



ANTITRUST & TRADE REGULATION



VOL. 94, NO. 2338

REPORT

FEBRUARY 8, 2008

PARALLEL CIVIL AND CRIMINAL PROCEEDINGS: THE NEED TO STAY DISCOVERY

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1. Introduction

When a grand jury investigation by DOJ's Antitrust Division is made public, major players in the targeted industry inevitably draw multiple civil class action lawsuits. Contending with the complications of parallel civil and criminal litigation poses significant challenges to the defense bar. Some help, however, has come from perhaps unlikely quarters: the Division's San Francisco Field Office.¹ In the last five years, the San Francisco Field Office has sought to stay discovery in many major private civil antitrust actions pending the conclusion of its own criminal investigations. After intervening to stay discovery in the *DRAM* civil litigation in 2002,² the Division has since successfully sought discovery stays in the *Rambus*, the *SRAM*, and the *TFT-LCD* litigation.³ It has intervened in numerous others in the last six months, including *Flash Memory* and the *Graphics Processing Unit* antitrust litigation,⁴ and even in at least two cases outside the Northern District of California.⁵ While this approach

may herald a greater emphasis by the Division on protecting its grand jury proceedings, its repeated success in convincing courts to put the brakes on civil discovery has benefited antitrust defendants.

2. The Recent Pattern Indicates a Change in Practices by the Antitrust Division and in Responses by the Court

Until the recent string of Northern District of California cases, the Antitrust Division was seen as much less aggressive in seeking discovery stays than, say, the Securities Exchange Commission ("SEC") or DOJ's Criminal Division in securities actions, both of which actively seek (and are regularly granted) discovery stays to protect grand jury materials⁶ and criminal investigations in litigation.⁷ The San Francisco Field Office's pattern of intervention in private lawsuits appears to be a new approach by the Antitrust Division. In the past, the Division only intermittently sought stays in parallel civil suits.⁸ An example of its earlier indiffer-

¹ The San Francisco Field Office covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming.

² *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. 02-1486 (N.D. Cal.) ("DRAM").

³ *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827 (N.D. Cal. Sept. 25, 2007) ("TFT-LCD") (Order Granting U.S.'s Mot. to Stay Disc.); *Hyundai Elec. v. Rambus, Inc.*, No. 00-20905 (N.D. Cal. Apr. 11, 2005) ("Rambus") (Order Granting the U.S.'s Mot. for Protective Order under Fed. R. Civ. P. 26(c)); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-1819 (N.D. Cal.) ("SRAM").

⁴ *In re Flash Memory Antitrust Litig.*, No. 07-86 (N.D. Cal. Oct. 23, 2007) ("Flash Memory") (Order Permitting Intervention); *In re Graphics Processing Units Antitrust Litig.*, No. 07-1826 (N.D. Cal. July 30, 2007) ("GPU") (Notice of Appearance by Alexandra Jill Shepard of U.S. DOJ, Antitrust Division).

⁵ *In re Plastics Additives Antitrust Litig.*, No. 03-2038 (E.D. Pa. June 6, 2005) (Mem. in Supp. of Mot. for Protective Order

Under Fed. R. Civ. P. 26(e) by the U.S.); *Ivax Corp. v. Aztec Peroxides, LLC*, No. 02-593 (D.D.C. May 12, 2003) (Mot. by the U.S. to Intervene and Limit Disc. Pending Completion of the Grand Jury Investigation) and May 19, 2003 (Order (staying depositions, but allowing interviews and interrogatories)).

⁶ Fed. R. Crim. P. 6(e) governs disclosure of grand jury materials by the government (as opposed to by defendants).

⁷ *SEC v. Chestman*, 861 F.2d 49, 50 (2d Cir. 1988) (government has distinct and "discernible interest in [preventing civil discovery] from being used to circumvent the more limited scope of [criminal discovery].").

⁸ Many of the stays that were sought historically were initiated by the Philadelphia Field Office of the DOJ Antitrust Division. See, for example, *Randle Trout Distrib. v. Country Skillet Catfish Co.*, No. 92-360 (W.D. Wash. Mar. 27, 1992); *Am. Seafood v. Magnolia Processing*, No. 92-1030 (E.D. Pa. Mar. 11, 1992); *In re Elec. Carbon Prods. Antitrust Litig.*, No. 03-2182 (D.N.J. Aug. 18, 2004); *In re Graphite Electrodes Anti-*

