

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

SOUTHEAST READY MIX, LLC, et al.,

Plaintiffs,

v.

ARGOS NORTH AMERICA CORP.
F/K/A ARGOS USA CORP., et al.,

Defendants.

Civil No. 1:17-CV-02792-ELR

**INTERVENOR UNITED STATES' MEMORANDUM
IN SUPPORT OF ITS UNOPPOSED MOTION TO EXTEND ORDER
STAYING DISCOVERY**

The United States of America, through the Department of Justice, Antitrust Division (“the Division”), moves to extend by an additional six months the Court’s January 22, 2019 Order staying discovery in this matter. The Division will deliver a declaration in support of its motion to the Court *ex parte*, which it seeks to file under seal by separate motion. The Division has also conferred with counsel for Plaintiffs and Defendants and understands that this motion is unopposed.

Should the Court grant its request, the Division reserves the right to seek a reasonable extension of the stay if warranted by the circumstances. The United States will notify the Court promptly if developments in the criminal investigations moot the need for the stay prior to its expiration.

I. BACKGROUND

On January 18, 2019, the Division moved to intervene in this action to protect its interests in active criminal investigations into potential Sherman Act violations in the cement and concrete industries. (Doc. 125.) The Division simultaneously moved for a limited stay of all discovery for a period of six months, with leave to seek extension of the stay if necessary. (Doc. 126.) On January 22, 2019, the Court issued orders permitting the Division to intervene and staying discovery through July 22, 2019. (Docs. 128, 130.) Since that time, the Division has continued to move forward with its investigations. Based on ongoing developments in the criminal investigations and their current status, the Division requests that the discovery stay issued in the Court's prior order be extended an additional six months.

II. ARGUMENT

In the Eleventh Circuit, courts are required to stay civil actions during parallel criminal proceedings only where special circumstances compel such a result "in the interests of justice." *United States v. Lot 5, Fox Grove, Alachua Cty., Fla.*, 23 F.3d

359, 364 (11th Cir. 1994) (citing *United States v. Kordel*, 397 U.S. 1, 12 & n.27 (1970)). To determine whether such circumstances exist, lower federal courts routinely weigh the following factors: (1) the extent of overlapping issues in the criminal and civil proceedings; (2) the public interest; (3) the interests of the parties and the Court; and (4) the status of the criminal matter. *See, e.g., SEC v. Rand*, No. 1:09-CV-01780-AJB, 2010 WL 11549601, at *5 (N.D. Ga. Dec. 14, 2010). The foregoing factors weigh in favor of extending the discovery stay an additional six months.

A. Overlapping issues

First, the facts alleged in the operative complaint and the subject of the government's investigations are closely related and involve overlapping issues, evidence, and witnesses. The Division has open investigations into anticompetitive conduct in the concrete and cement industries encompassing the coastal region of Georgia and South Carolina and beyond. These investigations unmistakably overlap with the allegations set forth in the Plaintiffs' operative complaint, which asserts two counts under the Sherman Act against Defendants for conspiracy to restrain trade by group boycott in the ready-mix concrete market and conspiracy to fix prices in the cement market—allegations set in coastal Georgia and southeastern coastal South Carolina. (Doc. 92.) Under the prevailing authority in this Circuit, when both civil

and criminal proceedings arise out of the same or related conduct, courts are to afford priority to the criminal matter over the civil proceeding. *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962). The overlap of issues, evidence, and witnesses between this proceeding and the Division's criminal investigation, therefore, weigh in favor of extending the discovery stay.

B. Public Interest

Second, extending the stay comports with the public interest in protecting the integrity of criminal enforcement efforts. "The very fact that there is a clear distinction between civil and criminal actions requires a government policy determination of priority: which case should be tried first. Administrative policy gives priority to the public interest in law enforcement." *Campbell*, 307 F.2d at 487. If the parties are permitted to proceed with discovery at this time, the Division has significant concerns that such discovery would interfere with its criminal investigations and burden potential witnesses. Without a stay, the Division's investigations may be compromised, as discovery is likely to reveal the nature, scope, and direction of the investigations, as well as the identities of potential witnesses and targets. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 (N.D. Cal. Sept. 25, 2007), ECF No. 300, at 2. The discovery requests previously propounded—which sought, *inter alia*, production of documents turned

over to the government—also present the risk that the parties would receive a premature view of the Division’s key evidence. Given the limitations on discovery in criminal proceedings, “[a] litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit.” *Campbell*, 307 F.2d at 487. Thus, the public interest in avoiding interference with criminal enforcement weighs in favor of extending the discovery stay in this matter.

