

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

Case No. 11-cv-10949

Hon. LAWRENCE P. ZATKOFF

vs.

MICHAEL POTTS,

Defendant.

COMBINED MOTION AND BRIEF IN SUPPORT OF
AN ORDER STAYING THE PROCEEDINGS
AGAINST DEFENDANT MICHAEL POTTS

Defendant MICHAEL POTTS, by and through the undersigned attorney, hereby moves this Honorable Court for an Order Staying the Proceedings against Defendant Michael Potts, or in the alternative, an order to Postpone an Answer to the Complaint, and Postpone Compliance with the testimonial aspects of the Statutory Restraining Order.

The undersigned Counsel has contacted the Plaintiff's attorney who will not consent to the relief requested. See L.R. 7.1 (1)&(2).

PROCEDURAL HISTORY

On or about March 10, 2011, the CFTC filed a civil complaint in the instant case against ALAN JAMES WATSON (Watson), MICHAEL POTTS (Potts), and Cash Flow Financial, LLC (CFF), seeking injunctive and equitable relief and penalties under the Commodity Exchange Act, as amended, 7 U.S.C. §§ 1-25.

Among other things, the complaint alleges that POTTS “fraudulently solicited and accepted at least \$45 million from more than 600 individuals....” (Complaint, Para. 1).

The complaint further states that POTTS, “as an unregistered associated person... of a CPO, failed to disclose material facts to actual and prospective pool participants.... Further, Watson and POTTS made material misrepresentations....” (Complaint, Para 2).

On March 11, 2011, the Court entered a statutory restraining order SRO (docket entry “dkt.” # 5) pursuant to the government’s Ex Parte Motion (dkt. # 3). This order directs defendant POTTS to perform certain tasks that are testimonial in nature. They include:

- Provide the Commission with a full accounting.... (Page 6, Para. 22)
- Transfer to the territory of the United States.... (Page 7, Para. 23 – 24)
- Provide the Commission access to all records.... (Page 7, Para 25)
- Deliver over to the Receiver.... (Page 10, Para. C)
- ... [S]hall cooperate fully and assist the receiver. This cooperation and assistance shall include... providing any information... that the Receiver deems necessary.... (Page 11, Para D)
- Representatives of the Commission be immediately allowed to inspect.... (Page 14, Para. 27 – 29).

On March 14, 2011, a summons issued for defendant POTTS. (Dkt. # 7). On March 24, 2011, a Certificate of Service/Summons was returned executed as to POTTS, who was reportedly served on 3/18/2011. Potts' answer is due this **Friday, April 8, 2011**. (Dkt. #11).

On March 28, 2011, AUSA Mark Lytle from the Eastern District of Virginia contacted the undersigned and advised in substance that POTTS is the target of an on-going grand jury investigation based on the same conduct alleged in the instant civil case.

On April 6, 2011, the undersigned spoke again with AUSA Lytle. Lytle outlined evidence he believes will convict POTTS if POTTS proceeds to trial. The undersigned and Lytle discussed the possibility of POTTS negotiating a resolution to the impending criminal matter. The undersigned anticipates speaking with Lytle again about this course of action in the near future. Because the investigation is on-going in Virginia, counsel may be required to travel there for meetings between POTTS and Lytle.

On March 29, 2011, the undersigned filed a notice of appearance on behalf of POTTS. (Dkt. # 14). On March 30, 2011, the Court entered a Consent Order of Preliminary Injunction as to POTTS. (Dkt. #17).

POTTS specifically reserved his rights against self-incrimination in the consent order. For example, the order specifically states, "Defendant Potts without admitting or denying the allegations of the Complaint and without waiving his right against self incrimination as provided by the Fifth Amendment to the Constitution of the United States, consents to the entry of this Order...." (Order, p.2)

POTTS freely consented to this Court's Jurisdiction and Venue and to a variety of Prohibitions from Violations of the Act. (Order, p. 3)

However, regarding the mandates of the Statutory Restraining Order, POTTS specifically preserved his Fifth Amendment rights against self-incrimination. At Page 5, the order states:

IT IS HEREBY ORDERED that the mandates of the... SRO entered March 11, 2011, shall continue with respect to Defendant Potts pending further order of this Court. Specifically, Defendant Potts shall abide by all obligations of the SRO subject to his right against self incrimination as provided by the Fifth Amendment to the Constitution of the United States....

