

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Thomas E. Perez, SECRETARY OF LABOR,
United States Department of Labor,

Plaintiff,

v.

BRIDGEPORT HEALTH CARE CENTER,
INC. and CHAIM STERN, Individually

Defendants.

CIVIL ACTION NO.:
3:16-cv-01519-AVC

June 4, 2018

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY
DUE TO PENDING CRIMINAL PROSECUTION**

Defendants Bridgeport Health Care Center, Inc. ("BHCC") and Chaim Stern ("Stern") move for an immediate stay of all proceedings in the above-captioned action due to the Secretary of Labor's ("DOL") recent pursuit of a criminal investigation of both Defendants. Defendants have moved for the same stay relief in a second action the DOL is pursuing against both Defendants, Acosta v. Bridgeport Health Care Center, Inc., et al., No. 3:16-cv-00189-VAB (the "DOL Health Plan lawsuit"). Stay of both of these actions, as well as a now-pending Second Circuit Appeal from this Court's denial of DOL's Motion for Preliminary Injunction in the above-captioned action, is both necessary and appropriate to avoid forcing Defendants to choose between incriminating themselves in the criminal investigation and raising an inference against their interests in the civil cases. A stay is also appropriate to avoid the motion practice that will inevitably arise from this Hobson's choice DOL is forcing the Defendants to make concerning their Fifth Amendment rights. Moreover, DOL has not and cannot meet any

of the criteria outlined below that might justify it proceeding with this civil action while simultaneously pursuing a criminal investigation against the Defendants.

I. FACTUAL AND PROCEDURAL BACKGROUND

DOL filed two lawsuits against BHCC and Stern: Secretary of Labor, United States Department of Labor v. Bridgeport Health Care Center, Inc., et al., No. 3:16-cv-01519 (the “DOL Retirement Plan lawsuit”) (filed September 8, 2016) and Acosta v. Bridgeport Health Care Center, Inc., et al., No. 3:16-cv-00189-VAB (the “DOL Health Plan lawsuit”) (filed February 1, 2018). A third action, Local 1522 of Council 4, American Federation of State County and Municipal Employees, et al. v. Bridgeport Health Care Center, Inc., et al., No. 3:15-cv-01019 (the “Union lawsuit”) was the first filed, originally filed on July 2, 2015 by the Union that represents healthcare workers employed by BHCC, as well as several individual union member plaintiffs.

In the Union lawsuit, the Plaintiffs assert a broad set of claims, including some claims for ERISA violations, but also claims for breach of contract, equitable estoppel, failure to provide benefits, promissory estoppel, breach of fiduciary duty, misrepresentation, fraud, and conversion; all arising out of the alleged mismanagement of various plans offered by BHCC. The Union lawsuit Plaintiffs claim entitlement to a jury trial and further claim punitive, compensatory, and consequential damages, in addition to equitable relief.

The DOL Retirement Plan and Health Plan lawsuits arise under the Employment Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 et seq. In the DOL Retirement Plan Complaint, DOL alleges that BHCC sponsored the Bridgeport Health Care Center Retirement Plan (the “Retirement Plan”), an employee pension benefit plan

subject to ERISA, and acted as a fiduciary of the Plan within the meaning of ERISA. (See DOL Retirement Plan Complaint, ¶¶ 8-12). DOL further alleges that Chaim Stern served as a trustee of the Plan and acted on behalf of BHCC managing Plan funds, which allegedly qualified Chaim Stern as a fiduciary of the Plan. (See *id.* ¶¶ 7, 13). DOL alleges that the Defendants failed to discharge their fiduciary duties by making withdrawals, investments, and transfers of money from the Plan for non-Plan-related reasons in violation of ERISA §§ 403, 404 and 406, 29 U.S.C. §§ 1103, 1104 and 1106. (See *id.* ¶¶ 33-38).

In the DOL Health Plan lawsuit, DOL alleges that BHCC sponsored the Bridgeport Health Care Center, Inc. Benefit Plan (the “Benefit Plan”), a self-funded employee welfare benefit plan subject to ERISA. (See DOL Health Plan Complaint, ¶ 8.) DOL further alleges that Stern served as Plan Administrator of the Benefit Plan and acted on behalf of BHCC, making all financial decisions for BHCC and the Benefit Plan. (See *id.* ¶ 14.)

