

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

v.

ALAN JAMES WATSON, CASH FLOW
FINANCIAL LLC and MICHAEL S.
POTTS,

Defendants,

and

THE JEDBURGH GROUP,
Relief Defendant.

CIVIL ACTION NO.: 11-cv-10949

Judge Lawrence P. Zatkoff
Magistrate Judge Mona K. Majzoub

**PLAINTIFF U.S. COMMODITY FUTURES TRADING COMMISSION'S
OPPOSITION TO MOTION TO STAY PROCEEDINGS
WITH RESPECT TO DEFENDANT POTTS**

Plaintiff Commodity Futures Trading Commission (the "Commission") hereby opposes Defendant Michael Potts' ("Potts") Motion to Stay Proceedings. Potts Motion to Stay should be denied because he has failed to meet any of the criteria for obtaining a stay. His motion is based on speculation as to the scope of the criminal investigation and is not supported by affidavits or other evidence. He has made no showing of a substantial overlap between the criminal investigation and this civil action. He has not even been indicted and provides no information as to the possible duration of a stay. Most importantly, he has failed to address the substantial prejudice and harm to the Commission, the more than 600 individual victims of the Cash Flow

Financial (“CFF”) ponzi scheme and the public at large that will result from a stay of proceedings. The victims of the CFF ponzi scheme have been without their funds since at least July 2009. The victims are entitled to the speedy resolution of this matter so that they can learn what happened to the funds they deposited with CFF for trading and be compensated as fully as possible for their losses. Justice delayed is justice denied and each day of delay of these proceedings results in a tangible harm to the CFF victims, many of whom have been negatively affected by the recession. For these reasons and others set forth more fully below, Potts’ Motion to Stay should be denied.

I. BACKGROUND

Defendant Potts entered into a Consent Order of Preliminary Injunction (“Consent P.I.”) extending the application of the Statutory Restraining Order (“SRO”), but preserving Potts’ right against self incrimination. Prior to agreeing to the Consent P.I., the parties discussed the fact that Potts could technically comply with the terms of the SRO by affirmatively asserting his Fifth Amendment right against self incrimination with respect to each of the SRO’s requests for documents and/or information. Potts’ Motion to Stay the Proceedings is an attempt to renege on the bargain he struck.

Potts is attempting to avail himself of the protections of the Fifth Amendment without actually asserting his rights, which is all the Commission has requested he do. Potts’ Fifth Amendment rights are in no way being infringed upon by this litigation. Potts has and will have an opportunity to assert his rights with respect to each demand or question asked of him, but he must affirmatively do so.

Notably, by his own admission, Potts has not yet been indicted. He asserts in his brief, without supporting affidavit, that he has been notified that he is the “target” of a grand jury

investigation, but failed to provide any written evidence of his target designation that could shed light on the potential charges to be brought against him or provide insight to the likely timing of an indictment or resolution of the criminal investigation. Potts has not identified any grand jury subpoenas to himself or others for documents or testimony that might further delineate the scope of the criminal investigation. He also failed to file an Answer in this matter identifying the facts he believes to be in dispute so that the Court could evaluate the likely overlap between issues in this matter and any potential criminal proceeding.

II. ARGUMENT

This Court should deny defendants' Motions for Stay because no special circumstances or substantial justification exists to justify such an extreme remedy. Moreover, there is no constitutional requirement that a civil proceeding be stayed pending the outcome of a parallel criminal proceeding. *See United States v. Lot 5, Fox Grove*, 23 F.3d 359, 363-64 (11th Cir. 1994) (citing *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C. Cir.) (en banc), *cert. denied*, 449 U.S. 993 (1980)); *Federal Savings and Loan Insurance Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989). "In the absence of substantial prejudice to the rights of the parties involved," parallel civil and criminal proceedings brought by the government are not only "unobjectionable" but often favored. *Dresser Industries*, 628 F.2d at 1374-75; *see also, SEC v. First Financial Group of Texas, Inc.*, 659 F.2d 660, 666-67 (5th Cir. 1981) (and cases cited therein). Accordingly, staying a civil case is "an extraordinary remedy" that is inappropriate in this case. *Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mechanical, Inc.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995).

