

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

HCI DISTRIBUTION, INC.; and
ROCK RIVER MANUFACTURING, INC.,

Plaintiffs,

vs.

DOUGLAS PETERSON, NEBRASKA
ATTORNEY GENERAL; TONY FULTON,
NEBRASKA TAX COMMISSIONER,

Defendants,

UNITED STATES OF AMERICA,

Intervenor.

CASE NO. 8:18CV173

UNITED STATES OF AMERICA'S
MOTION TO STAY ALL
PROCEEDINGS AND REQUEST FOR
PERMISSION TO INTERVENE

The United States of America, by undersigned counsel, pursuant to 28 U.S.C. § 517, asking this Court for an order allowing the United States to intervene in the above captioned case for the limited purpose of participating in the motion to stay all proceedings in the above entitled case, including any required response by the named defendants to the initial pleadings (Attorney General Peterson and Tax Commissioner Fulton) and staying any required discovery in the matter.

I. INTRODUCTION AND FACTUAL OVERVIEW

In January, 2018, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (hereinafter "ATF") executed judicially authorized criminal search warrants at the manufacturing and wholesale distribution locations where the HCI Entities who filed this lawsuit operate their tobacco companies. The affidavits concerning that matter are sealed by order of the honorable Judge Cheryl R. Zwart in magistrate numbers

18MJ3005, 18MJ3006, 18MJ3007, an 18MJ3009. The federal criminal investigation is ongoing into the tobacco operations and other matters associated with the tobacco operations and distribution. Following the federal search warrants, the attorneys for the HCI Entities filed a motion that is pending before Judge Zwart concerning that search operation. Following that filing, the present lawsuit was filed against the Attorney General for the State of Nebraska and the Tax Commissioner for the State of Nebraska to prevent them from taking federal action against the HCI Entities as concerns their tobacco operations, which are the same tobacco subsidiaries that were searched at the operation in January, 2018.

Because the ongoing federal criminal proceedings stem from the same facts and incidents that give rise to this civil suit, a temporary stay of all proceedings is warranted. The United States has specific statutory authority conferred pursuant to 28 U.S.C. § 517, to “attend to the interests of the United States in a suit pending in a court of the United States or in a court of a State . . .”. As explained below, a temporary stay of all proceedings in this civil case ensures fairness to all parties, promotes judicial economy, serves the interest of justice and outweighs any prejudice that would result from a minimal delay of Plaintiff’s civil suit.

The United States has a specific interest that the criminal investigation and search warrant matters now pending in the United States District Court for the District of Nebraska proceed to conclusion without the attendant occurrences that a concurrent civil action in this Court would necessarily impose.

II. ARGUMENT

Because Plaintiff's criminal proceedings now pending in the U.S. District Court for the District of Nebraska, and this civil action now pending before the above Court concern core facts from the ongoing federal investigation, and because Plaintiff's claims here relate to rulings that will likely be made in the pending criminal proceedings in the United States District Court case, this Court should "in accord with common practice, [] stay the civil action until the criminal case or the likelihood of a criminal case is ended." *Wallace v. Kato*, 549 U.S. 384, 393-94 (2007).

A. Legal Standard

Courts have discretion in determining whether to grant a motion to stay. *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). As the Supreme Court recognized, "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." *Id.* The determination of whether to stay a proceeding "calls for an exercise of judgment to balance the various factors relevant to the expeditious and comprehensive disposition of the causes of action on the court's docket." *Popoola v. MD-Individual Practice Ass'n, Inc.*, No. DKC-00- 2946, 2001 WL 579774, at *2 (D. Md. May 23, 2001) (quoting *United States v. Georgia Pacific Corp.*, 562 F.2d 294, 296 (4th Cir. 1977)); *Landis*, 299 U.S. at 254-55 (noting that the decision as to whether to stay a proceeding "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance"); *see also, e.g., In re Mutual Funds Investment Litigation*, MDL No. 1568, 2011 WL 1540134, at *1 (D. Md. Apr. 20, 2011) (assessing a request for a stay pending appeal and noting that, in striking the balance *Landis* envisioned, courts

look to such factors as the length of the stay, the hardship to the movant were the action to proceed, the burden a stay would impose on the non-moving party and whether the stay would promote judicial economy by avoiding duplicative litigation).

