IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
Plaintiff	§	No. 3:09-CV-00298-N
v.	§	
STANFORD INTERNATIONAL BANK, Ltd., et al.	§	
Defendants.	§	

MEMORANDUM BY THE UNITED STATES IN SUPPORT OF
APPLICATION FOR STAY OF DISCOVERY IN THE INSTANT CASE

The United States of America, by and through the United States Department of Justice ("United States"), hereby applies for a stay of discovery in the instant case pending the outcome of a parallel criminal prosecution within the Southern District of Texas against many of the same defendants. This Memorandum is not filed in support of a motion to seek a blanket stay or otherwise restrict other aspects of this civil proceeding, including but not limited to the work and function of the Court appointed Receivership. The United States respectfully submits that a stay of discovery in the instant case is an appropriate exercise of the inherent authority of the Court to control the disposition of causes of action on its docket and should be entered by the Court.

BACKGROUND

The Securities and Exchange Commission ("SEC") filed this action on February 17, 2009, against Stanford International Bank, Ltd. ("SIBL"), Stanford Group Company ("SGC"), Stanford Capital Management, LLC. ("SCML"), R. Allen Stanford ("Stanford"), James M. Davis ("Davis"), and Laura Pendergest-Holt ("Holt") alleging that the defendants violated the

federal securities laws, namely, 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5, 15 U.S.C. §§ 80b-6(1) and 80b-6(2). On February 27, 2009, the SEC filed its First Amended Complaint which added Stanford Financial Group ("SFG") and Stanford Financial Group Building, Inc. ("SFGBI") as relief defendants. On June 19, 2009, the SEC filed a Motion for Leave to File an Amended Complaint and Memorandum of Law in Support. A proposed Second Amended Complaint was attached to the Motion as "Exhibit A." In its proposed Second Amended Complaint, the SEC names Gilberto Lopez ("Lopez"), Mark Kuhrt ("Kuhrt"), and Leroy King ("King") as additional defendants.

On June 19, 2009, the United States District Court for the Southern District of Texas unsealed a criminal indictment charging Stanford, Holt, Lopez, Kuhrt and King each with one count of conspiracy to commit mail, wire and securities fraud, in violation of 18 U.S.C. § 371; seven counts of wire fraud, in violation of 18 U.S.C. § 1343; ten counts of mail fraud, in violation of 18 U.S.C. § 1341; and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). In addition, Stanford, Holt and King were charged with one count of conspiracy to obstruct an SEC investigation, in violation of 18 U.S.C. § 371, and one count of obstruction of an SEC investigation, in violation of 18 U.S.C. § 1505. The Indictment is styled and numbered *United States of America v. Robert Allen Stanford, et al.,* No. H-09-342.

Also on June 19, 2009, the United States District Court for the Southern District of Texas unsealed a criminal information charging Davis with one count of conspiracy to commit mail, wire and securities fraud, in violation of 18 U.S.C. § 371; one count of mail fraud, in violation of 18 U.S.C. § 1341; and one count of conspiracy to obstruct an SEC investigation, in violation of 18 U.S.C. § 371. The information is styled and numbered *United States of America v. James M. Davis* No. H-09-335.

The SEC alleges in its lawsuit that the defendants were engaged in a "massive, ongoing fraud." According to the Complaint, the First Amended Complaint, and the Proposed Second Amended Complaint (referred to collectively as the "Complaint"), Stanford created a web of affiliated companies that operated under SFG. SIBL, one of SFG's affiliates, was a private, offshore bank domiciled in St. John's, Antigua. SGC was a Houston-based affiliate with offices located throughout the United States. SGC's principal business consisted of sales of SIBL issued securities marketed as Certificates of Deposit ("CD").

As outlined in the Complaint, Stanford was the Chairman of the Board and sole shareholder of SIBL and the sole director of SGC's parent company. Davis was the Director and Chief Financial Officer of SFG and SIBL. Holt was the Chief Investment Officer of SIBL and its affiliate SFG. Lopez was the Chief Accounting Officer of SFG. Kuhrt was the Global Controller for SFG. King was the Administrator and Chief Executive Officer for Antigua's Financial Services Regulatory Commission ("FSRC"), the entity responsible for bank oversight in Antigua.

