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.)

BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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JURISDICTION

Plaintiffs-Appellees asserted that the district court had jurisdiction pursuant to 28 U.S.C. § 1331. The district court's judgment and order of permanent injunction were entered on January 14, 2005. The United States filed a timely notice of appeal on February 14, 2005. This Court's jurisdiction rests on 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court lacked authority to enjoin the United States from seeking an indictment because plaintiffs had an adequate remedy at law and would not be irreparably harmed by an indictment. (JA20, 30-32).

2. Whether a federal district court has jurisdiction to enjoin the United States from exercising its constitutional authority to determine whether a criminal case should be filed. (JA20, 30-32).

3. Whether the district court's finding that plaintiffs had not breached a conditional leniency agreement was wrong as a matter of law because the court failed to address the key requirements under the agreement – whether plaintiffs terminated their participation in the illegal activity promptly and effectively upon discovering it, and whether they provided false information and withheld material facts about their illegal activity. (JA20-21, 32-35).

STATEMENT OF THE CASE

On February 6, 2004, plaintiffs Stolt-Nielsen S.A. and its subsidiary Stolt-Nielsen Transportation Group Ltd. (collectively "SNTG") filed a complaint alleging that the Conditional Leniency Agreement ("Agreement") they had entered into with the United States Department of Justice's Antitrust Division ("Division") on January 15, 2003, prohibited the Division from indicting them without the

Division first obtaining a pre-indictment judicial determination that SNTG had violated the Agreement. SNTG requested a pre-indictment hearing to determine whether it had complied fully with its obligations under the Agreement. SNTG further sought an injunction permanently enjoining the Division from indicting it. (JA52-72). At a February 9, 2004 conference, the Division agreed to give the court notice before seeking an indictment. (JA28, 51, 682).

On February 18, 2004, plaintiff Richard Wingfield ("Wingfield"), an SNTG executive, filed his own complaint seeking similar relief. (JA108). Shortly thereafter, Wingfield filed a motion for a temporary restraining order and a preliminary injunction. (JA14, DE3). SNTG filed its own motion for a preliminary injunction on March 10, 2004, seeking to enjoin the Division from indicting any plaintiff during the course of the proceedings below. (JA5, DE10). The court consolidated the complaints (JA8, DE34) and held a two-day hearing on April 13-14, 2004. Nine months later, on January 14, 2005, the court permanently enjoined the United States from indicting plaintiffs for any violations of the Sherman Act, 15 U.S.C. § 1, that were the subject of the Agreement.[1] (JA19).

[1] On March 2, 2004, the Division gave notice of its intent to seek an indictment against SNTG and Wingfield. (JA682). However, after the court scheduled the April 2004 hearing, the Division agreed not to seek the indictment until after the court ruled. At the close of the hearing the court consolidated the requests for preliminary relief with the requests for a permanent injunction. *See*

STATEMENT OF FACTS

The Agreement, made pursuant to the Division's Corporate Leniency Policy ("Leniency Policy"),[2] is a type of non-prosecution agreement (JA77), and was expressly conditioned on the truthfulness of SNTG's representations in the Agreement, and its full and truthful cooperation with the Division. The Division withdrew the conditional grant of leniency after it learned SNTG had made material misrepresentations to it, and had provided false information and withheld material evidence relevant to the scope of the conspiracy as required by the Agreement.

A. The Leniency Policy

The Leniency Policy, adopted in its present form in August 1993 (JA390), states that the Division will grant leniency – defined as an agreement not to charge a firm criminally for the activity being reported – to corporations that report their illegal antitrust activity to the Division and otherwise meet all of the policy's stated preconditions. (JA77). By making leniency available to qualified applicants, the policy creates an incentive for firms to report their criminal activity to, and

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JA28-29 & n.6.

[2] The Leniency Policy (JA77) is *available at* http://www.usdoj.gov/atr/public/guidelines/0091.pdf

cooperate with, the Division, and thereby give the Division assistance in obtaining evidence to use in prosecutions of the reporting firm's co-conspirators.[3] (JA390, 657).

A firm can qualify for leniency either before ("Type A") or after ("Type B") the Division has initiated an investigation of the particular conduct being reported. (JA391). But if, as in this case, a corporation applies for Type B leniency because an investigation is already in progress, it must be the first corporation "to come forward and qualify for leniency with respect to the illegal activity being reported" and, at that time, the Division must not have evidence against the corporation "that is likely to result in a sustainable conviction." (JA78, 391). Additionally, under either Type A or Type B leniency, the corporation applying for leniency must meet certain stated prerequisites. Of particular relevance here, the applicant must represent that "upon its discovery of the illegal activity being reported, [it] took prompt and effective action to terminate its part in the activity." (JA77, 79). This prerequisite exists because "as a matter of good public policy, [the Division does] not believe that it would be appropriate to provide leniency to a company that upon

[3] "Since the Division revised its leniency program [in 1993], cooperation from amnesty applications has resulted in scores of convictions and close to $2 billion in criminal fines." Scott Hammond, An Overview Of Recent Developments In Criminal Enforcement 9 (Jan. 10, 2005) *at* http://www.usdoj.gov/atr/public/speeches/207226.pdf

discovery of the illegal conduct chooses to continue engaging in that conduct." (JA392). A 1998 policy statement (JA656) explained that termination means "refraining from further participation [in the conspiracy] unless continued participation is with Division approval."[4] (JA660; *accord* JA394-95).

Another precondition to obtaining leniency is that any corporation accepted into the program must pledge to provide the Division with "full, continuing and complete cooperation," including "report[ing] the wrongdoing with candor and completeness." (JA78, 79). This condition also requires the applicant firm's full cooperation during any future investigation or prosecution of its co-conspirators. (JA393).

Finally, if a corporation qualifies for leniency, its officers, directors, and employees may also qualify for leniency. However, as the 1998 policy statement explains, a major difference between Type A and Type B leniency is that when a corporation qualifies for Type A leniency, the grant of leniency is automatic "and is not subject to the exercise of prosecutorial discretion." (JA657). Type A leniency also is automatic for "all directors, officers, and employees who come forward with the corporation and agree to cooperate." (*Id.*). On the other hand, if a corporation

[4] The policy statement is *available at* http://www.usdoj.gov/atr/public/speeches/1626.htm

qualifies only for Type B leniency, "the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually." (JA131).

All of the preconditions to qualifying for leniency are explicitly repeated in the Division's model conditional leniency letter. (JA670). The second sentence of the letter expressly notifies the company signing it that the "*agreement is conditional* and depends upon [the corporation] satisfying the conditions set forth below." (*Id.*) (emphasis added). There are two reasons why the Division's initial grant of leniency to any corporation is conditional. First, the Division enters into leniency agreements early in its investigation of the conduct being reported, when it has little or no information about the illegal activity. (JA393). At that time, the Division typically has no way to verify the representations made to it, including the representation that upon discovery the applicant took prompt and effective action to terminate its part in the conspiracy. Thus, the grant of leniency is expressly conditioned on the Division's verification of those representations. (JA74 ¶3, 393). Second, the leniency agreement is forward looking and depends upon the applicant fulfilling certain obligations over time, including cooperating during any future prosecution of co-conspirators, and making restitution where possible. (JA393,

670). Only after all the obligations are met, usually at the end of an investigation, will the applicant be given a final grant of leniency. (JA393, 670).

Lastly, the model letter expressly provides that if the "Division at any time determines" that the corporation violated the agreement, "this Agreement shall be void, and the Antitrust Division may revoke the conditional acceptance of [the corporation] into the Corporate Leniency Program." (JA671). The letter also explains that if it does revoke the conditional leniency, the Division may then prosecute the corporation "without limitation." (*Id.*).

B. The Grant Of Conditional Leniency To SNTG

On November 22, 2002, the Division began investigating possible collusion in the parcel tanker shipping industry (JA398-99) – ocean transportation of "bulk liquid chemicals, edible oils, acids and other specialty liquids." (JA37 ¶8). SNTG is one of the largest parcel tanker firms in the world. At that time, plaintiff Wingfield was Managing Director, Tanker Trading & Operations for SNTG. (JA36 ¶3). The investigation was prompted in part by an article published that day in the *Wall Street Journal* reporting that SNTG was being sued by Paul O'Brien ("O'Brien"), its former general counsel. (JA398). According to that article, O'Brien had alleged in his complaint (JA685) that "Stolt-Nielsen has been engaged in 'illegal antitrust activities' that violate U.S. and international law 'against price-

fixing and other illegal collusive conduct.'" (JA674). O'Brien had also alleged that SNTG's Chairman, Samuel Cooperman ("Cooperman"), was personally involved in the ongoing criminal activity. (*Id.*). According to O'Brien, he was forced to resign from SNTG in March 2002 because after he reported the illegal collusive conduct to the company, SNTG had refused to cease the conduct. (JA398-99, 674).

Later that day, SNTG counsel John Nannes ("Nannes") contacted the Division to inquire about corporate leniency for an unnamed client. (JA399-400). Nannes, a former Division official (JA305-06), was retained by SNTG during a meeting that day with Cooperman to advise SNTG on the Division's leniency program. (JA308-09). During the meeting, Cooperman explained that SNTG had reason to believe that one or more of its customers intended to file civil antitrust claims against it. (JA313, 329). Cooperman did not then describe SNTG's conspiratorial activities or his personal involvement in them. Instead, Cooperman provided Nannes with a "chronology" of events beginning with a February 2002 memorandum from O'Brien to Cooperman in which O'Brien "rais[ed] some antitrust concerns." (JA314, 330). As a result, SNTG allegedly took steps to strengthen its antitrust program including "provid[ing] copies of its new antitrust compliance policy to its principal competitors." (JA314-15, 331-32). Nevertheless, O'Brien had left SNTG, indicating that "he was not fully satisfied

with the response." (JA314).