B. A Stay of All Civil Proceedings Until Resolution of the Pending Criminal Matter is Warranted.

Where the same incident gives rise to a civil lawsuit for damages and a criminal prosecution, the civil case ordinarily should be stayed until the criminal proceedings have concluded. *See Estes-El v. Long Island Jewish Med. Ctr.*, 916 F. Supp. 268, 269 (S.D.N.Y. 1995) (explaining “[i]t is well-settled that the Court may (and indeed, should) stay a federal Section 1983 action until resolution of parallel state court criminal proceedings.”); *Guillory v. Wheeler*, 303 F. Supp. 2d 808, 811 (M.D. La. 2004) (observing that where criminal charges remain pending, “the better course is to proceed as strongly suggested by the Fifth Circuit Court of Appeals--to stay proceedings ... until the pending criminal case has run its course”); see also, e.g., *Peyton v. Burdick*, 358 F. App’x 961, 962 (9th Cir. 2009) (vacating and remanding action to the district court with instructions to impose a stay because plaintiff’s claims for false arrest and manipulation of the evidence implicate rulings that are likely to be made in pending criminal proceeding); *Gallipeau v. Mitchell*, No. 07-3522, 2009 WL 539947, at *1 (D.S.C. Mar. 4, 2009) (staying plaintiff’s *Bivens* claims stemming from alleged warrantless seizure until resolution of plaintiff’s federal criminal charges).

The Supreme Court, in discussing claim accrual, noted:

If a plaintiff files a false arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with

common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended.

Wallace, 549 U.S. at 393-94.

Courts, relying on *Wallace*, routinely stay civil actions pending resolution of ongoing criminal proceedings when those civil suits include claims challenging a plaintiff's arrest or are otherwise related to issues that may be ruled on in the criminal proceeding. *e.g.*, *Dickerson v. City of Charleston Police Dep't*, No. 10-1625, 2011 WL 3880958 (D.S.C. Aug. 10, 2011), *adopted by* 2011 WL 3881041 (D.S.C. Sept. 2, 2011) (staying civil action alleging excessive force, false arrest, false imprisonment, illegal search and seizure and other claims); *Max-George v. Keel*, No. 10-1215, 2010 WL 2010876 (S.D. Tex. May 18, 2010) (staying civil action that included claim that defendants falsely charged him with criminal offenses); *Cameron v. Wise*, No. 09-967, 2009 WL 3755093 (S.D.N.Y. Nov. 2, 2009) (staying civil action asserting claims of false arrest and theft); *Crooker v. Burns*, 544 F. Supp. 2d 59, 60 (D. Mass. 2008) (staying civil actions raising illegal search and seizure claims); *Motley v. Wolf*, No. 07-823, 2007 WL 4270569 (E.D. Mo. Dec. 3, 2007) (staying civil case raising false arrest claim).

Even prior to *Wallace*, courts recognized that staying the civil action until resolution of the criminal matter makes sense in most instances because the resolution of the criminal action could contribute significantly to the narrowing of issues in dispute in the civil case, would avoid potential Fifth Amendment issues and other discovery problems that may arise in parallel proceedings, and should prevent inconsistent rulings.

See *Estes-El*, 916 F. Supp. at 270 (identifying concerns created by proceeding simultaneously in criminal and civil actions); *Guillory*, 303 F. Supp. 2d at 810-11 (same).