ence is the 1980 *Golden Quality Ice Cream Litigation*, in which the Eastern District of Pennsylvania court denied defendants' request to stay all civil proceedings (including discovery) pending the conclusion of the DOJ's parallel criminal investigation. In that case the Antitrust Division expressly stated that it took no position on the motion, satisfied with preserving the confidentiality of its grand jury documents through the protective order.⁹ This early position contrasts with the statement made by the Division in the same court twenty years later in the *Graphite Electrodes Litigation*, in which it agreed "with the position set forth by [the defendant] that the Government should not obtain by civil discovery that to which it is not entitled to through the Rules of Criminal Procedure. . . ."¹⁰ The Division's intent in civil proceedings was often to make sure it was not dragged into those proceedings. For example, in the *In re Flat Glass Antitrust Litigation* in 1988, the Division opposed plaintiffs' third party subpoena issued to the DOJ to produce grand jury documents in the parallel civil matter.¹¹

Similarly, courts historically often denied requests by the government¹² and defendants¹³ alike to stay civil antitrust discovery made on the basis of parallel criminal proceedings and often granted plaintiffs access to grand jury materials. Courts have noted that they will not necessarily protect a defendant asserting that "ma-

trust Litig., No. 97-4182 (E.D. Pa. Mar. 15, 2000) (Mot. of the U.S. to Rescind the March 8, 2000 Order of the Court).

⁹ *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53 (E.D. Pa. 1980).

¹⁰ See *In re Graphite Electrodes Antitrust Litig.*, No. 97-4182 (E.D. Pa. Mar. 15, 2000) (Mot. of the U.S. to Rescind the Mar. 8, 2000 Order of the Court).

¹¹ See *In re Nelson v. Pilkington*, No. 98-3498 (3rd Cir. Dec. 7, 1998) (Court of Appeals Brief for the U.S.).

¹² Denials of the Division's motions to stay include *White v. Mapco Gas Prods.*, 116 F.R.D. 498 (E.D. Ark. 1987); *Alvin Indep. School v. Sysco Food Servs.*, No. 90-3774, (S.D. Tex. Aug. 28, 1991) (Order denying Mot. to Stay); *Am. Seafood v. Magnolia Processing*, No. 92-1030 (E.D. Pa. May 7, 1992) (Mem. and Order Denying [U.S. Mot. for Stay]); *In re Nasdaq Money Makers Antitrust Litig.*, 169 F.R.D. 493 (S.D.N.Y. 1996); *In re Auction Houses Antitrust Litig.*, No. 00-648 (S.D.N.Y. July 31, 2000) (Order); and *In re Scrap Metal Litig.*, No. 02-844 (N.D. Ohio Nov. 7, 2002) (Mem. & Order). Examples of stays pending disposition of criminal or regulatory proceedings granted on the Division's motion include *Randle Trout Distrib. v. Country Skillet Catfish Co.*, 92-360 (W.D. Wash. May 5, 1992); *Leasing Ventures v. Gen. Instrument*, No. 95-6325 (S.D. Fla. July 19, 1995); and *Philip Morris, Inc. v. Heinrich*, 1996 U.S. Dist. LEXIS 9156 (S.D.N.Y. Jun. 28, 1996).

¹³ Stays pending disposition of criminal or regulatory proceedings granted on defendant's motion include *In re Residential Doors Antitrust Litig.*, 900 F.Supp. 749 (E.D. Pa. 1995); *Amity Plumbing & Heating v. Rheem Mfg. Co.*, No. 79-1519 (E.D. Pa. June 4, 1979); *Air-Wize Inc. v. Rheem Mfg. Co.*, No. 79-470 (E.D. Pa. Feb. 12, 1979); *Texaco v. Borda*, 383 F.2d 607 (3d Cir. 1967); and *Chronicle Publ'g. Co. v. NBC*, 294 F.2d 744 (9th Cir. 1961). Denials of stays despite arguments by defendants of parallel criminal proceedings include *In re Mid-Atlantic Toyota Antitrust Litig.*, 92 F.R.D. 358 (D. Md. 1981); *In re Elec. Weld Steel Tubing Antitrust Litig.*, No. 79-4628 (E.D. Pa. Feb. 28, 1980); *In re Indep. Gasoline Antitrust Litig.*, M.D.L. 267 (D. Md. July 19, 1977); *In re Folding Cartons Antitrust Litig.*, M.D.L. 250 (N.D. Ill. July 2, 1976); *In re Small Bags Antitrust Litig.*, C.A. No. 76-3407 (E.D. Pa. Dec. 21, 1979); *In re Gas Meters Antitrust Litig.*, M.D.L. 360 (E.D. Pa. 1980); *Philadelphia Housing Auth. v. Am. Radiator & Standard Sanitary Corp.*, 269 F.Supp. 540 (E.D. Pa. 1967).

terials unearthed during civil discovery may eventually inure to the benefit of the Government in the prosecution of the criminal action," noting that "this concern is of doubtful relevance to the civil proceedings."¹⁴ Where courts refused to grant stays, it was based on protecting the interests of parties — usually plaintiffs,¹⁵ but sometimes defendants¹⁶ — in having their civil cases litigated efficiently and expeditiously.