Nannes and Cooperman then discussed "whether the company should contact the Antitrust Division to seek to participate in the Division's Leniency Policy." (JA315). "Cooperman admitted to Nannes that an internal investigation would yield information providing *a sufficient basis to seek amnesty*."[5] (JA39 ¶22) (emphasis added). In fact, Cooperman had already secured the Board's authorization to contact the Division. (JA316). Nannes called the Division that afternoon. (JA334).

After several general discussions with the Division's Deputy Assistant Attorney General for Criminal Enforcement, James Griffin ("Griffin"), Nannes eventually identified his client as SNTG. Griffin immediately informed him that the Division had opened an investigation of the parcel tanker industry. (JA334-35, 399-401). Griffin also said he was aware of the newspaper article and was "concerned about the allegation that the general counsel was aware of the conduct and the company did not take prompt and effective action to terminate its role in the cartel" (JA401), as required by the Leniency Policy. Nannes responded that "he

[5] Cooperman, who was personally involved in the conspiracy, investigated O'Brien's report of antitrust violations. (JA468). And all of the SNTG employees involved in the unlawful activity remained in their positions following Cooperman's investigation. (JA479-80).

did not think Mr. O'Brien's allegations were credible and he was confident that he would be able to satisfy [the Division] of that." (*Id.*).

Nannes met with the Division on December 4, 2002 to address the Division's concerns about SNTG's eligibility for leniency. Most of that meeting was spent discussing "what happened in February, March and early April of 2002." (JA402). In fact, "the whole discussion was about Mr. O'Brien's discovery and *whether the company qualified even to apply for immunity*." (JA405) (emphasis added). Nannes told the Division that in February 2002, O'Brien had obtained evidence of conduct that, if true, would constitute an antitrust violation.[6] (JA402). But Nannes insisted that O'Brien's allegation that SNTG's illegal conduct had continued was not credible. Nannes explained how SNTG had strengthened its antitrust compliance policy after O'Brien had raised his antitrust concerns in February 2002, and also had taken action "to notify the coconspirators that the company no longer

[6] What O'Brien had obtained was an April 10, 2001 facsimile (JA887) from Bjorn Jansen ("Jansen"), SNTG's Director of Pacific Ocean Services (JA710 ¶1), to Wingfield. (JA708 ¶1). Jansen's facsimile "relat[ed] to Stolt-Nielsen Transportation Group's . . . cooperation agreement with [SNTG competitor] Odfjell." (JA708 ¶1). In it, Jansen notes that "[t]here is a fairly strong sense among the people here that continued coop is preferable . . . [to] going to 'war' . . . [because] a net gain from going to war is not easily seen." (JA888). The analysis contained in the facsimile had been requested by Stolt-Nielsen S.A. Chairman Jacob Stolt-Nielsen. (JA708 ¶1). After O'Brien obtained it, Cooperman chided Jansen that he "was stupid for sending the fax and that Mr. Wingfield was stupid for asking for it." (JA708 ¶1).

would participate in the conduct." (JA402-03).

Nannes gave the Division six documents dated March and April 2002 (JA676-81) that Nannes said "provided unequivocal evidence or proof that the company had in fact terminated its conduct in March and April." (JA403). Two of the documents were e-mails from Wingfield to SNTG's co-conspirators, Odfjell Seachem AS ("Odfjell") and Jo Tankers B.V. ("Jo Tankers") (JA403-04) stating: "I refer to our recent discussion, and as requested I attach herewith a copy of our revised Antitrust Compliance Handbook dated March 11." (JA680-81). Wingfield's reference in the e-mails to "our recent discussion" was to separate private meetings between Wingfield and Odfjell, and Wingfield and Jo Tankers, at a March 2002 trade association convention. SNTG communicated its withdrawal "orally" to avoid creating incriminating documents.[7] (JA404-05). Griffin told Nannes that if all "this evidence of withdrawal turned out to be . . . 'a head fake' . . . and Mr. O'Brien's allegations were in fact true, the company would not qualify

[7] Nannes was unsure whether he told the Division on December 4, 2002, about Wingfield's March 2002 meetings with Odfjell and Jo Tankers at the trade association convention, although he "could have said [that] because [he] knew of it at the time." (JA472-73). Nannes explained that before Wingfield sent his April 8, 2002 e-mails to Odjfell and Jo Tankers (JA680-81), "Mr. Wingfield had met with Odfjell and Jo separately . . . [and] he told them that Stolt had a new antitrust compliance policy. *And that Stolt was going to adhere to that policy*." (JA473) (emphasis added).

for leniency and even if we did enter into a conditional leniency agreement, that that would be revoked."[8] (JA405).

After cautioning Nannes "on more than one occasion" that a leniency letter for SNTG would contain the standard representation regarding prompt termination upon discovery of the illegal activity, and that the Division "intended to verify the accuracy and truth of that representation" (JA 408),[9] the Division conditionally accepted SNTG into the leniency program, and SNTG signed the Agreement on January 15, 2003. (JA73-76). Following the model letter (JA397, 670), the Agreement stated that the conditional leniency was "[s]ubject to verification of SNTG's representations in paragraph 1 above" that it "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity," and was also "subject to its full, continuing and complete

[8] The Division asked SNTG to waive its attorney-client privilege so the Division could interview O'Brien, but SNTG refused. (JA405-06, 1001).

[9] Griffin told Nannes during their initial telephone call that the Division would follow its model conditional leniency letter, with which Nannes was familiar (JA377-78), if leniency was granted, and Griffin e-mailed the model letter to Nannes that day. (JA334-35, 848-53). Nannes acknowledged that his understanding of the term "upon discovery" contained in the model letter was the definition contained in the Division's 1998 policy statement. (JA483). Specifically, "discovery" occurs when "either the board of directors or counsel for the corporation (either inside or outside)" first learn of the illegal conduct. (JA661).

cooperation, as described in paragraph 2 above." (JA73-74). Paragraph 2 required SNTG to, among other things, "provid[e] a full exposition of all facts known to SNTG relating to the anticompetitive activity being reported," and to "us[e] its best efforts to secure the ongoing, full and truthful cooperation of the current and former directors, officers and employees of SNTG, and encourag[e] such persons voluntarily to provide the Antitrust Division with any information they may have relevant to the anticompetitive activity being reported." (JA73-74).

The Agreement did not specify a discovery date because, at that time, the Division did not know the actual date with certainty. Under standard Leniency Policy procedure, therefore, the Division needed to reserve its right to verify that O'Brien did not discover the illegal conduct even prior to February 2002 (JA410), the date that Nannes supplied. (JA406). As Nannes explained, "the issue would have been what the company did in response to the issues raised by Mr. O'Brien." (JA458; *accord* JA410, 459).

The Agreement expressly provided that if the Division determined that SNTG violated the Agreement, the Agreement would be void and the Division could then criminally prosecute SNTG. (JA74). Nannes admitted that SNTG "understood" "what the consequences were" if circumstances later "lead to termination of the leniency agreement." (JA482).

C. Revocation Of SNTG's Conditional Leniency

Less than three months after signing the Agreement, the Division learned from other sources that SNTG had continued to participate in the conspiracy "until as late as November of 2002." (JA412-14, 531-32; *see* GSA[10] 7, 27-35). To that point, SNTG had only produced two executives for interviews and some documents. However, neither the executives interviewed nor the documents produced disclosed the conspiracy's continuation after March 2002. (JA453, 475-76). Moreover, not only did SNTG withhold evidence of the true extent of the conspiracy, it provided false information. Jansen, one of the executives interviewed with Nannes present, falsely stated during his February 2003 interview that SNTG had ceased all anticompetitive activity after its new antitrust compliance program went into effect.[11] (JA492-93).

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[10] Most of the Division's evidence about SNTG's continued participation in the conspiracy from March to November 2002 is protected from disclosure by Fed. R. Crim. P. 6(e)(2)(B). In compliance with Rule 6(e), the Division filed that evidence under seal in the district court in two *ex parte* filings for the court's *in camera* consideration. (JA15, DE17). *See In re Grand Jury Subpoena*, 223 F.3d 213, 216 (3d Cir. 2000) (sanctioning district court's use of *ex parte in camera* proceedings to protect grand jury secrecy). Because the district court has kept that Rule 6(e) information under seal (JA50), in this Court, that *ex parte* material is contained in the separate volume of the Appendix, filed under seal, titled "Government's *Ex Parte* and *In Camera* Supplemental Appendix" ("GSA").

[11] In addition to Jansen and Wingfield, Cooperman and William Humphreys also possessed material information regarding post-March 2002 activity that

The Division promptly notified SNTG on April 8, 2003 (JA82) that it was considering whether to withdraw the conditional leniency in light of recently obtained evidence indicating SNTG had not terminated its part in the illegal activity upon discovery. (JA412). The Division suspended all of SNTG's obligations to cooperate with the Division pending resolution of the termination issue. (JA413). At SNTG's request, the Division explained that it believed SNTG had discovered the conspiracy "in early 2002" when "O'Brien . . . learned of SNTG's involvement in [it]," and that SNTG had "continued to conspire until at least October 2002." (JA1003-04). The Division also stated that SNTG's failure to promptly terminate its illegal activity, and its further failure to provide full and truthful cooperation, each constituted an independent breach of the Agreement sufficient to void it. (JA531-33, 1004).

Only after the suspension of SNTG's cooperation did Jansen, in his individual capacity (JA537-38), admit the cooperation agreement with Odfjell was still in effect in October 2002, although he believed that by that time "the cooperation

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SNTG failed to provide, including, for example, information regarding an October 2002 conversation between Wingfield and Odfjell concerning an upcoming customer contract. (JA706-07 ¶13; *see also* GSA272-76).

