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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Erus Builders LLC,  
Plaintiff,  
v.  
Volt Solar Systems Incorporated, et al.,  
Defendants.

No. CV-14-02686-PHX-JZB

**ORDER**

Pending before the Court is Plaintiff’s Motion to Stay Proceedings Pending the Securities and Exchange Commission’s Criminal Investigation. (Doc. 254.) For the reasons below, the Court will deny Plaintiff’s Motion.<sup>1</sup>

**I. Background**

This matter has been pending in this Court since December 15, 2014. (Doc. 1.) The initial February 5, 2016 discovery deadline was first extended to April 5, 2016, subsequently extended to October 28, 2016, and finally extended to February 24, 2017. (Docs. 36, 49, 114, 207.) During his initial deposition, Malcom Adler, at that time a named Defendant in this matter, asserted a blanket refusal to answer questions based on his Fifth Amendment rights in light of an SEC subpoena he received related to his business dealings with the Volt entities and other parties. (Docs. 69, 69-6, 69-8.) Consequently, on December 3, 2015, Plaintiff filed a Motion to Compel Mr. Adler’s

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<sup>1</sup> This matter is suitable for resolution based on the briefing alone. Accordingly, the Court denies Plaintiff’s request for oral argument. *See* Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 deposition. (*Id.*) After briefing, the Court granted Plaintiff’s Motion and required Mr.  
2 Adler to appear for a second properly noticed deposition, during which he may not assert  
3 a blanket claim of privilege to all potential questions posed by Plaintiff, but, instead, may  
4 refuse on Fifth Amendment grounds to answer any “questions which present a ‘real and  
5 appreciable danger of self-incrimination.’” (Doc. 114 at 6.)

6 After disputes arose over scheduling Mr. Adler’s second deposition, and whether  
7 Mr. Adler would respond to any questions posed, the parties had two telephone  
8 conferences with the Court regarding the deposition. (Docs. 117, 137.)

9 Mr. Adler sat for his deposition on July 18 and 19, 2016. (Docs. 168 at 15, 168-3  
10 at 3.) During that time, it appears he asserted the Fifth Amendment privilege in response  
11 to almost every question posed. (Docs. 168, 168-2, 168-3.) On September 19, 2016,  
12 Plaintiff filed a second Motion to Compel Defendant Adler’s deposition, arguing Mr.  
13 Adler’s invocation of his Fifth Amendment rights to every question posed was improper.  
14 (Doc. 167.) However, on December 7, 2016, before the Court held oral argument and  
15 ruled on the Motion to Compel, the parties filed a Stipulation for Entry of Judgment with  
16 regard to Plaintiff’s claims against Mr. Adler based on a settlement reached between the  
17 parties. (Doc. 224.) The parties contacted the Court and indicated that the oral argument  
18 on Plaintiff’s Motion to Compel could be cancelled. The Court issued an Order advising  
19 the parties that it would deny Plaintiff’s Motion to Compel as moot unless it received an  
20 objection within ten days of the date of the Order. (Doc. 225.) Neither party filed an  
21 objection. Therefore, on December 19, 2016, the Court denied the Motion to Compel as  
22 moot. (Doc. 232.) The Court entered judgment against Mr. Adler on February 8, 2017,  
23 and he is no longer a party to this case. (Doc. 248.) Other than a subpoena issued by  
24 Plaintiff to the Volt entities’ former counsel for documents protected from disclosure by  
25 the attorney-client and/or work product privileges, which the Court quashed by granting  
26 Defendant Sharon Altman and Jerome Wenger’s Motion for Protective Order, Plaintiff  
27 has not notified the Court of any other discovery disputes in this case in accordance with  
28 the Court’s Scheduling Order. (Docs. 36, 208, 233.)

1           On March 30, 2017, the day before the dispositive motion deadline, Plaintiff filed  
2 its pending Motion to Stay. (Doc. 254.) Plaintiff requests the Court stay this matter  
3 pending the outcome of the SEC proceedings against Mr. Adler.