Other courts including state courts, have frequently stayed discovery in civil proceedings when a related criminal prosecution may be undermined by a criminal defendant's use of the broad discovery rules available in the civil case. See, e.g., *State v. Deal*, 740 N.W.2d 755 (Minn. 2007); *State v. Tomasso*, 49 Conn.Supp. 327, 878 A.2d 413 (Conn. Super. 2004); *Turley v. U.S.*, 2002 WL 31097225 (W.D. Mo. 2002); *Bridgeport Harbour Place I, LLC v. Ganim*, 269 F. Sup.2d 6, 10 (D. Conn. 2002). The rationale behind such a stay is that a litigant should not be allowed to use the liberal discovery procedures applicable to a civil suit to avoid restrictions on criminal discovery and obtain documents he would not otherwise be entitled to for use in his criminal suit. *Campbell v. Eastland*, 307 F.2d 478, 488 (5th Cir.1962), *cert. denied*, 371 U.S. 955 (1963):

There is a clearcut distinction between private interests in civil litigation and the public interest in a criminal prosecution, between a civil trial and a criminal trial, and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. But these distinctions do not mean that a civil action and a criminal action involving the same parties and some of the same issues are so unrelated that in determining good cause for discovery in the civil suit, a determination that requires the weighing of effects, the trial judge in the civil proceeding should ignore the effect discovery would have on a criminal proceeding that is pending or just about to be brought. The very fact that there is clear distinction between civil and criminal actions requires a government policy determination of priority: which case should be tried first. Administrative policy gives priority to the public interest in law enforcement.

Id. at 487-88.

In this particular case, the weight of the various interests tips heavily in favor of issuing a temporary stay until Plaintiff's criminal proceedings are resolved. First, were

the civil action permitted to move forward prior to resolution of the criminal matter, individual defendants Attorney General Peterson and Commissioner Fulton would be forced to defend claims that might ultimately be barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). As the Supreme Court recognized in *Wallace*, it is possible that a conviction in a related criminal case will bar some, if not all, of the claims in the civil action.

Wallace, 549 U.S. at 393- 94 (citations omitted) (“[i]f plaintiff files a false arrest claim before he has been convicted ... it is within the power of the district court ... to stay the civil action If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* [*v. Humphrey*] will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit.”); *see also Quinn v. Guerrero*, No. 09-166, 2010 WL 412901, at *3 (E.D. Tex. Jan 28, 2010), *adopted by* 2010 WL 653477 (E.D. Tex. Feb. 23, 2010) (same); *Cameron*, 2009 WL 3755093, at *3 (same). Although litigating claims that may ultimately be barred burdens all parties as well as the Court, the burden is disproportionately borne by Defendants Attorney General Peterson and Commissioner Fulton. In addition, the interests of the United States are at issue, to ensure that the government’s interest in vindicating justice in the criminal case are recognized.

Were this case to proceed simultaneously with the criminal action, defendants would be forced to respond to and defend claims that might otherwise be resolved by a threshold legal motion. More importantly, the overriding interest of the United States in ensuing a fair resolution of the pending criminal charges would be impaired if the

pending civil case were allowed to proceed. Congress has provided clear authority pursuant to 28 U.S.C. § 517, for the United States to appear and to “attend to the interests of the United States” in this matter. It is for this reason that the United States has filed the instant motion.

Even in instances in which it is unclear whether the claims a plaintiff has raised in a civil case will necessarily be barred by *Heck* if the plaintiff is convicted, the better course is to stay the civil action in its entirety while the criminal action is ongoing. *Crooker*, 544 F. Supp. 2d at 65 (noting that the criminal disposition will permit the court to better assess whether *Heck* applies to *Bivens* claims and rule consistently on any constitutional issues); *Motley*, 2007 WL 4270569, at *1 (determining that a stay was justified because otherwise the parties would be left to “speculate about whether a prosecution will be brought, whether it will result in conviction, and whether the impending civil action will impugn that verdict” (quoting *Wallace*, 549 U.S. at 393)); *Guillory*, 303 F. Supp. 2d at 811 (explaining that the better course is to stay the civil case in part because it is difficult to determine without resolution of the criminal proceedings how excessive force claim would be affected by the criminal matter).