The other SNTG employee interviewed by the Division was Andrew Pickering, Wingfield's predecessor, who was involved with the inception of the conspiracy in 1998 but had since relocated to Singapore. (JA359-61, 429-30).

agreement we had with Odfjell was dying." (JA710-11 ¶¶7, 12). Later, SNTG's co-conspirators Odjfell and Jo Tankers, along with several of their executives, each pled guilty to an illegal antitrust conspiracy in the parcel tanker industry that "continu[ed] until as late as November 2002." (JA717-18, 746-47, 777-78, 810-11, 840-41).

In June 2003, the Division concluded that Wingfield independently breached the Agreement. (JA417). Although Wingfield had continued to participate in conspiratorial meetings and discussions with his competitors "after SNTG's new antitrust compliance policy was issued in March 2002" (JA708 ¶5, 710 ¶4; *see also* GSA 21, 30-35), he never told the Division. (JA474-75). Additionally, Wingfield knew that "another SNTG employee" had lied to the Division about the true extent of his and Wingfield's continued participation in the conspiracy after O'Brien's discovery, and Wingfield "took no action to correct that." (JA417-18; *see also* GSA199, 293 ¶4). On June 24, 2003, Wingfield was charged by criminal complaint with violating Section 1 of the Sherman Act, 15 U.S.C. § 1, by participating in a conspiracy to allocate customers, rig bids, and fix prices among companies providing parcel tanker shipping of products to and from the United States. (JA99). Wingfield surrendered the following day and was released on bail. He agreed to postpone his indictment and thus has not yet been indicted.

The Division formally revoked SNTG's conditional leniency on March 2, 2004.[12] (JA682).

D. The District Court's Decision

Nine months after holding the two-day hearing, the court issued an order permanently enjoining the Division from indicting plaintiffs. The court first drew "guid[ance]" (JA31) from the Seventh Circuit's decision in *United States v. Meyer*, 157 F.3d 1067, 1077 (7th Cir. 1998), and concluded that SNTG had a due process right to a pre-indictment hearing on its claim that it did not breach the Agreement. (JA32-33). The court believed that if the hearing was held post-indictment, and the "indictment w[as] . . . determined to have been wrongfully secured, it would be too late to prevent the irreparable consequences." (JA31). On the other hand, the court reasoned that "the government's interest will not be significantly compromised by a judicial proceeding and decision prior to indictment," an ongoing grand jury investigation notwithstanding. (JA32).

Turning to the merits, the court never addressed when SNTG "discovered" its illegal activity or when it "terminated" it. It concluded that "the negotiations" did

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[12] This is the only time that the Division has revoked a grant of conditional leniency. (JA413). *See* Jim Walden, Kristopher Dawes, *The Curious Case of Stolt-Nielsen S.A. v. United States*, The Antitrust Source (March 2005), *available at* http://www.abanet.org/antitrust/source/03-05/02-mar05-walddawe323.pdf.

not clearly establish "the date when SNTG ended its participation" in the conspiracy." (JA34 n.10). Instead, the court asked whether "DOJ and SNTG agree[d] that the illegal conduct was discovered in March 2002, thus triggering SNTG's obligation to withdraw from its participation in the anticompetitive activity" at that time. (JA33). The court noted that the Agreement immunizes SNTG for illegal conduct occurring prior to the date the Agreement was executed, January 15, 2003, and does not specifically reference February or March 2002. (*Id*.). Then, relying on the Agreement's integration clause, the court concluded that the Division "cannot depend upon a tacit understanding of what it contends was meant during negotiations but was not memorialized in the integrated agreement." (JA34). Also expressing its belief that the Division "has received the benefit of the bargain," the court further reasoned that "DOJ cannot prosecute the party that incriminated itself when it delivered the evidence DOJ used to accomplish its goals." (JA35).

SUMMARY OF ARGUMENT

The district court's injunction preventing the United States from seeking an indictment against SNTG is both unprecedented and wrong. Until this case, no court has ever enjoined the United States from seeking an indictment. *Deaver v. Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987). Injunctive relief was not warranted in

this case because: (1) plaintiffs had an adequate remedy at law and would not have suffered irreparable injury if an injunction had been denied; (2) an injunction precluding an indictment infringes the authority granted the Executive Branch in the Constitution to determine whether to file a criminal case; and (3) the district court misinterpreted the Agreement and thereby effectively nullified its expressly conditional nature, its verification requirement, and the government's express right to revoke the conditional agreement if it determines that SNTG violated it. Under these circumstances, this Court should reverse the district court's order granting an injunction and remand the case with instructions to vacate the district court's findings and order, and to promptly dismiss the complaints. *Id.* at 66-67.

1. Injunctive relief is never appropriate when there is an adequate remedy at law and the moving party will not suffer irreparable injury if an injunction is denied. *Id.*; *Lui v. Commission, Adult Entertainment, DE,* 369 F.3d 319, 325 (3d Cir. 2004). In this case, SNTG has an adequate remedy at law because it will be able to claim the Agreement as a defense if it is indicted by a grand jury. *United States v. Kenny*, 462 F.2d 1230 (3d Cir. 1972). Moreover, the Supreme Court has held that simply being indicted and forced to assert a defense in a criminal case is not irreparable injury. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940); *Younger v. Harris*, 401 U.S. 37, 46 (1971). Under these circumstances, the district court had no

authority to enter an injunction in this case.

2. The district court had "no jurisdiction" to enjoin the United States from seeking an indictment. *In re Sawyer*, 124 U.S. 200, 210 (1888). The Constitution expressly assigns the power to commence a criminal prosecution to the Executive Branch. Thus, the Executive Branch has the "exclusive authority and absolute discretion" to decide whether and when to seek a criminal indictment. *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Deaver*, 822 F.2d at 68-71. Once the Executive Branch has exercised its prosecutorial discretion and obtained an indictment, a court can adjudicate the resulting case including any defenses the defendant can lawfully assert. To enjoin the United States from seeking an indictment, however, impairs the authority of the Executive Branch to exercise its constitutional responsibilities. *Deaver*, 822 F.2d at 69-70.

The district court's belief that SNTG had a due process right to pre-indictment review of its claim that it had not violated the Agreement has no legal support. The cases it cites expressly hold that a *post*-indictment determination that the agreement has not been breached provides "all of the protection demanded by due process." *Meyer*, 157 F.3d at 1077. No case cited by the district court sanctions a pre-indictment injunction against seeking an indictment. Indeed, such an injunction would violate the Separation of Powers doctrine. Faithful adherence to

that doctrine compels the conclusion that the district court's order enjoining the United States from seeking an indictment must be reversed.

3. The district court's interpretation of the Agreement ignores its plain language. The district court believed that the Division was trying to impose obligations on SNTG that were not stated in the Agreement. It thus relied on the Agreement's integration clause, the absence of a termination date, and the fact that the Agreement granted SNTG conditional leniency for conduct occuring before the Agreement was signed, to conclude that SNTG had not violated the Agreement. But the district court's interpretation of the Agreement ignores the long-established rule that contracts must be interpreted as a whole without rendering portions of the contact meaningless. *United States v. Skalsky*, 857 F.2d 172, 176 (3d Cir. 1988).

In this case, SNTG expressly represented in the Agreement that it had taken "prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity." (JA73). The Agreement expressly stated that it was "conditional" and that SNTG's representations were "[s]ubject to verification." (JA73-74). And it allowed the Division to declare the Agreement void and prosecute SNTG if it determined that SNTG violated the Agreement. (*Id.*). Finally, the Agreement required SNTG's "full, continuing, and complete cooperation" in the Division's investigation. (JA73).

The district court's interpretation of the Agreement renders SNTG's representations and the verification requirement meaningless and cannot be correct. Moreover, the district court glosses over SNTG's failure to provide "full, continuing, and complete cooperation" by ignoring not only how SNTG withheld evidence that the conspiracy, and its involvement in it, continued until at least November 2002, but also how SNTG provided false information about its continuing involvement in the conspiracy as well. The perverse result of the court's decision is to reward a company that lied to obtain leniency while its co-conspirators, who were truthful, received criminal sanctions. Accordingly, its interpretation of the Agreement is plainly wrong.

4. Wingfield independently violated the Agreement by continuing to conspire after O'Brien discovered the conspiracy, and by failing to report evidence that the Agreement expressly required him to disclose concerning SNTG's and his continuing involvement in the conspiracy. Accordingly, the Agreement is void as to him as well.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a grant or denial of a permanent injunction for abuse of discretion. *E.g.*, *Citizens Fin. Group, Inc. v. Citizens Nat'l Bank of Evans City*, 383 F.3d 110, 126 (3d Cir. 2004), *cert. denied*, 2005 WL 483034 (2005); *International Union, UAW v. Mack Trucks, Inc.*, 820 F.2d 91, 94-95 (3d Cir. 1987). "However, because an abuse of discretion exists where the district court's decision 'rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact,'" this Court "appl[ies] plenary review to the District Court's legal conclusions." *AmeriSteel Corp. v. International Brotherhood of Teamsters*, 267 F.3d 264, 267 (3d Cir. 2001) (quoting *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1476 (3d Cir. 1996)); *accord Citizens Fin.*, 383 F.3d at 126.

Whether a plea agreement or other type of cooperation agreement has been breached "is a question of law subject to *de novo* review." *United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000); *United States v. Moscahlaidis*, 868 F.2d 1357, 1360 (3d Cir. 1989). The district court's underlying findings of fact are "reviewed for clear error." *Baird*, 218 F.3d at 229; *Moscahlaidis*, 868 F.2d at 1360.

