct." JA457; 459 (Nannes admitting "[t]hat's what I thought was the proper issue under the leniency

policy"). If "what the company did in response to the issues raised by Mr. O'Brien" was "the proper issue under the leniency policy" (JA 458-59), then what "Mr. O'Brien learned about the antitrust conduct" (JA457) must have constituted discovery. Wingfield's notes support this conclusion. Wingfield noted that SNTG could meet the Leniency Policy's "condition" that it "ended promptly" its illegal activity when SNTG "[f]irst found out" about it because SNTG "[g]ave [its] AT [antitrust] policy to competitors/partners" at the March 2002 "NPRA" convention. JA699-702, 404-05, 455, 472-73; *see* US Br. 48 n.24. And the fact, found by the district court, that "Cooperman admitted to Nannes that an internal investigation *would yield* information providing *a sufficient basis to seek amnesty*" during their initial meeting (JA39 ¶22) (emphasis added), supports the conclusion that SNTG had discovered its crime before it hired Nannes. Indeed, Cooperman had secured the authorization of SNTG's Board to contact the Division about leniency before he met with Nannes. JA316, 332.

Both the court and SNTG ignore this evidence and focus instead on when Nannes concluded a conspiracy existed. But what Nannes did or did not know in November-December 2002 is nothing but a distraction, because the real issue is when SNTG itself discovered the conspiracy. And SNTG knew about the conspiracy by at least February 2002. SNTG cannot avoid this fact and restart the

discovery clock by retaining new counsel months later and asking him to conduct his own investigation.

In any event, SNTG is wrong (SBr. 55-56) that the court found that SNTG discovered the conspiracy through Nannes. The court made no finding as to when SNTG discovered the conspiracy and never even addressed whether O'Brien discovered it. The court's finding that Nannes eventually "concluded" that SNTG "agreed to divide customers" (JA25) is irrelevant because the court never equates Nannes' conclusion to SNTG's discovery. Similarly, that Nannes thought the internal fax that O'Brien discovered "was evidence of conscious parallelism, not evidence of an antitrust violation" (SBr. 55), is immaterial. O'Brien alleged in his complaint (JA685) that SNTG had been engaged in price fixing. O'Brien had worked at SNTG for nearly 11 years (JA686 ¶4), was familiar with both the company and the industry, and was "directly responsible for overseeing the company's compliance with . . . antitrust laws." *Id*. ¶5. That O'Brien, with his knowledge and experience, would view the document differently than Nannes, who had been retained by SNTG for only a matter of days, is not surprising.[9] In fact, the record fully supports O'Brien's conclusion. *See*, *e.g.*, GSA157-61.

[9] SNTG has refused the Division's requests to interview O'Brien. JA405-06, 1001.

SNTG's claim that, even if O'Brien discovered the conspiracy by February 2002, it nonetheless took prompt and effective action that eventually led to termination in November (SBr. 56-57, 61), is simply wrong. A nine-month delay from discovery to termination cannot be considered prompt and effective. US Br. 48-49.

Moreover, that SNTG's March 2002 efforts were not effective to terminate its part in the conspiracy is not surprising since: (1) Cooperman, who was personally involved in the conspiracy, investigated O'Brien's report of antitrust violations (JA468),[10] (2) after Cooperman's investigation, all of the SNTG employees involved in the unlawful conspiracy remained in their positions (JA479-80), and (3) SNTG executives, including Wingfield, were still allowed to meet unsupervised with competitors.[11] *E.g.*, JA708 ¶5, 710-11 ¶¶8-12. There is no evidence, and the court made no finding, that SNTG's March 2002 action caused SNTG to cease its conspiratorial conduct.

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[10]In his complaint, O'Brien specifically alleged that Cooperman "was personally involved in the ongoing illegal conduct complained of by Mr. O'Brien," and that because "Cooperman knew that an independent investigation . . . would expose his own criminal conduct . . . Cooperman caused SNTG to refuse to investigate or cease its ongoing illegal conduct." JA692.

[11]For additional evidence of the ineffectiveness of SNTG's March 2002 action *see* GSA97-102, 158-67.

Finally, SNTG's claim (SBr. 61) that "the Agreement is naturally read to require 'prompt and effective' remedial steps upon discovery and absolute termination by January 15, 2003" ignores the plain language of the Agreement. In the Agreement, reflecting one of the prerequisites to obtaining leniency, SNTG expressly represented that it "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity," and the Agreement made this representation subject to verification by the Division. US Br. 5-6; JA73-74. The only reasonable interpretation of this provision is that SNTG was required to take prompt and effective action to terminate its involvement in the conspiracy on whatever date it discovered its involvement. JA410. Any other interpretation of the Agreement renders the representations made by SNTG and the Division's right to verify those representations meaningless and cannot be correct. US Br. 49-50. Indeed, if SNTG's interpretation of the Agreement were correct, then any company that is willing to lie about its eligibility to obtain leniency would be able to obtain it. The plain language of the Agreement does not support such a perverse result.