According to the Complaint, SIBL marketed its CDs to investors in the United States exclusively through SGC Financial Advisors. By year-end 2008, SIBL had sold more than $7 billion of CDs to investors by touting: SIBL's safety and security; consistent, double-digit returns on SIBL's investment portfolio; and high rates of returns on CDs that exceeded those offered by commercial banks in the United States. The defendants represented to investors that SIBL focused on "maintaining the highest degree of liquidity as a protective factor for our depositors" and that SIBL's assets were "invested in a well-diversified portfolio of highly marketable securities issued by stable governments, strong multinational companies and major international banks." The defendants trained SGC advisors to represent to investors that the

"liquidity/marketability of SIBL's invested assets" was the "most important factor to provide security to SIBL clients."

According to the Complaint, however, SIBL's actual investments and financial condition were not as represented to investors. Among other things, the Complaint alleges that SIBL's investment portfolio contained at least $1.6 billion in undisclosed "loans" to Stanford. In an effort to conceal their fraud and ensure that investors continued to purchase the CD, the defendants fabricated the performance of SIBL's investment portfolio. The Complaint alleges that SIBL's financial statements were fictional and SIBL's accountants "reverse-engineered" SIBL's financial statements to reflect investment income that SIBL did not actual earn. In addition, the defendants told investors that SIBL had received a capital infusion of $541 million on November 28, 2008. In actuality, SIBL did not receive a capital infusion. Rather, according to the Complaint, Stanford contributed to SIBL equity interests in two grossly overvalued pieces of real estate that SIBL already owned.

The Criminal Indictment and Information unsealed on June 19, 2009, are based on substantially the same facts and allege substantially the same conduct against Stanford, Davis, Holt, Lopez, Kuhrt, and King as those alleged in the SEC Complaint. The witnesses in the instant SEC case are largely identical to those who will testify during the criminal prosecution and the documentary evidence on which the United States intends to rely during the criminal prosecution is substantially the same as that collected by the SEC.

ARGUMENT

A. Introduction

The defendants, in their capacity as civil defendants in this action, can seek access to and use of discovery that a defendant would not be entitled to obtain in a criminal proceeding.

Disclosure of the requested information, which would include deposition testimony from material third-party witnesses, would compromise the rights of the government and public to a fair trial in the criminal action. The United States is concerned that unless a stay of discovery in this proceeding is ordered pending disposition of the United States' criminal case against the criminal defendants, the defendants will be permitted to use civil discovery to circumvent the limitations on criminal discovery to the prejudice of the United States.

B. The Court has inherent authority to issue a stay

This Court has the discretionary authority to enter a stay in this civil proceeding. A court's authority to grant a stay derives from the power of every court "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for the litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *United States v. Colomb*, 419 F.3d 292, 299 (5th Cir. 2005) (citing *Landis* for district court's authority to grant stay); *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (relying on *Landis* for authority to grant stay). Moreover, a court may stay civil proceedings "when the interests of justice seem to require such action." *Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009) (noting that interests of justice are considered when deciding whether to grant a stay); *see also Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986); *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th Cir. 1982); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375, (D.C. Cir. 1980) (quoting *United States v. Kordel*, 397 U.S. 1, 12 n. 27 (1969)). Before granting a stay, a court must consider "the competing interests which will be affected by the granting or refusal to grant a stay." *Blanchard*, 667 F.2d at 479 (vacating stay due to trial court's failure to weigh competing interests); *CMAX, Inc.*, 300 F.2d at 268; *Alcala v. Texas Webb County*, No. L-08-0128, 2009

U.S. Dist. LEXIS 36970, at *15-18 (S.D. Tex. May 1, 2009) (describing the factors taken into account while balancing competing interests).

The requested relief by the United States is consistent with the governing case law. The interests of justice generally weigh in favor of a stay of parallel civil proceedings due to the variety of ways in which the civil proceeding may impede a criminal prosecution. *Kreisler*, 563 F.3d at 1080 ("A district court may also stay a civil proceeding in deference to a parallel criminal proceeding . . . ."); *SEC v. Dresser Indus., Inc.,* 628 F.2d 1368, 1375 (D.C. Cir.), *cert. denied,* 449 U.S. 993 (1980); *United States v. One 1964 Cadillac Coupe DeVille,* 41 F.R.D. 352, 353 (S.D.N.Y. 1966) ("where both civil and criminal proceedings arise out of the same or related transactions the government is ordinarily entitled to a stay of all discovery in the civil case until disposition of the criminal matter"). Indeed, courts have long recognized the wisdom of staying civil actions or civil discovery pending the resolution of related criminal proceedings to avoid the conflict inherent in concurrent proceedings concerning the same underlying facts and issues. *See United States v. United States Currency*, 626 F.2d 11, 17 (6th Cir. 1980); *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1089 (5th Cir. 1979). Here, the facts and issues presented in the SEC's complaint are virtually identical to those alleged in the indictment.

As the Supreme Court observed in *Landis*, private litigants must recognize that "the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience are to be promoted." *Landis*, 299 U.S. at 256. Indeed, as the Ninth Circuit stated in *CMAX, Inc.*, where the party opposing a stay seeks no more than money damages, the rationale for denying the stay is less appealing. *CMAX, Inc.*, 300 F.2d at 268-69. Any interest the defendants might have in moving forward with this matter, including through civil discovery, should not trump the Government's interest in preserving evidence or

developing facts in a parallel criminal investigation of the same defendants. In reversing a district court's denial of a stay in a civil proceeding, the Fifth Circuit has stated:

> There is a clear-cut 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. . . The very fact that there is a clear distinction between civil and criminal actions requires a government policy determination of priority: which case would be tried first. Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.

Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir.), *cert. denied,* 371 U.S. 955 (1963); *SEC v. Offill*, No. 3:07-CV-1643-D, 2008 U.S. Dist. LEXIS 28977, at *10-11 (N.D. Tex. Apr. 9, 2008). Accordingly, the stay sought by the Government is a matter the Court may grant through the exercise of its inherent authority.

C. Prejudice will result if the Court does not stay this action

Denying the requested relief now would likely compromise or, at a minimum, severely prejudice the parallel criminal prosecution. A significant threat to the integrity of the criminal prosecution is by itself sufficient to warrant the Court's grant of this application for a stay.

Judicial economy will also be served by the potential resolution of some, if not all, of the disputed issues in this action. A prior criminal conviction will operate as an estoppel in a subsequent civil proceeding as to those issues that were determined in the criminal matter. *See, e.g., Emich Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558, 568-69 (1951); *Howard v. INS*, 930 F.2d 432, 434-35 (5th Cir. 1991) (construing the applicability of *Emich's* holding to a deportation proceeding). Should the prosecution result in criminal convictions of the criminal defendants (whether by trial or plea agreement) for securities fraud, such convictions will

facilitate the resolution of this civil proceeding under the same securities fraud statutes, *i.e.,* 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5. Accordingly, should the criminal case related to this civil securities fraud suit proceed to trial or other resolution first, it would likely result in the conservation of scarce judicial resources, as well as an overall reduction of litigation time and expenses in this case.

Finally, were a stay not granted, the defendants would likely seek extensive civil discovery in this case – including the deposition of key fact witnesses regarding the SEC's securities fraud claims – that would not be available to them or proper under the Federal Rules of Criminal Procedure. These witnesses are also likely to be critical to the Government's criminal case against the defendants. Federal criminal law provides certain time frames for discovery by defendants and establishes strict limitations on material criminal defendants may obtain prior to trial. *See, e.g.,* FED. R. CRIM. P. 16 and 26.2 and 18 U.S.C. § 3500. Rule 26.2 and Section 3500 state that the prosecution is not required to provide a criminal defendant with a witness's statements until after the witness has testified on direct examination at trial. Further, the court may not compel the Government to disclose statements of a witness before the conclusion of his direct testimony. 18 U.S.C. § 3500(a); *United States v. Campagnulo,* 592 F.2d 852, 859-60 (5th Cir. 1979).