II. THE DISTRICT COURT DID NOT HAVE THE AUTHORITY TO ENJOIN AN INDICTMENT

The district court's holding that due process entitled SNTG to a pre-indictment hearing on its claim that it had not breached the Agreement is contrary to every case that has previously addressed the issue. Injunctive relief is inappropriate when, as here, the movant has an adequate remedy at law and would not be irreparably injured by an indictment. Moreover, the Executive Branch has the exclusive authority under the Constitution to define the circumstances under which it will either prosecute or grant leniency to those who violate the antitrust laws. The district court's decision to intrude into this exercise of prosecutorial discretion prior to indictment was wrong.

A. The District Court Erred In Concluding That Injunctive Relief Was Appropriate In This Case

The district court's decision to grant injunctive relief in this case is contrary to the long established rule that equitable relief is not appropriate when there is an adequate remedy at law and no irreparable injury.[13] *Deaver*, 822 F.2d at 68-69. In

[13] The only possible exception to this rule would be the rare case in which a potential criminal defendant could establish that the investigation itself or the threat of a criminal prosecution violated some specific right guaranteed by the Constitution, like free speech, the value of which would be destroyed if not immediately vindicated. *See generally Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (discussing limited nature of post-indictment review of prosecutorial discretion); *Lawson v. Hill*, 368 F.3d 955, 960 (7th Cir. 2004) (refusing to enjoin

Younger, the Supreme Court emphasized that "the basic doctrine of equity jurisdiction [is] that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." 401 U.S. at 43-44. This Court has faithfully followed *Younger* and refused to enjoin criminal proceedings when the moving party can raise all of its claims in the criminal proceeding. *Lui*, 369 F.3d at 325-26. Indeed, in *Kenny*, this Court reversed a district court order enjoining a state court prosecution because the plaintiff could protect his rights by asserting his defenses as a defendant in state court. 462 F.2d at 1232.

In this case, if SNTG is indicted, it will be able to argue that the Agreement precludes its prosecution. *See* Fed. R. Crim. P. 12(b)(3)(A). Thus, it has an adequate remedy at law.

Moreover, contrary to what the district court stated (JA31 & n.8), SNTG will not suffer irreparable injury if it is indicted. In the context of enjoining a state court criminal prosecution, the Supreme Court has held that for comity reasons "even

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prosecutor from enforcing allegedly unconstitutional state statute noting that such relief is not appropriate "other than in exceptional circumstances"). This case, however, simply involves one of many types of legal defenses that courts routinely adjudicate post-indictment.

irreparable injury is insufficient unless it is both great and immediate." *Younger*, 401 U.S. at 46 (internal quotations and citation omitted). Since enjoining a federal criminal prosecution raises serious Separation of Powers issues (*Deaver*, 822 F.2d at 68-71), SNTG should also be required to show "great and immediate" irreparable injury. SNTG, however, cannot establish any irreparable injury.

Being indicted is not, as a matter of law, an irreparable harm. In *Younger*, the Court explained that "[c]ertain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term." 401 U.S. at 46; *accord Cobbledick*, 309 U.S. at 325 ("Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship"); *Deaver*, 822 F.2d at 69 (although "an innocent person may suffer great harm to his reputation and property by being erroneously accused of a crime, all citizens must submit to a criminal prosecution brought in good faith so that larger societal interests may be preserved"). Put differently, the interests in not standing trial, not experiencing adverse publicity, and not experiencing other consequences of an indictment "are not unique to the corporation but are shared by *all* individuals indicted on criminal charges," *John Doe Corp. v. United States*, 714 F.2d 604, 606 (6th Cir. 1983), and therefore are not irreparable harms.

Unlike the defendant in *In re Fried*, 161 F.2d 453, 458-59 (2d Cir. 1947), relied on by the district court (JA31 n.8), SNTG cannot claim that its reputation will be damaged if it is charged in an indictment. *In re Fried*, which predates *Younger* by more than two decades, is an attack on the then-prevailing use of coercive and unconstitutional interrogation techniques that the court called "foul exploits" and "miserable behavior" that triggered a "vigorous[] exercise" of equity power to restrain. 161 F.2d at 459-60. Nevertheless, the court's concern that a "wrongful indictment . . . often . . . works a grievous, irreparable injury" (161 F.2d at 458), is contrary to *Younger* and subsequent cases.

In any event, by issuing a press release announcing its action (Press Release, Stolt-Nielsen S.A., Stolt-Nielsen Transportation Group Granted Conditional Amnesty In Parcel Tanker And Inland Barge Investigations (Feb. 25, 2003), *available at* http://www.stolt-nielsen.com, *reprinted at* http://di.se/Nyheter/?O=Index&page=%2fAvdelningar%2fpressreleaseShow.aspx%3fpressSeqNo%3d6367%26pressCp%3d3), SNTG publicly admitted that it had violated U.S. antitrust laws since only a criminal needs, and is eligible to receive, leniency.[14] Under these circumstances, SNTG cannot suffer irreparable injury simply by being indicted for a crime it has already admitted it

[14] In its press release, SNTG admits it has "been granted conditional amnesty from prosecution and fines for violation of U.S. antitrust laws."

committed.[15]

In the analogous context of Fed. R. Crim. P. 41, where potential criminal defendants have tried, before indictment, to suppress evidence allegedly seized unlawfully, courts of appeals repeatedly have held that the threat of criminal prosecution based on the seized property is not a sufficient showing of irreparable harm. "[I]f the threat of criminal prosecution was sufficient to establish irreparable harm, actions for the return of property under the court's equitable power would become quite ordinary because the threat of imminent indictment is nearly always present." *Matter of 6455 South Yosemite, Englewood, Colo.*, 897 F.2d 1549, 1557 (10th Cir. 1990); *accord United States v. Search of Law Office, Residence*, 341 F.3d 404, 415 (5th Cir. 2003); *Ramsden v. United States*, 2 F.3d 322, 326 (9th Cir. 1993); *Matter of the Search of 4801 Fyler Ave.*, 879 F.2d 385, 389 (8th Cir. 1989); *Johnson v. United States*, 971 F. Supp. 862, 868 (D. N.J. 1997). Thus, the district court's belief that merely being indicted causes irreparable consequences (JA31) is plainly

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[15] Similarly, since Wingfield has already been charged with a criminal antitrust violation in a criminal complaint, he cannot claim that he would be irreparably injured by an indictment charging the same offense. *See* JA166-70 (*Wall Street Journal* article discussing at length Wingfield's participation in the conspiracy including quotations from his e-mails and journal); JA193 (*Wall Street Journal* article reporting that "[i]n June, Richard B. Wingfield . . . was charged with participating in the parcel-tanker shipping conspiracy" to which a former Jo Tankers' executive pled guilty).

inconsistent with settled precedent.

Finally, the district court's belief (JA31-32) that SNTG "incriminated itself" by producing documentary evidence of the conspiracy, including customer allocation lists, does not establish irreparable injury. A corporation has no Fifth Amendment right against self incrimination. *Hale v. Henkel*, 201 U.S. 43, 74 (1906); *Braswell v. United States*, 487 U.S. 99, 105 (1988). Because the Division had already commenced its investigation, it could have compelled SNTG to produce documents incriminating itself and its co-conspirators whether or not SNTG had applied for leniency. In any event, any claim that its constitutional rights have been violated could be asserted as a defense in any criminal proceeding against it.

Accordingly, because plaintiffs have an adequate remedy at law and will not be irreparably injured if indicted, the district court abused its discretion by granting injunctive relief.

B. A District Court Cannot Enjoin The Executive Branch From Exercising Its Prosecutorial Discretion To File An Indictment

An injunction preventing an indictment infringes the authority granted to the Executive Branch in the Constitution. The executive power of the United States is vested in the President. U.S. Const., art. II, § 1. The Attorney General and the Department of Justice have the exclusive right to conduct litigation on behalf of the

United States, except as otherwise provided by law. 28 U.S.C. § 516; *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965); *Newman v. United States*, 382 F.2d 479, 480-82 (D.C. Cir. 1967). Moreover, criminal prosecution is an inherently executive function within the absolute discretion of the Executive Branch. *See United States v. Nixon*, 418 U.S. at 693 ("Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). Thus, the power to decide *whether* to bring charges, *what* violations to charge, and *when* to file those charges belongs to the Executive Branch and the grand jury. *E.g.*, *Wayte v. United States*, 470 U.S. 598 607 (1985); *In re United States*, 345 F.3d 450, 452-53 (7th Cir. 2003); *In re Grand Jury Proceedings*, 525 F.2d 151, 156-57 (3d Cir. 1975) (discussing broad powers of the grand jury); *Cox*, 342 F.2d at 171 ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions").

Under the Constitution, if the Executive Branch exercises its constitutional authority to file a case, then the courts have the authority to adjudicate the resulting case or controversy. But prior to indictment, the Supreme Court has held that a court of equity has "no jurisdiction" to enjoin a criminal prosecution, and that to assume jurisdiction to restrain such a prosecution would "invade the domain of the"

Executive Branch. *In re Sawyer*, 124 U.S. at 210.

Thus, the Judicial Branch may not invade the Executive's exercise of prosecutorial discretion. *See generally*, *Loving v. United States*, 517 U.S. 748, 757 (1996) ("[T]he separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties"); *Deaver*, 822 F.2d at 68-71; *Cox*, 342 F.2d at 171. "A judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them." *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir. 1992); *see also, Cheney v. United States Dist. Court for the Dist. of Columbia*, 124 S.Ct. 2576, 2580 (2004) (courts must give recognition to the "paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties"). While the exercise of discretion by the Executive Branch "is always subject to abuse, . . . the framers of our Constitution have indicated their conviction that the danger of abuse by the executive is a lesser evil than to render the acts left to executive control subject to judicial encroachment." *Goldberg v. Hoffman*, 225 F.2d 463, 466 (7th Cir. 1955).

