

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.	§	

MOTION BY THE UNITED STATES TO
INTERVENE PURSUANT TO RULE 24 AND SUPPORTING BRIEF

The United States of America, by and through the United States Department of Justice (“United States”), hereby respectfully moves this Court for an order permitting it to intervene in this action under Rule 24, Federal Rules of Civil Procedure, to seek a stay of discovery in this proceeding pending the outcome of a parallel criminal case in the Southern District of Texas against three of the defendants for substantially the same conduct with which they are charged in the civil case.

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 Complaint, First Amended Complaint, and Proposed Second Amended Complaint (referred to collectively as the “Complaint”) that the defendants were engaged in a “massive, ongoing fraud.” According to 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 the following: 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 that alleged in the SEC Complaint. The witnesses in the instant SEC case are largely identical to those who will testify during the criminal prosecution. In addition, documentary evidence on which the United States intends to rely during the criminal prosecution is substantially the same as that which underlies the SEC action.

ARGUMENT

Rule 24 (a) of the Federal Rules of Civil Procedure provides a right of intervention for an applicant who can demonstrate: (1) an interest in the subject matter of the civil suit; (2) an impediment to his protecting that interest arising from the pending action; and (3) inadequate protection of that interest by the existing parties to the action. FED R. CIV. P. 24(a); *see* 7C Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1908 (1986 & Supp. 2003). Alternatively, intervention may be permitted by the Court under Rule 24(b)(2) “when an applicant’s claim or defense and the main action have a question of law or fact in common.” FED. R. CIV. P. 24(b)(2). In the instant case, intervention by the United States is appropriate under both provisions of Rule 24(a) for the limited purpose of protecting the criminal action against the same defendants as in this case

A. The United States has the right to intervene

The United States has a direct and substantial interest in the subject matter of the SEC’s civil enforcement action, which substantially parallels the facts of the pending criminal case. Specifically, the United States has a “discernible interest in intervening in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal matter.” *SEC v. Chestman*, 861 F.2d 49, 50 (2d Cir. 1988). In *Chestman*, the Second Circuit held that the District Court had not abused its discretion in permitting intervention by the government under either Rule 24(a) or (b). Moreover, the United States’ interest cannot be adequately protected by the SEC, which has statutory authority limited to the enforcement of the securities fraud laws in the civil context. As the court noted in *Securities and Exchange Commission v. Downe*, 1993 WL 22126 (S.D.N.Y. 1993), “even though the SEC is

involved in this action, the [Department of Justice] may have an interest in this litigation which is qualitatively different from the SEC's interest. Moreover, the [Department of Justice] is better equipped to explain its need for intervention in the instant case due to a parallel criminal investigation, rather than using the SEC as a conduit for such arguments." *Id.* at 12.

The term "interest" is not construed in a strict, narrow, or technical fashion. Instead, as several federal circuit courts of appeal have instructed, Rule 24(a) is to be liberally applied, *i.e.*, to favor intervention of right in cases of doubt. *See, e.g., Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000); *United States v. Union Elec. Co.*, 64 F.3d 1152, 1158 (9th Cir. 1995); *United States v. Stringfellow*, 783 F. 2d 821, 826 (9th Cir. 1986), *vacated on other grounds*, 480 U.S. 370, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987); *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986); *see generally, Moore's Federal Practice*, § 24.03[1] & [2] (3d ed. 2003). Application of these standards to the present situation leads inevitably to the conclusion that the United States is entitled to intervene in this action for the purpose of protecting against the premature discovery of information that is the subject of the criminal prosecution of the criminal defendants and is likely to be used during their criminal trial.

Unless stayed, the disposition of the civil suit will impair the Government's ability to protect its interest. As a result of the filing of the civil action, the civil defendants, the majority of whom are also defendants in the criminal prosecution, will gain an opportunity to benefit from discovery in the context of the civil case that they would be prohibited from receiving under the Federal Rules of Criminal Procedure. The potential witnesses in the SEC's civil case are virtually identical, if not identical, to the potential witnesses in the criminal prosecution. Consequently, because the criminal prosecution involves virtually all of the same issues, parties,

and witnesses identified by the SEC in its complaint, there is an almost certain likelihood that allowing civil discovery to proceed, would jeopardize the ongoing criminal prosecution of the defendants.