2. SNTG's claim that it met its cooperation requirement because it used its "best efforts" to do so (SBr. 57-58) is wrong. SNTG has never given the Division

any facts concerning its post-March 2002 conspiratorial activity.[12] JA475. Yet at least four high-level SNTG officials possessed material information regarding that conspiratorial activity. *See* US Br. 15 & n.11. For example, SNTG never told the Division that its Chairman, Cooperman, knew that in October 2002 Wingfield discussed SNTG's bid for an upcoming contract with a co-conspirator. *See* JA706-07 ¶13; GSA 272-76, 299-300.

SNTG's total failure to provide the Division with any information concerning conspiratorial activity that occurred after March 2002 – when its top-level management was aware of it – refutes its claim that it used its "best efforts" to provide "full, continuing and complete" cooperation. *See* JA664-65. Carried to its logical limits, SNTG's theory of cooperation would allow a corporation to obtain conditional leniency and then provide no information to the Division by claiming that its most senior officers' and employees' failure to cooperate cannot be imputed to the company. Similarly, SNTG's attempt to paint Jansen as a rogue employee who lied "to [SNTG] and Nannes" about his and Wingfield's continued unlawful conduct (SBr. 59) must be rejected, because Wingfield, who was Jansen's direct supervisor and in charge of SNTG's worldwide parcel tanker

[12] Thus the court's finding that "[u]sing SNTG's information, DOJ charged Odfjell with [conspiring] *through November 2002*" (JA45 ¶73) (emphasis added) is clearly wrong.

chartering, was fully aware of Jansen's conduct.[13] JA708 ¶5, 710 ¶¶1, 5. In any event, a corporation generally is liable for the acts of its agents. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970). *See* JA213.

SNTG's claim (SBr. 61-62) that any breach by it is not material because the Division received the benefit of the bargain is unpersuasive. This argument ignores the numerous cases cited in our opening brief (US Br. 52-57), including decisions from this Court, holding that the provision of useful information, even evidence that leads to successful prosecutions,[14] does not by itself relieve a party from its breach of an immunity or non-prosecution agreement. Here, as the Division expressly told the court, SNTG's failure to tell the Division the true parameters of the conspiracy prevented the Division from prosecuting the crime to the fullest extent possible, which is what it bargained for but did not receive from

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[13]SNTG's claim that Jansen's affidavits are inadmissible hearsay (SBr. 59) is wrong. One of Jansen's affidavits (JA710-11) was prepared at SNTG's "request[]" (JA616-17) and therefore constitutes a party admission under Fed. R. Evid. 801(d)(2)(C). And both affidavits, which are sworn to and based on Jansen's first-hand knowledge, are party admissions under Rule 801(d)(2)(D). *E.g., Albright v. Virtue*, 273 F.3d 564, 569 n.4 (3d Cir. 2001).

[14]*E.g., United States v. Davis*, 393 F.3d 540, 547 (5th Cir. 2004); *United States v. Carrara*, 49 F.3d 105, 106, 108 (3d Cir. 1995). Wingfield's claim of "substantial assistance" (WBr. 27-31) similarly ignores this precedent.

SNTG.[15] Thus, SNTG's breach caused delays in the grand jury process and required the government to grant immunities it would not have granted and to seek fines and prison sentences less than it otherwise would have.[16] JA 279; 387, 643-44; *see* US Br. 53-54.

SNTG's reliance on *United States v. Fitch*, 964 F.2d 571 (6th Cir. 1992) (SBr. 62), is misplaced. The immunity agreement in *Fitch* provided no remedy for the government in the event Fitch breached it, and only allowed the government to prosecute him for perjury if he made any false statements. 964 F.2d at 573, 575. In upholding the dismissal of Fitch's indictment, the Sixth Circuit held that the government could not void the agreement and prosecute Fitch for the immunized crimes because the agreement lacked any provision allowing the government to

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[15]SNTG's claim that "the district court invited Division counsel to ask the Division witness about any such prejudice (JA387), but counsel never did" (SBr. 62) is wrong. The court's statement – "Ask him about that. Off the record" (JA387) – was made during a colloquy between the court and counsel, and is followed by the reporter's notation that "(Whereupon a discussion was held off the record)." *Id.* Nothing in the transcript ties the court's remark to anybody but the parties' counsel engaged in the colloquy, and there is certainly nothing to tie it to "the Division witness," who had not yet taken the stand.