The Union Plaintiffs filed suit *three years ago*, in July 2015. One day *prior* to that, DOL issued pre-suit subpoenas to BHCC and Chaim Stern.¹ The subpoenas broadly called for production of financial records purportedly related to mismanagement of the

¹ Counsel for Stern and BHCC later learned that prior to and/or at the same time that DOL issued subpoenas to them, DOL also had issued subpoenas to third-party financial institutions calling for production of records of Bridgeport Health Care Center, Inc.’s and Stern’s financial transactions with those institutions. Critically, Defendants did not receive copies of documents produced to DOL in response to those third-party subpoenas until 1 ½ years later – in December 2017 and February 2018 – and the documents amounted to tens of thousands of pages of records. DOL then served Defendants with thousands of additional documents that DOL had received from third parties on April 5, 2018 and May 10, 2018.

pension plan in violation of ERISA. This subpoena activity and information DOL obtained interviewing Chaim Stern and others in May 2015 would become the basis for DOL's ERISA claims asserted approximately one year later in its September 8, 2016 complaint in the Retirement Plan lawsuit.

The Defendants' first filing in the DOL Retirement Plan lawsuit was a Motion to Dismiss on various grounds including DOL's failure to pursue administrative remedies before proceeding directly to civil litigation against the Defendants.

While the Motion to Dismiss was pending, DOL moved for a preliminary injunction while also propounding extensive written discovery requests on BHCC and Chaim Stern. Given that the Defendants' Motion to Dismiss the action remained pending, the Defendants moved for a stay of discovery and opposed the motion for preliminary injunction. The District Court denied the Motion to Dismiss on September 26, 2017 (ECF 64) and, on November 17, 2017, found the Motion to Stay Discovery moot as a result (ECF 71).

On March 6, 2018, the District Court denied DOL's motion for a preliminary injunction (ECF 87).²

Discovery proceeded in the DOL Retirement Plan lawsuit, with DOL engaging in aggressive discovery tactics. These tactics included propounding at least three sets of overreaching written discovery requests, pressing for admissions as to unauthenticated third-party documentation, and the eleventh-hour disclosure of thousands of third-party

² The Court held that DOL failed to make the requisite irreparable harm showing for injunctive relief. Notably, the Court also concluded that there was no demonstrated urgency given that DOL waited six (6) months after filing suit to seek a preliminary injunction.

records that the Defendants had requested from DOL as part of the pre-suit subpoena activity, but which DOL had failed or refused to provide to the Defendants' counsel. (See footnote 1, supra). As a result of the DOL's scorched-earth discovery tactics, motions to compel and objections as to written discovery remained pending before the District Court as of April 2018.

On April 18, 2018, BHCC filed for Chapter 11 Bankruptcy. BHCC filed timely Notices of Bankruptcy in all three of the pending civil lawsuits. Pursuant to 11 U.S.C. § 362(a), the bankruptcy filing automatically stayed the litigation as to BHCC in both DOL lawsuits and in the Union lawsuit.

However, notwithstanding the automatic bankruptcy stay effective of April 18, 2018, on May 4, 2018, DOL ignored the stay and, at the eleventh hour, filed a Notice of Appeal from the District Court's March 6, 2018 denial of DOL's motion for preliminary injunction in the above-captioned action. Additionally, DOL filed "Responses" to BHCC's Notices of Bankruptcy in all three pending civil actions (including in the Union lawsuit, to which DOL is not a party), claiming to be exempt from the automatic stay pursuant to DOL's purported "police and regulatory" powers.

On May 14, 2018, Judge Hall notified the parties of the Court's intent to administratively close the Union lawsuit as a result of BHCC's Notice of Bankruptcy filing and on May 30, 2018, she issued another Order effectuating that administrative stay. In her May 30th Order, Judge Hall specified that the Union lawsuit *as a whole* was stayed and that the case could not be reopened as to BHCC until the stay was lifted. As to Mr. Stern, she instructed that the case could be reopened as to him only *upon good cause shown* (ECF 336).

