

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

IN RE: READY-MIXED CONCRETE PRICE)	Master Docket No.
FIXING LITIGATION)	1:05-CV-00979-SEB-VSS
)	
)	
THIS DOCUMENT RELATES TO:)	
ALL ACTIONS)	
)	

MEMORANDUM IN SUPPORT OF
THE GOVERNMENT’S MOTION
TO LIMIT THE SCOPE OF DISCOVERY UNTIL
COMPLETION OF CRIMINAL PROCEEDINGS

I. INTRODUCTION

The United States of America (“the government”) requests this Court to protect an ongoing grand jury investigation by limiting the scope of discovery to certain classes of documents and staying all other discovery (including but not limited to depositions) undertaken pursuant to civil litigation founded on the very conduct the grand jury is investigating. Further, the government requests that the order limiting discovery remain in effect during the pendency of the grand jury’s investigation and resulting criminal proceedings. Such protection is necessary to preserve the secrecy of ongoing grand jury proceedings, as well as to prevent broad discovery in a civil case that would interfere with the government’s investigation.

If unlimited discovery is allowed to go forward, it will undermine the grand jury’s investigation by allowing the parties involved in the civil action to determine the scope and focus of the investigation, interfere with the privacy rights of witnesses and potential witnesses, facilitate the destruction of evidence by those who have not yet produced documents, and encourage coordination of stories by subjects and potential witnesses. *See Douglas Oil Co. v.*

Petrol Stops Northwest, 441 U.S. 211, 219 & n. 10 (1979).

II. STATEMENT OF FACTS

The grand jury for the Southern District of Indiana is investigating allegations of price fixing by producers of ready-mixed concrete in the Indianapolis, Indiana metropolitan area. This investigation has required the review of voluminous documents as well as interviews of numerous witnesses. On June 29, 2005, Irving Materials, Inc. (a defendant in the present litigation) and four individuals currently or formerly with that company, pled guilty to a one count Information charging them with participation in a conspiracy to eliminate competition for the sale of ready-mixed concrete in the Indianapolis metropolitan area in violation of Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1). Although the government has conducted a substantial investigation to date and additional criminal charges are expected soon, it still has significant steps to take.

On November 9, 2005, counsel for the Plaintiffs filed Plaintiffs' Notice of Rule 30(B)(6) Deposition of Defendant Irving Materials, Inc. That discovery demand, along with others which have recently been filed, pose a risk to the on-going grand jury investigation. Specifically, unlimited discovery in this matter would give the plaintiffs as well as the defendants access to core grand jury information to which they would not otherwise be entitled and would eviscerate the secrecy and integrity of the grand jury process. Furthermore, it would provide possible defendants in criminal matters with discovery to which they are not entitled and would enable those criminal defendants to coordinate false evidence.

III. PROPOSED LIMITED DISCOVERY

In order to protect the integrity of the grand jury's investigation and to prevent

unwarranted discovery in the government's criminal investigation, the government respectfully requests that this Court issue an Order limiting discovery in this matter to the following classes of documents until the grand jury's investigation and resulting federal proceedings are completed:

1. Pricing Documents
 - Price Cards & Schedules
 - Published or benchmark prices
 - Discount Policies
 - Historical Price & Discount Records – January 1, 1995 to present.
2. Transactional Documents
 - Actual transaction and customer documents
 - Records and summaries of transactions
 - Historical transactional documents – January 1, 1995 to present.
3. Profit & Loss Documents
 - Quarterly, or monthly P&L's
 - Backup Schedules and documents
 - P&L's for specific products/locations
 - Historical P&L documents – January 1, 1995 to present.
4. Financial Statements
 - Current and historical financial statements
 - Third-party financial statements provided to lenders, suppliers, etc.

The government believes that limiting reciprocal discovery to the above categories of documents until the completion of criminal proceedings will protect the government's legitimate interest in ensuring that the grand jury's investigation is not compromised while advancing discovery in the civil matters to the extent possible.

IV. AUTHORITY OF THE COURT

This Court, invested with the judicial power of the United States, has inherent authority to protect its proceedings. *Degen v. United States*, 517 U.S. 820, 823 (1996); *Chambers v. NASCO*,

Inc., 501 U.S. 32, 43-46 (1991). Grand jury proceedings fall within this Court's jurisdiction and therefore are protected under the Court's authority. Fed. R. Crim. P. 6. *See Skolnick v. Campbell*, 454 F.2d 531, 534 footnote 3 (7th Cir. 1971). In the event that a grand jury investigation may be compromised by civil discovery proceedings, the Court can protect the grand jury investigation from interference.

The Court has wide discretion with respect to discovery matters. *Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776, 778 (7th Cir.1991); *United States v. Valona*, 834 F.2d 1334, 1341 (7th Cir.1987); *In re Rassi*, 701 F.2d 627, 631 (7th Cir.1983). The Court's inherent power to protect matters under its supervision includes the authority "to stay civil proceedings, postpone civil discovery, or impose protective orders when the interests of justice so dictate." *Doe v. City of Chicago*, 360 F.Supp. 2d 880, 881 (N.D.Ill. 2005); *see also Afro-Lecon, Inc. v. United States*, 820 F.2d 1198 (Fed. Cir. 1987). Additionally, the Court can "exercise its discretion to manage the civil litigation to avoid interference with the criminal case." *Degen*, 517 U.S. at 827; Fed. R. Civ. P. 26(c). Therefore, when civil proceedings threaten to interfere with a criminal case, the Court has the ability to protect the criminal case by postponing civil discovery and/or staying civil proceedings.