This court has discretion, however, to stay the civil proceeding or postpone civil discovery pending the outcome of a parallel criminal proceeding, but "only when 'special

circumstances' so require in the 'interest of justice'." *Lot 5, Fox Grove*, 23 F.3d at 364 (quoting *United States v. Kordel*, 397 U.S. 1, 12 & n. 27 (1970)). In cases such as this where a civil defendant is merely the target of a grand jury investigation and has not yet been indicted, courts rarely grant a stay of the proceedings. *Chao v. Fleming*, 498 F. Supp. 2d 1034, 1037 (W.D. Mi. 2007) ("In general, courts recognize that the case for a stay is strongest where the defendant has already been indicted, whereas pre-indictment requests for a stay, as in this case, are usually denied."); *United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 811 F. Supp. 802, 805 (E.D.N.Y. 1992) ("As a preliminary matter, since Avellino has yet to be indicted by any grand jury, his motion to stay may be denied on that ground alone."); *United States v. Lockheed Martin Corp.*, Civ. No. L09CV324-HSO-JMR, 2010 WL2816658 at *5 (S.D. Ms. July 16, 2010) (noting that pre-indictment requests for a stay of civil proceedings are usually denied and ultimately denying pre-indictment request for stay after weighing relevant factors); *Simon Prop. Grp. Inc. v. Palombaro*. No. 08-1634, 2009 WL 840245, at *2 (W.D. Pa. Mar. 30, 2009) (pre-indictment status of criminal case weighs in favor of denying stay). The uncertainty and indefinite nature of the grand jury process weigh heavily against a stay, but are among several factors considered by courts when a defendant moves to stay civil proceedings pending the final resolution of parallel criminal proceedings. Courts typically consider the following six factors:

- "(1) the extent to which the issues in the criminal and civil cases overlap;
- (2) the status of the [criminal proceedings], including whether the defendants have been indicted;
- (3) the plaintiffs interest in proceeding expeditiously weighed against the prejudice to the plaintiff caused by a delay;
- (4) the private interests of and burden on the defendants;

(5) the interest of the court; and

(6) the public interest."

Soroush v. All, No. 09-3703, 2009 WL 3467897, at *1 (E.D. Pa. Oct. 28, 2009); *Chao*, 498 F. Supp. 2d at 1037.

1. Potts Has Failed to Prove Substantial Overlap of Civil and Criminal Cases.

There is no reliable evidence that this matter and the criminal investigation substantially overlap. Just like the civil defendants in *Soroush v. AH*, No. 09-3703, 2009 WL 3467897 at *2 (E.D. Pa. Oct. 28, 2009), and *State Farm Mat. Auto. Ins. Co. v. Beckham-Easley*, No. Civ. A. 01-5530, 2002 WL 31111766 at *2 (E.D. Pa. Sept. 18, 2002), Potts has not yet been indicted, nor has he filed an Answer in this matter to identify the facts he believes to be in dispute. There are no sworn affidavits setting forth the scope of the criminal action. Potts points to no grand jury subpoenas to himself or others for documents or testimony which might further delineate the scope of the criminal investigation. *See Brock v. Tolkow*, 109F.R.D. 116, E.D.N. Y. 1985) (grand jury subpoenas indicated potential scope of imminent criminal indictment was coteminiuous with civil ERISA action); *Continental Ins. Co. v. Securi Enter., Inc.*, No. 10-4586 (MLC), 2010 WL 5392735, at *3, *9 (D.N.J. Dec. 21, 2010) (nineteen grand jury subpoenas previously issued to defendants and others indicated that criminal investigation was substantially same as civil litigation). Potts has also not produced a letter designating his "target" status that could shed light on the potential charges to be brought against him.