THE COURT MAY STAY CIVIL PROCEEDINGS WHEN A DEFENDANT IS THE TARGET OF AN ON-GOING GRAND JURY INVESTIGATION, AND IS ACTIVELY EXPLORING THE POSSIBILITY OF A NEGOTIATED RESOLUTION OF THE CRIMINAL MATTER, WHICH IS BASED ON THE SAME CONDUCT THAT IS ALLEGED IN THE INSTANT CIVIL MATTER.

In *Eastwood v. United States*, 2008 WL 656074 (2008), the Eastern District of Tennessee summarized the Court's general power to stay proceedings as follows:

Generally, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes in its docket with economy of time and effort for itself, for counsel and for litigants," *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 81 L.Ed. 153 (1936). "[E]ntry of such an order ordinarily rests with the sound discretion of the District Court." *Ohio Envtl Council v. United States. Dist. Court, So. Dist. of Ohio, Ea. Div.*, 565 F.2d 393, 396 (6th Cir.1977). The Court's discretion is not normally cabined by the pendency of related criminal proceedings. See *United States v. United States. Currency*, 626 F.2d 11, 16 (6th Cir.1980). "Civil and criminal actions may be brought either simultaneously or successively and there is no requirement that a civil proceeding be stayed pending the outcome of criminal proceedings." *S.E.C. v. Novaferon Labs, Inc.*, No., No. 91-3102, 1991 WL 158757, at *2 (6th Cir. Aug.14, 1991) (citing *S.E.C. v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C.Cir.1980)). "[A] court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions 'when the interests of justice seem[] to require such action, sometimes at the request of the prosecution, * * * sometimes at the request of the defense[.]' " *Dresser Indus., Inc.*, 628 F.2d at 1375 (quoting *United States v. Kordel*, 397 U.S. 1, 12 n. 27, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970)) (alterations in original). This standard "embodies recognition of the power of the federal courts, after a balancing of interests in the particular case before them, to stay civil suits because of pending criminal charges." *United States. Currency*, 626 F.2d at 16 (quoting *Arthurs v. Stern*, 560

F.2d 477, 479 (1st Cir.1977) and citing Kordel, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1).

In *Chao v. Fleming*, 498 F.Supp.2d 1034 (W.D.MI 2007), the Western District of Michigan confronted a similar situation to the one at bar and granted the defendant's requested stay. In *Chao*, the court explained the applicable law as follows:

While nothing in the Constitution requires a civil action to be stayed in the face of a pending or impending criminal indictment, a court still has broad discretion in determining whether to stay a civil action while a criminal action is pending or impending. *See Landis v. No. Am. Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1936); *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir.1995) (citing *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir.1989)).

However, simultaneous criminal and civil cases involving the same or closely related facts may give rise to Fifth Amendment concerns sufficient to warrant a stay of the civil proceedings. "Courts are afforded th[e] discretion [to grant a stay] because the denial of a stay could impair a party's Fifth Amendment privilege against self-incrimination, extend criminal discovery beyond the limits set forth in Federal Rule of Criminal Procedure 16(b), expose the defense's theory to the prosecution in advance of trial, or otherwise prejudice the criminal case." *Trustees of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.*, 886 F.Supp. 1134, 1138 (S.D.N.Y.1995). A stay of a civil case is an extraordinary remedy that should be granted only when justice so requires. *See Pelzer v. City of Pa.*, No. 07-0038, 2007 WL 1377662, at *2 (E.D.Pa. May 7, 2007); *Crawford & Sons, Ltd. v. Besser*, 298 F.Supp.2d 317, 319 (E.D.N.Y.2004).