On May 15, 2018, the Bankruptcy Court granted certain creditors' emergency motion for appointment of a Chapter 11 Bankruptcy Trustee, a motion in which DOL purported to join, notwithstanding that it is not a BHCC creditor. At the hearing on that Motion, Judge Nevins improperly permitted DOL representatives to question Mr. Stern and others under oath as to many of the facts in issue in the DOL Retirement Plan and Health Plan lawsuits.³

One week later, on May 22, 2018, agents of the U.S. Department of Labor and United States Internal Revenue Service executed Search-and-Seizure Warrants at the premises of BHCC and home of Chaim Stern, seeking a virtually identical set of documentation that DOL had been pursuing in the DOL Retirement Plan lawsuit through overreaching written discovery directed to BHCC and Stern and via third party subpoenas. The timing of those warrant executions, following immediately on the heels of DOL being denied a preliminary injunction and improperly questioning Mr. Stern in Bankruptcy Court proceedings (in which DOL is not a creditor) raises legitimate concerns that BHCC and Mr. Stern now are being punished for exercising their constitutional and civil rights in the Bankruptcy Court and Retirement Plan lawsuit proceedings. This, along with six other factors outlined in detail below, call for this Court to immediately stay all proceedings in the above-captioned action so that BHCC and Mr. Stern may properly defend themselves in all pending civil and criminal proceedings against them.

³ At that hearing, Mr. Stern asserted his Fifth Amendment rights as to questions pertaining to a third party entity, Em Kol Chai, an entity about which DOL has pursued information for years through third party subpoenas, interviewing Mr. Stern and others, as well as written discovery in the DOL Retirement Plan lawsuit.

II. LEGAL ARGUMENT

A. *As a Matter of Law, the Civil Proceedings Against BHCC Already Are Stayed.*

All of the civil cases against BHCC are stayed as a matter of law. BHCC filed for Chapter 11 Bankruptcy in the United States Bankruptcy Court for the District of Connecticut on April 18, 2018 (Docket No. 18-50488). Pursuant to 11 U.S.C. § 362(a), the filing of a Chapter 11 Bankruptcy operates as an automatic stay of “the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title”

The Defendants submit that this stay, as a matter of law, must be regarded as in effect notwithstanding Defendants’ instant petition for a stay pending the outcome of the criminal proceedings. Judge Hall’s recent Order in the Union lawsuit administratively closing that matter “due to the filing of a Chapter 11 Bankruptcy Petition” and specifying that the matter will remain stayed as to BHCC unless and until the stay is lifted clearly recognizes this well-established law.

Insofar as DOL challenges the automatic stay, it has the burden to prove that an exception applies. In re Best Payphones, Inc., Case No. 01-15472 (SMB), 2016 WL164900, at *11 (S.D.N.Y. Jan. 13, 2016) (“The party asserting an exception to the automatic stay bears the burden of proving that the exception applies.”).⁴ The “mere

⁴ Unpublished cases are attached hereto as **Exhibit A**.

incantation of 11 U.S.C. §362(b)(4) or . . . ‘police and regulatory powers,’ . . . does not carry that burden.” Id.⁵

B. The DOL Retirement Plan Lawsuit and the DOL Health Plan Lawsuit Also Must Be Stayed as to Both Stern and BHCC Due to DOL’s and the IRS’ Recent Criminal Proceedings.

Because DOL and the IRS now are pursuing ongoing criminal investigations of BHCC and Chaim Stern, the Court should stay the above-captioned matter as to both Mr. Stern and BHCC on the additional ground that those actions cannot proceed without causing unconstitutional legal jeopardy to BHCC and Stern. A court has the discretion to stay a case if the interests of justice require it. United States v. Kordel, 397 U.S. 1, 12 n.27 (1970). A stay of a civil case when there are pending criminal proceedings is not constitutionally required but may be warranted in certain circumstances. Id.; See also Bridgeport Harbour Place, LLC v. Ganim, 269 F.Supp.2d 6, 8 (D.Conn. 2002); Trustees of Plumbers & Pipefitters Nat’l Pension Fund v. Transworld Mechanical, Inc., 886 F.Supp. 1134, 1138 (S.D.N.Y. 1995). “This authority allows a court to ‘stay civil proceedings, postpone civil discovery or impose protective orders and conditions when the interests of justice seem to require such action.’” Bridgeport Harbour Place, 269 F.Supp.2d at 8 (quoting Securities & Exch. Comm’n v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C.Cir. 1980) (en banc)).

Whether to stay a case “calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” Landis v. N. Am. Co., 299 U.S. 248, 254-55 (1936). The factors to be considered in deciding whether to grant a stay

⁵ The Defendants reserve their rights to oppose, through separately briefing in this and the other pending civil matters, DOL’s “police and regulatory powers” argument.

include: (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 criminal defendant has been indicted; (3) the private interest of the plaintiff in proceeding expeditiously weighed against the prejudice to the plaintiff caused by the delay; (4) the private interest of and burden on the defendant; (5) the interest of the courts; and (6) the public interest. Johnson v. New York City Police Dept., No. 01 Civ. 6570(RCC)(JCF), 2003 WL21664882, at *1 (S.D.N.Y. July 16, 2003).

1. *The Issues Involved In This Civil Proceeding Significantly Overlap With The Parallel Criminal Investigation.*

Whether there is similarity between civil proceedings and parallel criminal proceedings is considered “the most important factor” in the analysis of whether a stay should issue. See Metzler v. Bennett, No 97-CV-148 (RSP.GJD), 1998 WL187454, at *6 (N.D.N.Y. April 15, 1998). Where there is significant overlap, there is commensurate danger of self-incrimination. See id.; see also Chao v. Fleming, 498 F.Supp.2d 1034, 1037 (“[S]imultaneous criminal and civil cases involving the same or closely related facts may give rise to Fifth Amendment concerns sufficient to warrant a stay of the civil proceedings.”). Accordingly, in the present case, where the issues in the civil suits and the criminal proceedings are remarkably similar, the circumstances weigh in favor of a stay.

DOL’s claims against BHCC and Chaim Stern in both the Retirement Plan and Health Plan lawsuits are similar to the charges listed in the Search Warrants that were executed on May 22, 2018. For example, the Search Warrants seek “all evidence, fruits and/or instrumentalities pertaining to,” among other things, “money laundering and illegal monetary transactions, in violation of 18 U.S.C. §§ 1956 and 1957; conspiracy to

commit money laundering and illegal monetary transactions, in violation of 18 U.S.C. § 1956(h); . . . theft or embezzlement from an employee benefit plan in violation of 18 U.S.C. § 664; [and] theft or embezzlement from a health care benefit program in violation of 18 U.S.C. § 669.” See Search Warrants, attached hereto as **Exhibit B**. These charges are similar in substance to the allegations in the DOL Retirement Plan lawsuit complaint in which DOL alleges that Defendants made an improper loan and improperly transferred retirement plan assets to Em Kol Chai, which in turn, transferred those assets to entities such as Bridgeport Manor, Toner Co., and American Friends of Viznitz in Israel. See DOL Retirement Plan Complaint at ¶¶ 23, 24-32.

Similarly, the Search Warrants seek “all evidence, fruits and/or instrumentalities pertaining to,” among other things, “false statement relating to health care matters, in violation of 18 U.S.C. § 1035; [and] health care fraud, in violation of 18 U.S.C. § 1347.” Search Warrants, attached hereto as Exhibit B. These charges are similar to the allegations in the DOL Health Plan lawsuit complaint, in which DOL alleges that BHCC “failed to fund the health claim reimbursement account as required” and that “approximately \$1,117,391,34 in health claims remained outstanding . . . as of September 2016 and approximately \$381,930.94 in health claims remained outstanding . . . as of October 2016.” See DOL Health Plan Complaint at ¶¶ 18, 20, 25.