Because the scope of discovery in criminal cases is narrower than in civil cases, "civil discovery may not be used to subvert limitations on discovery in criminal cases, by either the government or by private parties." *McSurely v. McClelland,* 426 F.2d 664, 671-72 (D.C. Cir.), *cert. denied*, 474 U.S. 1005 (1985); *see also Kreisler*, 563 F.3d at 1080 (noting that a district court may stay a civil proceeding pending a criminal trial to "prevent either party from taking advantage of broader civil discovery rights"). The Fifth Circuit Court of Appeals in *Campbell,*

supra, stated that courts considering motions to stay civil proceedings and for protective orders pending disposition of related criminal cases need to be sensitive to the differences between the policies and objectives of the civil rules of discovery and the criminal rules of discovery. *Campbell*, 307 F.2d at 487. The *Campbell* court further stated that a litigant should not be allowed to make use of liberal discovery procedures applicable to civil suits "as a dodge to avoid the restrictions on criminal discovery." *Id.* at 478.

In addition, federal criminal practice allows a witness full choice over whether to speak with any of the parties or their representatives prior to testifying in a criminal case. Those basic protections, however, are unavailable to the same witness in a civil case. In short, the criminal defendants' use of the civil discovery process to secure key witness statements that would certainly then be used in their criminal case would permit precisely what the foregoing cases are intended to prevent – the subversion of the criminal discovery limits by civil means. Accordingly, the Government asserts that it has both policy and legal interests which it can be protected only by a stay of these civil proceedings.

None of the parties in the civil action will suffer substantial prejudice if the stay sought by the Government is granted. The stay will not impede the defendants' ability to gather the facts underlying this suit, because documents relating to the conduct alleged in the indictment will be made available to the defense during the course of the criminal proceeding pursuant to Rule 16 of the Federal Rules of Criminal Procedure and witness statements and impeachment material will be provided no later than the time of their criminal trial. Accordingly, the defendants will be provided with most, if not all, of the materials that would be made available to them during the course of civil discovery, other than the civil depositions of material witnesses that may be pursued by the defendants.

The United States, by contrast, will suffer irreparable prejudice if depositions commence and other third-party discovery takes place. The criminal defendants may assert their Fifth Amendment right against self-incrimination and refuse to provide sworn interrogatory and discovery responses to the SEC in this case. If that were the case, it would be unfair to permit the criminal defendants to use the civil discovery process to reap the fruits of the United States' extensive investigation by obtaining discovery of prior statements of material witnesses that may jeopardize the criminal prosecution.

The United States submits that the parallel criminal prosecution should be permitted to proceed unimpaired by premature disclosure of critical evidence that may have a bearing on the United States' ability to work with cooperating witnesses and to prosecute this case. The public interest in enforcement of the criminal laws outweighs the civil defendant's desire to proceed with discovery in this matter. *Campbell,* 307 F.2d at 487 ("Administrative policy gives priority to the public interest in law enforcement."); *see also Offill*, 2008 U.S. Dist. LEXIS 28977 at *10-11; *In re Ivan F. Boesky Securities Litig.,* 128 F.R.D. 47, 49 (S.D.N.Y. 1989) ("[T]he ***public interest*** in the criminal case is entitled to precedence over the civil litigant.") (emphasis in original).

CONCLUSION

Based upon all of the foregoing reasons, the United States respectfully requests that the Court grant its application for a stay of discovery in the instant case pending the outcome of the

parallel criminal case involving the same facts, circumstances and defendants as this case.

Respectfully submitted,

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Certificate of Conference

I HEREBY CERTIFY that the United States has conferred with the SEC and counsel of record for the SEC who does not oppose intervention or a stay of discovery in this matter. The United States conferred with counsel of record for Receiver Ralph S. Janvey who indicated that he does not oppose intervention or a stay of discovery in this matter. The United States has conferred with counsel of record for defendant James Davis who indicated that he does not oppose intervention or a stay of discovery in this matter. The United States has conferred with counsel of record for defendant Laura Pendergest-Holt who indicated that his client opposes the relief sought by the United States. The United States has contacted various counsel of record for defendants Stanford International Bank, Ltd., Stanford Group Company, Stanford Capital Management LLC and R. Allen Stanford, and, as of the time of this filing, has not been able to ascertain their position.

/s/ Jack B. Patrick

Certificate of Service

I HEREBY CERTIFY that a copy of the United States' Application for Stay of Discovery and Supporting Brief have been furnished to Counsel of Record by filing on ECF on July 17, 2009.

/s/ Jack B. Patrick