4       **II. Legal Standard**

5           “A district court has discretionary power to stay proceedings in its own court.”  
6 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005) (citing *Landis v. North*  
7 *American Co.*, 299 U.S. 248, 254, (1936)). The Constitution does not ordinarily require a  
8 stay of civil proceedings pending the outcome of criminal proceedings. *Federal Sav. &*  
9 *Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989). Thus, it is permissible to  
10 conduct a civil proceeding at the same time as a related criminal proceeding, even if that  
11 necessitates the invocation of the Fifth Amendment privilege. *Baxter v. Palmigiano*, 425  
12 U.S. 308, 318 (1976).

13           In deciding whether to stay civil proceedings pending parallel criminal  
14 proceedings, a district court must consider ““the particular circumstances and competing  
15 interests involved in the case.”” *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324  
16 (9th Cir. 1995) (quoting *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902  
17 (9th Cir. 1989)). Courts should consider the following six factors: (1) “the extent to  
18 which the defendant’s fifth amendment rights are implicated;” (2) “the interest of the  
19 plaintiff[] in proceeding expeditiously with this litigation or any particular aspect of it,  
20 and the potential prejudice to plaintiff[] of a delay;” (3) “the burden which any particular  
21 aspect of the proceedings may impose on defendants;” (4) “the convenience of the court  
22 in the management of its cases, and the efficient use of judicial resources;” (5) “the  
23 interests of persons not parties to the civil litigation;” and (6) “the interest of the public in  
24 the pending civil and criminal litigation.” *Keating*, 45 F.3d at 325 (citing *Molinaro*, 889  
25 F.2d at 903).

26           “The strongest case for deferring civil proceedings until after completion of  
27 criminal proceedings is where a party under indictment for a serious offense is required to  
28 defend a civil or administrative action involving the same matter.” *Sec. & Exch. Comm’n*

1 *v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980). “The case for staying  
2 civil proceedings is ‘a far weaker one’ when ‘[n]o indictment has been returned[, and] no  
3 Fifth Amendment privilege is threatened.’” *Molinaro*, 889 F.2d at 903 (quoting *Dresser*  
4 *Indus.*, 628 F.2d at 1376). *See also S.E.C. v. Global Express Capital Real Estate Inv.*  
5 *Fund, I, LLC*, 289 F. App’x 183, 191 (9th Cir. 2008) (unpublished) (“The case for staying  
6 civil proceedings is weak when no indictment has been returned.”).

### 7 **III. Analysis**

8 In this case, it is Plaintiff, not any of the Defendants, that requests a stay. Plaintiff  
9 argues that a stay in this case pending the SEC’s investigation is appropriate because (1)  
10 “Plaintiff has attempted on numerous occasions to obtain discovery related to the wiring  
11 of the funds at issue . . . . However, to date, it appears that Mr. Adler is the only person  
12 that has knowledge of the events that occurred with the Volt Entities,” but Mr. Adler has  
13 asserted the Fifth Amendment privilege against self-incrimination, and, therefore, there is  
14 a substantial prejudice to Plaintiff if a stay is not ordered; (2) evidence generally  
15 suggests, contrary to their assertions otherwise, Defendants Altman and Wenger had  
16 control over, or involvement in, Volt’s financial affairs; (3) this case overlaps with the  
17 underlying SEC investigation; (4) Defendants would not be burdened by a stay; and (5) a  
18 stay is in the Court’s and the public’s interests because Defendants “have veiled  
19 themselves from discovery at every step, including but not limited to administratively  
20 dissolving the entities of which they were members and/or executives and failing to  
21 provide any documents related to this matter.” (Doc. 254.)

22 Defendants Altman and Wenger do not oppose a stay with regard to Wenger, but  
23 assert that a stay of the case with regard to Altman is not appropriate.<sup>2</sup> (Doc. 262.) More  
24 specifically, Defendants argue that while there is an issue of fact for trial as to Defendant  
25 Wenger’s liability, no issues remain as to Defendant Altman and she is entitled to  
26 summary judgment as a matter of law.