Our "criminal justice system is structured to provide the criminal defendant ample opportunity to vindicate his rights *after* he is indicted," not before. *North v. Walsh*, 656 F. Supp. 414, 421 (D. D.C. 1987) (citing Fed. R. Crim. P. 12(b)). There

simply is "no right to an injunction restraining a pending indictment in a federal court." *Deaver*, 822 F.2d at 68. We are aware of no case in which, during a pending criminal investigation, a federal prosecutor was enjoined from seeking an indictment or a federal grand jury was enjoined from returning an indictment. *See id.* at 69; *see also Christoforu v. United States*, 842 F. Supp. 1453, 1456 (S.D. Fla. 1994) (dismissing case seeking injunction against criminal enforcement of a statute, citing *Deaver*); *Doe v. United States*, 534 F. Supp. 652, 654-55 (D. Kan. 1982).

The Executive Branch is not required to grant leniency to criminals who violate the laws of the United States. If it does decide to grant leniency, it is free to decide the circumstances under which leniency will be granted. Thus, a decision by the Executive Branch to grant, deny, or revoke leniency is simply an exercise of the prosecutorial discretion granted to it by the Constitution. How the Executive Branch exercises its prosecutorial discretion is not subject to judicial approval or review prior to the filing of a criminal case. *Deaver*, 822 F.2d at 68-71; *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 976 (D.C. Cir. 2005); *Cox*, 342 F.2d at 171 ("The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause").

Although Separation of Powers considerations foreclose a court from granting

an injunction preventing the Executive Branch from carrying out its Constitutional duty, the district court believed that the Agreement gave SNTG the right to obtain injunctive relief. Specifically, the court stated that SNTG had a due process right to have a court determine – pre-indictment – whether the Agreement had been breached. (JA29-30). In fact, cases interpreting virtually identical language in similar agreements unanimously hold that post-indictment review of a claim that the government is bound by the terms of the agreement adequately protects a defendant's rights.

For example in *Meyer*, the case primarily relied on by the district court (JA30-31), the government entered into a written immunity agreement with defendant Hoff in which "the *government promised . . . not to charge him* with any criminal violations . . . ." 157 F.3d at 1071 (emphasis added). As in this case, "[d]ue to the perceived breach of the immunity agreement by Hoff, the government believed that it was relieved of its obligation to refrain from prosecuting him." *Id.* at 1072. After he was indicted, Hoff unsuccessfully moved to dismiss the indictment arguing, as SNTG did in this case, "that due process required a pre-indictment determination of his breach." *Id.*; *accord id.* at 1076.

After his conviction, Hoff on appeal did "not contend that the district court erred in determining that he had breached the agreement, he merely contest[ed] the

timing of that determination" by claiming that "due process required a pre-indictment hearing to determine breach." *Id.* at 1076. The Seventh Circuit disagreed. Relying on an earlier decision that had addressed a similarly worded agreement,[16] the court held that "[t]he benefit" that Hoff received from the government's agreement that it "*would not charge him* . . . was to avoid the risk of conviction." *Id.* at 1077 (emphasis added). The court therefore held that "[t]he district court's [post-indictment but] pretrial evidentiary hearing satisfied . . . all of the protection demanded by due process." *Id.* Thus, in both *Meyer* and *Verrusio*, the court saw no distinction between an agreement not to charge and other "nonprosecution agreements."[17] *Id.* at 1077 n.3.

The Seventh Circuit's conclusion that the benefit of Hoff's bargain was to avoid the risk of conviction, not the risk of indictment, is "consistent" (*id.*) with how other circuits have interpreted similar agreements. *E.g., United States v. Bailey*, 34 F.3d 683, 690 (8th Cir. 1994) ("an agreement not to prosecute . . . is in essence a promise not to be punished") (collecting cases); *United States v. Dederich*, 825 F.2d

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[16] *United States v. Verrusio*, 803 F.2d 885, 886-87 & n.1 (7th Cir. 1986) (government agreed that "it would not file additional charges").

[17] Indeed, the specific language in the Agreement – that the government agreed "not to bring any criminal prosecution" and that appellees "shall not be prosecuted criminally" (JA73-74) – rings of a standard non-prosecution agreement.

1317, 1319, 1321 (9th Cir. 1987) (rejecting claim by a former compelled witness that government's grant of transactional immunity barred the indictment; "[t]he guarantee afforded by the immunity can be adequately protected by appeal after conviction"); *United States v. Bird*, 709 F.2d 388, 392 (5th Cir. 1983) ("a promise of immunity" gives only "immunity from punishment"); *United States v. Gerant*, 995 F.2d 505, 509 (4th Cir. 1993) ("a non-prosecution agreement implicates the same due process concerns as a plea agreement"); *United States v. Eggert*, 624 F.2d 973, 974-76 (10th Cir. 1980) (where agreement "included a promise from the government that *there would be no new indictments* with respect to any pending investigations," court held that agreement bestowed on defendant only a right not to be convicted, not a right to avoid standing trial) (emphasis added). All of these cases are themselves consistent with the Supreme Court's nearly century-old holding that an immunity statute providing that "[n]o person shall be prosecuted [for any conduct] . . . concerning which he may testify" provided immunity only from "successful prosecution," not a right to avoid standing trial. *Heike v. United States*, 217 U.S. 423, 431 (1910).

No case cited by the district court supports its due process conclusion. Both *Meyer* and *Verrusio* explicitly held that due process does not require pre-indictment relief. *Meyer*, 157 F.3d at 1077 ("pretrial evidentiary hearing satisfied [due process] requirement"); *Verrusio*, 803 F.2d at 890 ("due process does not require a judicial

determination that the defendant breached a plea agreement before the defendant is indicted"); *see also United States v. Ataya*, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988) ("the due process clause does not require the 'judicial determination' to be made prior to reindictment") (citation omitted). While the Seventh Circuit may have expressed a preference for a pre-indictment hearing in *dictum* in some of these decisions, its actual holdings reflect the reality that there is no such right. As Judge Posner explained in the analogous context of a party's attempt to enjoin a civil prosecution by the SEC, "[i]f *A* knows that *B* is about to sue him and thinks that *B's* suit is barred by the statute of limitations, *A* cannot file suit against *B* asking that *B* be enjoined from bringing his suit on the ground that *A* has a good defense to it." *Buntrock v. SEC*, 347 F.3d 995, 997 (7th Cir. 2003). The reason for this policy is that "defendants must not be allowed to turn every case in which there is a defense into two cases."[18] *Id.* at 997.

Moreover, SNTG's rights under the Agreement are limited to what the parties agreed to. *See, e.g., United States v. Benchimol*, 471 U.S. 453, 455 (1985). The

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[18] *United States v. Nolan-Cooper*, 155 F.3d 221 (3d Cir. 1998), also cited by the district court (JA29, 31-32), simply states that the government must adhere to the promises it makes in a plea agreement. It does not address whether a defendant has a right to a pre-indictment determination of whether the government has violated the agreement, nor does it address the Separation of Powers implications of such a holding.

Agreement does not provide that SNTG can seek pre-indictment injunctive relief if the Division revokes leniency. *See Meyer*, 157 F.3d at 1077 ("Notably, neither agreement addressed a particular procedure for the government to follow in the event of a perceived breach by the defendant"); *Verrusio*, 803 F.2d at 889 n.3. To the contrary, the Agreement expressly provides that "*[i]f the Antitrust Division* at any time *determines* that SNTG has violated this Agreement, this Agreement shall be void, and the Antitrust Division . . . *may thereafter initiate a criminal prosecution* against SNTG, without limitation." (JA74) (emphasis added).

Finally, the court was absolutely wrong that "the government's interest will not be significantly compromised by a judicial proceeding . . . prior to indictment . . . ." (JA32). To allow prospective criminal defendants to "bring[] ancillary equitable proceedings" would "encourage a flood of disruptive civil litigation," that would impermissibly "circumvent federal criminal procedure" and intrude on the prosecutorial discretion of the Executive Branch. *Deaver*, 822 F.2d at 71. Here, the government was forced to use its limited resources to continue the grand jury investigation and, at the same time, defend this case while maintaining grand jury secrecy. And the grand jury's investigation has effectively been on hold ever since the district court scheduled the April 2004 hearing.

Nothing in either the Constitution or the Federal Rules of Criminal Procedure supports either SNTG or the court impeding the grand jury's investigation with such lengthy delays. *United States v. Dionisio*, 410 U.S. 1, 17 (1973); *United States v. Calandra*, 414 U.S. 338, 343-352 (1974). Rather, "the public's interest in the fair and expeditious administration of the criminal laws," and the need to avoid disrupting and delaying criminal investigations by conducting mini-trials on issues that should be resolved post-indictment if criminal charges are filed, compel the conclusion that the district court had no authority to enjoin the government from seeking an indictment in this case. *Dionisio*, 410 U.S. at 17.

Therefore, whether viewed simply as a question of whether equitable relief was appropriate given the availability of an adequate remedy at law and the absence of irreparable injury, or viewed as an unprecedented intrusion into an exercise of prosecutorial discretion by the Executive Branch, the result is the same. The district court erred in enjoining the United States from seeking an indictment in this case.

III. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT SNTG DID NOT BREACH THE AGREEMENT

The district court's contorted interpretation of the Agreement renders much of the Agreement meaningless and reflects the court's failure to apply well established rules of contract interpretation.

