

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

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

CONSOLIDATED REPLY BY THE UNITED STATES
TO DEFENDANTS' OPPOSITION TO THE UNITED STATES' MOTION TO
INTERVENE AND TO THE UNITED STATES' APPLICATION
FOR STAY OF DISCOVERY PROCEEDINGS

The United States of America, by and through the United States Department of Justice ("United States"), hereby respectfully submits this Consolidated Reply to the Defendants' Opposition of the United States' Motion to Intervene and to the United States' Application for Stay of Discovery.

The United States has moved this Court for an order permitting it to intervene in this action under Rule 24, Federal Rules of Civil Procedure, and has applied for a stay of discovery in the instant proceedings. Docket Entries 601 and

602. The United States is not seeking a stay of all aspects of the civil proceeding, but only a stay of discovery to protect its legitimate interests in the criminal case and such that the procedures in the parallel criminal case, now pending trial, would not be adversely impacted by the broader civil discovery.

Defendants Stanford International Bank, Ltd., Stanford Group Company, Stanford Capital Management, LLC, and R. Allen Stanford (collectively referred to herein as “the Stanford Defendants”) have submitted an opposition (Docket Entry 687) and defendant Laura Pendergest-Holt has submitted an opposition (Docket Entry 702) in which they spend considerable time attacking the Securities and Exchange Commission (“SEC”) and the Receiver and the remainder of the time simply disagreeing with the stated reasons for the requested stay of discovery.

For the reasons stated below, the opposition is without merit. The motion to intervene and application for stay of discovery should be granted.

ARGUMENT

1. The United States should be allowed to intervene to protect its legitimate interest in a parallel criminal proceeding.

Defendant Holt apparently opposes the United States’ motion to intervene, but does not offer any discussion or support for her opposition apart from her discussion regarding the stay of discovery. In opposition to the United States’

motion to intervene, the Stanford Defendants wrongly contend that the United States does not have a “legitimate interest” in intervening as required under Federal Rule of Civil Procedure 24(a) and that permissive intervention under Federal Rule of Civil Procedure 24(b) is not warranted.

Neither the Stanford Defendants nor defendant Holt note any prejudice to themselves, and there is none, that would arise from the intervention of the United States in the civil case as requested. Their opposition to the intervention, on the other hand, denies and demeans the legitimate interest of the United States in intervening to prevent the defendants in the civil case from circumventing the more limited scope of discovery in the parallel criminal proceeding. Indeed, the opposition essentially demeans the very protections afforded the United States under the Federal Rules of Criminal Procedure.

Further, the interests of the United States in the criminal case cannot be adequately protected by the SEC or any other party in the civil case who might or might not attempt to obtain for the benefit of the United States the protections to which the United States is entitled in criminal cases, much less to object to “overbroad” or “improper” discovery demands, as characterized by the Stanford Defendants. Moreover, the SEC and other parties have diverging interests in the

litigation, different in nature and in scope from the United States' interests in the criminal case. Hence, under the controlling standards, the United States has a right to intervention under Rule 24(a) or, in the alternative, to permissive intervention under Rule 24(b).

2. A stay of discovery should be granted pending resolution of the criminal case.

In their opposition to the application for stay of discovery, the Stanford Defendants and defendant Holt choose to discount completely the plainly substantial interest of the United States in the civil case and the clear prejudice to the criminal case, when the subject matter giving rise to the civil case is also the subject matter of the ongoing criminal prosecution in which all of the indicted defendants are also defendants in the SEC's Complaint and First Amended Complaint (Robert Allen Stanford and Laura Pendergest-Holt) or are additional defendants in the SEC's proposed Second Amended Complaint (Gilberto Lopez, Mark Kuhrt and Leroy King) now pending before this Court.

In addition to the substantial, legitimate interest of the United States, the Stanford Defendants and defendant Holt further choose to ignore other factors strongly in favor of a stay of the discovery. Many courts have used a six-part test to determine whether a stay is appropriate, including consideration of the interests

of the defendant. The six-part test weighs the following factors: (1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the case, including whether the defendant has been indicted; (3) the interests of the plaintiff in proceeding expeditiously versus the prejudice to the plaintiff resulting from the delay; (4) the interests of, and burden on, the defendant; (5) the interests of the Court; and (6) the public's interest. See SEC v. Offill, No. 3:07-cv-1643, 2008 WL 958072, at *1 (N.D. Tex. April 9, 2008); SEC v. Gordon, No. 09-CV-0061, 2009 WL 2252119 at *4 (N.D. Okla. July 28, 2009).

