UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE: READY-MIXED CONCRETE ANTITRUST LITIGATION	MASTER DOCKET NO. 1:05-CV- 00979-SEB-VSS
THIS DOCUMENT RELATES TO: ALL ACTIONS	

IMI DEFENDANTS' MEMORANDUM IN OPPOSITION TO BUILDER'S CONCRETE'S MOTION TO RECONSIDER DISCOVERY ORDER

I. Introduction

Defendants Builder's Concrete & Supply, Inc. and Gus Nuckols (collectively, "Builder's" or "BCS") seek reconsideration of the Court's November 28, 2005 Order limiting discovery (the "Discovery Order"). Because the Discovery Order fairly allows reciprocal document production in the relevant areas of inquiry while also protecting the integrity of the Government's ongoing criminal investigation of the ready-mixed concrete industry, BCS' various requests for reconsideration should be denied in their entirety.

Professing respect for the limitations on discovery in parallel criminal proceedings protected by the Discovery Order, Builder's disclaims "any improper purpose" to evade those criminal restrictions. But Builder's purpose is perfectly clear: to find out what IMI and any other cooperating parties have been telling the grand jury. That is precisely the improper purpose interdicted by the Discovery Order.

The Discovery Order should remain in place, and Builder's proposed alternatives rejected, for at least three separate reasons:

(1) If the Discovery Order is modified in the manner requested in Builder's Proposed Order-Alternative A, then the grand jury secrecy required by Federal Rule of Criminal Procedure 6(e)(2) will be breached and IMI 's alleged criminal co-conspirators given an improper preview of the Government's case in chief at any criminal trial, thus compromising an ongoing criminal investigation;

(2) Builder's cannot use discovery in this civil case to evade the restrictions upon discovery in parallel criminal proceedings; and

(3) Potential witnesses for IMI in the deposition or other non-documentary discovery allowed by Builder's proposed order may remain in criminal jeopardy and thus would be entitled, in appropriate circumstances, to assert their Fifth Amendment privilege against self-incrimination. If they choose to do so, then IMI, which wants to present a full and fair account of the facts to this Court, may be unfairly prejudiced at trial by adverse inferences arising from the witnesses' privileged refusal to testify. This Court and others have deferred civil discovery where necessary to avoid creating such a dilemma. The present Discovery Order serves each of these purposes and should remain in place, unmodified.

II. Background And Statement Of Facts

This private antitrust suit follows IMI's June 29, 2005 plea agreement with the Department of Justice. IMI and four of its executives, Pete Irving, Dan Butler, Price Irving and John Huggins, each pled guilty to one-count criminal informations charging price fixing in Indianapolis for ready-mixed concrete from July 2000 until May 2004.[1] At the same time, the Department of Justice publicly stated that its Antitrust Division is conducting an "ongoing

[1] Copies of the plea agreements are posted at www.usdoj.gov/atr/cases/irving.htm.

investigation of the ready-mixed concrete industry. . . ."[2] Pursuant to the plea agreements, IMI and the individual IMI defendants continue to cooperate with the Government's ongoing investigation.

While the Department of Justice has announced that its investigation of the ready-mixed concrete industry is ongoing, and the IMI defendants have been actively cooperating in that investigation, to date there have been no indictments returned by the grand jury or plea agreements concluded with IMI's alleged co-conspirators. In the IMI plea agreement, however, the Government states it has evidence sufficient to prove that IMI representatives "engaged in conversations and attended meetings with representatives of other ready mixed concrete producers in the Indianapolis, Indiana metropolitan area. During such meetings and conversations, agreements were reached to fix the price at which ready mixed concrete was to be sold in the Indianapolis, Indiana metropolitan area." IMI Plea Agreement, ¶ 4.b. The Antitrust Division's investigation of IMI's alleged co-conspirators continues.

Accordingly, at the Department of Justice's request, on November 28, 2005 the Court entered the Discovery Order limiting discovery to documentary production in four broad categories pending the conclusion of the criminal proceedings or further Order of the Court. The Government's motion stated that document production under the Discovery Order is to be "reciprocal"[3] and the document categories set forth in the Discovery Order are easily broad enough to encompass the parties' legitimate needs at this point in the civil proceedings.

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[2] A copy of the Department of Justice's Press Release dated June 29, 2005 is available at www.usdoj.gov/atr/public/press_releases/2005/209816.htm.