The Search Warrants also seek information concerning entities that are named in the DOL Retirement Plan lawsuit complaint and the DOL Health Plan lawsuit complaint. For example, the entities the DOL Retirement Plan lawsuit complaint lists as having received improperly transferred funds (e.g., Bridgeport Manor, Toner Co., and American Friends of Viznitz in Israel) also are listed as “Subject Entities” in the Search-and-

Seizure Warrants executed on May 22, 2018. Likewise, the DOL Health Plan lawsuit complaint identifies United Medical Resources and Meritain Health, Inc. as third-party administrators for the BHCC Health Benefit Plan that is the target of that complaint. These entities are also listed as “Subject Entities” in the Search Warrants. The presence of the same entities in the DOL complaints and as “Subject Entities” in the Search Warrants clearly indicates that there is overlap between the criminal and civil proceedings.

Further, both the civil actions and the criminal proceeding arise from alleged violations of ERISA. See DOL Retirement Plan Complaint at ¶ 1; DOL Health Plan Complaint at ¶ 1. These same allegations provide the basis for the Search Warrants, which list the “items to be seized” to include:

all evidence, fruits and/or instrumentalities pertaining to violations of wire fraud, in violation of 18 U.S.C. § 1343; mail fraud, in violation of 18 U.S.C. § 1341; conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1349; money laundering and illegal monetary transactions, in violation of 18 U.S.C. §§ 1956 and 1957; . . . theft or embezzlement from an employee benefit program in violation of 18 U.S.C. § 664; theft or embezzlement from a health care benefit program, in violation of 18 U.S.C. § 669; *false statements and concealments of facts in relation to documents required by ERISA*, in violation of 18 U.S.C. § 1027; false statements relating to health care matters, in violation of 18 U.S.C. 1035; [and] health care fraud, in violation of 18 U.S.C. § 371

See Search Warrants, at **Exhibit B**.

Further still, there is an obvious, substantial overlap between the items sought via the Search Warrants and the items DOL has sought to obtain through discovery and through third party subpoenas in the civil proceedings. The “Description of Items to Be Seized” attached to the Warrants includes many of the same items that were listed in DOL’s Request for Production of Documents served on BHCC on April 11, 2017 and

Mr. Stern on February 22, 2017. See Exhibits C and D, attached hereto. For example, the requests for production of documents served on BHCC and Mr. Stern and the Description of Items to Be Seized attached to the Search Warrants both seek, among other things: (1) BHCC's accounting records, (2) correspondence concerning loans made to Em Kol Chai, (3) correspondence concerning transfer of funds between BHCC or Mr. Stern and Em Kol Chai, and (4) correspondence between BHCC and American Friends of Vznitz in Israel, Point Developers, and Toner Co.

These similarities demonstrate that DOL's effort to press forward with this civil action is unnecessarily duplicative of its criminal investigation of both BHCC and Mr. Stern. Although the specifics of the criminal investigation have yet to be established, it is clear from the Search Warrants that the substance of that investigation substantially overlaps with the facts in issue in the civil cases. Accordingly, this Court should stay all civil proceedings against BHCC and Stern.

2. Given DOL's Active Criminal Prosecution of BHCC and Stern, This Civil Action Must Be Stayed to Protect BHCC's and Stern's Civil Rights.

The strongest case for a stay of civil proceedings arises when there is already an indictment. Walsh Secs., Inc. v. Cristo Prop. Mgmt., Ltd., 7 F.Supp.2d 523, 527 (D.N.J. 1998). "However, each case must be evaluated individually . . . [and] it is 'still possible to' obtain a stay if the Government is conducting an active parallel criminal investigation." Id.; see also Volmar Distributors, Inc. v. New York Post Co., 152 F.R.D. 36, 38 (S.D.N.Y. 1993). This is especially so when it becomes clear that the defendants are targets of a criminal investigation. See Walsh, 7 F.Supp.2d at 527. Importantly, District Courts have recognized that a stay in pre-indictment circumstances is especially

warranted when the civil and criminal actions are both brought by the government.

Brock v. Tolkow, 109 F.R.D. 116, 119 (E.D.N.Y 1985).