Indeed, the Complaint in this matter includes two counts, which relate to Potts - fraud by an associated person of a commodity pool operator (Count IV) and failure to register as an associated person of a commodity pool operator (Count V). Count IV charges Potts with fraud by an associated person of a commodity pool operator pursuant to Section 4o(1)(B) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §6o(1)(B) (2008). Section 4o(1)(B) does not

require the Commission to prove that defendant Potts acted with *scienter*, only that his actions effected a fraud. *CTS v. CFTC*, 233 F.3d 981, 993 (7th Cir. 2000); *Messer v. E.F. Hutton & Co.*, 847 F.2d 673, 678-79 (11th Cir. 1988); *CFTC v. Perkins*, 2009 WL 806576, at * 7 (D.N.J. 2009). However, most criminal charges and those likely relevant, if any, in regards to Potts require proof of the defendant's intent. *See generally United States v. Young*, 470 U.S. 1, 32 (1985) (Blackman, J., concurring in part and dissenting in part) (noting that mail fraud is a "specific intent" crime requiring proof of the defendant's knowledge and specific intent to defraud). As a result, the civil and criminal case, if any, will require very different levels and types of proof. Similarly, Count V, which charges Potts with the failure to register as an associated person is typically a regulatory matter and rarely provides the basis for a criminal charge. Thus, it is likely that there will be substantial differences between the two cases.

2. Potts Has Not Been Indicted and There Is No Indication of the Timing of Any Potential Criminal Proceedings.

Courts are more likely to grant a stay to an indicted defendant because criminal defendants have a right to a speedy trial, thereby reducing the likelihood of a lengthy delay. *State Farm Mat. Auto. Ins. Co.*, 2002 WL 31111766 at *2 ("A court is most likely to grant a stay of civil proceedings where an indictment has been returned" but that "pre-indictment requests for a stay are typically denied" because "of the uncertainty surrounding when, if ever, indictments will be issued, as well as the effect of the delay on the civil trial."); *Saroush*, 2009 WL 3467897, at *2 ("the right to a speedy trial reduces the potential for a long delay and in turn the resulting prejudice to the civil plaintiff"). However, the right to a speedy trial does not accrue until the defendant is actually indicted. 18 U.S.C. §3161 (discussing time limits that begin once the defendant is charged with a crime). Grand jury investigations can go on indefinitely. Potts has

provided no allegations, much less credible evidence indicating the status of the investigation and likely timing of an indictment, plea and/or trial.

Moreover, even if Potts were indicted in the very near future and able to quickly resolve the criminal investigation currently underway in the Eastern District of Virginia, the U.S. Attorney's Office for the Eastern District of Virginia cannot bind other jurisdictions. Thus, Potts, who resides in the Eastern District of Pennsylvania and engaged in conduct related to an entity located in the Eastern District of Michigan, may continue to assert his Fifth Amendment right against self incrimination with respect to other jurisdictions and indefinitely delay this matter.

3. The Commission Will Be Prejudiced By Any Delay.

The Commission has a right to timely resolution of its claims. As recognized in *State Farm Mat. Auto. Ins. Co.*, 2002 WL 31111766 at *3, "it would be perverse if plaintiffs who claim to be victims of criminal activity were to receive slower justice than other plaintiffs because the behavior they allege is sufficiently egregious to have attracted the attention of the criminal authorities." Delay, in and of itself, is a prejudice to the Commission.

Delay may also result in more tangible harms as well. For example, a delay in the proceedings with respect to Potts may result in a delay locating and recovering assets, which will diminish the Commission's ability to collect on any judgment. The Consent P.I., which extends the effect of the SRO including the asset freeze provisions of the SRO – provisions which Potts does not appear to be protesting -- prohibits the transfer of funds or assets by Potts. Thus far, the Receiver has located and frozen one account held by Potts containing \$156.26. *See* Statement by Fulton Bank of Defendant Potts' Assets, attached as Ex. 1. Nevertheless, after the entry of the SRO, Potts has retained competent counsel to represent him in this matter and the source of those funds has not been disclosed. Staying the proceedings with respect to Potts will likely result in the further dissipation of funds.