The change in attitude by the courts has been demonstrated by the San Francisco Field Office's success in obtaining stays since the 2002 *DRAM* stay as well as decisions of courts nationwide. Stays requested by the Antitrust Division have been granted by the Southern District of New York in 2000,¹⁷ the Central District of California in 2000,¹⁸ the Eastern District of Pennsylvania in 2000¹⁹ and 2003,²⁰ the Eastern District of New York in 2002,²¹ the District of Columbia in 2003,²² and twice by the District of New Jersey in 2004.²³ As a possible spillover effect, it is also becoming commonplace to see courts granting requests for stays by defendants for other reasons, such as a pending motion to dismiss,²⁴ *Twombly* grounds, or pending the filing of a consolidated complaint.²⁵

Defendants' and plaintiffs' positions on government-requested discovery stays in private antitrust actions also appear to have evolved. It was typical to see objections by plaintiffs or defendants to stay requests by the

¹⁴ *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 57 (E.D. Pa. 1980).

¹⁵ *Connecticut ex rel. Blumenthal v. BPS Petrol. Distribs., Inc.*, No. 91-173 (D. Conn. July 16, 1991) ("stays in proceedings may result in prejudice . . . because 'witnesses relocate, memories fade, and persons . . . are unable to seek vindication or redress for indefinite periods of time on end'") (citation omitted); *Citibank, N.A. v. Hakim*, No. 92 6233 (S.D.N.Y. Nov. 18, 1993).

¹⁶ *U.S. v. Hugo Key & Son, Inc.*, 672 F.Supp. 656, 658 (D.R.I. 1987) ("Certainly, it cannot be controverted that every defendant has a strong interest in the expeditious determination of his civil liberties.").

¹⁷ *In re Auction Houses Antitrust Litig.*, No. 00-648 (S.D.N.Y. May 17, 2000) (Order granting stay until July 17, 2000). Note this court subsequently denied the government's motion to stay on July 31, 2000. See n. 12, above.

¹⁸ *Thomas & Thomas v. Newport Adhesives*, No. 99-7796 (C.D. Cal. Apr. 3, 2000) (Minutes).

¹⁹ *In re Graphite Electrodes Antitrust Litig.*, No. 97-4182 (E.D. Pa. Mar. 8 and 24, 2000).

²⁰ *In re Plastics Additives Antitrust Litig.*, No. 03-2038 (E.D. Pa. July 6, 2005) (Mem. in Supp. of Protective Order Under Fed. R. Civ. P. 26(e) by the U.S.).

²¹ *In re Visa/Check/Mastermoney Antitrust Litig.*, No. 96-5238 (E.D.N.Y. Jan. 1, 2000).

²² *Ivax Corp. v. Aztec Peroxides, LLC*, No. 02-593 (D.D.C. May 12, 2003) (Notice of Mot. and Mot. by the U.S. to Intervene and Limit Disc. Pending Completion of the Grand Jury Investigation and May 19, 2003 Order).

²³ *In re Elec. Carbon Prods. Antitrust Litig.*, No. 03-2182 (D.N.J. Oct. 19, 2004) (Order granting government's motion for a limited stay of discovery in part); *In re Ins. Brokerage Antitrust Litig.*, No. 04-5184 (D.N.J. July 11, 2006) (Order).

²⁴ Dismissal at the outset may now be more prevalent in light of the Supreme Court's decision in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

²⁵ See, e.g., *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-1775 (E.D.N.Y. July 26, 2007) (Order staying discovery); *In re Flash Memory Antitrust Litig.*, No. 07-86 (N.D. Cal. Jan. 4, 2008) (denying plaintiffs' motion for discovery prior to filing consolidated complaint).

government. In the recent series of Northern District of California antitrust complex class actions, however, all parties supported the government's stay motions and agreed to joint stipulations.²⁶ For example, in the *TFT-LCD* matter, all parties and the government had agreed to a discovery stay, and left Judge Illston to decide only one peripheral dispute about whether access to grand jury materials should be allowed.²⁷

The evolution to a position of consistent support by the government, parties, and judges alike for the requests to stay civil discovery pending the conclusion of parallel criminal antitrust proceedings has made discovery stays an appropriate procedural step and a critical case management tool.

