

## It May Help To Oppose Discovery Stay In Parallel Proceedings

By **David Krakoff, Adam Miller and Bradley Marcus** (May 2, 2019)

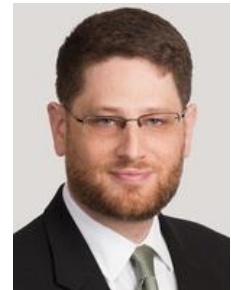
Representing a client in parallel civil and criminal proceedings is fraught with peril at every strategic turn. Decisions in each case can significantly affect the other, often in unpredictable ways. One piece of conventional wisdom for attorneys representing such clients is to support motions by the government to stay discovery in the civil action pending resolution of the criminal case. However, the orthodox approach isn't always the right one, and there are circumstances in which it may be wise to oppose a stay of civil discovery despite an ongoing criminal investigation of your client.[1]



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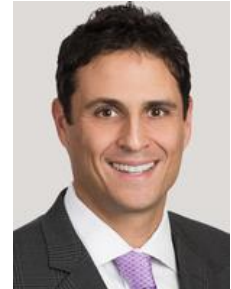
### DOJ Intervention and Motion for Stay

The government often seeks to stay discovery in civil litigation when it is conducting a parallel criminal investigation involving the same underlying facts. For the government, a stay of civil discovery can avoid disclosure of sensitive information about the investigation, prevent potential criminal defendants from obtaining useful information, and allow the government the first opportunity to question witnesses in an adversarial manner and without interference from defense counsel.



Adam Miller

The U.S. Department of Justice has frequently intervened and sought stays in securities cases, even where the parallel civil case is being pursued by the U.S. Securities and Exchange Commission. Just last week, the DOJ moved to intervene and stay an SEC civil suit against former Theranos Inc. chief operating officer Ramesh "Sunny" Balwani, who is a defendant in a related criminal case. The DOJ argued that Balwani has used the SEC's case to seek "information irrelevant to the SEC's allegations but directly relevant to the criminal indictment's allegations" in an attempt to "impermissibly us[e] civil discovery to his benefit in the criminal case." [2] The DOJ also often intervenes to seek stays in other contexts, such as antitrust matters. [3]



Bradley Marcus

District courts have broad discretion whether to grant or lift a stay, but generally require that the request be justified by "extraordinary circumstances." [4] Courts typically analyze factors such as the following:

- 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 interests of the courts; and
- 6) the public interest. [5]

More often than not, courts grant the DOJ's requests to stay discovery pending the outcome of a grand jury's investigation. [6] Although courts balance the aforementioned factors, they typically find persuasive the DOJ's usual argument that its investigation will be prejudiced as a result of civil discovery. [7]

## **Conventional Approach**

The conventional approach calls for a potential criminal defendant to support the government's efforts to obtain a stay of discovery in a related civil matter. By doing so, the potential defendant can delay (or possibly avoid altogether, if the civil case can be resolved) having to produce documents and provide statements that could be used against him or her in the criminal proceeding, all of which the DOJ is likely to obtain. Absent a stay, the potential criminal defendant may be able to avoid civil discovery by invoking the privilege against self-incrimination, but that decision may result in an adverse inference making the civil case virtually impossible to defend.[8]

Moreover, corporate executives facing these decisions must consider the impact on the advancement and indemnification of their legal fees. Complex cases require sophisticated and experienced defense counsel, which most executives cannot afford on their own. While every situation is different, some corporations — particularly those seeking credit for cooperating with the government — may seek to stop advancing legal fees if significant inculpatory information is revealed in discovery, or if the executive chooses to assert the privilege against self-incrimination. Avoiding this outcome is often reason enough to support anything that will delay civil discovery.

## **Conventional Wisdom of Supporting a Stay May Not Be Best**

Of course, each case is unique and the conventional approach is not always best. We recently faced an unusual situation that led us to oppose the DOJ's motion for a stay of civil discovery despite an ongoing criminal investigation of our clients. In that case, the investigation stemmed from a corporate boardroom dispute in which a company accused one of its directors as well as its largest shareholder (our clients) of wrongdoing in unrelated business activities. The corporation forced our client out as a director, redeemed (i.e., seized) the shares at issue at a significant discount, and provided the government with information to use against our clients.

The DOJ opened an investigation and soon thereafter moved to stay discovery in the related civil litigation focusing on the share redemption. After careful consideration, we opposed the request because we determined that: (1) a long delay in the civil litigation would have reduced our clients' chances of successfully recovering the damages caused by the share redemption; and (2) the benefit of being able to take timely discovery into the information the corporation provided to the government outweighed the risks of having our clients provide information in discovery. We were particularly concerned about the prospect of evidence being lost during the stay because many of the key actors were retired or approaching retirement.