27 In Reply, Plaintiff attaches additional discovery obtained, including emails and  
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<sup>2</sup> Defendant Moore did not file a response to Plaintiff’s Motion to Stay.

1 copies of checks, which Plaintiff asserts show that some of the money paid to Volt by  
2 Plaintiff was disbursed to Defendants Altman and an entity owned by Defendant Wenger,  
3 and contrary to their testimony otherwise, those Defendants had control over, or  
4 involvement in, the Volt entities' financial transactions. (Doc. 263.)

5 In balancing the relevant factors and considerations, the Court finds a stay is not  
6 appropriate in this case and will deny Plaintiff's Motion. As an initial matter, while there  
7 appears to be no dispute that there is some overlap between the topics in the SEC  
8 subpoena and some of the issues in this case, and although Mr. Adler's counsel avers that  
9 Mr. Adler would invoke his Fifth Amendment rights in response to any deposition  
10 question or question at trial, the Court never addressed the extent to which Mr. Adler's  
11 Fifth Amendment rights are implicated with regard to Plaintiff's claims against the  
12 remaining Defendants because Plaintiff chose to abandon its Motion to Compel and has  
13 not otherwise pursued obtaining deposition testimony from Mr. Adler. Notably, Plaintiff  
14 previously took the position that Mr. Adler's invocation to every question posed during  
15 his deposition was not legally supported. (Docs. 69, 167.) Therefore, it is unclear to  
16 what extent Mr. Adler's Fifth Amendment rights are implicated in this case. *United*  
17 *States v. Pierce*, 561 F.2d 735, 741 (9th Cir. 1977) ("Only after an invocation of the  
18 privilege with respect to a specific question can a reviewing court determine whether a  
19 responsive answer might lead to injurious disclosures.").

20 However, even assuming that Mr. Adler's Fifth Amendment rights are implicated  
21 in this case to some extent, Defendants' and the Court's interests weigh heavily against  
22 granting a stay. As Plaintiff concedes, Mr. Adler has not been indicted as a result of the  
23 ongoing SEC investigation. And, there is no indication if or when Mr. Adler will be  
24 indicted. It is possible the SEC investigation could continue for years, and, if criminal  
25 charges are filed, Mr. Adler's Fifth Amendment rights would be implicated for an even  
26 longer period of time. The present action has been pending for approximately two and  
27 half years, discovery has long since closed, and the dispositive motion deadline has  
28 passed. Therefore, Plaintiff is effectively requesting the Court to, potentially years in the

1 future, reopen discovery and again modify the deadlines in this matter. Such a stay  
2 would disrupt the Court’s calendar by indefinitely postponing trial. *ESG Capital*  
3 *Partners LP v. Stratos*, 22 F. Supp. 3d 1042, 1046 (C.D. Cal. 2014) (“Courts have  
4 recognized that . . . ‘the court has an interest in clearing its docket.’ *Molinaro*, 889 F.2d  
5 at 903. Staying a civil case until the resolution of a criminal case is inconvenient for the  
6 court, especially where—like in *Stratos*’s situation—there is no date set for the criminal  
7 trial. This factor consequently weighs against *Stratos*.”).

8 Likewise, witnesses’ memories can fade over the course of the delay, and  
9 witnesses might not be available following the termination of the criminal proceedings.  
10 *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 809 (N.D. Cal.  
11 1989). Thus, because Plaintiff requests an indefinite stay of this case that would cause  
12 Defendants prejudice, and hinder the Court’s ability to manage its docket, these factors  
13 weigh heavily against granting Plaintiff’s request for a stay.

14 The Court finds that Plaintiff may suffer some prejudice without a stay of this  
15 case. However, Plaintiff fails to establish that any potential prejudice it faces from being  
16 unable to depose Mr. Adler or call him as a witness at trial outweighs the burdens to  
17 Defendants and this Court of granting an indefinite stay, particularly because Plaintiff  
18 chose to abandon its Motion to Compel against Mr. Adler. While Plaintiff asserts that  
19 Mr. