

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, <i>et al.</i> ,)	
Plaintiffs)	
)	
v.)	Docket No. 2:12-cv-184
)	
KENNETH L. MILLER, <i>et al.</i> ,)	
Defendants)	

DEFENDANTS PHILIP ZODHIATES, VICTORIA HYDEN
AND RESPONSE UNLIMITED, INC.'S MOTION TO STAY

Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc., hereby move to stay this action pending the resolution of parallel criminal proceedings now pending in the United States District Court for the Western District of New York.

Preliminary Statement

Defendants move for a stay of this action in light of Mr. Zodhiates' September 19, 2014 indictment by a Western District of New York grand jury. Five of the six factors typically considered by Courts when deciding whether to stay parallel civil proceedings support Defendants' motion. The parallel proceedings pose overlapping issues, Mr. Zodhiates has been indicted, judicial economy is served by allowing parallel criminal proceedings to proceed first, and the public interest in maintaining the integrity of criminal proceedings favors entry of a stay.

Background

Plaintiff alleges that Lisa Miller, Philip Zodhiates, and other defendants “conspired to kidnap Isabella Miller Jenkins and ensure her detention outside of the United States.” Complaint at 1. On September 19, 2014, Mr. Zodhiates was indicted by a grand jury impaneled in the United States District Court for the Western District of New York. The indictment charges that Lisa Miller, Mr. Zodhiates, and Timothy Miller conspired to remove and retain a child from the United States. *See United States v. Miller*, No. 1:14-cr-175-RJA-JJM, Docket No. 1 (W.D.N.Y. Sept. 19, 2014).

When deciding whether to stay a civil action in light of parallel criminal proceedings, courts consider:

- 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 interest of the courts; and 6) the public interest.

Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 99 (2d Cir. 2012); (citing *Trustees of Plumbers & Pipefitters, Nat’l Pension Fund v. Transworld Mech., Inc.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995)). Staying a civil case has “been characterized as ‘an extraordinary remedy’” that may be appropriate “when related criminal proceedings are imminent or pending” and entry of a stay would be prudential. *Id.* at 98 (quoting and citing *Plumbers*, 886 F. Supp. at 1139, 1138 n. 4). The factors typically considered serve as a “rough guide” for the exercise of judicial discretion, rather than a mechanical test. *Id.* This Court has previously entered a stay of civil proceedings in the context of parallel criminal and forfeiture proceedings. *See United States v. 22.3 Acres of Land*, No. 2:08-cv-00047-wks, Docket No. 20 (D. Vt. April 30, 2008).

All but one of the factors weigh in favor of a stay of this action. The two cases squarely overlap and Mr. Zodiates has been indicted. While Plaintiff has an interest in the expeditious resolution of this case, Courts have found this interest trumped by the Fifth Amendment quandary for Defendants associated with post-indictment parallel actions. Courts have also recognized that completing criminal proceedings first favors both judicial economy and the public's interest in preserving the integrity of criminal proceedings.

1. Overlap Of The Issues.

“A stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter.” *Harris v. Nassau County*, 2014 U.S. Dist. LEXIS 94554 *8 (E.D.N.Y. July 11, 2014) (quoting *Crawford & Sons v. Besser*, 298 F. Supp. 2d 317, 319 (E.D.N.Y. 2004)). Indeed, Courts have considered “the degree to which the civil issues overlap with the criminal issues” to be the “most important factor.” *Id.* (quoting *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 203 (S.D.N.Y. 1989)).

The complaint and indictment both allege that Lisa Miller conspired with other defendants, including Mr. Zodiates, to remove Ms. Miller's daughter from the United States and retain her outside of the United States. The substantial overlap of the issues in the civil and criminal cases “weighs heavily in favor of granting a stay of these proceedings.” *Id.* A stay is particularly appropriate where testimony by a defendant “in the civil action” would likely be treated as “admissions . . . in their criminal prosecution.” *SEC v. Boock*, 2010 U.S. Dist. LEXIS 59481, *5 (S.D.N.Y. June 15, 2010).

Plaintiff and the Government have both confirmed that Plaintiff is actively sharing information she obtains in this action with the Government. According to Plaintiff, information provided by Plaintiff has been used “in applying for and carrying out search warrants.” Docket

No. 154 (Plaintiff's Reply in Support of Motion to Compel) at 4. The government has indicated that it issued "a grand jury subpoena" to Response Unlimited "[w]hen it became apparent during the course of this litigation" that Response Unlimited may have documents "which might pertain to the government's continuing investigation." Docket No. 155 (Government's Statement of Interest) at 3. This Court's recent denial of a motion for a protective order limiting the use of discovery in this action to this action heightens the importance of the overlap between the two proceedings by making it likely that any discovery or testimony provided by Mr. Zodiates would be provided by Plaintiff to the Government for use in the W.D.N.Y. criminal proceeding.