[16] This prejudice distinguishes the unintentional omissions in *United States v. Castaneda*, 162 F.3d 832, 839 (5th Cir. 1998) (SBr. 61-62), which were merely "cumulative or surplusage" to the information already known to the government. In this regard, Wingfield's mere restatement (WBr. 17, 25) of the district court's clearly erroneous finding number 79 (*see* US Br. 54-55) is unavailing.

declare it "null and void" and, therefore, the government was "limited to its contractually agreed-upon remedy of prosecuting Fitch for perjury." *Id.* at 576-77. Moreover, while the court agreed that "'a bad faith, intentional, substantial omission'" would constitute a breach of the agreement, it concluded that "the government was not misled by [Fitch's] untruths." *Id.* at 574-75 (citation omitted).

Here, however, the Agreement explicitly states that if SNTG breached, the "Agreement shall be void, and the Antitrust Division may revoke the conditional [leniency and] initiate a criminal prosecution against SNTG, without limitation." JA74. Moreover, SNTG's failure to disclose the full scope of the conspiracy, including its own involvement in it until late 2002, was a "bad faith, intentional, substantial omission" that misled the Division into granting conditional leniency to which SNTG was never entitled, and therefore constituted a clear breach of the Agreement even under *Fitch*. *See* 964 F.2d at 574. Indeed, SNTG's actions – lying to obtain leniency to which it was not entitled – amounts to corruption of the leniency process itself.

3. Wingfield completely ignores the fact that he withheld all evidence of his and SNTG's continuing involvement in the conspiracy after March 2002. US Br. 60. Instead, he argues that the Agreement did not require that he present himself

voluntarily to the Division for an interview and, therefore, that he satisfied his duty to cooperate by producing four customer lists and his "business diaries" (JA261, 266) through Nannes.

Wingfield's claim that he was ready and willing to be interviewed is irrelevant. Wingfield attempts to cloud the issue by repeatedly stating that he was not required "to come in for an interview with the Government even without being asked to do so." WBr. 27; *accord id.* at 1, 15 & n.1, 19, 33, 34, 40, 41, 44, 45. Under the express terms of the Agreement, he was required "voluntarily [to] provid[e] the United States with *any* materials or information" he had "that was relevant to" the conspiracy being reported.[17] JA75 ¶4(d) (emphasis added).

Wingfield knew about the existence and duration of the conspiracy and that Jansen had lied to the Division about it. *E.g.*, JA417, 420, 710 ¶5. Thus, at a minimum, Wingfield had an obligation to be honest with Nannes by disclosing this information to Nannes when he gave him his diaries and other information. Because Wingfield did nothing, including telling Nannes (JA453-54), Nannes

[17]Thus, *Plaster v. United States,* 605 F. Supp. 1532, 1535 (W.D. Va. 1985), (WBr. 32-33), in which Plaster's only obligation apparently was "to agree to testify" if called, is inapposite.

could not alert the Division that the conspiracy continued until November 2002.[18] *See* JA268. Thus, Wingfield clearly breached his duty to provide all information known to him about the conspiracy, despite Nannes' warning that the "success" of his efforts to secure leniency for SNTG and its employees "was dependent upon" Wingfield's complete and truthful cooperation. JA353-54, 361.

Wingfield's reliance (WBr. 27-31) on his production of corporate documents to Nannes ignores the fact that, as both SNTG's complaint (JA59, 64) and SNTG's and Wingfield's counsel acknowledged (JA254-55, 261, 266, 431, 500-01), all of the documents that Wingfield gave Nannes that Nannes produced to the Division were business documents. Thus, both Nannes and Wingfield's counsel admitted that "the government could have compelled them by subpoena had it chose."[19] JA501, 254.

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[18]The Division explained (JA218, 291-92, 419, 420) that it received all of SNTG's information from Nannes, but did not "know who gave the information to Mr. Nannes." At the hearing it was disclosed that Wingfield gave Nannes information "that went from Mr. Wingfield through the company to the Government." JA268. Additionally, until Jansen later told the Division, the Division did not know that Jansen told Wingfield he had lied.

[19] SNTG's claim (SBr. 63) that the three customer lists that Wingfield had at home (JA358-59) might have been hard to find in response to a subpoena ignores the obligations that a corporate subpoena recipient has to produce responsive documents including business documents in the custody of its employees.