C. Interests of the Parties and Impact on Court

Third, the instant motion is unopposed. In considering the interests of the parties, at least one court in this Circuit has weighed the absence of any objection in favor of granting a stay. *See SEC v. Rand*, No. 1:09-cv-01780-AJB, 2010 WL 11549601, at 65 (Dec. 14, 2010). While the Division recognizes that an extension of the stay will further delay the parties’ litigation, advancement of the criminal investigations while this action is stayed serves to avoid complications arising from potential criminal exposure on overlapping issues. Indeed, were discovery to proceed here, such efforts have the potential to be frustrated by Fifth Amendment assertions and, relatedly, potential targets may be forced to choose between pursuing their defenses in the civil matter and protecting their rights against self-

incrimination. In the same way, extending the stay may eliminate the need to devote court resources to resolving such conflicts. Thus, “[j]udicial economy is also served by allowing the related criminal prosecution to proceed in advance of the overlapping civil litigation.” *United States ex rel. McCullough v. Colasante*, No. 1:10-cv-126-MCR/GRJ, 2014 WL 12873165, at *1 (N.D. Fla. June 17, 2014).

D. Status of the Criminal Matter

As detailed in the accompanying declaration, the stage of the Division’s ongoing criminal investigations provides additional justifications for extending the stay of discovery. It is within a federal district court’s inherent powers to grant a stay of discovery in civil cases to protect related grand jury investigations even prior the issuance of an indictment. *SEC v. Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1327 (N.D. Ala. 2003). Courts within this Circuit have extended orders staying discovery in this context explicitly to prevent parties from seeking information about ongoing criminal investigations, as well as future criminal prosecutions. *E.g.*, *SEC v. LeCroy*, No. 2:09-CV-02238-AKK (N.D. Ala. Mar. 17, 2011), ECF No. 74, at 2 (extending discovery stay to protect governmental interest in criminal antitrust investigation). The Eleventh Circuit has also characterized the preservation of grand jury secrecy as a significant governmental interest in making such determinations. *See In re Eisenberg*, 654 F.2d 1107, 1111 (1981). As such, the status of the Division’s

investigations supports an extension of the stay and should not bar granting an extension at this time.

III. CONCLUSION

The extent of the overlapping issues between the civil and criminal proceedings, the public interest in avoiding interference with criminal investigations, the interests of the parties, judicial economy, and the status of the Division's investigations all weigh in favor of extending the discovery stay. The Division, therefore, respectfully requests that the Court extend the Order staying discovery, entered on January 22, 2019, an additional six months.

Respectfully submitted this 19th day of July, 2019.

/s/ Somadinna Nwokolo
Somadinna Nwokolo
Florida Bar No. 120126
Matthew Stegman
D.C. Bar No. 1015677

Trial Attorneys
Washington Criminal II Section
U.S. Department of Justice
Antitrust Division
450 5th Street, N.W.
Washington D.C. 20001
Tel: (202) 598-2438
Fax: (202) 598-2428
Somadinna.Nwokolo@usdoj.gov

CERTIFICATE OF FONT AND POINT SELECTION

Pursuant to Local Rule 7.1D, I hereby certify that the foregoing Intervenor United States' Memorandum in Support of its Unopposed Motion to Extend Order Staying Discovery has been prepared with one of the font and point selections (Times New Roman, 14 point) approved by the Court in Local Rule 5.1(C).

/s/ Somadinna Nwokolo
Somadinna Nwokolo
Florida Bar No. 120126
Trial Attorney
Washington Criminal II Section
U.S. Department of Justice
Antitrust Division
450 5th Street, N.W.
Washington D.C. 20001
Tel: (202) 598-2438
Fax: (202) 598-2428
Somadinna.Nwokolo@usdoj.gov

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date electronically filed the foregoing Intervenor United States' Memorandum in Support of its Unopposed Motion to Extend Order Staying Discovery with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to all counsel of record for all parties to this action.

/s/ Somadinna Nwokolo
Somadinna Nwokolo
Florida Bar No. 120126
Trial Attorney
Washington Criminal II Section
U.S. Department of Justice
Antitrust Division
450 5th Street, N.W.
Washington D.C. 20001
Tel: (202) 598-2438
Fax: (202) 598-2428
Somadinna.Nwokolo@usdoj.gov