V. RISK TO THE INTEGRITY OF THE GRAND JURY INVESTIGATION

Because the current situation falls within the Court's purview, civil discovery related to the grand jury investigation should be partially stayed. The risk to the integrity of the grand jury investigation is significant because a party to a civil case is entitled to discovery of any information sought that appears "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *Degan*, 517 U.S. at 825-26. The difference between civil and

criminal discovery rules is present in all types of discovery: requests for documents and witness statements, requests for admissions and interrogatories, and depositions of witnesses. While a party in a civil suit has broad leeway with respect to document discovery and witness depositions, a criminal defendant is not entitled to discovery until, at the earliest, after indictment. *See* Fed R. Crim P. 16, and the *Jencks Act*, 18 U.S.C.A. §3500.

Without the Court's intervention, the parties to the civil proceedings will be able to circumvent criminal discovery rules through using the more liberal discovery rules of civil litigation. In essence, the criminal defendants will be able to use the civil discovery process to acquire information about the criminal case prior to indictment. This clearly violates the integrity of the grand jury process and subverts the judicial process. The government has a compelling interest in ensuring that grand jury information is kept secret. Furthermore, allowing the defendants to engage in civil discovery will interfere with the grand jury secrecy provisions of Federal Rule of Criminal Procedure 6(e). The limited discovery proposed above would not interfere with the grand jury investigation.

VI. PROTECTING THE INTEGRITY OF THE GRAND JURY INVESTIGATION

Because of the seriousness of a grand jury investigation the Court "should be sensitive to the difference in the rules of discovery in civil and criminal cases." *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962). Indeed, "the very fact that there is clear distinction between civil and criminal actions requires a [...] determination of priority." *Id.* Therefore, in the weighing of private interests in civil litigation against public interest in a criminal prosecution "policy gives priority to the public interest in law enforcement." *Id.*

Protecting the grand jury from interference has substantial support. The Supreme Court,

the Seventh Circuit and other courts have cited *Campbell* positively for the rule that a court “should not permit a defendant in a criminal case to use liberal civil discovery procedures to gather evidence to which he might not be entitled under the more restrictive criminal rules.” *Benevolence Intern. Foundation v. Ashcroft*, 200 F.Supp. 2d 935 (N.D.Ill. 2002); *see also, e.g., Degan*, 517 U.S. at 825 (finding that a court can exercise its discretion to manage civil litigation to avoid interference with a criminal case); *In re Film Recovery Sys., Inc.*, 804 F.2d 386, 389 (7th Cir. 1986) (stating that a court should take caution “where a criminal litigant initiates a civil suit in order that he might circumvent the limitations on discovery imposed by criminal proceedings.”); *Wilk v. Am. Med. Ass’n*, 635 F.2d 1295, 1300 (7th Cir. 1980) (proposing that “[a] collateral litigant should not be permitted to exploit [the discovery process] “as a device to obtain access to the sealed information); *United States v. Phillips*, 580 F. Supp. 517, 518-19 (N.D.Ill 1984) (stating that “judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other.”).

In *United States v. On Leong Chinese Merchants Ass’n Bldg.*, 918 F.2d 1289 (7th Cir. 1990), a motion to stay discovery in a forfeiture claim was upheld. The government filed a forfeiture complaint pursuant to 18 U.S.C. § 1955(d), which forbids the use of property for illegal gambling activities. The government sought the forfeiture of the defendant’s real property and currency, chips, and equipment seized in a raid. On Leong filed a claim to the Building and other seized property. The government subsequently moved to stay discovery with respect to the forfeiture action because of a concurrent, related criminal investigation. *Id.* at 1291. The motion was granted and upheld.

VII. PARTIES WILL NOT BE ADVERSELY AFFECTED

In considering whether to grant a request for a stay of discovery in a civil matter pending a grand jury's investigation, courts frequently look at a number of factors, including whether the plaintiffs or defendants would be prejudiced by such a stay. *See, e.g., Nowaczyk v. Matingas*, 146 F.R.D. 169 (N.D.Ill. 1993). However, in the present case, no such prejudice can be demonstrated. All of the parties would be able to continue discovery once all criminal proceedings resulting from the grand jury's investigation are completed. In fact, in the event that there were criminal trials, discovery for all parties would arguably be facilitated by the existence of the criminal trial transcripts. Counsel for the government has spoken to counsel for the parties, but has been unable to reach a consensus on the present motion. Notwithstanding that lack of consensus, neither the plaintiffs nor the defendants can demonstrate any prejudice they would suffer if this Court were to grant the government's motion. Counsel for the government are prepared to discuss the progress and status of the grand jury's investigation with this Court *in camera* if requested to do so.

VIII. CONCLUSION

The public interest in law enforcement and ensuring competition in the market far outweigh the need for unrestricted discovery in this matter to take place at the present time. For the foregoing reasons the government asks this Court to limit discovery in this matter during the pendency of the grand jury's investigation and resulting criminal proceedings. Because discovery demands have already been made, the government respectfully request that the Court rule on this motion as quickly as possible in order to prevent irreversible damage to the integrity of the grand jury process.

In the alternative, if the Court is disinclined to allow some discovery to proceed while

staying other discovery, the government requests that all discovery be stayed until conclusion of the criminal proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2005, a copy of the Government's Motion to Limit the Scope of Discovery Until Completion of Criminal Proceedings and Memorandum in support thereof were served upon the following counsel of record by electronic mail, pursuant to the October 31, 2005 Case Management Plan and Order Providing for Consolidation and Organizational Matters:

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