To the extent that Wingfield claims that he may have been misled by a promise of leniency into producing to Nannes the business records the Division could have subpoenaed, the record does not support his claim. Wingfield gave those documents to Nannes weeks before the Agreement existed and with full knowledge that Nannes' attempt to obtain leniency depended on his complete and truthful cooperation. *See* JA357-63, 446-49. Moreover, the Division did not know that Wingfield had given those lists to Nannes until the hearing.[20] JA268, 291-92, 419, 420. And Wingfield's claim that he produced the customer lists to Nannes "[i]n reliance upon the promise of amnesty" (WBr. 27) because he "had been assured that he would receive amnesty in return for his cooperation" (WBr. 31) is wrong. Nannes testified that he could not promise any SNTG employee leniency "until we made the proffer and got the leniency letter" from the Division. JA361.

Wingfield also knew the consequences of telling Nannes less than the complete truth. Nannes explained that "the employees had an understanding that the company was participating in efforts that *if successful* would protect the company and the employees from antitrust prosecution." JA454 (emphasis

[20] Accordingly, Wingfield is wrong that the government "'pull[ed] the rug' from under" him when it charged him criminally. WBr. 30-31. *See also supra* note 18.

added). And Nannes specifically advised them "that the success of the strategy in protecting the company and the individuals was dependent upon their candor and cooperation and the forthcomingness of the employees in telling us what had previously transpired." JA361; *accord* JA353-54. Nannes also told the employees that they had a right to their own counsel. JA451. Thus, Wingfield was on notice that any "protect[ion] . . . from antitrust prosecution" that he could expect required his full and truthful disclosure of all the facts and circumstances of the conspiracy. And, as Wingfield's own notes reveal, he also knew, before he even spoke with Nannes, that a "condition" to obtaining leniency was that he and SNTG must have "ended promptly" their conspiratorial conduct when they "[f]irst found out" about it prior to the "NPRA" convention in March 2002. JA702. Consequently, Wingfield's suggestion that he did not appreciate that he might expose himself to criminal liability by cooperating with Nannes (WBr. 31) is refuted by the record.

Nor was the Division required to treat Wingfield the same way it treated Jansen. WBr. 36-39. Once the Division learned from other sources that the conspiracy and SNTG's participation in it continued into late 2002 (*see* US Br. 15), the Division suspected both that SNTG was never eligible for leniency, and that Jansen had lied in his February 5, 2003 interview about his and Wingfield's

participation in the conspiracy. *E.g.*, *compare* JA492-93 *with* GSA97-103. At that point, the Division exercised its prosecutorial discretion by using the "little fish" – "Mr. Wingfield's subordinate" – to pursue the "big fish" Wingfield (JA645), who led SNTG's involvement in the conspiracy post-March 2002. In fact, Wingfield acknowledges that '"[i]t is well settled that the Government may in its discretion make agreements . . . [for] immunity from prosecution for the defendant's cooperation.'" WBr. 52-53 (citation omitted). There is no requirement that the Division must treat all SNTG employees the same.

Finally, whether or not the conspirators carried shipments to and from the United States after March 2002 is immaterial.[21] WBr. 50. An antitrust conspiracy is a "partnership in criminal purposes" that continues "up to the time of abandonment or success." *United States v. Kissel,* 218 U.S. 601, 608 (1910). In a price-fixing conspiracy, like in this case, "the price-fixing agreement itself constitutes the crime." *United States v. Hayter Oil Co.*, 51 F.3d 1265, 1270 (6th Cir. 1995) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 n.59 (1940)). In this case, there is no evidence the conspiracy terminated prior to November 2002. *See United States v. Kushner,* 305 F.3d 194, 198 (3d Cir. 2002)

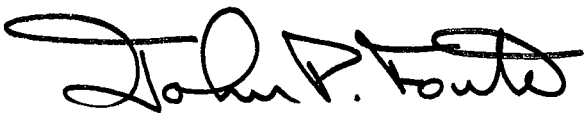
[21] For evidence concerning post-March 2002 shipments and whether they involved transportation to or from the United States *see* GSA103-04, 295, 301-03.

(with a conspiracy "the crime is in the agreement, not in the achievement of its criminal end").

CONCLUSION

The order of the district court enjoining the United States from seeking an Indictment against SNTG and Wingfield should be reversed and the case remanded with instructions to vacate the court's Findings of Fact and Opinion and to dismiss the complaints.

Respectfully submitted.



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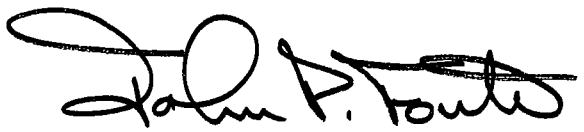
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I, John P. Fonte, hereby certify that on this 7th day of July, 2005, I served two hard copies of the foregoing Reply Brief For Appellant United States of America by Federal Express, and an exact electronic version of the hard copy in PDF form by electronic mail on:

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