"Nonprosecution agreements, like plea bargains, are contractual in nature, and are therefore interpreted in accordance with general principles of contract law." *United States v. Castaneda*, 162 F.3d 832, 835 (5th Cir. 1998); *accord Baird,* 218 F.3d at 229 (cooperative plea agreement); *United States v. Brown,* 801 F.2d 352, 354 (8th Cir. 1986) ("a cooperation-immunity agreement is contractual in nature") (citation omitted). Thus, an immunity or plea agreement, "like any contract, should be construed as a whole, so that various provisions of the contract are harmonized and none are rendered meaningless." *United States v. Schilling,* 142 F.3d 388, 395 (7th Cir. 1998) (internal quotations and citations omitted); *accord Skalsky,* 857 F.2d at 176; *Brown,* 801 F.2d at 354 (immunity agreement must be read as a whole; interpretation must not produce absurd results); *H.C. Lawton, Jr., Inc. v. Truck Drivers, Chauffeurs,* 755 F.2d 324, 328 (3d Cir. 1985) (contract to be read as a whole; contract terms "must be construed so as to render none nugatory") (internal quotations and citation omitted).

In this case, the Agreement contains a conditional promise by the Division: *if* SNTG's representations concerning its eligibility for leniency are verified by the Division, and *if* SNTG satisfies the obligations imposed on it by the Agreement, including its obligation to provide "its full, continuing and complete cooperation" to the Division during the investigation, *then* the Division will not prosecute SNTG for

the antitrust violation it reported, and also will not prosecute any SNTG employees "who admit their knowledge of, or participation in, and fully and truthfully cooperate with the . . . Division in its investigation of the anticompetitive activity being reported." (JA73-75). The district court, however, ignored the conditional nature of the agreement, and rendered the verification pre-condition meaningless. It then substituted its view of the value of SNTG's cooperation without determining whether SNTG had satisfied its obligation to cooperate as defined in the Agreement. For both reasons, the district court's interpretation of the Agreement was legal error.

A. The District Court Improperly Ignored Express Terms Of The Agreement Including Its Conditional Nature

1. The district court improperly equated the Agreement to a plea or immunity agreement. (JA29-30 &n.7). In fact, there are significant differences that are crucial to understanding the Agreement.

As the district court observed, courts generally view plea agreements as "unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguards obtain" because a plea agreement requires a defendant to waive his constitutional rights, plead guilty to a crime, and be sentenced. (JA29-30) (quoting *In re Altro*, 180 F.3d 372, 375 (2d Cir. 1999)). Moreover, a court enters a judgment of conviction on a plea agreement after a hearing, assuming it decides to

accept the plea agreement. Fed. R. Crim. P. 11(c). Similarly, an immunity agreement requires an individual to waive his Fifth Amendment rights in whole or in part.

But while anyone can enter into a plea agreement, and any individual can agree to waive his Fifth Amendment rights, a corporation like SNTG must ask for and qualify for leniency in order to receive it. A corporate leniency agreement does not require the corporation seeking leniency to waive any of its constitutional rights, the corporation is not required to plead to any offense, and no criminal sanction is imposed. Because an application for leniency is essentially a plea for mercy by a criminal directed to the Division, a court has no role in determining whether or not leniency should be granted.

A leniency agreement is conditional precisely because the applicant's eligibility for leniency must be verified by the Division. As in this case, the corporate criminals that seek leniency from the Division are represented by sophisticated counsel, and fully understand that the corporation assumes the risk that if the Division determines that the corporation does not qualify for leniency, it can prosecute the company and use any information provided to the Division against it. (JA432, 480-82). Only those who qualify for leniency should receive its rewards; those who do not qualify should run the same risk of prosecution and conviction that any criminal faces. Because the district court failed to understand that SNTG could not receive

leniency unless it satisfied all the preconditions established by the Leniency Policy, the court failed to appreciate the importance of the representations – which the Agreement expressly provided were subject to verification by the Division – made by SNTG in the Agreement.

2. The Agreement, following the Division's model letter, expressly referred to the Division's Corporate Leniency Program (a copy of the Leniency Policy was attached to the Agreement (JA74 ¶3)). In the Agreement, SNTG explicitly represented (among other things) that it "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity." (JA73). Moreover, SNTG explicitly agreed "to provide full, continuing and complete cooperation," including "providing a full exposition of all facts known to SNTG relating to the anticompetitive activity being reported." (*Id.*). The Agreement further stated that it "is conditional and depends upon SNTG satisfying the conditions set forth [therein]," and that only "[a]fter all of these conditions are met" will SNTG's leniency application be "granted." (*Id.*). The Agreement gave notice that the Division intended to investigate the veracity of SNTG's information by providing that the grant of conditional leniency was "[s]ubject to verification of SNTG's representations," and to SNTG's obligation to divulge all known facts about the conspiracy. (JA74). Finally, the Agreement expressly provided that if the

Division determined that SNTG violated the Agreement, "this Agreement shall be void, and the Antitrust Division . . . may thereafter initiate a criminal prosecution against SNTG, without limitation." (*Id.*).

Nannes knew that the Division's Agreement with SNTG was "conditional," that "the representations by Stolt are stated in the letter and are conditions of the leniency agreement," and that if "the conditions aren't met, the Antitrust Division has the right to revoke" the Agreement. (JA480). SNTG's Chairman "Cooperman was [also] familiar with the elements of the policy." (JA332). In fact, a month after it signed the Agreement, SNTG published a press release explaining that the company "has been granted conditional amnesty . . . by the Antitrust Division of the U. S. Department of Justice," and that its amnesty was "*subject to the conditions of the amnesty programs*, including continued cooperation." *See* p. 28, *supra* (emphasis added). Thus, contrary to the court's suggestion (JA33), there was no "ambiguity and confusion" in the Agreement that "inure[d] . . . to SNTG's detriment." *See, e.g.*, *United States v. Ballis*, 28 F.3d 1399, 1410 (5th Cir. 1994) (defendant's obligations under a plea agreement "were not ambiguous [when t]he letter clearly stated its terms were conditioned on Ballis giving complete and truthful information").

In concluding that SNTG had not violated the terms of the Agreement, however, the court failed to reconcile its conclusion with these critical points. It

appeared to believe that the Division was trying to impose some obligation on SNTG that was not stated in the Agreement.[19] The district court noted that the Agreement: (1) does not state when SNTG discovered the illegal activity or terminated its involvement in that activity; (2) immunizes SNTG for illegal conduct that occurred prior to January 15, 2003; and (3) contains an integration clause.[20] It thus erroneously framed the issue as: "Did DOJ and SNTG *agree* that the illegal conduct was discovered in March 2002, thus triggering SNTG's obligation to withdraw?"[21]

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[19] In *Altro*, relied on by the district court (JA34), "nothing in the written plea agreement could reasonably be viewed as foreclosing the Government's subpoena of Altro to testify before the grand jury." 180 F.3d at 375. In contrast in this case, the Division relied on the express language in the Agreement to support its conclusion that SNTG had violated that Agreement. Accordingly, *Altro* does not support the district court's interpretation of the Agreement which renders meaningless whole portions of that Agreement.

[20] The integration clause simply states that the leniency letter "constitutes the entire agreement between the Antitrust Division and SNTG, and supercedes all prior understandings, if any, whether oral or written, relating to the subject matter herein." (JA76).

[21] The court's conclusion, unsupported by any record cite, that "Griffin conceded that Nannes had never represented that SNTG's participation in the anticompetitive activity ceased as of March 2002" (JA34), although irrelevant, is clearly erroneous. Griffin specifically testified that when Nannes gave him the six SNTG e-mails dated March-April 2002 (JA676-81), Nannes stated that those six documents "provided unequivocal evidence or proof that the company had in fact terminated its conduct in March and April [2002]." (JA403). That is why Griffin told Nannes "that if it turned out that all of this . . . evidence of withdrawal turned out to be . . . 'a head fake' . . . and Mr. O'Brien's allegations were in fact true, the company would not qualify for leniency and even if [the Division] did enter into a

(JA33) (emphasis added). The district court then used the Agreement's integration clause to conclude wrongly that the Division "cannot depend upon a tacit understanding of what it contends was meant during negotiations but was not memorialized in the integrated agreement." (JA34).

This is clearly the wrong legal inquiry under the express terms of the Agreement. *See Benchimol*, 471 U.S. at 455 (what parties in fact agree to in written agreement controls questions of breach, not "such implied-in-law terms as were read into this agreement by the Court"). The Agreement plainly states SNTG's representation that it "took prompt and effective action to terminate its part in the anticompetitive activity being reported *upon discovery of the activity*," and expressly conditions the "conditional" grant of leniency on verification of that representation, as well as the other representations that SNTG made in the Agreement.[22] (JA73-74) (emphasis added). Nothing in the plain language of the Agreement, including the integration clause, links the date of discovery to the date the Agreement was signed, or to any other specific date. Rather, the representation concerning discovery simply

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conditional leniency agreement, that that would be revoked." (JA405).

[22] SNTG also represented in the Agreement that it "was not the leader in, or the originator of, the anticompetitive activity being reported." (JA73). Like the "prompt and effective" representation, this representation is required by the Division's Leniency Policy, and obviously refers to the company's role in the conspiracy that is being reported.

states that SNTG took prompt and effective action to terminate its involvement in the conspiracy on whatever date it discovered its involvement in the conspiracy.[23]

Thus, the relevant issue the court failed to address was: When did SNTG discover the illegal conduct and when did it terminate its participation in it? As Griffin explained, the negotiations that preceded the signing of the Agreement focused almost exclusively on "whether the company qualified even to apply for immunity based upon its actions upon Mr. O'Brien's discovery of the conduct." (JA405, *accord* JA401-02, 406-07, 599). In fact, Nannes had a "clear understanding" that SNTG's eligibility for leniency depended on "what the company did in response to the issues raised by Mr. O'Brien." (JA458-59). And SNTG clearly understood the importance of this issue since it provided documentary evidence that, it claimed, proved that SNTG's involvement in the conspiracy ended shortly after O'Brien's discovery of the

[23] The Division's written leniency agreements do not specify a discovery or termination date because neither the Division nor the applicant seeking leniency may know the exact dates at the time the Agreement is signed. (JA393). By not specifying those dates, both the Division and the applicant can focus on the real issue – did the applicant take prompt and effective action to terminate its role in the conspiracy upon discovery of the illegal conduct, whenever discovery occurred. (JA410). The Division grants conditional leniency up to the date the letter agreement is signed to "give the company comfort" of knowing that its leniency extends to "the point in time where there was clearly legal withdrawal from the conspiracy by notifying law enforcement authorities." (JA411; *see also* JA395; 674).

conspiracy. (JA402-03, 472-75). And it relied on this evidence in arguing that it did qualify for leniency under the Division's Leniency Policy.[24] (JA403). The plain language of the Agreement authorized the Division to verify SNTG's representation that it had taken prompt and effective action to terminate its involvement in the illegal activity, and to void the Agreement if it determined that SNTG had not.