2. The Status Of The Criminal Case.

"Courts consistently hold that '[a] stay of a civil case is most appropriate where a party to the civil case has already been indicted for the same conduct.'" *Harris*, 2014 U.S. Dist. LEXIS 94554 *10 (quoting *Plumbers*, 886 F. Supp. at 1139). While this factor is not automatically dispositive, "[t]here is considerable authority for the principle that a stay is most justified where a movant . . . is already under indictment for a serious criminal offense and is required at the same time to defend a civil action involving the same subject matter." *Louis Vuitton*, 676 F.3d at 101. Indeed, "[t]he weight of authority in this Circuit indicates that courts will stay a civil proceeding when the criminal investigation has ripened into an indictment." *Harris*, 2014 U.S. Dist. LEXIS 94554 *10 (quoting *In re Par Pharm, Inc.*, 133 F.R.D. 12, 13 (S.D.N.Y.)); accord, e.g., *Plumbers*, 886 F. Supp. at 1140 (granting a post-indictment stay); *Volmar Distribs. v. New York Post Co.*, 152 F.R.D. 36, 39-40 (same); *Boock*, 2010 U.S. Dist. LEXIS 59481, *5-6 (same). This action should be stayed in light of the indictment of Mr. Zodiates.

3. Private And Public Interests.

A decision whether to stay “must rest upon a particularized inquiry into the circumstances of, and the competing interests in, the case.” *Louis Vuitton*, 676 F.3d at 99. Cases finding a stay constitutionally required are uncommon, “likely because district courts stay proceedings out of an abundance of caution when there is a serious question as to whether a denial would violate the Fifth Amendment.” *Id.* at 100, n. 15. While Plaintiff has “a legitimate interest in the expeditious resolution” of her case, many district courts have found this interest “trumped” by a defendant’s “interest[] in avoiding the quandary of choosing between waving their Fifth Amendment rights or effectively forfeiting the civil case,” particularly where “the subject matter of both cases overlaps to a significant degree.” *Plumbers*, 886 F. Supp. at 1140. These courts recognize that a “stay will result in inconvenience and delay to Plaintiffs. But under settled authority, the Fifth Amendment is the more important consideration.” *Parker v. Dawson*, 2007 U.S. Dist. LEXIS 63068, *20 (E.D.N.Y. Aug. 27, 2007) (quoting *Volmar*, 152 F.R.D. at 40 and collecting cases).

“Judicial efficiency also weighs in favor of granting a stay” where the defendant has been indicted and will face trial. *Plumbers*, 886 F. Supp. at 1140. Courts have recognized that completing criminal proceedings first may narrow issues and avoid duplicative work. *Harris*, 2014 U.S. Dist. LEXIS 94554,*12 (citing *Crawford*, 298 F. Supp. 2d at 319; *Plumbers*, 886 F. Supp. at 1140; *Parker*, 2007 U.S. Dist. LEXIS 63068).

Finally, the public interest is protected where the issues in the two proceedings are overlapping, such that the criminal prosecution may serve to advance the public interests. *Plumbers*, 886 F. Supp. at 1140. “Furthermore, the public’s interest is best served by ‘preserving the integrity of the criminal case.’” *Harris* 2014 U.S. Dist. LEXIS 94554,*13 (quoting *Crawford*, 298 F. Supp. 2d at 319).

Conclusion

This action should be stayed pending the resolution of the criminal proceeding currently pending in the United States District Court for the Western District of New York. Five of the six factors courts consider when determining whether to stay a civil action in favor of a parallel criminal action support entry of a stay here. The criminal proceeding addresses overlapping issues and has resulted in the indictment of Mr. Zodhiates. Plaintiff has a legitimate interest in the expeditious resolution of this action. However, Courts have found this interest offset by the tension between a defendant's interest in preserving constitutional Fifth Amendment rights and being able to defend a parallel civil action. Courts have also found that both judicial economy, and the public interest in maintaining the integrity of criminal proceedings, weigh in favor of completing parallel criminal proceedings before resolving overlapping civil proceedings.

Dated: Burlington, Vermont
November 12, 2014

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CERTIFICATE OF SERVICE

I, Matthew B. Byrne, Esq., attorney for Defendants, certify that, on November 12, 2014,
I served Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc.'s Motion
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