The decision to stay a case requires an examination of the specific circumstances, taking into account the competing interests involved. *See Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 175 F.Supp.2d 573, 576 (S.D.N.Y.2001) (quoting *Molinaro*, 889 F.2d at 902). One court has observed that "the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter." *Dresser Indus., Inc.*, 628 F.2d at 1375-76. Some of the factors that a court should consider and balance in determining whether to grant a stay include:

1) the extent to which the issues in the criminal case overlap with those presented in the civil case; 2) the status of the case, including whether the defendants have been indicted; 3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; 4) the private

interests of and burden on the defendants; 5) the interests of the courts; and 6) the public interest.

Trustees of the Plumbers & Pipefitters Nat'l Pension Fund, 886 F.Supp. at 1139 (footnotes and citations omitted).

The undersigned respectfully suggests that this court proceed with the same multi-faceted analysis utilized by the court in *Chao*, and conclude that a stay of proceedings are warranted as to defendant POTTS.

Defendant POTTS has not been indicted – yet. However, based upon the undersigned’s conversations with AUSA Lytle, Mr. POTTS apparently only has two options in the relatively near future – negotiate a resolution of the criminal matter, or face indictment and criminal proceedings in the Eastern District of Virginia.

As stated in *Chao, supra*,

In general, courts recognize that the case for a stay is strongest where the defendant has already been indicted, whereas pre-indictment request for a stay, as in this case, are usually denied. [Citations Omitted]. On the other hand, a stay should not be categorically denied solely because the defendant has not yet been indicted. See Walsh Secs., Inc. v. Cristo Prop. Mgmt., Ltd., 7 F.Supp.2d 523, 527 (D.N.J.1998) (“It is ‘still possible’ to obtain a stay, even though an indictment or information has not yet been returned, if the Government is conducting an active parallel criminal investigation.”) (citing Milton Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 203 (1989)).

See also Brock v. Tolkow, 109 F.R.D. 116, 119 (E.D.N.Y.1985) (a stay “is most likely to be granted where the civil and criminal actions involve the same subject matter and is even more appropriate when both actions are brought by the government. (citing Dresser Indus., 628 F.2d at 1376).]; S.E.C. v. Healthsouth Corp., 261 F.Supp.2d 1298, 1326 (N.D.Ala.2003) (granting a pre-indictment stay where the indictment was “an eventuality” and “the harm to defendant Scrusby from blindly pushing ahead with this matter [would] greatly outweigh the prejudice to the SEC from a stay of this civil proceeding”).

Whether the issues in the criminal case overlap those of the civil case is regarded as the most important factor. The *Chao* court's analysis in this regard is applicable to Mr. POTTS.

The *Chao* court, 498 F.Supp.2d at 1039, stated:

The ... extent to which the issues in the criminal case overlap with those in the civil case, is regarded as “the most important factor” because “[i]f there is no overlap, then there would be no danger of self-incrimination and no need for a stay.” *Metzler v. Bennett*, No. 97-CV-148 (RSP/GJD), 1998 WL 187454, at *6 (N.D.N.Y. Apr. 15, 1998) (citing *Transworld Mech.*, 886 F.Supp. at 1139). See also *In re Adelpia Commc'ns Sec. Litig.*, No. 02-1781, 2003 WL 22358819, at *3 (E.D.Pa. May 13, 2003) (“The similarity of the issues underlying the civil and criminal actions is considered the most important threshold issue in determining whether or not to grant a stay.”). Although [POTTS has] not been indicted, it appears that the issues framed by any indictment to be handed down will be coextensive with those in this case.... Thus, the substantive factual and legal issues would be almost identical. As the *Tolkow* court wrote, “[a] stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter and is even more appropriate when both actions are brought by the government.” 109 F.R.D. at 119. See also *Cruz*, 1997 WL 370194, at *3 (“When both actions are brought by the government, there is a danger that the government may use civil discovery to obtain evidence and information for use in its criminal prosecution, and by doing so, circumvent the Fifth Amendment rights against self-incrimination.”). The identity of issues and parties thus supports POTTS' request for a stay.