Second, while the temporary stay may impose a slight burden on Plaintiff, who like all Defendants, ostensibly seeks expeditious resolution, the proposed stay would not be unduly burdensome because there has been no recent State Action by the Attorney General or by the Tax Commissioner that makes this matter imminent and there has been no indication by other Defendant that State Action is planned or threatened. This matter

wholly concerns a federal investigation, and the timing of the filing of the lawsuit demonstrates that clearly and that also demonstrates that resolution of the federal criminal matter will resolve the pending civil matter. Moreover, because the incident at issue in this lawsuit is purportedly from the Plaintiffs' perspective a long running matter and dispute dating back well before the present Attorney General and Commissioner assumed their public duties and responsibilities, there is no danger of lost evidence or a sudden shift in the facts underlying the civil claim. This is a historical issue improperly filed as a civil matter against the State that attempts to hold State actors responsible for a future federal criminal action.

Perhaps the most compelling reason to stay the pending civil matter is that a temporary stay of the civil matter may serve to protect Plaintiff, who can avoid the potential for self-incrimination. *See, e.g., Shaw v. Hardberger*, No. 06-751, 2007 WL 1465850, at *1-2 (W.D. Tex. May 16, 2007) (granting plaintiff's motion to stay in part based on potential Fifth Amendment concerns because the civil case arose from the same set of operative facts as the criminal charges and thus "there is a danger of self-incrimination"); *Estes-El*, 916 F. Supp. at 270 (explaining that permitting the civil action to go forward may prejudice plaintiff because of "potential Fifth Amendment issues"). The minimal harm a short postponement of the civil matter occasions does not appreciably tip the scales against a stay.

Third, a stay will promote judicial economy. While a stay temporarily will defer the Court's assessment of Plaintiff's state court claims, awaiting the resolution of the criminal matter in federal court likely will foster a more efficient evaluation. *Cf., Wallace*, 549 U.S. at 394 (noting that "[i]f the plaintiff is ultimately convicted, and if the

stayed civil suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit.”). In particular, the postponement of the civil case may streamline review by potentially eliminating some (or all) of the issues in the civil case. *See Quinn*, 2010 WL 412901, at *3 (noting “it would be a waste of *the Court’s* limited time and resources to handle claims which may ultimately be barred”); *Cameron*, 2009 WL 3755093, at *3 (observing that the “interest of judicial economy is served by waiting for the outcome of plaintiff’s criminal proceeding”); *Estes-El*, 916 F. Supp. at 270 (noting that “[t]he interest of judicial economy strongly supports a stay” because disposition of the criminal charges “may well be determinative” of plaintiff’s civil claims).

Even if Plaintiff ultimately is absolved of all charges or avoid criminal prosecution altogether and Plaintiff is able to surmount a *Heck* challenge, courts acknowledge it is still more efficient to await final resolution of the criminal action before proceeding in the civil case. *E.g.*, *Crooker*, 544 F. Supp. 2d at 65 (staying *Bivens* claims and reasoning, “[t]hough it is conceivable that some of the allegedly [improper conduct might] ... escape the *Heck* bar, conservation of judicial resources dictates a single determination as to the applicability of *Heck* at the conclusion of all criminal proceedings.”). A stay ensures that this Court is not simultaneously adjudicating the same issues as those before the federal court in the criminal matter. *Id.* at 64 (noting that were the court to rule on the propriety of the searches at issue in plaintiff’s *Bivens* claims during the pendency of the criminal matter, the court might “become entwined with issues related to [the] pending criminal charges and future trial as well.”).

Therefore, under either scenario (*i.e.*, plaintiff is found guilty or acquitted), proceeding *seriatim* rather than simultaneously is likely to promote judicial economy.