A stay of the proceedings with respect to Potts may also result in an overall delay of the Receiver's ability to distribute funds to victims of the Cash Flow Financial ("CFF") scheme.

Finally, if the Commission proceeds through discovery with respect to the other defendants without the benefit of discovery from Potts, the Commission may need to re-issue requests for admissions and/or interrogatories and re-depose witnesses based on information provided by Potts and for which Potts has no personal fear of incrimination and thus no legitimate basis for a Fifth Amendment assertion once the stay is lifted. Conversely, Potts' attorney could request to depose the same witnesses again so that he may ask questions, which he could be prohibited from doing during the course of a stay with respect to his client. *See, e.g., In re Worldcom Inc. Secs. Litig.*, Nos. 02 Civ. 3288 (DLC), 02 Civ. 4816 (DLC), 2002 WL 31729501, at * (S.D.N.Y. Dec. 5, 2002) (stay may be revisited at the onset of discovery because parties should not be required to repeat depositions in order to permit party who sought a stay the opportunity to question witness). This will result in unnecessary and duplicative discovery prejudicing not only the Commission but the other litigants as well.

4. The Burden on Defendant Potts Is Speculative At Best.

Potts has the right and has and will be afforded every opportunity to assert his right against self incrimination as provided in the Fifth Amendment to the Constitution of the United States. In no way has his Fifth Amendment right been infringed or diminished in anyway in this case.

The only burden/prejudice identified by Potts is the fact that he must make a choice whether or not to asset his Fifth Amendment right against self incrimination in the civil litigation.¹ As recognized in *Lockheed Martin Corp.*, "the pre-indictment nature of the pending

¹ Potts asserts that he is also burdened financially by defending two suits at once, but it is unclear how his costs will be reduced by successive criminal and then civil litigation. Indeed, concurrent litigation may

criminal investigation weakens [Movants'] Fifth Amendment interest." 2010 WL2816658 at *6; *Simon Property Grp. Inc.*, 2009 WL 840245, at *2 (threat to un-indicted civil defendant's Fifth Amendment right against self incrimination "merely speculative" during pre-indictment stage). While it is true that adverse inferences may be drawn against Potts if he chooses to assert the Fifth, that is a decision common to civil litigants and is not the basis to delay civil litigation. *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1994) (acknowledging that there is "no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege," and it is "permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding."); *Soroush*, 2009 WL 3467897, at *3 ("[B]ecause of the plethora of other interests at issue in any litigation defendants are often required to make this Gordian decision [between 'asserting his Fifth Amendment rights at the risk of losing the civil trial, or waiving these rights to defend himself in civil proceedings at the risk of incriminating himself'].") (quoting *State Farm*, 2002 WL 3111176, at *3); *SEC v. Musella*, 1983 WL 1297, 38 Fed. R. Serv.2d 426, 427 (S.D.N.Y. 1983) ("the choice may be unpleasant, but it is not illegal, and must be faced."). Without more, simply being required to make a choice as to whether to assert the Fifth Amendment privilege in a civil action in order to avoid waiving it in a potential criminal action does not rise to the level of a due process violation. *See Baxter v. Palmigiano*, 425 U.S. 308, 318-19 (1976); *SEC v. Grossman*, 121 F.R.D. 207, 210 (S.D.N.Y. 1987) (no deprivation of due process simply by being required to choose whether to assert the privilege or not); *In re CFS-Related Securities Fraud Litig.*, 256 F. Supp.2d 1227, 1240 (N.D. Okla. 2003) (not unconstitutional to require defendant to make the choice).

result in a reduction of litigation costs because similar discovery responses and issues may be resolved in both fora simultaneously resulting in less duplication of effort.

In fact, Potts himself may be prejudiced if the Court grants his motion for stay and the civil cases proceeds without him. For example, court rulings on discovery issues, motions for summary judgment, evidentiary matters and possibly even trial could determine the law of the case without Potts' input. This is especially important in this case where, thus far, the other individual defendant Alan Watson appears to be proceeding *pro se*.

5. The Interests of The Court in Moving Forward Expeditiously Will Be Severely Impacted by Any Delay.

The Court's interests in efficiency and judicial economy will be furthered by denying a stay. Given the uncertain nature of the criminal investigation, it is possible that the remaining defendants and relief defendant could proceed through discovery, summary judgment and even to trial before Potts is indicted, much less his criminal case actually concluded. This may result in significant delay and/or duplication by the Court.

6. The Public, Specifically the Victims of the CFF Ponzi Scheme, Will Be Negatively Impacted By Any Delay.

Staying the proceedings will have a negative impact on the more than 600 individual members of the public who deposited funds in the CFF Ponzi scheme. Unlike the beneficiaries in *Brock v. Tolkow*, 109 F.R.D. 116, 120 (E.D.N.Y. 1985) or *Trustees of the Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mech. Inc.*, 886 F. Supp. 1134, 1140 (S.D.N.Y. 1995), cited by Potts, who were receiving payments and not suffering immediate or irreparable harm, CFF pool participants have been without their money since July 2009. Some have since lost their jobs, become physically disabled or otherwise had family emergencies or hardships that have been further exacerbated by the loss of funds in CFF. Each day that goes by without resolution of this case causes additional harm for these individuals. Moreover, just as the Commission has an interest in the prompt resolution of civil suits, the public – even those members of the public who did not deposit funds with CFF – have an interest in the prompt

resolution of civil claims. *Simon Prop. Grp. Inc.*, 2009 WL 840245, at *2 (“The public has an interest in prompt resolution of civil disputes, and in not allowing those being investigated for criminal wrongdoing to avoid their civil obligations.”)(quoting *Int’l Fidelity Ins. Co. v. Podlucky*, No. 07-0235, 2007 WL 2752139, at *3 (W.D. Pa. Sept. 19, 2007).

Contrary to Potts' representations, there is no guarantee that these interests will be fully represented in a criminal case. First, different interests are promoted by the Act as enforced by the Commission and the criminal laws as enforced by the Department of Justice or U.S. Attorney’s Offices. *SEC v. First Fin. Grp. Of Tex., Inc.*, 659 F.2d 660, 666-67 (5th Cir. 1981)(“The simultaneous prosecution of civil and criminal actions is generally unobjectionable because the federal government is entitled to vindicate the different interests promoted by different regulatory provisions even though it attempts to vindicate several interests simultaneously in different forums.”).

Second, criminal authorities have differing procedures for victims of crime to obtain restitution from civil litigants. *See, e.g.*, 21 U.S.C. §853(n) (2008) (setting forth procedures for third-parties to establish interest in assets subject to criminal forfeiture). Thus, the CFF Ponzi scheme victims, many of whom have already submitted a claim to the receiver appointed in the *CFTC v. Trade LLC* action pending in Florida and who will be required to submit a claim to the receiver appointed by the Court in this action, may then be required to submit a third claim for any civil restitution or forfeiture obtained, assuming the money is not deposited generally in the U.S. Treasury as happens in many cases. Criminal authorities are neither equipped nor incentivized to collect and return funds to large classes of victims with differing interests in the same way that a civil receiver is. *See generally* Courtney J. Linn, “Recovering Assets in Investment Fraud Cases,” 45 *Crim. Law Bulletin* No. 5, Art. 2 (Fall 2009) (describing the

difficulties faced by the Department of Justice in collecting and distributing restitution to victims of financial crimes and the benefits of parallel or initial proceedings brought by regulatory agencies).

Third, the assumption that the interests of the public and civil litigants will be benefitted by criminal proceedings due to the narrowing of issues and factual development presumes that the criminal case is litigated up to and including trial. However, the active litigation contemplated does not begin until after indictment. As discussed *supra*, because Potts has yet to be indicted there is no right to a speedy trial and thus no guarantee of the public's right to the prompt resolution of the civil claims.