The burden of dual proceedings on defendant POTTS is substantial. The costs alone of litigating a civil matter in Michigan and negotiating a resolution to a criminal matter based on the same allegations in Virginia, all while residing in Pennsylvania, are enormous.

Moreover, requiring POTTS to choose between asserting his Fifth Amendment rights – thereby subjecting himself to the possibility of adverse inferences in the instant case – and defending himself in this action imposes a substantial burden on POTTS, particularly because the government is the real party in interest in both cases and could seek to use evidence gathered in this case in the criminal investigation.

Regarding the interests of non-parties and the public interest, the criminal case will serve to protect and advance those same interests. See *Tolkow*, 109 F.R.D. at 121. Thus, a stay of this civil case will not be detrimental to these interests. See Chao supra.

Moreover, POTTS' situation is also analogous to the one confronted by the Honorable Victoria Roberts in this District. In *Goodman v. Mady*, 2005 WL 2417209, *16-17 (2005), Judge Roberts granted a stay and stated in relevant part:

[The defendant] requests that the Court stay these proceedings until the criminal charges pending against him are resolved. It is undisputed that the criminal charges stem from the same set of facts on which this case is based. Consequently, [the defendant] asserts that, if he is required to present a defense in this case before the criminal charges are resolved, he may jeopardize his right to assert his Fifth Amendment privilege.

In this case, [the defendant] has already been charged based on the same allegations Plaintiff asserts here. Consequently, there is a clear danger that statements compelled or given by him in defense of Plaintiff's civil claims could be used to incriminate him in the criminal case. Denying [the defendant's] request would put him in the position of having to choose between preserving his right to invoke the Fifth Amendment privilege in the criminal case or foregoing a defense in this civil matter. District courts have the discretion to relieve a defendant from making such a choice. When civil proceedings may interfere with a party's exercise of the privilege against self-incrimination, the trial court may choose any means it deems appropriate under the circumstances to fairly balance the interests of the parties, including a stay of the civil proceedings, entering a protective order, or delaying discovery. See *United States v. Kordel*, 397 U.S. 1, 8-9, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970); *U.S. Currency*, 626 F.2d at 17; *United States v. A Leasehold Interest in Property Located at 850 S. Maple*, 743 F.Supp. 505, 514 (E.D.Mich.1990); *United States v. Mellon Bank*, 545 F.2d 869, 873 (3rd Cir.1976); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1376 (D.C.Cir.1980), *cert den.*, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980); *Brock v. Tolkow*, 109 F.R.D. 116, 120-121 (E.D.N.Y.1985); *In re Phillips, Beckwith & Hall*, 896 F.Supp. 553, 557-558 (E.D.Va.1995).

WHEREFORE, for the reasons stated above, defendant MICHAEL POTTS, by and through the undersigned attorney, hereby moves this Honorable Court for an Order Staying the Proceedings against Defendant Michael Potts, or in the alternative, an order to Post-pone an Answer to the Complaint, and Postpone Compliance with the testimonial aspects of the Statutory Restraining Order.

Respectfully Submitted,

/s John Freeman
JOHN FREEMAN
Law Office of John Freeman, PLLC
3150 Livernois, Ste. 270
Troy, MI 48083
248-250-9950
formerfedlawyer@hotmail.com

Dated: April 6, 2011

CERTIFICATE OF SERVICE

The undersigned will file this document in accord with the electronic filing practices of the Eastern District of Michigan, which will cause an electronic notice to be sent to Plaintiff's counsel.

Respectfully submitted,

/s John Freeman

JOHN FREEMAN

Law Office of John Freeman, PLLC

3150 Livernois, Ste. 270

Troy, MI 48083

248-250-9950

formerfedlawyer@hotmail.com

Dated: April 6, 2011