[3] *See* Memorandum in Support of the Government's Motion to Limit the Scope of Discovery, p. 3 ("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.").

BCS wants additional discovery beyond the document categories defined in the Discovery Order – but only discovery of a most selective variety. BCS seeks the right to serve interrogatories or requests for admissions as to any party "not subject to criminal prosecution in connection with any matter alleged in the Consolidated Class Action Complaint for this action, either by reason of having already been sentenced or having been informed by the Government that he, she or it is no longer a target of its pending criminal investigation . . . ." Similarly, BCS wants depositions to go forward unless a party "remains a target, is under indictment, or has not been sentenced in connection with the Government's pending investigation. . . . "[4] (IMI was sentenced on June 29, 2005. The individual IMI defendants were sentenced on December 9, 2005. To date, no other defendant in the civil case has been criminally charged.)

This is just a backhanded way of saying BCS wants to know what IMI's witnesses have told the grand jury so that BCS can adjust its criminal defense strategy accordingly. It is precisely the purpose of the Discovery Order, however, to prevent such evasions of criminal discovery limitations through discovery in parallel civil proceedings. The result of Builder's proposed modifications to the Discovery Order would be to breach the grand jury secrecy required by Criminal Rule 6(e) and to compromise the Government's ongoing criminal investigation by revealing to potential targets of that investigation the nature and scope of the Government's evidence.

[4] *See* BCS' Proposed Order—Alternative A, ¶'s 2 and 3.

III. Argument

A. Deferral Of Civil Discovery As Provided In The Discovery Order Is Necessary To Protect The Ongoing Criminal Investigation.

The additional discovery sought by BCS through its Proposed Order – Alternative A goes to the heart of the Government's secrecy interests protected by the Discovery Order. If this discovery is allowed to go forward now, the result would be both to compromise the grand jury secrecy required by Federal Rule of Criminal Procedure 6(e)(2) and to jeopardize the Antitrust Division's ongoing criminal investigation of the Indianapolis ready-mixed concrete industry, an investigation which IMI is pledged to assist under the plea agreement.

BCS' proposed order would allow it (or plaintiffs or any other party) to seek testimony from IMI with respect to the substance of alleged conspiratorial meetings at the base of the IMI plea agreement. Paragraphs 2 and 3 of Builder's Proposed Order – Alternative A explicitly allow BCS, plaintiffs or any other party to depose the IMI defendants or to serve interrogatories or requests for admissions seeking information about the alleged conspiracy to fix prices for ready-mixed concrete in the Indianapolis, Indiana metropolitan area. The result of such testimony would be to provide IMI's alleged co-conspirators with an improper preview of the Government's criminal case; indeed, such testimony would effectively provide the alleged co-conspirators with a seat in the grand jury room.

Criminal Rule 6(e)(2) ensures the secrecy of grand jury proceedings in order to protect the integrity of ongoing criminal investigations. The rule provides, in pertinent part, that "a matter occurring before the grand jury" is to be held in secret by specified participants in the criminal process. The Supreme Court has "consistently recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 218, 99 S.Ct. 1667, 1672-73 (1979); *United*

States v. Procter & Gamble Co., 356 U.S. 677, 681-82, 78 S.Ct. 983, 986-87 (1958) (noting "a long-established policy that maintains the secrecy of grand jury proceedings in the federal courts").

The Court has recognized "several distinct interests served by safeguarding the confidentiality of grand jury proceedings." The *Douglas Oil* Court described these as follows:

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There would also be the risk that those about to be indicted would flee, or try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil, 99 S.Ct. at 1673.

In addition to the considerations described by the *Douglas Oil* court, other courts have recognized that premature disclosure of matters occurring before the grand jury can facilitate evasion by potential targets of the investigation. In *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), for example, the Fifth Circuit granted a stay of discovery in a civil suit until the disposition of parallel criminal proceedings in order to preserve the integrity of an ongoing criminal investigation. The Court noted "that in determining good cause for discovery in the civil suit, a determination that required the weighing of effects, the trial judge in the civil proceeding" cannot "ignore the effect discovery would have on a criminal proceeding that is pending or just about to be brought." *Id.* at 487.

To the extent that the needs of parallel civil and criminal actions conflict, the Court directed trial judges to give priority to the criminal case: "Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge

should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities." *Id.* Among the specific dangers the *Campbell* court identified in allowing civil discovery to go forward first was "a fear that broad disclosure of the essentials of the prosecution's case would result in perjury and manufactured evidence. Second, it is supposed that revealing the identity of confidential Government informants would create the opportunity for intimidation of prospective witnesses and would discourage the giving of information to the Government." *Id.* at 487 & n. 12.

These concerns have been repeated by the Seventh Circuit in the context of a civil party's attempt to gain access even to ordinary business records subpoenaed by a grand jury:

> The institutional interests [in grand jury secrecy], which range from not forewarning the targets of the grand jury's investigation to protecting witnesses and grand jurors from reprisals, are those that are important to the grand jury's investigatory effectiveness. The personal [interests] are private interests, mainly in reputation, that the *ex parte* nature of the grand jury puts at risk: for example, the reputation of a person accused of wrongdoing by a witness before the grand jury.

In the Matter of Special March 1981 Grand Jury (Appeal of Almond Pharmacy, Inc.), 753 F.2d 575, 578-79 (7th Cir. 1985) (*citing In re Biaggi,* 478 F.2d 489, 491-92 (2d Cir. 1973) (the leading summary of interests protected by grand jury secrecy, including "the interest of the Government against disclosure of its investigation of crime which may forewarn the intended objects of its inquiry or inhibit future witnesses from speaking freely. . . .")).

In a related context under the Freedom of Information Act (FOIA), the Seventh Circuit has specifically held that a civil antitrust party's interest even in ordinary business records subpoenaed by a grand jury – to say nothing of the substance of the testimony before a grand jury – is outweighed by the Government's interest in an ongoing, parallel criminal investigation. In *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998), the Seventh Circuit

affirmed this Court's denial of Government investigatory materials to civil antitrust plaintiffs: "The Government explained to the court a number of ways in which disclosure could interfere with its ongoing criminal investigation. Public disclosure of information could result in destruction of evidence, chilling and intimidation of witnesses and revelation of the scope and nature of the Government's investigation . . . . [P]ublic disclosure of information under the FOIA would presumably be available to the public as a whole, including targets of the investigation." *Id.* at 1039.

The risks associated with premature disclosure described in *Campbell*, *Almond Pharmacy* and *Solar Sources* are equally applicable here. BCS seeks discovery of the factual bases for IMI's plea agreement with the Government. Any such discovery would necessarily reveal the scope and direction of Government's ongoing criminal investigation into the Indianapolis ready-mixed concrete industry, as well as the substance of IMI's testimony and other matters occurring before the grand jury within the meaning of Criminal Rule 6(e). If such discovery is allowed to go forward now, then IMI's alleged co-conspirators may as well be invited to listen in on grand jury testimony, which "could result in destruction of evidence, chilling and intimidation of witnesses, and revelation of the scope and nature of the Government's investigation." *Solar Sources*, 142 F.3d at 1039.

BCS rather half-heartedly attempts to argue that its proposed discovery does not affect grand jury secrecy because it seeks the testimony directly from IMI or other cooperating parties, not from grand jury transcripts. BCS Brief, p. 7 & n. 5. That is a distinction without a difference in these circumstances. IMI has a duty under the plea agreement to assist the Government's investigation. The jeopardy to that investigation is the same whether the potential targets of the investigation, IMI's alleged co-conspirators, discover its scope and direction from a prohibited

reading of grand jury transcripts or from sitting in a civil deposition and hearing substantially the same thing directly from IMI's witnesses. In either case, the dangers to the ongoing criminal investigation, as identified in *Campbell*, *Almond Pharmacy* and *Solar Sources*, are substantial: forewarning the intended objects of the grand jury's inquiry and prematurely revealing the scope and nature of the Government's investigation.

The normal right of a grand jury witness to speak is intended to protect the witness' *voluntary* disclosure "to counsel or to an associate" for the purpose of obtaining legal counsel.[5] The rule does not authorize *compulsory* disclosure by the witness of matters occurring before the grand jury to actual or potential targets of the grand jury's ongoing investigation. As the Court observed in *In re Grand Jury Subpoena Duces Tecum*, 797 F.2d 676, 679-80 (8th Cir. 1986), "[t]o construe the provisions of Rule 6(e) to give a grand jury witness unrestricted freedom to communicate the existence of the subpoena and the investigation or the content of testimony to targets [of the investigation] could completely undercut the entire purpose of grand jury secrecy. . . . We therefore conclude that upon a proper showing in an appropriate case, the district court may direct a grand jury witness to keep secret from targets of the investigation the existence of a subpoena, the nature of documents subpoenaed or testimony before the grand jury, for an appropriate period of time." *See also In re Swearingen Aviation Corp.*, 605 F.2d 125, 127 (4th Cir. 1979) ("The person who is the subject of the [grand jury] investigation has no right to require a witness to divulge such information").

Similarly, in *In re Potash Antitrust Litigation*, 162 F.R.D. 563, 566-68 (D. Minn. 1995), the Court rejected a civil antitrust party's effort to obtain the substance of a grand jury witness'

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[5] *See* Advisory Committee Note to Rule 6(e) ("The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate").

testimony. Like this case, *Potash* involved an ongoing grand jury investigation and a parallel private antitrust suit. *Id.* at 565-66. The civil party sought to depose a grand jury witness, contending that "by failing to include Grand Jury witnesses in the listing of persons to whom secrecy attaches, the drafters of the Rule [6(e)] necessarily restricted the Court's authority to impose, on any other persons, an obligation of secrecy. We disagree." *Id.* at 566.

The *Potash* Court squarely rejected the civil party's contention. In doing so, the Court stated:

> Where we part company with the Plaintiffs, therefore, is at the point at which they seek to elicit the substance of the testimony that the deponent provided to the Grand Jury. This, we think, goes too far when, as here, the Grand Jury's investigation is continuing.
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> [W]e see little substantive distinction between allowing the Plaintiffs to scrutinize the testimony that has been presented to an active and continuing Grand Jury investigation and permitting the plaintiffs to review the proceedings of the Grand Jury as they may have been captured by 'an interpreter, a stenographer, an operator of a recording device [or] a typist who transcribes recorded testimony.'

In re Potash Antitrust Litigation, 162 F.R.D. at 567 (*quoting* Federal Rule of Criminal Procedure 6(e)(2).

The reasoning of *In re Grand Jury Subpoena Duces Tecum* and *In re Potash Antitrust Litigation* is equally apposite here. BCS' proposed discovery beyond the Discovery Order delves into matters occurring before the grand jury, including the IMI witnesses' knowledge of the matters described in the plea agreements and the nature and extent of any participation in the alleged conspiracy by potential targets of the grand jury's ongoing investigation. While Rule 6(e) permits the witnesses *voluntarily* to disclose this information to their own legal counsel, for example, in order to obtain counsel's advice, it does not follow that their testimony may be

compelled at BCS' (or at plaintiffs') instance in face of the risks any such disclosure would pose to the Antitrust Division's ongoing criminal investigation. At all events, moreover, the scope of Rule 6(e) does not affect the common law principle, described in part B. below, that forbids the use of civil discovery to evade restrictions on criminal discovery.

The Discovery Order does not ultimately deny to the civil parties any evidence to which they are otherwise entitled. The Discovery Order does not prevent a deposition of IMI; it merely defers that deposition until the conclusion of the ongoing criminal proceedings. As the Government points out, any criminal trial transcripts may serve the same purpose. Either way, at the conclusion of the criminal proceedings the full panoply of civil discovery can go forward in a timely manner. For now, to protect the ongoing criminal investigation, the Discovery Order should remain in place without modification.

B. Discovery In Civil Proceedings Cannot Be Used To Evade Restrictions Upon Discovery In Parallel Criminal Proceedings.

Closely related to the interest in grand jury secrecy protected by Criminal Rule 6(e) is the common law interest recognized by the Supreme Court in preventing the evasion of restrictions upon criminal discovery by means of the broad discovery normally available in parallel civil proceedings. In this parallel criminal-civil context, "the district court has its usual authority to manage discovery in a civil suit, including the power to enter protective orders limiting discovery as the interests of justice require. Decisions in the Courts of Appeals have sustained protective orders to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases." *Degen v. United States*, 517 U.S. 820, 826, 116 S.Ct. 1777, 1782 (1996).

This principle originated in *Campbell*, described in Part A. above, and has been used by many other courts in deferring civil discovery until the conclusion of parallel criminal proceedings. *See, e.g., Campbell*, 307 F.2d at 487 ("A litigant should not be allowed to make use

of the liberal discovery procedures available 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"); *Benevolence International Inc. v. Ashcroft*, 200 F.Supp.2d 935, 939-40 (N.D. Ill. 2002) ("A trial 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").[6]

In this case, the danger of the evasion of criminal discovery restrictions through civil discovery beyond that defined in the Discovery Order is both real and immediate. In the parallel criminal investigation, the other participants in the Indianapolis ready-mixed concrete industry, IMI's co-defendants in this civil case, cannot obtain discovery of matters occurring before the grand jury and certainly cannot obtain from the Government at this point an account of the scope or direction of the criminal investigation or details of the Government's case in chief at any criminal trial. If BCS' proposed discovery were to go forward now, however, IMI's co-defendants could very well gain the substance of that information simply through their attendance at a deposition or by serving interrogatories. Equally, neither BCS nor plaintiffs would have any means of using such discovery, once elicited, without alerting the other participants in the Indianapolis ready-mixed concrete industry to matters that these parties would have no hope of obtaining in the criminal investigation.

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[6] *See also Javier H. v. Garcia-Botello*, 218 F.R.D. 72, 74-75 (W.D. N.Y. 2003) ("The risk that civil discovery will be used to circumvent criminal discovery limitations becomes much greater where the same facts are at issue, as in the instant case"); *Twenty-First Century Corp. v. LaBianca*, 801 F.Supp. 1007, 1010-11 (E.D. N.Y. 1992) ("Allowing civil discovery to proceed – including the deposition of defendant Redzinski – may afford defendants an opportunity to gain evidence to which they are not entitled under the governing criminal discovery rules. . . . Nevertheless, this result may occur since the issues in the civil and criminal proceedings overlap extensively"); *In re Ivan F. Boesky Securities Litigation*, 128 F.R.D. 47, 50 (S.D. N.Y. 1989) ("A defendant in a criminal case should not be permitted to use the liberal discovery procedures to gather evidence which he might not be entitled to under the more restrictive criminal rules").

As in *Campbell* and the other cases cited above, then, the proposed civil discovery should be temporarily deferred, as provided in the Discovery Order, until such time as it can no longer prejudice parallel criminal proceedings through the evasion of restrictions on criminal discovery. Once again, the Discovery Order is temporary in duration and does not ultimately deny to BCS or any other party any evidence to which it is otherwise entitled.

C. Deferral Of Civil Discovery Is Justified To Protect The Individual IMI Defendants' Fifth Amendment Privilege

The Discovery Order is also justified in order to protect the individual IMI defendants' Fifth Amendment privilege against self-incrimination. Contrary to BCS' unexamined assumption, each of the individual IMI defendants, Pete Irving, Dan Butler, Price Irving and John Huggins, retains a privilege against self-incrimination notwithstanding their guilty pleas. *See, e.g., United States v. Chase*, 281 F.2d 225, 230 (7th Cir. 1960) (guilty plea and grand jury testimony do not waive the Fifth Amendment privilege "concerning federal offenses other than the specific offenses of which [the defendant] stood convicted"); *In re Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1150-59 (7th Cir. 1981) (immunized grand jury testimony does not waive the privilege even as to the same questions in a subsequent, civil deposition); *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 871-72 (7th Cir. 1979) (federal antitrust conviction did not diminish the privilege in subsequent civil proceedings because a separate, State-law prosecution "could cover any alleged illegal activities engaged in by [defendant] regardless of the time of occurrence or product line").

Neither the Fifth Amendment's double jeopardy clause nor the plea agreements foreclose the possibility of State-law prosecution, *Heier v. State*, 133 N.E. 200 (Ind. 1921); *State v. Allen*, 646 N.E.2d 965, 967-68 (Ind. Ct. App. 1995), or even of further federal prosecution for certain categories of offenses specifically excepted from the Government's agreement not to prosecute in

the plea agreements (principally securities or tax offenses).[7] The individual IMI defendants remain in potential criminal jeopardy and would be entitled to take the Fifth, in appropriate circumstances, in civil discovery beyond that allowed by the Discovery Order.

As described above, BCS seeks testimony about the factual bases for IMI's guilty plea and details of the alleged conspiracy. The potential for additional criminal jeopardy, under State law or otherwise, means that IMI's most knowledgeable witnesses would be entitled to take the Fifth with respect to some or all questions embraced by the discovery contemplated in BCS' Proposed Order – Alternative A. If they chose to do so, then IMI could be subject to adverse inferences at trial. *Baxter v. Palmigiano*, 425 U.S. 308, 318 96 S.Ct. 1551, 1558 (1976); *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 664 (7th Cir. 2002); *National Acceptance Company of America v. Bathalter*, 705 F.2d 924, 929-30 (7th Cir. 1983). The result is an unnecessary dilemma for IMI or other parties cooperating with the Government: a waiver of the Fifth Amendment privilege and the potential for additional criminal jeopardy that entails or else adverse inferences from the witnesses' privileged silence for plaintiffs to parade before a jury.

This is not a dilemma which the law requires the Court to impose on IMI. Both the Supreme Court and this Court have endorsed deferral of civil discovery where necessary to protect both the values embodied in the Fifth Amendment and a civil defendant's right ultimately to be judged on the merits. *United States v. Kordel*, 397 U.S. 1, 8-9, 90 S.Ct. 763, 768 (1970) ("The respondents press upon us the situation where no one can answer the interrogatories

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[7] *See* Plea Agreements, ¶ 14 ("The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence"). The Supreme Court has long held under the Fifth Amendment that double jeopardy does not bar a subsequent, State-law prosecution because each of the dual sovereigns within the federal system are entitled to enforce their criminal laws. *See, e.g., Bartkus v. Illinois*, 359 U.S. 121, 133, 79 S.Ct. 676, 683 (1959).

addressed to the corporation without subjecting himself to a 'real and appreciable' risk of self-incrimination. For present purposes, we may assume that in such a case, the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action"); *Jones v. City of Indianapolis*, 216 F.R.D. 440, 450-52 (S.D. Ind. 2003) (same).

In *Jones*, for example, this Court granted a stay of civil discovery in order to avoid precisely the waiver versus adverse inference dilemma which BCS seeks to impose on IMI here. In that case, an ongoing federal grand jury investigation paralleled civil proceedings under § 1983 against city police officers. In granting a stay of civil discovery as to topics implicated by the parallel criminal investigation, this Court stated:

> Defendants' interests could be substantially harmed if a limited stay is not granted. For instance, utilizing the liberal rules of civil discovery, plaintiff could obtain information that may substantially harm defendants' interests if criminal indictments are handed down. If a limited stay is not granted, the Court finds that defendants would be faced with an unnecessary dilemma: surrender their Fifth Amendment rights against self-incrimination, or not testify and risk the possibility of adverse inferences being taken from the assertion of these Fifth Amendment rights or possibly even civil sanctions and/or the entry of a default judgment. A limited stay of discovery will eliminate this quandary.
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> In sum, weighing these competing interests, the Court finds that a limited stay is necessary to protect the defendants' Fifth Amendment rights against self-incrimination should criminal indictments flow from the DOJ's pending criminal investigation. In light of this, the Court grants defendants a limited stay of discovery.

Jones, 216 F.R.D. at 451-52; *Walsh Securities, Inc. v. Cristo Property Management Ltd.*, 7 F.Supp.2d 523, 526-29 (D. N.J. 1998) (same).

The Discovery Order grants a deferral of civil discovery implicating Fifth Amendment concerns, consistent with the principles set forth in *Jones*. Just as IMI is cooperating in the

Government's investigation, so too it wants nothing more than to present a full and fair account of the facts to this Court. When those facts are known, IMI believes it will be clear both that class certification is inappropriate in this case and that the named plaintiffs have suffered no damage. As a matter of fundamental fairness, IMI should not be stripped of any opportunity to defend itself on the merits by adverse inferences arising from the individual defendants' invocation of their Fifth Amendment privilege.

Any such inferences from silence are likely to be far more damaging in front of a jury than a plain, accurate account of what actually happened. The Discovery Order strikes a reasonable balance between protecting the individual defendants' Fifth Amendment privilege and allowing IMI to defend itself on the merits, under the facts as they actually exist. For these reasons as well, the Discovery Order should not be modified.

IV. Conclusion

For all of these reasons, the Discovery Order should remain in place, unmodified.

Respectfully submitted,

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