As noted, evidence obtained by the Division after the Agreement was signed established that although SNTG discovered the illegal activity no later than February 2002 (*see* GSA23-24 & n.16), it continued to engage in it until November 2002. Thus, the legal issue the court should have answered was whether that nine-month delay constituted "prompt and effective" action by SNTG. The court never addressed that question, but the answer plainly must be no, because corporate criminals who continue

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[24] In notes dated November 25, 2002, apparently reflecting a conversation with Cooperman ("SAC") and Stolt-Nielsen President Reginald Lee ("RJL") (JA699), the first business day following Cooperman's Friday, November 22, 2002 meeting with Nannes, Wingfield wrote in his business journal (after a large section of "material withheld on grounds of attorney-client privilege"):

> Conditions
> (1) First found out - ended promptly
> (2) Gave AT [antitrust] policy to competitors/partners

Wingfield then noted that his "best estimate of dates AT policy given" were the March 2002 "NPRA dates." (JA699-702). Nannes said the same thing at the December 4, 2002 meeting. (JA404-05, 455, 472-73).

to engage in illegal activity for that many months after the corporation discovered the illegal activity and then lie about it do not deserve leniency.

Thus, the court erred in concluding that, notwithstanding other express terms of the Agreement, the Division cannot prosecute SNTG simply because neither a discovery nor termination date is "set forth in the agreement," and "[t]he agreement immunizes SNTG from prosecution for activity prior to January 15, 2003." (JA34). The court's interpretation turns the Agreement on its head by rewarding a corporation not eligible for leniency with the leniency it lied to obtain. It reads out of the contract both the requirement that SNTG must have ceased its illegal activity when it first was discovered, and the Division's express right to verify SNTG's eligibility for leniency.

As such, the court's reading of the Agreement violates "one of the basic canons of contract construction, which is that the Court must look to the whole instrument, and ascertain the intention of the parties by an examination of all that they have said, rather than of a part only." *New Wrinkle, Inc. v. John L. Armitage & Co.*, 238 F.2d 753, 757 (3d Cir. 1956), citing *Black v. United States*, 91 U.S. 267, 269 (1876) (same). The court's construction also violates the maxim that contract terms must be construed so as to render none "nugatory." *CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc.*, 381 F.3d 131, 137 (3d Cir. 2004); *H.C. Lawton, Jr.*, 755 F.2d at 328. Indeed, while enforcing what "[t]he plea agreement *explicitly states*," this Court explained in *United*

States v. Carrara, 49 F.3d 105, 107 (3d Cir. 1995), that "[s]pecific performance requires *that the court enforce every portion of the agreement,* which most specifically here includes the government's right to withhold its [promised downward departure] motion because Carrara gave false testimony."

Neither the granting of conditional leniency for conduct prior to January 15, 2003, nor not specifying a discovery or termination date in the Agreement, in any way conflicts with or altered SNTG's obligation to take – as expressly stated in the Agreement itself – prompt and effective action to terminate its participation in the conspiracy when it discovered it. The court's complete failure to address the issues presented by the written Agreement produced a result that cannot be reconciled with the plain language of that Agreement or the facts in the record. Because the district court's interpretation of the Agreement unnecessarily renders whole portions of it "meaningless" and "nugatory," its interpretation must be rejected.

B. The Division Did Not Receive The Benefit Of The Bargain

The court's belief that the Division received the benefit of its bargain with SNTG (JA34-35) is irrelevant and wrong. It is irrelevant because the Division bargained for an agreement that granted leniency only if SNTG satisfied all of the pre-conditions in its Leniency Policy. (JA73). In fact, as the Division soon learned, SNTG was not eligible to receive leniency because its involvement in the conspiracy

continued for many months after the conspiracy was discovered by O'Brien. And because SNTG was not eligible to receive leniency, it, along with any of its culpable executives that the Division should elect to prosecute, should be charged with a crime and punished in accordance with the law like any other criminal.[25] Whether or not the Division received useful information from SNTG does not change the fact that SNTG was ineligible to receive leniency, and it assumed the risk that if leniency was denied or revoked, "any documentary or other information provided by SNTG [or any SNTG executive] . . . may be used against SNTG in any . . . prosecution," as the Agreement expressly provides (JA74-75), and as Nannes expressly acknowledged. (JA482).

In any event, SNTG never disclosed the evidence it had concerning the continuation of the conspiracy, including its involvement in it, after March 2002. Indeed, Nannes conceded that: (1) Jansen had told the Division in his February 2003 interview that SNTG had ceased all conspiratorial activity with Odfjell and Jo Tankers "after [SNTG's] new [antitrust] policy, came into effect" (JA492), (2) "what Jansen was telling [the Division in that interview was] consistent with what [Nannes] had told the Division all along" (JA493), (3) the conspiracy in fact "did continue to November

[25] Although SNTG was not eligible to receive leniency, several SNTG executives have negotiated binding non-prosecution agreements that are conditioned on their truthful cooperation irrespective of whether SNTG receives leniency. *See e.g.* JA491-92, 898-901; GSA128-29, 233-35.

[2002]" (JA475), and (4) as of the date of the hearing SNTG had never provided the Division with any information that the conspiracy and SNTG's participation in it had continued after March 2002, even though such information would have been "important" to the Division. (JA453, 474-75). Thus, SNTG did not provide "a full exposition of all facts known to SNTG relating to the anticompetitive activity being reported," the explicit benefit stated in the Agreement for which the Division bargained.[26] (JA73; *see* GSA 27-35). This failure to disclose all relevant evidence forced the Division to look elsewhere for the truth.

Rather than address SNTG's obligation "to provide full, continuing and complete cooperation" (JA73), the court focused on the benefits it believed the government received. (JA34-35). And it concluded that the Division received the benefit of the bargain because "SNTG's partners in the conspiracy were prosecuted and convicted." (*Id.*). The court's conclusion, which completely ignores how SNTG's breach prejudiced the investigation, is wrong as a matter of law.

Just like the government, SNTG is bound by the terms of the Agreement it signed. *Carrara*, 49 F.3d at 107. In *Skalsky*, this Court reviewed a district court

[26] Instead, when SNTG provided Jansen for interview in February 2003, Jansen falsely stated that the conspiracy did not continue past March 2002, and specifically withheld evidence that both he and his direct supervisor, Wingfield, continued conspiratorial activity into late 2002. (JA492-93, 708 ¶¶4 & 5, 710-11 ¶¶4, 5, 7, 10 & 12).

finding that Skalsky materially breached his non-prosecution agreement by failing to completely disclose all information concerning his dealings with a grand jury target. Noting that Skalsky gave the government "misleading answers" that "threw the agents off the scent" (the court never characterized the answers as untruthful), the court concluded that Skalsky's information was "a far cry from 'the complete, truthful and accurate information and testimony' contemplated by his agreement with the government," and amounted to a "material[] breach" of the agreement because "the grand jury's investigation . . . .was severely hampered by Skalsky's *incomplete and evasive* testimony." 857 F.2d at 178-79 (citation omitted) (emphasis added); *accord United States v. Gonzalez-Sanchez,* 825 F.2d 572, 578 (1st Cir. 1987) ("[T]he failure of the defendant to fulfill his promise to cooperate and testify fully and honestly releases the government from the plea agreement"); *United States v. Reardon,* 787 F.2d 512, 516 (10th Cir. 1986) (defendant's failure to "provide a full and truthful accounting and statement of all knowledge" of the crime constitutes breach of plea agreement); *United States v. Flores,* 975 F. Supp. 731, 742 (E.D. Pa. 1997) (same).

Applying *Skalsky* to the facts of this case, SNTG's misrepresentations plus its failure to fully disclose evidence concerning its involvement in the conspiracy similarly impeded the grand jury's investigation and amounted to a material breach of the Agreement. Specifically, because SNTG affirmatively withheld evidence

concerning the duration of the conspiracy from the Division, and provided a witness who lied about the duration of the conspiracy, the Division had to spend additional time and resources to obtain that evidence. The Division was forced to immunize co-conspirators that it otherwise would have prosecuted, and to make deals with other co-conspirators that it otherwise would not have made. (JA279, 387). And in each prosecution the Division did bring, "the United States Sentencing Guidelines fine and incarceration ranges exceed[ed] the agreed-upon sentence . . . because of the defendant's substantial assistance in the government's investigation and prosecutions" (JA722, 731-32, 750-51, 761, 781, 794, 814, 825, 844), which was needed to establish the true duration of the conspiracy. Moreover, because SNTG failed to provide any information about the conspiracy continuing after March 2002, the volume of commerce that was affected by the conspiracy after March 2002 was not included in the computation of the corporate co-conspirators' Sentencing Guidelines' fine ranges (JA791). *See* U.S.S.G. §§ 1B1.8 & 2R1.1.

