



Attorneys for Plaintiff Graham B. Spanier

SCHNADER HARRISON SEGAL &
LEWIS LLP
Elizabeth K. Ainslie (Pa. I.D. No. 35870)
eainslie@schnader.com
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103-7286
Telephone: (215) 751-2000
Facsimile: (215) 751-2205

GRAHAM B. SPANIER,

Plaintiff,

v.

LOUIS J. FREEH and FREEH
SPORKIN & SULLIVAN, LLP,

Defendants.

COURT OF COMMON PLEAS
OF CENTRE COUNTY

No. 2013-2707

2013 OCT 18 PM 4: 22

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO STAY CIVIL PROCEEDINGS**

This Court should stay this action pending resolution of the criminal trial in which Plaintiff Dr. Graham B. Spanier (“Spanier”) is a defendant because the failure to do so would be highly prejudicial to him, and because Defendants Louis J. Freeh (“Freeh”) and Freeh Sporkin & Sullivan, LLP (“FSS”) cannot articulate any prejudice that they would suffer by staying this action until after the

resolution of the criminal trial. Spanier previously provided Defendants the opportunity to avoid the litigation of this matter at this time by offering to enter into a tolling agreement with them. Defendants rejected this proposal. Having done so, they cannot now claim they would be prejudiced by the fact that there is litigation pending against them, as their refusal to enter into the tolling agreement is what necessitated commencing this action. In contrast, forcing Spanier to litigate these claims concurrently with defending himself from the criminal charges pending against him would cause prejudice to him in both actions. A stay is warranted in this case, and Spanier respectfully requests that this Court grant his motion.

I. PROCEDURAL HISTORY

On July 11, 2013, Spanier commenced this action by filing a Praecipe for a Writ of Summons with the prothonotary. He subsequently served the writs on the Defendants,¹ notifying them of his intent to bring a claim against them for statements made about him on July 12, 2012. Had Spanier not filed the praecipe to issue a writ of summons at that time, his cause of action against the Defendants

¹ Pepper Hamilton LLP was originally named as a defendant in the Praecipe to Issue a Writ of Summons filed by Spanier on July 11, 2013. However, on September 12, 2013, Spanier filed a Praecipe to Issue Amended Writ of Summons, which named only Louis J. Freeh and Freeh Sporkin & Sullivan, LLP as defendants.

would be barred by Pennsylvania's one-year statute of limitations for defamation actions. *See* 42 Pa. C.S. § 5523 (2012).

On September 30, 2013, Defendants filed a Praecipe to File Complaint requesting that the prothonotary enter a Rule upon Plaintiff to file a complaint within 20 days or be subject to entry of Judgment Non Pros. On September 30, 2013, the prothonotary issued the Rule to File Complaint as requested by Defendants. Spanier now moves to stay the civil proceedings in this case, including any requirement to file a complaint, until the criminal case pending against him has concluded.

II. STATEMENT OF FACTS

On July 12, 2012, Defendants Freeh and FSS held a national press conference and released the "Report Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky" (the "Freeh Report"), which was prepared at the request of the Board of Trustees of the Pennsylvania State University ("PSU"). Among other baseless and derogatory remarks, the Freeh Report stated that Spanier "repeatedly concealed critical facts relating to Sandusky's child abuse from the authorities, [PSU's] Board of Trustees, the Penn State community, and the public at large." Freeh Report at 16. These allegations are false and defamatory to Spanier.

On November 1, 2012, a presentment was returned and a charge issued in the Court of Common Pleas of Dauphin County charging Spanier with endangering the welfare of children, perjury, obstruction of justice, criminal conspiracy, and failure to report sexual assault. Also charged were Timothy Curley (“Curley”) and Gary Schultz (“Schultz”), who may be tried with Spanier, and whose activities are also a focus of the Freeh Report. The case is not yet scheduled to go to trial, but discovery is already underway, and it is anticipated that the trial will occur in 2014.

Had Spanier taken no action, the one-year statute of limitations on his defamation claim for the statements made in the Freeh Report would have run on July 12, 2013. To that end, on June 5, 2013, Spanier’s counsel requested that Defendants agree to enter into a tolling agreement pending resolution of the criminal charges. *See* Letter from E. Ainslie to L. Freeh (June 5, 2013), attached hereto as Exhibit A. Defendants, however, refused to enter into a tolling agreement. Therefore, Spanier filed the Praecipe for Writ of Summons on July 11, 2013, to preserve his ability to bring his defamation claim.

III. STATEMENT OF THE QUESTION INVOLVED

Should civil proceedings be stayed when the plaintiff is a defendant in a related criminal case expected to be tried within one year, when requiring the plaintiff to continue to prosecute his civil case would burden witnesses’ rights

under both the United States and Pennsylvania constitutions, and when a stay would not prejudice either party and would promote judicial economy?

Suggested response: Yes.

IV. ARGUMENT

The Court should stay this action pending the resolution of the criminal action against Spanier because the failure to do so will unnecessarily force multiple witnesses to choose between testifying in this action or exercising their Fifth Amendment rights against self-incrimination, thereby leading to an incomplete record and allowing the court to draw adverse inferences against Spanier. Proceeding with this action before the criminal trial against him is complete would prejudice Spanier, while granting the stay would not be prejudicial to any party and would promote judicial economy. For these reasons, the Court should stay this matter until the criminal trial against Spanier is complete.

A. Spanier Would Be Greatly Prejudiced If This Matter Was Not Stayed

Forcing Spanier to litigate this action while the criminal action is pending would unnecessarily jeopardize his ability to prosecute this action. Spanier would be forced to litigate this matter at this time even though key witnesses may well assert their right against self-incrimination in light of the upcoming criminal trial. This incomplete and inadequate record might therefore

foreclose Spanier from prevailing in this action. On the other hand, if this matter were stayed, neither Spanier nor the Defendants would be prejudiced and this matter could be litigated after the criminal trial, when the issues here have been sharpened and the risk of witnesses refusing to testify on Fifth Amendment grounds would be significantly lessened. Therefore, there is no reason *not* to stay this action pending the resolution of the criminal trial.

Staying civil litigation while a related criminal case proceeds is common, and in fact, another civil case in which Spanier is a party has already been stayed. The United States District Court for the Middle District of Pennsylvania stayed a civil action brought by a John Doe plaintiff against PSU, Spanier, Curley, Schultz, and others alleging violations of his constitutional rights as well as state law claims of premises liability, negligence, conspiracy, intentional infliction of emotional distress, and sexual assault. *See Doe v. Pa. State Univ.*, No. 4:12-CV-2068, 2013 U.S. Dist. LEXIS 21604 (M.D. Pa. Feb. 14, 2013). In finding that a stay of the civil action was appropriate, the court found that “Spanier, Curley, and Schultz have been indicted and are awaiting trial which is expected to begin in 2014,” and that “[t]he strongest case for a stay . . . occurs during a criminal prosecution after an indictment has been returned.” *Id.* at *4 (quoting *Walsh Sec.*, 7 F. Supp. 2d at 527). The court went on to note that once an indictment has been issued, “the potential for self-incrimination is high and the

burden of delay [of the civil case] is lessened as a result of the Speedy Trial Act.” *Id.* at *5. The court also found that staying the civil case until the resolution of the criminal action promoted judicial efficiency, as it may “encourage settlement ... [or] eliminate[] the necessity of litigating certain issues.” *Id.* at *7. Given that this request for a stay concerns the same criminal proceeding, these factors are equally applicable here.

While in *Doe*, it was the defendants who moved to stay the civil proceedings, there is no appreciable difference in the analysis required in this case. Spanier was charged on November 1, 2012 and the trial is expected to take place next year. Therefore, this action will likely be stayed for a year, at most. As *Doe* notes, the potential for self-incrimination is heightened in light of the fact that it is likely that the criminal defendants will be witnesses in this case. *Id.* at *4-6. It is also likely that these witnesses will assert their constitutional rights against self-incrimination should this case move forward before the criminal case concludes. This would subject Spanier to any negative inferences that may be drawn from a witness’s refusal to testify on Fifth Amendment grounds and would deprive him of the opportunity to fully prosecute his claims. *See Anderson v. Scott*, No. 30006-2009-C.A., slip op. at 3 (Lawrence Cnty. Com. Pl. Sept. 15, 2011), attached hereto as Exhibit B (granting a stay of plaintiff’s deposition where criminal charges were pending against him and finding that “the natural inferences that follow . . . an

assertion [of a witness's right against self-incrimination] may place the [party] at a disadvantage." (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)); See also *Cotter v. State Civil Serv. Comm'n*, 6 Pa. Commw. 498, 502, 297 A.2d 176, 178 (Pa. Commw. Ct. 1972) (holding that a continuance of a hearing should have been granted where criminal charges were pending against the appellant, as "to do otherwise forced the appellant to choose unnecessarily to refrain from testifying in his own defense, and this resulted in an undeveloped and incomplete record.").

B. The Defendants Cannot Articulate Any Prejudice If This Action is Stayed

While Spanier would be greatly prejudiced if this matter were to proceed at this time, Defendants cannot articulate any prejudice that they would suffer if this matter were stayed. As set forth above, Spanier's counsel offered Defendants the opportunity to enter into a tolling agreement which would have avoided Spanier's commencement of this action. Therefore, Defendants cannot argue that they are prejudiced by this litigation, since it was their own decision which caused it to commence. Defendants now seek to use the procedural posture of the criminal action to force Spanier to abandon this action. Therefore, Defendants' interest in proceeding with this matter at this time is merely strategic; they believe that if Spanier is required to go forward, he will not be able to muster sufficient evidence to support his claims and that this matter will be dismissed.

Having once, we believe, precipitated the filing of charges against Spanier, Defendants should not be able to take advantage of the pending charges in this way.²

² Pennsylvania courts apply the same six-factor test used by federal courts within the Third Circuit to determine whether to stay civil litigation pending the resolution of a related criminal trial:

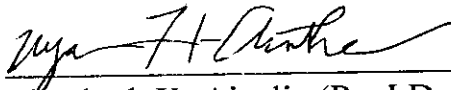
1. The extent to which the issues in the criminal and civil cases overlap;
2. The status of the case, including whether the defendant has been indicted;
3. The Plaintiff's interest in proceeding expeditiously weighed against the prejudice to the plaintiff caused by a delay;
4. The private interests of and burden on the defendant;
5. The interest of the Court; and
6. The public interest.

See Anderson, No. 30006-2009-C.A., slip op. at 4 (citing *Kaiser v. Stewart*, 1997 U.S. Dist. LEXIS 1377, *5 (E.D. Pa. Feb. 6, 1997); *Walsh Sec., Inc. v. Cristo Prop. Mgmt, Ltd.*, 7 F. Supp. 2d 523, 527 (D.N.J. 1998)). An analysis of these factors further demonstrates that this matter should be stayed, as the criminal and civil cases overlap substantially and are predicated on the same issue; Spanier has been formally charged; Spanier would be greatly prejudiced if this matter were not stayed, while Defendants cannot articulate any prejudice that would occur if it were stayed; and it would improve judicial efficiency if this matter were stayed until after the criminal trial, as a resolution of the criminal case may eliminate the need to litigate certain issues. *See Doe*, 2013 U.S. Dist. LEXIS 21604 at *7.

V. CONCLUSION

For all of these reasons, this matter should be stayed pending the final resolution of the criminal proceedings against Graham Spanier.

Respectfully submitted,



Elizabeth K. Ainslie (Pa. I.D. No. 35870)

SCHNADER HARRISON SEGAL &
LEWIS LLP

1600 Market Street, Suite 3600

Philadelphia, Pennsylvania 19103-7286

Telephone: 215-751-2000

Facsimile: 215-751-2205

Attorney for Plaintiff Graham B. Spanier

Dated: October 18, 2013

June 5, 2013

Elizabeth K. Ainslie
Direct Dial 215-751-2359
Direct Fax 215-751-2205
E-mail: eainslie@schnader.com

PERSONAL AND CONFIDENTIAL

VIA UPS NEXT DAY AIR

Louis J. Freeh, Esq.
Pepper Hamilton, LLP
The New York Times Building
37th Floor
620 Eighth Avenue
New York, New York 10018-1405

RE: Tolling Agreement

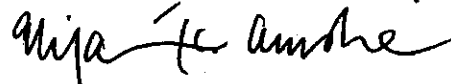
Dear Mr. Freeh:

As you know, I am representing Graham Spanier in connection with a number of problems he faces currently. Dr. Spanier is contemplating the filing of a defamation lawsuit against you and your former firm.

This is obviously not a step we want to take lightly, but the one-year statute of limitations for defamation will, I believe, run out on July 12, 2013. Would you be willing to enter into a tolling agreement with Dr. Spanier that would obviate the necessity of filing this suit next month?

If I have not heard from you by June 14, I will assume that you are not interested in my proposal.

Very truly yours,



Elizabeth K. Ainslie
For SCHNADER HARRISON SEGAL & LEWIS LLP

EKA/di

cc: Barbara Mather, Esquire

EXHIBIT A

MELISSA ANDERSON, : IN THE COURT OF COMMON PLEAS
as Executrix of the Estate of :
WILLIAM ANDERSON, JR., deceased : LAWRENCE COUNTY, PENNSYLVANIA
and MELISSA ANDERSON, :
Individually, :
: :
: :
PLAINTIFF :
vs. :
: :
DR. VAN EDWARD SCOTT, M.D., :
: :
DEFENDANT : NO. 30006 OF 2009, C.A.

APPEARANCES

For the Plaintiff: Daniel I. Herman, Esquire
Geer and Herman, P.C.
2100 Wilmington Road
New Castle, PA 16105

For the Defendant: Ronald M. Puntil, Jr., Esquire
2900 U.S. Steel Tower
600 Grant Street
Pittsburgh, PA 15219

OPINION

Hodge, J. September 15, 2011

Before the Court for disposition is Defendant's Motion for a Protective Order. The current action arises out of a Complaint for Wrongful Death, filed on August 5, 2010, wherein the Plaintiff alleges that a doctor-client relationship existed between the Decedent, William Anderson, Jr., and the Defendant, Dr. Van Edward Scott, M.D. The Plaintiff further believes that the Defendant had been treating the Decedent for numerous personal injuries since April 26, 2005, and that over a period of two years, the Defendant negligently prescribed

copious prescriptions, which ultimately caused the Decedent's death on May 17, 2007.

On March 14, 2011, counsel for the Plaintiff served a Notice of Deposition of Dr. Scott; the Defendant's deposition was scheduled to occur on June 8, 2011. Defendant filed an objection to the same on May 20, 2011. The basis of Defendant's objection is that he intends to invoke his Fifth Amendment privilege against self-incrimination, as criminal charges have been filed by the Commonwealth of Pennsylvania, and the Defendant fears the negative inferences that may be drawn by a civil jury if he invokes his Fifth Amendment right. Defendant proposes that his deposition in the civil proceeding be delayed until after the criminal proceedings are concluded to avoid this negative outcome.

Alternatively, the Plaintiff objects to any delay in the civil proceedings. Plaintiff argues that any accommodations provided to a party invoking the Fifth Amendment should not unduly interfere with the opposing party's right to have the civil case proceed in a timely manner. Furthermore, Plaintiff argues that the distinction between the rights and risks involved when a Defendant invokes the Fifth Amendment are entirely different in a civil proceeding versus a criminal proceeding and the two matters cannot be evaluated in the same light.

Article 1, Section 9 of the Pennsylvania Constitution provides that a person "cannot be compelled to give evidence against himself." The American Court system has historically valued and safeguarded the Fifth Amendment privilege against compulsory self-incrimination and its underlying purpose, and since 1964, the protections of the Fifth Amendment, as set forth in the United States Constitution, have governed state court proceedings. Malloy v. Hogan, 378 U.S. 1 (1964). The privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 445 (1972).

While it logically follows that an individual is free to assert his Fifth Amendment right in either a civil or criminal proceeding, the natural inferences that follow such an assertion may place the individual who wishes to avoid disclosure at a disadvantage. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (adverse inferences may be drawn from a party asserting his Fifth Amendment right in a civil proceeding). Yet, in a civil proceeding, to the extent that a court can accommodate a party's Fifth Amendment interests, the same should be done, provided that doing so does not unduly

disadvantage the opposing party. Gutierrez-Rodriguez v. Cartagena, 882 F.2 553, 577 (1st Cir. 1989). Thus, a balancing test is used to safeguard an individual's Fifth Amendment privilege against any unnecessary prejudice that befalls the other party as a result. S.E.C. v. Graystone Nash Inc., 25 F.3d 187, 192 (3d Cir. 1994). Consequently, it may be appropriate, in some situations, for a court to grant a stay in one proceeding until a resolution is reached in the other proceeding. Landis v. North Am. Co., 299 U.S. 248, 254 (1936).

Although not binding on this Court's decision, comparable case law exists from neighboring jurisdictions and from the District Courts, which provides this Court with ample guidance in its determination. Six factors are consistently referenced when considering whether to grant a stay. Those factors are as follows: 1) the extent to which the issues in the criminal and civil cases overlap; 2) the status of the case, including whether the defendant has been indicted; 3) the plaintiff's interest in proceeding expeditiously weighed against the prejudice to plaintiff caused by a delay; 4) the private interests of and burden on the defendant; 5) the interest of the Court; and 6) the public interest. Kaiser v. Stewart, 1997 U.S. Dist. LEXIS 1377, *5 (E.D.Pa. Feb. 6, 1997); Walsh Securities, Inc. v. Cristo Property Management, Ltd., 7 F.Supp.2d. 523, 527 (D.N.J. 1998).

First, the Court considers similarity of the issues between the civil and criminal proceedings. Although the decedent is not specifically mentioned in the criminal indictment, the indictment does allege a pattern of criminal behavior that directly correlates to the basis for the Plaintiff's wrongful death complaint. The Defendant persuasively argues that the language contained in the civil complaint mimics language in the criminal indictment verbatim. Consequently, any evidence offered against the Defendant in the civil case would be relevant to the criminal case. This factor weighs in favor of granting the Defendant's request for a protective order and stay his deposition until a conclusion of the criminal case.

Second, the Court considers the current status of the criminal proceedings. "A court is most likely to grant a stay of civil proceedings where an indictment has been returned." State Farm Mut. Auto. Ins. Co. v. Bechham-Easley, 2002 WL 31111766, *2 (E.D.Pa. Sept. 18, 2002) (citing Walsh Securities, Inc., 7 F.Supp.2d at 527.). The Defendant's criminal case is currently scheduled for the January 2012 Trial Term. It logically follows that there will be some resolution of the criminal matter within the next several months. This factor also weighs in favor of granting the Defendant's request to for protective order.

Third, the Court considers the prejudice to the Plaintiff as a result of granting a stay in the civil proceedings. Plaintiff is adamant that she desires to proceed forward with the civil matter as quickly as possible, and Plaintiff fears that if the Court granted a stay at this stage, there is no guarantee that the criminal matter would not be further continued in the future, thereby delaying the civil case even longer. The Defendant counters that this is contrary to the status quo of the case, as Plaintiff delayed in moving the case forward for four years following the decedent's death. Regardless of this fact, the Court recognizes that any delay in the civil proceeding, albeit a minimal delay, creates a substantial level of prejudice against the Plaintiff. As such, the Court finds that this factor weighs in favor of the Plaintiff's and against granting the Defendant's request for a protective order.