In almost all respects, there is a complete overlap of issues present in the civil case and in the criminal case which is now pending trial. As described in detail in the application for stay of discovery, the civil case and the criminal case also substantially overlap in facts and alleged misconduct and in witnesses likely to be called to testify at trial. The extent of overlap has been noted as being the "most important factor in ruling on a motion to stay." SEC v. Nicholas, 569 F.Supp.2d 1065, 1070 (C.D.Cal. 2008)(citing Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 203 (1989)). The Stanford Defendants and defendant Holt do not appear to dispute that the substantial overlap in the

cases and the status of the criminal case (indicted defendants pending trial) are two factors weighing heavily in favor of the stay of discovery.

Given the overlapping nature of the allegations and evidence in the civil and criminal cases, the interest of the Court is also a substantial interest in granting a stay. Staying discovery advances judicial economy because the higher level of proof required in a criminal case enhances the likelihood of collateral estoppel, res judicata, or settlement truncating or eliminating altogether the need for civil proceedings. See Offill, 2008 WL 958072, at *3. Rather than having two judges supervise proceedings in two very similar cases, the criminal case may obviate the need for much, if not all, of the discovery and other matters in the civil case.

In this instance, the plaintiff's interest and the public interest are intertwined and also weigh in favor of a stay of discovery. Where the civil case is a civil enforcement action, the "plaintiff's interest and the public interest are intertwined." Offill, 2008 WL 958072, at *3 (quoting S.E.C. v. Mersky, 1994 WL 22305, at *3 (E.D. Pa. Jan. 25, 1994)). The plaintiff in this matter, the SEC, does not oppose the stay. Because resolution of the criminal action may narrow or resolve completely issues in the SEC action, the balance of interests favors the Court granting a stay of discovery.

Permitting discovery to proceed in the civil case, on the hand, would prejudice the United States and its prosecution of the criminal case, and thus the public's interest, by allowing the criminal defendants access to discovery far exceeding the limited discovery available to them under the Federal Rules of Criminal Procedure. Allowing civil discovery to proceed would eviscerate the specific limits placed on defendants by the criminal rules regarding discovery and would greatly prejudice the United States' interest.

The Stanford Defendants and defendant Holt make light of or wholly disparage this important and legitimate interest even though they must be keenly aware that Courts have long recognized the need to stay civil proceedings to further the enforcement of criminal laws. Unlike federal criminal practice, a non-party witness could be compelled to testify through civil discovery. Absent a stay, defendants in the civil case would be able to depose potential government trial witnesses, essentially handing defendants a road map to the prosecution case to which they are not entitled. Whereas the Stanford Defendants claim that the stay is sought by the United States as a "tactical advantage," in fact, use of the civil discovery procedure by the defendants to benefit themselves in the criminal case would be the real tactical advantage. See Campbell v. Eastland, 307 F.2d 478, 487

(5th Cir. 1962, cert. denied, 371 U.S. 955 (1963)(litigants cannot be permitted to use civil discovery as “dodge” to avoid restrictions on criminal discovery).

Finally, the Court must balance the interests of the plaintiff in the civil suit – the SEC – with that of the defendants. Contrary to the claims of the Stanford Defendants and defendant Holt, the stay of discovery will not prevent them from defending themselves in the SEC case. Granting a stay, however, will avoid the distraction to the defendants of having to face two cases at the same time. The defendants will be able to investigate the facts and obtain many of the witnesses’ statements relevant to the transactions in due course through the Federal Rules of Criminal Procedure. For the criminal discovery, the United States has established a data base enabling the defendants to better search the electronically copied and scanned documents and records. The stay also protects the defendants from having to make a choice between whether to testify in the civil case in advance of the criminal trial or assert their Fifth Amendment rights against self-incrimination and face the possibility that a fact-finder would draw an adverse inference against them for so doing.

The Stanford Defendants apparently also contend that they need to proceed with civil discovery in order to stop the Receiver from carrying out his court-ordered duties with regard to assets and defendant Holt apparently contends that

she needs to proceed with civil discovery to overturn the Court's order freezing her assets and to provide access to insurance funds. The stay of discovery requested by the United States is not intended to and will not in any way prevent the Stanford Defendants or defendant Holt from pursuing those issues and other issues, which are now, in fact, pending for resolution before this Court.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court grant its motion to intervene and the application for stay of discovery in order to avoid prejudice to the parallel criminal securities fraud prosecution in the Southern District of Texas.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a copy of the Consolidated Reply By the United States to the Defendants' Opposition to the United States' Motion to Intervene and to the United States' Application for Stay of Discovery have been furnished to Counsel of Record by filing on ECF on August 21, 2009.

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