The court wrongly suggests (JA47 ¶79) that the Division's successful prosecutions resulted solely from SNTG's cooperation. The Division specifically told the court otherwise. (JA279, 387). Indeed, the "successful" prosecutions were guilty pleas pursuant to plea agreements by SNTG's co-conspirators who cooperated in the Division's investigation and who, unlike SNTG, provided evidence that was both

truthful and complete. Thus, the district court's assertion that the Division "did not and does not claim that SNTG failed to cooperate in the investigation or withheld evidence necessary to DOJ's successful prosecution of SNTG's co-conspirators" (JA33) simply cannot be reconciled with the record. Moreover, all of the documents that SNTG voluntarily produced were business documents that were subject to subpoena, as SNTG's and Wingfield's counsel acknowledged. (JA254-55, 261, 266, 431, 500-01). And of the two SNTG employees whom the Division interviewed, one lied.[27]

That the Division may have obtained some useful information or evidence from SNTG does not relieve SNTG from its breach. In *Carrara*, for example, the defendant "cooperated with the government and gave information by which the government was able to convict several individuals. *That is undisputed.*" 49 F.3d at 106 (emphasis added). But the defendant subsequently lied in an affidavit and, when he later admitted the lie, the government refused to request a downward departure as it had promised in the plea agreement. *Id.* In rejecting the defendant's claim that the government had "reap[ed] the benefits of the plea agreement," this Court explained that "to the extent that the government benefitted from information Carrara provided,

[27] The other interviewee, Pickering, provided only background information. *See supra* note 11.

the government was also put in the unenviable position of having to ascertain what aspects of Carrara's testimony were true and what aspects were lies." *Id.* at 108. SNTG's misrepresentations and omissions placed the Division in the same position.

Similarly, in *United States v. Davis*, 393 F.3d 540 (5th Cir. 2004), the court found that after defendant Davis provided information to the government pursuant to a plea agreement, "the Government did, in the end, obtain a guilty verdict against Samuel, *largely due to Davis's information.*" *Id.* at 547 (emphasis added). Nonetheless, the court concluded that Davis breached the agreement when he, as SNTG did here, withheld information about the complete extent of his involvement in the crimes being investigated. *Id.* Because withholding that information caused the government to expend substantial resources that "could have been avoided" if the defendant had been completely truthful, as also happened here, the court concluded that "[t]he government did not receive the honest, truthful disclosure of information that it had bargained for."[28] *Id.*

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[28] *See, e.g., United States v. Gerant*, 995 F.2d at 509 (defendant's claim that the government received the benefit of its bargain "because he provided substantial amounts of useful information and services for the government," "ignores *the express condition in the nonprosecution agreement* that [defendant] would come forth with complete truthfulness and candor") (emphasis added); *Flores*, 975 F. Supp. at 740, 742 (false statements by the defendant during government interviews negated his effectiveness as a cooperating witness and resulted in breach, even though he had "provided substantial assistance in the investigation or prosecution of others").

In contrast, in *Castaneda*, relied on by SNTG below, the court found that the defendant's omissions were unintentional and did not prejudice the government because "the relatively little that Castaneda omitted was already known to the government . . . [and] must be classified either as cumulative or surplusage." 162 F.3d at 839. In this case, however, Nannes admitted that SNTG never gave the Division any information about the conspiracy operating past March 2002 (JA475-76), and SNTG's misrepresentations, intentional omissions, and Jansen's lies, cannot be viewed as either "cumulative or surplusage."

Finally, the court's benefit of the bargain conclusion turned the Division's Leniency Policy upside down by allowing SNTG, which lied to obtain leniency and then withheld relevant information, to go free, while SNTG's corporate co-conspirators, who provided truthful information, were "rewarded" by being required to plead guilty, pay fines, and go to jail. *See Ballis*, 28 F.3d at 1411 (finding defendant's benefit of the bargain claim "specious" because if plea agreement enforced, government would have "received only untruthful and misleading information [while defendant would have] received a light sentence of only two years' probation").

For all these reasons, the district court's conclusion that the Division received the benefit of the bargain in accordance with the Agreement is wrong.

IV. WINGFIELD SEPARATELY BREACHED THE AGREEMENT

The district court concluded that Wingfield's only obligations under the Agreement were to "produce any documentary evidence requested by DOJ and make [himself] available for interview at the request of DOJ." (JA35 n.11). It then decided that because Wingfield produced documents and was available to interview "he is entitled to immunity." (*Id.*). The court's erroneous conclusion once again ignores explicit provisions of the Agreement and settled Circuit precedent.

Wingfield is not a party to the Agreement between SNTG and the Division. At best, he is a third party beneficiary of that Agreement, but only to the extent that the Agreement imposes any obligations or benefits on him. But if the Agreement is voided it no longer exists, and imposes no further obligations on any SNTG employee and provides no protection against prosecution. Accordingly, if the Agreement is void as to SNTG, it is void as to Wingfield.

In any event, under the Agreement, Wingfield, like any other SNTG officer or employee seeking leniency, was explicitly obligated to "fully and truthfully cooperate with the Antitrust Division in its investigation of the anticompetitive activity being reported." (JA126). The Agreement expressly provides that "[s]uch full and truthful cooperation shall include, but not be limited to: . . . (d) otherwise *voluntarily* providing the United States with any materials or information, not requested in (a)-(c)

of this paragraph, that he or she may have relevant to the anticompetitive activity being reported." (*Id*.) (emphasis added). It further provides that the Agreement "shall be void" as to Wingfield if he "fails to comply fully with his[] obligations" pursuant to the Agreement. (*Id.*).

In *Skalsky*, the defendant argued that "he was not obligated to volunteer information, he was required only to respond to specific questions asked of him." 857 F.2d at 178. Even though Skalsky's nonprosecution agreement did not expressly require "voluntary" action, this Court found his argument "untenable." *Id*. The Court explained that by giving "information that was incomplete, inaccurate in context, and 'affirmatively misleading,'" Skalsky breached his obligation to provide "'the complete, truthful and accurate information and testimony' contemplated by his agreement with the government." *Id*. (citations omitted). In this case, the Agreement expressly required Wingfield to provide the Division with all information concerning the activity being reported, whether or not specifically requested by the Division. (JA75).

The court's suggestion that because "Wingfield was available," the Division should have interviewed him (JA35 n.11), is wrong for several reasons. First, it ignores Wingfield's express obligation to come forward with information voluntarily. Second, if the Division had sought cooperation from Wingfield after it suspected

SNTG and Wingfield had breached the Agreement, Wingfield could have argued that the Division had "waived its right to complain of [the] breach." *United States v. Vogt*, 901 F.2d 100, 102 (8th Cir. 1990). Finally, after the Division discovered that Wingfield's participation in the conspiracy continued past March 2002, it had no reason to believe that Wingfield would provide truthful information. (GSA29-33).

Wingfield did withhold evidence from the Division. Jansen eventually admitted that "Mr. Wingfield and I continued to [conspire] after SNTG's new antitrust compliance policy was issued in March 2002." (JA708 ¶5, 710 ¶¶4, 5). In fact, Jansen admitted that the "cooperation agreement" with Odfjell was still in effect at least as late as October 2002. (JA708 ¶4, 711 ¶12). But Wingfield never told the Division that the conspiracy continued past March 2002. (JA453-54, 475-76). And even though Wingfield knew that SNTG had given the Division false information about the true extent of the conspiracy, Wingfield "took no action to correct that, to come forward and make it known to [the Division]."[29] (JA417-20). Thus, Wingfield clearly breached the Agreement. *Skalsky*, 857 F.2d at 178.

[29] For additional evidence of Wingfield's continued participation in the conspiracy and failure to cooperate fully and truthfully with the Division, *see* GSA293 ¶4 and GSA199; GSA29-35, 117-25.

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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STATEMENT OF RELATED CASES

This case has not been before this Court previously. Plaintiff-Appellee Stolt-Nielsen Transportation Group's ("SNTG") former general counsel, Paul O'Brien, has sued SNTG in Connecticut Superior Court alleging that he was constructively terminated by SNTG's failure to cease engaging in the anticompetitive conduct that is at issue in this case. CV-02-0190051-S, Superior Court Judicial District of Stamford/Norwalk. (A copy of the complaint is at Joint Appendix page 685.) The case currently is in the discovery phase.

Additionally, in its most recent Annual Report on Form 20-F filed with the Securities and Exchange Commission on June 16, 2004, plaintiff-appellee Stolt-Nielsen S.A. states on page 11:

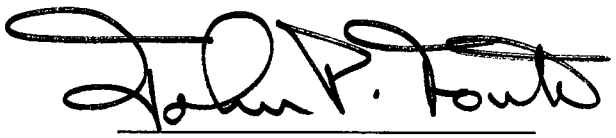
> Civil Litigation
>
> To date we are aware of 12 ongoing putative private class actions filed against SNSA and SNTG for alleged violations of antitrust laws. The actions set forth almost identical claims of collusion and bid rigging that track information in media reports regarding the DOJ and EC investigations. The suits seek treble damages in unspecified amounts and allege violations of the Sherman Antitrust Act and various state antitrust and unfair trade practices acts. Additionally, the Dow Chemical Company and Huntsman Petrochemical Corporation filed antitrust claims against us in the Federal District Court for the District of Connecticut. The claims track the allegations in the putative class actions described above and seek similar types of damages.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,912 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in 14-point Times New Roman.

Dated: May 17, 2005



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CERTIFICATE OF SERVICE

I, John P. Fonte, hereby certify that on this 17th day of May, 2005, I served two copies of the foregoing Brief For Appellant United States of America by Federal Express on:

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CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

1. I hereby certify that the text of the electronic PDF version of the foregoing Brief For Appellant United States of America that was filed electronically with the Court is identical to the text of the Hard Copies of the brief that were filed with the Court.

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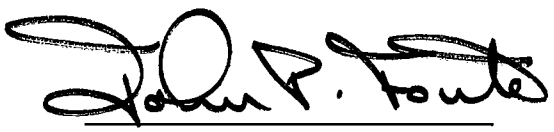

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