Fourth, the Court considers the private interests of and burden on the Defendant. The Court recognizes that when a civil and criminal case are simultaneously pending, a defendant may face the difficult choice of choosing between asserting his Fifth Amendment right and risk losing a civil trial, or waive that right and risk self-incrimination. However difficult the choice may be, requiring a defendant to make such a determination is not unconstitutional. Mitchell v.

U.S., 526 U.S. 314, 328 (1999); Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).

At this stage of the proceedings, however, the risk and burden place on the Defendant is great. The criminal trial is scheduled with the next few months, and to require the Defendant to proceed forward with a deposition for a civil case, that is in the early stages of discovery is a heavy burden. While granting Defendant's request for a stay would be inappropriate if prior to an indictment being filed, the available case law suggests that a delaying a defendant's deposition in a civil matter is appropriate when the criminal trial is imminent. See State Farm Mut. Auto. Ins. Co. v. Bechham-Easley, 2002 WL 31111766, *3 (E.D.Pa. Sept. 18, 2002); Sterling National Bank v. A-1 Hotels International, Inc., 175 F. Supp 2d. 573, 577 (2nd Cir. 2001). The Court finds that this factor also weighs in favor of granting the Defendant's request for a protective order and stay his deposition until a conclusion of the criminal case.

Fifth, the Court considers its own schedule and how the same will be affected by any delay in the proceedings. While the Court has experienced limited activity in regards to the civil case, excluding the motion presently before the Court for a determination, the criminal case is set for the January 2012 Trial Term. Defendant further argues that nothing is

prohibiting the Plaintiff from engaging in other areas of discovery while the criminal case is resolved; thereby making the parties more prepared to move forward once the criminal case is completed. The Court agrees. As such, the Court finds that a delay in the civil case would have no adverse impact upon the Courts. This factor also weighs in favor of granting the Defendant's for protective order.

Last, the Court considers the public interest in having an expeditious resolution of the criminal proceedings. This factor bears little impact on the Court's determination, as a stay in the civil case would have no effect of the resolution of the criminal case, and the criminal case is scheduled in the near future.

After considering all the above factors, the Court concludes that the Defendant's Motion for a Protective Order is proper. The Court will enter the following Order of Court in accordance with this Opinion.

MELISSA ANDERSON,	:	IN THE COURT OF COMMON PLEAS
as Executrix of the Estate of	:	
WILLIAM ANDERSON, JR., deceased	:	LAWRENCE COUNTY, PENNSYLVANIA
and MELISSA ANDERSON,	:	
Individually,	:	
	:	
PLAINTIFF	:	
vs.	:	
	:	
DR. VAN EDWARD SCOTT, M.D.,	:	
	:	
DEFENDANT	:	NO. 30006 OF 2009, C.A.

ORDER OF COURT

AND NOW, this 15th day of September, 2011, with this matter being before the Court on July 7, 2011 for argument on Defendant's Motion for a Protective Order, with Louise Geer, Esquire, appearing and representing the Plaintiff, and with Ronald M. Punttil, Jr, Esquire, appearing and representing the Defendant, and with counsel subsequently filing briefs for the Court's consideration, and with the Court having considered the arguments and briefs presented and in accordance with the attached Opinion, it is hereby **ORDERED and DECREED** as follows:


1. Defendant's Motion to for Protective Order is GRANTED. The Defendant's deposition shall be postponed until January 31, 2012. However, if there is a resolution of the Defendant's criminal proceedings prior to January 31, 2012, the Plaintiff is permitted

to proceed forward with Defendant's deposition in this matter.

2. The parties are permitted to proceed forward with all other aspects of discovery in the above captioned case in accordance with the Pennsylvania Rules of Civil Procedure.

3. The Prothonotary shall properly serve notice of this Order of Court upon counsel of record for the parties.

BY THE COURT:



John W. Hodge Judge J.

53RD
JUDICIAL
DISTRICT

LAURENCE COUNTY
PENNSYLVANIA

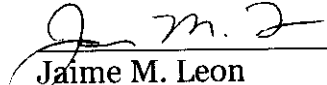
IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION

GRAHAM B. SPANIER, :
Plaintiff :
 :
vs. : No. 2013-2707
 :
LOUIS J. FREEH and :
FREEH SPORKIN & SULLIVAN, LLP :
Defendants :

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Memorandum of Law in Support of Motion to Stay has been served by U.S. mail, postage prepaid, on this 18th day of October, 2013 to the following attorneys:

Robert C. Heim, Esquire
Michael L. Kichline, Esquire
Asha T. Mehrotra, Esquire
William T. McEnroe, Esquire
DECHERT LLP
Cira Center
2929 Arch Street
Philadelphia, PA 19104-2808


Jaime M. Leon



**JOHN DOE, Plaintiff vs. THE PENNSYLVANIA STATE UNIVERSITY, et al.,
Defendants**

CIVIL NO. 4:12-CV-2068

**UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA**

2013 U.S. Dist. LEXIS 21604

**February 14, 2013, Decided
February 14, 2013, Filed**

COUNSEL: [*1] For John Doe, Plaintiff: Don A Bailey,
LEAD ATTORNEY, Harrisburg, PA.

For The Pennsylvania State University, Defendant: James
A. Keller, Joshua WB Richards, Saul Ewing LLP,
Philadelphia, PA.

For The Second Mile, Defendant: Howard A. Rosenthal,
Archer & Greiner, P.C., Philadelphia, PA; Joseph W.
Selep, Patrick J. Doran, Pittsburgh, PA.

For Edgewater Psychiatric Center, Defendant: Stuart T.
O'Neal, III, LEAD ATTORNEY, Robert S. Forster, Jr.,
Burns White LLC, West Conshohocken, PA; Brian
Grady, Kelley Partners, Ltd, Philadelphia, PA.

For Graham Spanier, Defendant: Jodi S. Wilenzik, Neil J.
Hamburg, Hamburg & Golden, P.C., Philadelphia, PA.

For Timothy Curley, Defendant: Faith C. Isenhath,
Michael W. Hawkins, LEAD ATTORNEYS, PRO HAC
VICE, Dinsmore & Shohl LLP, Cincinnati, OH; C. James
Zeszutek, Dinsmore & Shohl LLP, Pittsburgh, PA.

For Wendell Courtney, Defendant: Candidus K.
Dougherty, Jeffrey B. McCarron, Swartz Campbell LLC,
Philadelphia, PA.

For The Law Firm of McQuaide Blasko, Defendant:
Jennifer E. Burke, William M. McSwain, Drinker Biddle

& Reath LLP, Philadelphia, PA.