Here, it is clear that DOL has targeted Chaim Stern and BHCC for criminal prosecution, possibly because DOL has been unable to gain the traction it wants in the pending civil proceedings and is now emboldened by having succeeded in improperly participating in BHCC's bankruptcy proceedings, including questioning Mr. Stern under oath during those proceedings about the very topics and issues in play in the civil actions as well as in the Search-and-Seizure Warrants. On May 21, 2018, the Department of Justice sent subpoenas to American Friends of Vznitz in Israel and Em Kol Chai. See Ex. B. These subpoenas were accompanied by a letter requesting the recipients not to disclose the existence of the subpoena or its contents because disclosure "may impede an ongoing federal grand jury investigation into the possible commission of a felony." Id. The subpoena sought, among other things, "all records (including electronic communications) related to Bridgeport Health Care Center . . . [and] Chaim Stern" Id. At this moment, there can be no serious contention against there being an indictment in the making.

Under these circumstances, Defendants will be severely prejudiced if the DOL and Union lawsuits are permitted to continue. As discovery proceeds, the Defendants will have no choice but to assert their Fifth Amendment privileges in response to written discovery and deposition questioning. "[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.'" Baxter v.

Palmigiano, 425 U.S. 308, 318-19 (1976) (citing 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961)).

Accordingly, even though no criminal charges have been filed to date, substantively and substantially overlapping parallel civil and criminal actions will force the Defendants to face a “Hobson’s choice” between asserting their Fifth Amendment privileges in the civil proceedings and defending themselves in those and the criminal proceedings. They will risk adverse inferences in the civil actions while protecting their interests in the criminal case, or will have to waive their Fifth Amendment privileges in the civil case, only to expose themselves to self-incrimination in the criminal proceeding. These circumstances are certain to unalterably prejudice the Defendants. Therefore, this factor likewise weighs heavily in favor of a stay.

3. *DOL Will Not Be Prejudiced by a Stay of the Proceedings and Can Articulate No Legitimate Purpose for Pressing Forward with Those Proceedings under the Circumstances.*

A stay will not cause DOL any particularized prejudice and, under the circumstances – specifically, similar criminal proceedings as well as pending bankruptcy proceedings –DOL cannot possibly have a legitimate purpose for attempting to press forward with the civil matters. In fact, DOL’s civil cases can only be strengthened by allowing the criminal investigation and prosecution to play out. Should the criminal prosecution result in a conviction, DOL’s cases would be bolstered. If it is dismissed or terminates in an acquittal, DOL would be no worse off than it is at present.

Further, given BHCC’s bankruptcy proceedings, the extent to which assets are available to pay any judgment for monetary damages that DOL possibly could obtain in the civil actions is entirely in the hands of the Chapter 11 Trustee and the Bankruptcy

Court until those proceedings are concluded. Moreover, DOL's claims are for enforcement of ERISA, not for money damages. Thus, there can be no showing of urgency that justifies pressing forward with the civil actions – something the automatic bankruptcy stay implicitly recognizes under these circumstances.

Further still, delay will not prejudice DOL. The mere passage of time is not sufficient to establish prejudice. Tucker v. New York Police Dept., C.A. No. 08-cv-2156 (DMC), 2010 WL703189, at *7 (D.N.J. Feb. 23, 2010). “Delays in civil cases are fairly common,” and, in any event, the Plaintiffs are protected from any “financial losses” due to delay by their ability to obtain interest as part of a judgment. See Walsh, 7 F.Supp.2d at 528. Therefore, there is no concern of prejudice to the DOL that would justify pressing forward with the civil actions.

4. *In Contrast, Defendants Will Be Severely Prejudiced if the Civil Actions Are Not Stayed.*

As discussed above, even though there has been no indictment as of this filing, it is clear that the United States Attorney's Office has targeted Defendants for a criminal investigation. See Section II.A.1, 2, supra. And, again, parallel criminal and civil actions with overlapping issues will force the Defendants to choose between waiving their Fifth Amendment rights for the benefit of their civil case (and losing the protection of the privilege in the criminal case) or asserting their Fifth Amendment rights in the criminal case (and raising an adverse inference in the civil case.) Although it is not unconstitutional for the government to force citizens it prosecutes to make this Hobson's choice, it nevertheless is likely to lead to an unjust result, which outweighs any efficiencies gained by allowing parallel proceedings. See United States v. Kordel, 397 U.S. 1, 12 n.27 (1970). Accordingly, the Court should exercise its discretion to stay the

civil cases against both BHCC and Stern in the interest of justice. See Brock, 109 F.R.D. at 119 (holding stay to be especially warranted where both civil and criminal actions are brought by the government).