The state court hearing the civil action initially granted the DOJ's request, but only for two six-month periods. Thereafter, the court agreed with us that the case needed to move forward, although it did establish a procedure by which the DOJ could review and object to any specific discovery requests that might jeopardize the ongoing criminal investigation.[9] As a result, we were able to take robust discovery and the civil case eventually settled on favorable terms, while no criminal charges were brought.[10]

## **Conclusion**

Parallel criminal and civil proceedings raise unique concerns with no one-size-fits-all answer. The conventional wisdom suggests that a potential criminal defendant should support a stay of civil discovery. That may be the best choice — conventional wisdom is that for a reason

— but not always. In our case, the unconventional approach was appropriate and worked well, in part, because our clients were counter-plaintiffs in the civil case, seeking substantial damages. In the more common scenario where an individual is only a defendant in the civil case, she may have less interest in a speedy resolution.

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***Disclosure: In the case discussed in this article, David S. Krakoff, Adam Miller and Bradley A. Marcus, were part of a Buckley LLP team that represented Japanese gaming machine manufacturer Universal Entertainment Corp., its subsidiary, and its former CEO in litigation against Wynn Resorts Ltd. and in related foreign and domestic matters.***

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[1] This article is not intended to focus on DOJ intervention in False Claims Act cases, where there is a private relator but the United States is the real party in interest. Our focus is on DOJ interventions and stays in civil suits.

[2] See SEC v. Balwani, Case No. 18-1603, N.D. Cal., DE 67, filed on April 19, 2019.

[3] See, e.g., SEC v. TelexFree, Inc. [●](#), 52 F. Supp. 3d 349, 352 (D. Mass. 2014) (“Courts have repeatedly issued stays in securities cases involving SEC civil enforcement actions and corresponding criminal proceedings.”); SEC v. Purchasers of Sec. of Global Indus., Ltd. [●](#), No. 11 Civ. 6500(RA), 2012 WL 5505738, at \*2 (S.D.N.Y. Nov. 9, 2012) (discussing DOJ’s request to stay discovery in a civil SEC enforcement proceeding, pending resolution of DOJ’s parallel criminal proceedings); Four In One Co., Inc. v. SK Foods, L.P. [●](#), No. CIV S-08-3017 MCE EFB, 2010 WL 4718751, at \*2, \*7 (E.D. Cal. Nov. 12, 2010) (granting stay in lawsuit alleging that defendants violated antitrust law).

[4] Weil v. Markowitz [●](#), 829 F.2d 166, 174 n.17 (D.C. Cir. 1987); see also Chao v. Fleming [●](#), 498 F. Supp. 2d 1034, 1037 (W.D. Mich. 2007) (“A stay of a civil case is an extraordinary remedy that should be granted only when justice so requires.”).

[5] E.g., FTC v. E.M.A. Nationwide, Inc. [●](#), 767 F.3d 611, 627 (6th Cir. 2014) (citing Chao, 498 F. Supp. 2d at 1037); see also Rios v. City of Bayonne [●](#), No. 2:12-4716 (KM)(MAH), 2015 WL 1607565, at \*5 (D.N.J. Apr. 8, 2015).

[6] Bradley S. Lui, Eugene Illovsky & Jacqueline Bos, Increased DOJ Intervention to Stay Discovery in Civil Antitrust Litigation, 8 ABA Antitrust Litigator, Spring 2009, at 1, 1, 20-22 (collecting cases and describing trend of successful DOJ stays).

[7] SEC v. Chestman [●](#), 861 F.2d 49, 50 (2d Cir. 1988); see also SEC v. Dresser Indus., Inc. [●](#), 628 F.2d 1368, 1375-76 (D.C. Cir. 1980) (describing the “strongest case[s]” for

deferring a civil proceedings).

[8] Courts make clear that “[a] defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege.” *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995); *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98-99 (2d Cir. 2012). But courts are more inclined to grant a stay on Fifth Amendment grounds when a civil defendant has been indicted in a criminal case. *Estate of Lopez v. Suhr*, No. 15-cv-01846-HSG, 2016 WL 1639547, at \*4-5 (N.D. Cal. Apr. 26, 2016) (collecting cases); *Allstate Ins. Co. v. Howell*, No. CV-09-4660 (RJD)(VVP), 2010 WL 2091660, at \*1-2 (E.D.N.Y. May 25, 2010).

[9] This compromise approach has been used in other cases. For example, the District Court for the Southern District of New York recently extended a limited stay of discovery, preventing depositions and interviews of some employees of certain defendant banks, in one of the cases arising out of benchmark rate manipulation. See Mem. Endorsement, *Nypl*, No. 1:15-cv-09300 (S.D.N.Y. Sept. 8, 2017), ECF No. 218; Mem. Endorsement, *Nypl v. JP Morgan Chase & Co.*, No. 1:15-cv-09300 (S.D.N.Y. Nov. 6, 2018), ECF No. 355; see also *SEC v. Kanodia*, 153 F. Supp. 3d 478, 484 (D. Mass. 2015) (denying the government’s request for a stay, with the exception of the depositions of certain witnesses).

[10] Rashil Dutta & Farah Master, *Wynn Resorts to pay \$2.6 billion to settle lawsuit with Japan’s Universal*, Reuters (Mar. 8, 2018), <https://www.reuters.com/article/us-wynn-resorts-litigation-universal-ent/wynn-resorts-to-pay-2-6-billion-to-settle-lawsuit-with-japans-universal-idUSKCN1GL0CW>.