JUDGES: William W. Caldwell, United States District
Judge.

OPINION BY: William W. Caldwell

OPINION

MEMORANDUM

I. Introduction

On October 15, 2013, Plaintiff [*2] filed the instant action, alleging that Defendants, Pennsylvania State University ("PSU"), Second Mile, Edgewater Psychiatric Center, Gerald Sandusky, Graham Spanier, Timothy Curley, Gary Schultz, Wendell Courtney, and The Law Firm of McQuaide Blasko, violated his *First, Fourth, and Fourteenth Amendment* rights. He also brings state law claims of premises liability, negligence, conspiracy, intentional infliction of emotional distress, and sexual assault. Presently before the court is PSU's motion to stay the proceedings until the pending criminal actions against Defendants Spanier, Curley, and Schultz have concluded. The motion is concurred in by Defendants Second Mile, Curley, Spanier, and Courtney. Defendant Edgewater Psychiatric Clinic filed a brief in opposition to the

motion. Plaintiff did not file a response to the motion within the required time, and thus he is deemed not to oppose the motion. See *L.R. 7.6*.

II. Discussion

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936). [*3] "How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.*

In deciding whether to stay a civil case pending the resolution of a related criminal case, courts consider many factors, including: (1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the criminal proceedings, including whether any defendants have been indicted; (3) the plaintiff's interests in expeditious civil proceedings weighed against the prejudice to the plaintiff caused by the delay; (4) the burden on the defendants; (5) the interests of the court; and (6) the public interest. *In re Adelpia Communs. Secs. Litig.*, 2003 U.S. Dist. LEXIS 9736, *7-8, 2003 WL 22348819 (E.D. Pa. May 13, 2003) (Hutton, J.) (citing *Walsh Securities, Inc. v. Cristo Prop. Magmt., Ltd.*, 7 F. Supp. 2d 523 (D.N.J. 1998).

A. The Extent to Which the Issues in the Civil and Criminal Cases Overlap

This factor is the most important threshold issue in determining whether to grant defendant's motion. See *State Farm Mut. Auto. Ins. Co. v. Beckham-Easley*, 2002 U.S. Dist. LEXIS 17896, *4, 2002 WL 31111766 (E.D. Pa. Sept. 18, 2002) (Hutton, J.). [*4] The moving Defendants argue that Plaintiff's complaint mirrors the criminal allegations pending against Defendants Spanier, Curley, and Schultz. We agree and find that this factor weighs in favor of a stay.¹

¹ Plaintiff alleges that "The defendants knew that Sandusky (a defendant here also) was molesting young boys and they ratified his misconduct by supporting him and giving him continuing access for years to PSU and Second Mile facilities and programs." (Doc. 1, ¶ 52). Plaintiff brings claims for violation of his due process, *First Amendment*, and *Fourth*

Amendment rights as well as state law claims of premises liability, negligence, conspiracy, intentional infliction of emotional distress, and sexual assault. The criminal charges against Spanier, Curley, and Schultz include perjury, endangering the welfare of children, obstruction, conspiracy, and failure to properly report suspected child abuse.

B. The Status of the Criminal Proceedings

Defendants Spanier, Curley, and Schultz have been indicted and are awaiting trial, which is expected to begin in 2014. "The strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned." [*5] *Walsh Securities*, 7 F. Supp. 2d at 527. After indictment, the potential for self-incrimination is high, and the burden of delay is lessened as a result of the Speedy Trial Act. See *State Farm*, 2002 U.S. Dist. LEXIS 17896, *4, 2002 WL 31111766. Thus, this factor weighs in favor of a stay.

C. Edgewater's Interest in Expeditious Civil Proceedings Weighed Against the Prejudice Caused by the Delay

Edgewater argues that the allegations against it are severely damaging to its reputation, and a stay would prevent it from pursuing a prompt dismissal of the case.² However, due to the requirements of the Speedy Trial Act, this burden is decreased. *Id.* As a result, we find that this factor weighs only slightly against a stay.

² In support of its argument, Edgewater makes a passing reference to a single case involving the denial of a motion to stay proceedings, *McQueary v. The Pennsylvania State University*, Civ. No. 2012-1804 (December 19, 2012 Ct. Cm. Pleas Centre County). There, PSU sought to stay a civil suit against it until the criminal proceedings against Spanier, Schultz, and Curley were resolved. The court noted that Spanier, Schultz, and Curley were not defendants in the civil action, and [*6] there were not issues common to both the civil and criminal actions. The court also stressed that there were no legitimate self-incrimination concerns, and a criminal conviction would not lessen the burden of discovery on the civil plaintiffs.

The court's concerns in *McQueary* are inapplicable to the present case. Here, Spanier,

Schultz, and Curley have been named as Defendants. The criminal and civil proceedings largely overlap. There are significant self-incrimination concerns. Under these circumstances, we do not find Edgewater's argument persuasive.

D. The Burden on the Defendants in Both Criminal and Civil Actions

If the present proceedings go forward, Defendants Spanier, Curley, and Schultz risk self-incrimination. Id. These Defendants may be forced to choose between invoking their *Fifth Amendment* right against self-incrimination, allowing the court or jury to draw adverse inferences, or exposing themselves to criminal liability. See *Kaiser v. Stewart*, 1997 U.S. Dist. LEXIS 1377, *9-10, 1997 WL 66186, *3 (E.D. Pa. Feb. 6, 1997) (Bartle, J.). Because we find this burden to be significant, this factor weighs in favor of a stay.

E. The Interests of the Court

The court has a strong interest [*7] in case management and judicial efficiency. "[I]f the indicted defendants assert [their *Fifth Amendment*] privilege throughout the litigation, then it will be difficult or impossible to fairly apportion liability because of the differing factual record among the defendants." *In re Adelpia*, 2003 U.S. Dist. LEXIS 9736, 87-8, 2003 WL 22348819, *5. Additionally, criminal convictions may encourage settlement of civil lawsuits, eliminating the necessity of litigating certain issues. Id. We find that this factor weighs in favor of a stay.

F. The interests of the Public

"While a civil litigant with a private dispute has an interest in the prompt disposition of his or her claims, the public has a greater interest in enforcement of the criminal law." *Kaiser*, 1997 U.S. Dist. LEXIS 1377, *12, 1997 WL 66186, *4. We do not find that the public interest is harmed by a stay, and thus this factor weighs in favor of a stay.

III. Conclusion

Having weighed the above factors, we will grant PSU's motion for a stay. We will issue an appropriate order.