A stay of the civil action likewise serves the interest of judicial economy because it eliminates the need for the Court to structure civil discovery to account for (or to resolve any discovery disputes that may affect) the pending criminal case. *E.g.*, *Quinn*, 2010 WL 412901, at *3 (staying the civil case in part because “[t]he Court simply cannot fathom how it could construct a discovery plan that would balance the need to protect the interests and rights of all parties in the criminal matter with the need to have productive and relevant discovery in the civil matter”); *Shaw*, 2007 WL 1465850, at *2 (citation omitted) (observing, “[i]f this civil action is stayed until the conclusion of the criminal proceedings, there is no need to make rulings regarding potential discovery disputes involving issues that may affect the criminal case.”).

Finally, the United States has an interest in preserving the integrity of criminal proceedings and investigation and not jeopardizing an ongoing federal criminal investigation with civil depositions and discovery and ensuring that criminal defendants do not circumvent the more limited scope of the criminal discovery rules by obtaining discovery through a civil lawsuit. The party pursuing the civil matter need not intend to defeat the strictures of criminal discovery. *Twenty First Century Corp. v. LaBianca*, 801 F. Supp. 1007, 1010 (E.D.N.Y. 1992). Courts nonetheless recognize the real risk that, when the issues in the civil and criminal proceedings overlap, criminal defendants may gain evidence through civil discovery to which they are otherwise not entitled under the governing criminal rules. In other words, regardless of a party’s motives, there are inherent risks in allowing civil discovery to proceed while a criminal case is pending.

Id.; *Javier H. v. Garcia-Botello*, 218 F.R.D. 72, 75 (W.D.N.Y. 2003) (observing that allowing civil discovery to proceed would afford criminal defendants access to evidence not accessible under the criminal discovery rules “and, thereby, prejudice the proceedings”).

A stay therefore removes the possibility that either party to the criminal case benefits from information furnished under the broad civil discovery rules that would not be attainable under the more restrictive criminal discovery rules. *See Bristol v. Nassau County*, No. 08-3480, 2010 WL 1660238, at *1-2 (E.D.N.Y. Apr. 22, 2010) (maintaining stay of civil action raising false arrest and malicious prosecution claims in part because the broader discovery allowed to the plaintiff in the civil action could prejudice defendants); *Combs v. Nelson*, No. 09-329, 2009 WL 2044413, at *2 n.3 (E.D. Ark. July 10, 2009) (observing that “[i]n some cases the government seeks postponement of the noncriminal proceeding, to prevent the criminal defendant from broadening his rights of criminal discovery against the government”) *cf.*, *Shaw*, 2007 WL 1465850, at *2 (stating that “the public’s interest in the integrity of the criminal case is entitled to precedence over the civil litigant” (quoting *Javier H.*, 218 F.R.D. at 75)). Accordingly, it is in the interest of justice to stay the civil case until the criminal case ends.

IV. CONCLUSION

For the reasons stated above, all of which establish good cause for the relief sought, the United States of America respectfully requests that the Court grant its motion to stay all proceedings and enter an order directing that this case be stayed in its entirety, including staying any and all pending depositions, pending the resolution of

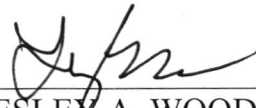
the federal criminal investigation and any federal criminal prosecution to follow. The United States does not request a hearing on the matter.

Dated this 31st day of May, 2018.

Respectfully Submitted,

UNITED STATES OF AMERICA,

By:



LESLEY A. WOODS, TX 24092092

Assistant U.S. Attorney

100 Centennial Mall North

487 Federal Building

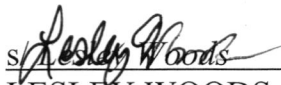
Lincoln, NE 68508-3865

Tel: (402) 437-5241

E-mail: lesley.woods@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2018, I filed the foregoing with the Clerk of the Court using the CM/ECF system which has sent notification of such filing to counsel of record.



LESLEY WOODS, TX#24092092

Assistant United States Attorney