Finally, civil litigants and the public may not benefit from factual development in the criminal case. As discussed *supra*, there may be substantial differences between the facts developed in the criminal case and those relevant to this civil case. Moreover, even if the two matters prove to be substantially related, prior to indictment, grand jury secrecy rules restrict the flow of information thus limiting the benefit to the civil case. *See generally* Fed. R. Crim. Pro. 6(e). Rule 6(e)'s restrictions are especially relevant here where Potts has indicated a desire to negotiate a resolution of the criminal matter. Potts Br. at 3. Typically, when a criminal defendant negotiates a plea prior to indictment, a criminal information setting forth the factual basis for the plea agreement is entered at the same time of the plea and in lieu of an indictment. *See generally* Fed. R. Crim. Pro. 7(b). The factual allegations in a criminal information are typically heavily negotiated between the respective U.S. Attorney's Office and defendant during the secretive grand jury stage and are thus without the opportunity for input by third parties like the Commission, the other defendants in the civil matter or members of the public. Although admissions in the criminal information may be binding on Potts, they are not binding on the

Commission or other civil litigants. The factual allegations in a criminal information may be more limited than those asserted in the civil complaint or may apportion blame differently than the civil parties would and thus may not serve to limit discovery or the factual issues in the civil case in any meaningful way. Therefore, there is no guarantee that the civil case or the public will benefit in any way from delaying the civil proceedings until the criminal matter is resolved.

III. CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court deny Potts' Motion to Stay the Proceedings.

Respectfully submitted on this 20th day of April, 2011,

U.S. COMMODITY FUTURES TRADING COMMISSION

/s/ Allison Baker Shealy

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P-30643

CERTIFICATE OF SERVICE

On April 30, 2011, I served Plaintiff U.S. Commodity Futures Trading Commission's Opposition To Motion To Stay Proceedings With Respect To Defendant Potts on the following parties:

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Alan J. Watson
Pro Se Defendant

/s/ Allison Baker Shealy
Allison Baker Shealy

EXHIBIT

1

Fulton Bank

Southern Division

4429 Bonney Road
Virginia Beach, VA 23462

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Statutory Restraining Order

Case 11-cv-10949

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Statement of Defendants' Assets Pursuant to Statutory Ex Parte Restraining Order in Case No. 11-cv-10949
Ex Parte Statutory Restraining Order Issued Against Alan James Watson, Michael Potts, Cash Flow Financial LLC and The
Jedburgh Group.

Date: 3/14/11
 Name of Institution: Fulton Bank
 Name and Title of Person Completing this Form: Chris Land, Ops Supervisor
 Direct Phone Number of Person Completing this Form: 257-222-2309

- A. If account exists and has not been closed: Identify 1) Individuals/Entity that the institution is or has been a depository of, 2) the account number, 3) the type funds or other assets that are on deposit, and 4) the amount.
 B. If account has been closed: Identify items 1-4, as listed above. In addition, list 5) Date of last transaction, 6) Date account closed, 7) Total amount of funds removed.
 C. If such accounts do not exist: Write "NONE" if such accounts do not exist.

Name	Acct Number	Asset/Amt Cash value	Date of Last Transaction in the acct	If Acct is Closed, Date of Last Trans	If Acct is Closed, Date Acct Closed	If Acct is Closed Total Amt: funds removed
Michael Potts	[REDACTED]	150,26	3/9/11			
Michael Potts						

FAX TO: George H. Malas - Commodity Futures Trading Commission FAX (202) 418-5523
 Phone (202) 418-5249

I have engaged in a thorough search of the records of Fulton Bank and
 (Financial Institution)
 determined that the information listed above is complete and accurate. I state under penalty of perjury that the foregoing is true and correct.
 Date: 3/14/11 Signature: Chris Land