/s/ William W. Caldwell

William W. Caldwell

United States District Judge

ORDER

AND NOW, this 14th day of February, 2013, upon consideration of Pennsylvania State University's [*8] motion to stay (doc. 24), and Edgewater Psychiatric Center's response thereto, and pursuant to the accompanying memorandum, it is ordered that said motion is GRANTED.

/s/ William W. Caldwell

William W. Caldwell

United States District Judge



LINDA S. KAISER, et al. v. ALLEN W. STEWART, et al.

CIVIL ACTION NO. 96-6643

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

1997 U.S. Dist. LEXIS 1377

February 6, 1997, Decided

February 6, 1997, FILED; February 6, 1997, ENTERED

DISPOSITION: [*1] Unopposed motion of United States to intervene GRANTED.

COUNSEL: For LINDA S. KAISER, Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as Liquidator of SUMMIT NATIONAL LIFE INSURANCE COMPANY c/o Office of Liquidations and Special Funds, LINDA S. KAISER, Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as Liquidator of EBL LIFE INSURANCE COMPANY c/o Office of Liquidations and Special Funds, PLAINTIFFS: GERALD E. ARTH, IRA B. SILVERSTEIN, LISA A. CARNEY, FOX, ROTHSCHILD, O'BRIEN & FRANKEL, PHILA, PA USA.

For ALLEN W. STEWART, BANKERS EQUITY LIFE INSURANCE COMPANY, ERIN GROUP ADMINISTRATORS, INC., CATHEDRAL LIFE INSURANCE COMPANY, COVENANT REALTY, LTD., TARTAN MANAGEMENT CORPORATION, c/o CT Corporation System, TSUNAMI CORPORATION, JEANNE T. FLETCHER, GEOFFREY S. STEWART, JUNE P. O'BRIEN, PAUL A. TAMACCIO, PACIFIC COAST UNDERWRITERS, INC., DEFENDANTS: TIMOTHY C. RUSSELL, CHRISTIE, PABARUE, MORTENSEN AND YOUNG, PHILA, PA USA. KENNETH I. TRUJILLO, CHRISTIE, PABARUE, MORTENSEN AND YOUNG, PHILA, PA

USA. For SUMMIT COMPANY, BANKERS EQUITY REALTY, DEFENDANTS: TIMOTHY C. RUSSELL, (See above). For NELLIE T. MORRIS, LUCILLE M. WERTS CONNORS, [*2] DEFENDANTS: KENNETH I. TRUJILLO, (See above). CREED C. BLACK, JR., PHILA, PA USA. For MARY ANN STEWART, DEFENDANT: DANIEL J. DI GIACOMO, DI GIACOMO & BAFFA, PHILA, PA USA.

For UNITED STATES OF AMERICA, MOVANT: LINDA DALE HOFFA, U.S. ATTORNEY'S OFFICE, PHILA, PA USA. For ROBERT E. WELSH, JR., MOVANT: CATHERINE M. RECKER, WELSH AND RECKER, P.C., PHILA, PA USA.

JUDGES: Harvey Bartle, III, J.

OPINION BY: Harvey Bartle, III

OPINION

MEMORANDUM

Bartle, J.

February 6, 1997

The question before the court is whether to stay this civil action pending resolution of a related criminal

action.

On October 1, 1996, Linda Kaiser, the Pennsylvania Insurance Commissioner ("Insurance Commissioner"), initiated this civil Racketeering Influenced and Corrupt Organizations ("RICO") action, pursuant to 18 U.S.C. § 1964, in her capacity as the Liquidator of two Pennsylvania life insurance companies. She seeks damages from defendant Allen W. Stewart ("Stewart") and 17 other individual and corporate defendants for their alleged role in causing the financial ruin of these insurance companies.¹

1 The Insurance Commissioner recently dismissed one defendant, Christie William Kaufmann, from her civil action.

[*3] Approximately two months later, on December 4, 1996, the United States handed down an indictment against Stewart, charging him with criminal RICO violations as well as mail fraud, wire fraud, and money laundering. *United States of America v. Stewart*, Criminal No. 96-583 (E.D. Pa.).² The allegations of the 63 count indictment are nearly identical to the present civil action, except that Stewart is the sole defendant. The trial in the criminal action is scheduled to begin on September 8, 1997 and to last several weeks.

2 Under our system of random assignments, this criminal case also happened to be assigned to the undersigned.

It is the United States that seeks a stay of this civil action until the conclusion of the criminal trial. Since it is not a party here, it has first sought to intervene either as of right or permissively pursuant to *Rule 24(a)* and *24(b)* of the *Federal Rules of Civil Procedure*. None of the parties contests the government's motion in this regard. Accordingly, the motion of the [*4] United States to intervene will be granted.

That is as far as any consensus extends. The United States asks this court to stay the entire civil action by placing the case in civil suspense pending the completion of the criminal trial. It contends that unless we stay the civil action, its ability to try the criminal case will be impeded and Stewart will obtain access, through civil discovery, to documents and information he would not be entitled to receive under the narrower criminal discovery rules. In her response, the Insurance Commissioner, the plaintiff in this action, agrees to a partial stay of

discovery but asks that document discovery be allowed to continue. Stewart and the Stewart defendants,³ on the other hand, ask this court to deny the motion to stay in its entirety so that full-blown discovery in this civil action may proceed. The remaining defendants, Nellie Morris, Lucille Werts Connors, Mary Ann Stewart, and American Insurance Managers, Inc., did not file a response.

3 Stewart is joined in his opposition to the government's motion to stay proceedings by defendants Jeanne Fletcher, June O'Brien, Geoffrey Stewart, Paul A. Tamaccio, Summit Company, Tartan Holdings, Inc., Bankers Equity Life Insurance Company, Erin Group Administrators, Inc., Bankers Equity Realty, Cathedral Life Insurance Company, Pacific Coast Underwriters, Inc., Covenant Realty, Ltd., Tartan Management Corporation and Tsunami Corporation. We will refer to these persons and entities collectively as the "Stewart defendants."

[*5] The United States Supreme Court has acknowledged a court's inherent power to stay proceedings. *Landis v. North Am. Co.*, 299 U.S. 248, 254-55, 81 L. Ed. 153, 57 S. Ct. 163 (1936); accord *United States v. Mellon Bank*, 545 F.2d 869, 872-73 (3d Cir. 1976). The Court stated:

the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. (citations omitted) True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.

Landis, 299 U.S. at 254-55. When related civil and criminal actions are pending, the criminal action should ordinarily be tried first to meet the requirements of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, and to alleviate any *Fifth Amendment* problems in the civil proceeding. *In Re Residential Doors* [*6] *Antitrust Litig.*, 900 F. Supp. 749, 756 (E.D. Pa. 1995). However,

there is no constitutional requirement that a civil action be stayed when there is also a parallel criminal proceeding pending. *De Vita v. Sills*, 422 F.2d 1172, 1181 (3d Cir. 1970).