Additionally, the United States' interest in enforcing its criminal laws cannot be protected adequately by the existing parties in the civil case. Despite the SEC's status as a governmental agency, the parties to this civil action cannot represent the United States' interest with respect to the investigation and enforcement of federal criminal statutes. *See Bureering v. Urawas*, 1996 WL 277206 (C.D.Cal. Jan. 8, 1996) ("the Government's prosecutorial and investigative interest is not adequately protected by any of the civil parties Clearly neither the plaintiff nor the defendants have this identical interest."). The United States alone is in the position of being affected by civil discovery and depositions, and if intervention to permit the United States to seek a stay is denied, that interest will be completely unprotected and the testimony of potential witnesses will be revealed when civil discovery continues. For the foregoing reasons, the United States requests that it be granted intervention as a matter of right in this case for the purpose of obtaining a stay.

B. Alternatively, the United States should be permitted to intervene

If the Court concludes that the United States does not have a right to intervene in this case, we request that the Court exercise its sound discretion to permit it to intervene under Rule 24(b) of the Federal Rules of Civil Procedure. *See In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988) (Department of Justice granted permissive intervention in private civil case to seek protection of privileged law enforcement materials). Rule 24(b) grants the Court discretion to permit intervention when there is: (1) a timely motion; (2) a common question of law or fact;

and (3) a basis for jurisdiction independent of diversity of citizenship. *See Moore's Federal Practice*, § 24.11 (3d ed. 2003); *Bureerong v. Uvawas*, 167 F.R.D. 83, 86 (C.D. Cal. 1996). In exercising its discretion whether to permit intervention, the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. FED R. CIV. P. 24(b).

This motion is timely filed. It is the undersigned's belief that the parties have engaged only in minimal discovery. Further, the Court's jurisdiction is not based upon diversity of citizenship. Finally, there are common issues of fact and law in the captioned case and in the criminal prosecution.

Further, a stay of this case will not prejudice the rights of any of the original parties. In fact, the parties to this case will benefit. The SEC, which does not oppose the requested stay, will benefit from the stay because the resolution of the criminal case will likely reduce the scope of discovery and simplify, if not wholly eliminate, the issues in the civil case. Further, the defendants will be relieved of the necessity of concurrently defending a civil lawsuit and a criminal action and, thus, will not be required to divert resources that may be necessary for the defense of the criminal case. *See White v. Mapco Gas Products Inc.*, 116 F.R.D. 498, 501-3 (E.D. Ark. 1987). Under these circumstances, the courts generally "have allowed the government to intervene in civil actions -- especially when the government wishes to do so for the limited purpose of moving to stay discovery." *Twenty First Century Corp. v. LaBianca*, 801 F. Supp. 1007 (E.D.N.Y. 1992); *see SEC v. Downe*, 1993 WL 22126 at 10 (S.D.N.Y. Jan. 26, 1993); *Kaiser v. Stewart*, Civ. A. 96-6643, 1997 WL 66186 (E.D. Pa. Feb. 6, 1997) (granting intervention); *Thornhill v. Otto Candies, Inc.*, Civ. A. No. 94-1479, 1994 WL 382655 (E.D. La.

July 19, 1994) (granting intervention under Rule 24).

CONCLUSION

The United States has a strong interest in maintaining the integrity of the criminal process, which will be subverted unless the Court allows intervention in the present action. Under the controlling standards, the government has a right to limited intervention under Rule 24(a) or, in the alternative, to permissive intervention under Rule 24(b). Based upon all of the foregoing reasons and in light of the United States' strong interest in the subject matter of the captioned case, as well as the absence of prejudice to the parties thereto, the United States respectfully requests that it be permitted to intervene in this case for the purpose of moving for and securing a stay of discovery in these proceedings.

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 has 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 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' Motion to Intervene Pursuant to Rule 24 and Supporting Brief has been furnished to Counsel of Record by filing on ECF on July 17, 2009

/s/ Jack B. Patrick