3. A Stay is an Appropriate Procedural Step that Benefits the Parties, the Court, and the Government

The government has established authority to intervene in a civil action for the purpose of limiting discovery where there is a parallel criminal proceeding involving a common question of law or fact.²⁸ The courts, however, recognize that they must "hesitate before granting a blanket stay of discovery in a civil proceeding, based on conclusory allegations of prejudice and on the mere possibility that a non-party witness may be called to testify before the Grand Jury."²⁹ Although not an automatic right,³⁰ and sometimes described as "an extraordinary remedy,"³¹ a civil stay of discovery is often the most appropriate result. In deciding whether to stay civil litigation, courts examine the interests of all interested parties and consider the "particular circumstances and competing interests involved in the case."³²

Where the same individual faces simultaneous civil and criminal proceedings, a civil stay serves a valuable purpose for all interested parties. It is efficient for the court; the prior resolution of particular issues as part of the criminal matter may eliminate duplication in the civil process.³³ Judges appear inclined to grant government motions for stays, likely on the basis that the government, charged with justice, is the more appropriate party to lead the investigation than plaintiffs whose goal is to conduct a shakedown. Plaintiffs benefit be-

cause the government will have laid out the roadmap of the case, reducing their work.

A discovery stay also typically benefits defendants. The civil matter may be resolved through alternative means while a stay is in place or may be dismissed before defendants ever need to embark on the expensive process of locating, collecting, sorting, and producing documents and electronic data. A stay protects defendants from plaintiffs attempting to use the discovery process to add substance to otherwise superficial complaints.³⁴ It also protects innocent players that are not the subject of the government investigation but have been dragged into the case because they are an industry player. Letting the government investigation take its course avoids unfairly involving parties that do not belong in the case.

Defendants also may require a discovery stay to protect their constitutional rights; it avoids potential exposure to double jeopardy from simultaneous proceedings.³⁵ And a stay helps defendants avoid the dilemma of invoking Fifth Amendment rights during civil depositions proceedings, which may diminish their chances of success at trial.³⁶ The criminal rules also offer defendants procedural protections that could be undermined through the more lenient civil discovery rules, and courts have criticized the government when it has, in a securities context, engaged in an "abuse of process"³⁷ and attempted to expand the scope of its discovery by filing parallel civil suits.³⁸

The government often seeks a stay to prevent the defendant or the plaintiff from obtaining testimony or evidence in the civil proceeding to show their innocence or learn more about how much the government actually knows.³⁹ The San Francisco Field Office intervened in civil proceedings in the Eastern District of Pennsylvania in 2005, arguing that it sought "to intervene . . . to prevent [the] defendant from using civil discovery to circumvent the much narrower rules of criminal discovery," noting that it was "an unprecedented effort to use the more liberal civil discovery rules to pierce the se-

³⁴ *Twombly*, 127 S. Ct. at 1955.

³⁵ *U.S. v. Halper*, 490 U.S. 435 (1989) (government may not proceed civilly against a defendant already criminally convicted for the same offense if it seeks punitive rather than remedial sanction).

³⁶ See *In re Plastic Additives Antitrust Litig.*, 2004 U.S. Dist. LEXIS 23989, at *18-19 (E.D. Pa. Nov. 29, 2004). Fifth Amendment is only available to individual and not corporate defendants. *U.S. v. Kordel*, 397 U.S. 1, 9 (1970).

³⁷ *SEC v. Dresser Indus.*, 628 F.2d 1368 (D.C. Cir. 1980). The courts also consider the origin of the conflict between the parallel civil and criminal proceedings.

³⁸ See, e.g., *U.S. v. Parrott*, 248 F.Supp. 196, 202 (D.D.C. 1965) ("the Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal proceeding.") Courts are reluctant to grant a government's motion for a stay where the government filed both the civil and criminal actions. *U.S. v. Gieger Transfer Serv., Inc.*, 174 F.R.D. 382 (S.D. Miss. 1997).

³⁹ *SEC v. Chestman*, 861 F.2d at 50 (The Government has a distinct and "discernible interest in intervening in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal matter."); see also, *Bd. of Governors of Fed. Reserve Sys. v. Pharaon*, 140 F.R.D. 634, 639 (S.D.N.Y. 1991) ("A litigant should not be allowed to make use of the liberal [civil] discovery procedures . . . to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled . . .").

²⁶ See, for example, the stay orders granted in the *SRAM*, *DRAM*, and *LCD* litigations.

²⁷ *TFT-LCD Litig.* (N.D. Cal. Sept. 25, 2007) (Order Granting U.S.'s Mot. to Stay Discovery).