To determine whether a stay is proper, we must balance the five factors enunciated by Judge Pollak in *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53 (E.D. Pa. 1980). In that case, the defendants sought a stay of seven civil antitrust suits pending the resolution of their indictment in a related criminal antitrust trial. *Id.* at 55. The factors we must balance are: (1) the interests of the plaintiff, including any potential prejudice of a delay; (2) the burden on the defendants; (3) case management and productive use of our judicial resources; (4) the interest of nonparties to the civil litigation; and (5) the public's interest in both the civil and criminal proceedings. *Id.* at 56. We will consider each of these interests in turn.

The Insurance Commissioner, as a civil plaintiff, has an interest in the speedy and efficient resolution of her case. *Id.* In her capacity as the Liquidator, [*7] she seeks to locate and preserve any assets rightfully belonging to the two insurance companies which are the subject of this action. While she has already obtained extensive documentation and hired at least one expert who has prepared a report, we recognize that the passage of time may hinder her efforts. The delay may increase the risk of "loss of evidence through fading memories and the death of individuals." *Shim v. Kikkoman Int'l Corp.*, 509 F. Supp. 736, 740 (D.N.J.), *aff'd*, 673 F.2d 1304 (3d Cir. 1981). Further, the Insurance Commissioner has indicated the possibility of adding other defendants to this action before the statute of limitations expires. Concerns about delay are diminished, however, by the fact that it will not be prolonged. As noted, the criminal trial will begin in early September and will conclude several weeks later. Finally, in considering the Insurance Commissioner's right to proceed, the completion of the criminal proceedings may "obviate much of the expenditure of time and dollars which plaintiff[] would otherwise be compelled to invest in [her] civil suit[]." *Golden Quality*, 87 F.R.D. at 56.

We next consider the burden on the defendants [*8] in the civil and criminal actions. According to the Stewart defendants, if the civil action is stayed in its entirety, they will be delayed in their efforts to clear their names and to put this case behind them. As a result of the accusations

in the Insurance Commissioner's complaint, which has generated much publicity, the defendants' personal and business lives are obviously disrupted. As ten of the defendants are business entities, including five insurance companies, we are sensitive to the reality that the pending civil suit can adversely affect their commercial reputations and their ability to conduct business. Further, the Stewart defendants contend that delaying discovery in this action harms them more than plaintiff. The Insurance Commissioner's complaint was filed after intensive investigation and was based upon an expert's financial review of the insurance companies. The Insurance Commissioner already possesses or has access to many of the documents relevant to this civil action. To this court's knowledge, as of this date the defendants have not yet received the report of the Insurance Commissioner's expert nor have they had an opportunity to review many of the documents [*9] upon which it is based. On the other hand, all defendants here have pending a motion to dismiss the complaint for failure to state a claim upon which relief can be granted.⁴ Of course, if they are successful, the civil case will end. It is not uncommon to hold discovery in abeyance until the court rules on such a motion.

4 The motions to dismiss are based in part on the argument that the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, preempts the RICO claim alleged.

According to the Stewart defendants, there is no burden upon them if this action proceeds without any limitation. This is a surprising argument. Stewart, the only civil defendant currently a criminal defendant, will undoubtedly invoke his *Fifth Amendment* right against self-incrimination if his deposition is sought before the criminal trial or if served with interrogatories.⁵ While the remaining civil defendants are not under indictment, they may also face a *Fifth Amendment* dilemma. If Stewart or any of these other defendants takes [*10] the *Fifth Amendment* in the civil case, the court or jury is allowed to draw an adverse inference. *Baxter v. Palmigiano*, 425 U.S. 308, 318, 47 L. Ed. 2d 810, 96 S. Ct. 1551 (1976). Conversely, if they do not exercise their constitutional right and instead answer questions posed, they may expose themselves to later criminal prosecution. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805, 53 L. Ed. 2d 1, 97 S. Ct. 2132 (1977). Moreover, defendants other than Stewart may also find themselves in the burdensome, if not contradictory, position of having to

give information to the government for its criminal investigation and in preparation for trial, while simultaneously defending themselves in this civil action.

5 The *Fifth Amendment* provides in pertinent part that no one "shall be compelled in any criminal case to be a witness against himself." *U.S. Const. amend. V*. A person may also invoke the *Fifth Amendment* right in a civil proceeding. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805, 53 L. Ed. 2d 1, 97 S. Ct. 2132 (1977).

[*11] We must also weigh this court's case management and efficient use of judicial resources. Both the civil and criminal cases are complex, and the docket pressures from these two cases alone, even at this early stage, have not been insubstantial. Since October 1, 1996 we have already held at least 12 status conferences, either in chambers or over the phone, and two court proceedings. A temporary restraining order in the civil case was modified, albeit by agreement of the parties, approximately nine times, until it was eventually dissolved. There are also five criminal and three civil motions currently pending. These include a motion to dismiss the complaint in the civil action for failure to state a claim upon which relief can be granted, as well as a motion in the criminal action to dismiss the indictment. We have previously decided motions to vacate expedited discovery and to vacate an order directing certain depositions in the civil action. *Kaiser v. Stewart*, 1996 U.S. Dist. LEXIS 18644, Civ. A. No. 96-6643, 1996 WL 730533 (E.D. Pa. Dec. 10, 1996). Moreover, if the government prevails at the criminal trial, the need to proceed with a prolonged civil action may disappear. See *Emich Motors Corp. v. General* [*12] *Motors Corp.*, 340 U.S. 558, 568-69, 95 L. Ed. 534, 71 S. Ct. 408 (1951); *Golden Quality*, 87 F.R.D. at 57. The cases involve the same transactions and contain substantially similar allegations of wrongdoing. The continuation of both cases at full steam will obviously impact on the court's limited resources.

We must next contemplate the burden of simultaneous actions on nonparties. *Golden Quality*, 87 F.R.D. at 56. The burden on nonparties, particularly those who hold relevant documents, may be significant. Both the civil and criminal actions involve literally thousands of documents, many of which are financial records. A nonparty may be forced to provide copies of documents to the government, the Insurance Commissioner, and

each of the 18 civil defendants if the civil action goes forward.