5. *Staying the Proceedings Will Promote Judicial Efficiency because Parallel Civil and Criminal Proceedings Will Lead to Increased Motion Practice.*

Courts possess an inherent interest in maintaining judicial efficiency with respect to their caseloads. In re Adelphia Communications Securities Litigation, No. 02-1781, 2003 WL 22358819, at *5 (E.D.Penn. May 13, 2003). This interest must be balanced by the interest of resolving individual cases efficiently. Walsh, 7 F.Supp.2d at 529.

In the present matter, a stay would promote judicial efficiency. In the absence of a stay, the Defendants will almost certainly assert their Fifth Amendment rights, which will lead to prolonged motion practice during the course of civil discovery. See In re Adelphia, 2003 WL 22358819, at *5. If the civil actions are stayed until the conclusion of the criminal proceedings, these motions, objections, replies, hearings, and rulings will not be necessary. Id. (citing Walsh, 7 F.Supp.2d at 528). Furthermore, if one Defendant asserts Fifth Amendment rights during the civil litigation while the other waives those rights, it would be “difficult or impossible to fairly apportion liability because of the differing factual record among defendants.” Walsh, 7 F.Supp.2d at 528-29. “Thus, staying the civil actions preserves judicial resources and streamlines some of the complexities” of these cases. In re Adelphia, 2003 WL 22358810, at *5. See also United States SEC v. Ott, 2006 U.S. Dist. LEXIS 86541 (D.N.J. Nov. 29, 2006) (“The interest of judicial economy is served because there is a reasonable expectation that

the criminal investigation could clarify and define some issues in the civil matter.”). This factor, therefore, also weighs in favor of staying the civil actions.

6. *Staying the Civil Proceedings Will Promote the Public Interest.*

The public’s interest is well served by staying the civil cases. “The public interest in a criminal case is entitled to precedence over a civil litigant, and substantial weight should be given to the public interest in balancing the policy *against* the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.” United States v. All Articles of Other-Sonic Gneric Ultrasound Transmission Gel, Civ. Action No.: 12-cv-2264 (ES)(SCM), 2013 WL 1285413, at *4 (D.N.J. Mar. 27, 2013) (emphasis added). “[T]he public has an interest in the government’s unimpeded investigation into potential criminal activities of Claimant.” Id. As such, while DOL may have to wait for resolution of its civil matters, courts have consistently held that allowing the parallel criminal matter to come to a complete, unimpeded conclusion outweighs any prejudice that may occur as a result of delay in the civil matter. Peterson v. Matlock, Civ. Action No.: 11-cv-2594 (FLW), 2011 WL 5416571, at *5 (D.N.J. Nov. 7, 2011); Tucker, 2010 WL703189, at *7 (“[T]he Court and the public are both better served by concluding the criminal charges before addressing related civil claims because it will permit ‘the criminal prosecution of [plaintiff] to proceed unimpeded and unobstructed by any concerns that may arise in discovery in the civil case.’”); Javier H. v. Garcia Botello, 218 F.R.D. 72, 74 (W.D.N.Y. 2003) (“[T]he public’s interest in the integrity of the criminal case is entitled to precedence over the civil litigant.”); Walsh, 7 F.Supp.2d at 529 (“In fact, a stay in this case would benefit the public by allowing the Government to conduct

a complete, unimpeded investigation into potential criminal activity.”). Accordingly, this factor also weighs in favor of staying the civil litigation.

III. CONCLUSION

For the reasons argued herein as well as others that may be raised at hearing, Defendants respectfully ask this Court for an order staying the above-captioned action pending the outcome of the criminal proceedings against the Defendants.

THE DEFENDANTS,
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AND CHAIM STERN

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CERTIFICATION OF SERVICE

I hereby certify that on this 4th day of June, 2018, a copy of the foregoing Memorandum of Law in Support of Defendants' Motion to Stay was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

By /s/ Brian J. Clifford ct30442