²⁸ *SEC v. Downe*, 1993 U.S. Dist. LEXIS 753 (S.D.N.Y. Jan. 26, 1993); Fed. R. Civ. P. 24(b)(2).

²⁹ *Bd. of Governors of Fed. Reserve Sys. v. Pharaon*, 140 F.R.D. 634, 640 (S.D.N.Y. 1991). In the *TFT-LCD* matter, although ultimately granting the government's motion for a stay, Judge Illston initially challenged the government's sealed declaration and requested supplemental filings. *TFT-LCD Litig.*, Sept. 21, 2007 (Supplemental Decl. of Niall E. Lynch in Support of the U.S.'s Mot. for a Limited Stay of Discovery).

³⁰ *U.S. v. Kordel*, 397 U.S. 1, 9-10 (1970).

³¹ *In re Mid-Atl. Toyota Antitrust Litig.*, 92 F.R.D. 358, 360 (D. Md. 1981); *In re Plastics Additives Antitrust Litig.*, No. 03-2038 (E.D. Pa. Nov. 11, 2004); *Weil v. Markowitz*, 829 F.2d 166 (D.D.C. 1987).

³² *Fed. Sav. and Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902-3 (9th Cir. 1989). The court considers: interests of plaintiffs in proceeding expeditiously and potential prejudice to plaintiffs; burden on defendants; convenience of the court, and efficient use of judicial resources; interests of third parties; and interests of the public.

³³ *In re Mid-Atl. Toyota Antitrust Litig.*, 92 F.R.D. at 360.

crecy of an active antitrust criminal grand jury investigation.”⁴⁰

In the Northern District cases mentioned earlier, the government’s primary argument in support of its motions for a stay was that it did not want to reveal its theories prematurely. In the *TFT-LCD* litigation, the court acknowledged that a stay helps the government preserve the secrecy and confidentiality of its grand jury proceedings and not “reveal the nature, scope and direction of the ongoing criminal investigation, as well as the identities of others who may be providing evidence to the grand jury or the government, and the identities of potential witnesses and targets.”⁴¹ The government is not the only party concerned about protecting the government’s theories. Defendants have objected to the stays on these grounds. For example in the *Rambus* civil litigation, the defendant objected where the target of the *DRAM* criminal investigation was a plaintiff in separate civil litigation.⁴²

4. Comparison of Recent Stays

Not all stays obtained by the San Francisco Field Office have been in the same format, perhaps demonstrating the Division’s growing experience in crafting its stays and negotiating them with parties. The first Northern District of California stay order in an antitrust class action was the *DRAM Antitrust Litigation* order granted by Judge Hamilton in 2003 in the format agreed and stipulated between the plaintiffs and defendants in

⁴⁰ *In re Plastic Additives Antitrust Litig.*, 2004 U.S. Dist. LEXIS 23989, at *18 (Mem. in Supp. of Mot. for Protective Order Under Fed. R. Civ. P. 26(e) by the U.S.).

⁴¹ *TFT-LCD Litig.*, Sept. 25, 2007 at 2.

⁴² *Rambus*, No. 00-20905 (N.D. Cal. Mar. 24, 2005) (*Rambus’s* Opp’n to Mot. by the U.S. for a Protective Order).

that matter, and the Division. The *DRAM* stay was open-ended, with a status conference scheduled nine months from the order. It allowed for the production of documents submitted to the grand jury and non-substantive documents, such as sales data and other data that plaintiffs could use to identify damages. It also allowed for third party depositions (other than of former employees of defendants). The stay on all deposition and interrogatory discovery ordered in the *SRAM* Litigation by Judge Wilken on June 12, 2007 was broader than that in *DRAM*. Judge Wilken stayed all discovery for a full year and stated that the government could request a further extension. The Northern District’s evolution in accepting that stays are appropriate in the complex antitrust litigation matters has developed to the point that in January 2008, Judge Armstrong granted a stay⁴³ requested by defendants in the *Flash Memory Litig.*, rather than by the Division (although the Division had been given permission to intervene for the purpose of seeking a stay).⁴⁴

5. Impact of the Recent Pattern of Intervention

The new apparent standard of intervening to stay discovery in complex private civil litigation by the San Francisco Field Office of the Division has garnered consistent support of the court and of plaintiffs and defendants alike. The courts and parties have realized the benefits of avoiding the duplication and contraventions of due process that parallel criminal and civil proceedings will bring. Other field offices of the Antitrust Division have started, and are likely, to adopt a similar strategy and policy.

⁴³ *Flash Memory Litig.*, Jan. 4, 2008 Order.

⁴⁴ *Flash Memory Litig.*, Oct. 23, 2007 Order.