Finally, we turn to the interest of the public, on whose behalf the government acts in its criminal prosecution of Stewart. While a civil litigant with a private dispute has an interest in the prompt disposition of his or her claims, the public has a greater interest in enforcement of the criminal law. *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), cert. denied, 371 [*13] U.S. 955, 9 L. Ed. 2d 502, 83 S. Ct. 502 (1963); *Golden Quality*, 87 F.R.D. at 58. This interest alone may be enough to stay the entire civil proceeding, or at least to narrow the range of civil discovery. *Campbell*, 307 F.2d at 487. We recognize that the Pennsylvania Insurance Commissioner, in her capacity as a statutory liquidator, is acting on behalf of the citizens of the Commonwealth. Her lawsuit seeks to protect the rights of policyholders as well as the public against weakened, if not insolvent, insurance companies that do business within its borders. Nonetheless, we consider the federal government's interest in proceeding with its criminal action to be paramount.

The government is rightly concerned that allowing the civil action to proceed may interfere with its law enforcement efforts. As stated before, this case is document intensive. If the civil parties seek documents which are in the possession of the government, the United States Attorney must take time, otherwise devoted to the criminal prosecution, to make these documents available and to be present while the civil parties view them. With the vast amount of documents and the 19 parties involved here, the time [*14] and cost to the government could be enormous.

The United States also argues that allowing both the civil and criminal cases to proceed will allow Stewart and others closely aligned with him to thwart its criminal prosecution. The Federal Rules of Criminal Procedure do not provide for depositions or interrogatories as the Federal Rules of Civil Procedure do. The Jencks Act, 18 U.S.C. § 3500, limits the pretrial discovery of government witnesses. ⁶ *Rule 6(e)(2) of the Federal Rules of Criminal Procedure* provides for a general rule of secrecy of grand jury proceedings. ⁷ The government asserts that because Stewart will have greater access to witnesses and documents through civil discovery, he may use this opportunity to obtain information on the government's criminal investigation. In this way a

defendant could then reach and manipulate witnesses, destroy documents, and "make up stories." (Mem. of Law in Supp. of United States' Application to Intervene and Mot. to Stay Proceedings at 6.) Through civil discovery, Stewart could take the depositions of government witnesses and obtain government documents, not for his civil case, but in preparation for his criminal defense.⁸ The possibility [*15] that a civil litigant may use discovery to gain information on his or her pending criminal case has been recognized as a legitimate consideration. See *Campbell*, 307 F.2d at 486. In *Campbell*, the Fifth Circuit stated that "considerations of public policy should prevail in order to prevent the civil discovery rules being subverted into a device for improperly obtaining discovery in the criminal proceedings." *Id.* It is in the public interest for all parties to have a level playing field. It would be unfair to allow a defendant to obtain full discovery knowing that in return the government could not obtain full discovery from that defendant.

6 That Act states in pertinent part:

in any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

18 U.S.C. § 3500(a).

7 The Rule provides that:

[a] grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

Fed. R. Crim. P. 6(e)(2).

[*16]

8 In fact, in a letter to counsel for the Insurance Commissioner, Stewart's attorney states "in order to avoid further conflict on this issue, perhaps you would be good enough to identify to us all of the records which your firm on behalf of the Liquidator has obtained from all third party sources, without subpoena and provide copies to us at our expense, and also to identify for us what records you have provided to the government." (Ex. A to the Liquidator's Resp. in Opp'n to the United States' Application to Intervene and Mot. to Stay Proceedings.)

After consideration of the above factors, we conclude that a blanket stay of the civil proceeding is unwarranted. While the government has a compelling position, so do the civil litigants. We believe a proper balance can be achieved by allowing limited civil discovery to continue. Civil discovery must be narrowed to ensure grand jury secrecy and to safeguard against unjustified disclosures to Stewart that could prejudice the government's criminal investigation and trial preparation. Therefore, we will enter an Order which halts civil discovery [*17] except as otherwise permitted. No depositions, other than of record custodians, may be conducted. Document discovery only will be allowed to continue subject to several restrictions enumerated in our Order which will prevent the revelation of grand jury information and will not unduly burden the government. The United States Attorney must be notified of all subpoenas and requests for production in the civil action, and nonparties served with subpoenas must be supplied a copy of our Order so that they are aware of the pertinent restrictions. All civil discovery requests and subpoenas must be served on or before July 1, 1997. As of August 1, 1997, civil discovery will be completely stayed pending conclusion of the criminal trial, to prevent interference with preparation for it. With limited document discovery allowed to go forward, the parties may continue to analyze and review what will undoubtedly be a central part of this litigation. We will allow additional parties to be joined. Any new parties will also be subject to these discovery restrictions. Finally, all parties, including the United States, may seek modification of this court's Order for compelling reasons.

ORDER

AND [*18] NOW, this 6th day of February, 1997 for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

1. The unopposed motion of the United States to intervene is GRANTED.

2. Except as provided herein, there shall be no further discovery permitted, either between or among the parties or from any nonparties, until the conclusion of the criminal trial in *United States v. Allen W. Stewart*, Criminal No. 96-583 (E.D. Pa.).

3. Document discovery only may continue as between and among the parties and from any nonparty, subject to the following restrictions:

a. No document request or subpoena *duces tecum* may be served on the United States;

b. No document request or subpoena *duces tecum* may request or order the recipient to produce or identify what documents, if any, were provided to the United States Attorney for the grand jury proceedings and/or the criminal trial;

c. Notice will be given to the United States Attorney of all document requests and subpoenas *duces tecum* that are served; and

d. To the extent any recipient is served with document requests or a subpoena *duces tecum*, the response to which would encompass some or all [*19] of the documents that were provided previously to the grand jury and/or to the United States Attorney for the prosecution of the criminal action against Allen W.

Stewart, and the recipient has no copies of those documents, the United States Attorney shall make and return copies of the requested documents to the recipient. All copying costs will be borne by the party requesting the documents. The recipient of the subpoena *duces tecum* or document request can then produce copies of the returned documents to the requesting party; provided, however, that the documents will not be identified in such a manner as to indicate whether or not they were produced to the grand jury or to the United States Attorney.

4. Any nonparty served with a subpoena *duces tecum* shall also be supplied with a copy of this Order.

5. This Order shall not be construed to bar the proper joinder of additional defendants or third-party defendants or to bar the filing of an answer or other response by such parties as permitted under *Rule 12 of the Federal Rules of Civil Procedure*.

6. No subpoena or document request shall be served after July 1, 1997 until the conclusion of the criminal trial. All discovery [*20] will be stayed as of August 1, 1997 until the conclusion of the criminal trial.

7. Any party, including the United States, may seek modification of this Order for compelling reasons.

BY THE COURT:

Harvey Bartle, III

J.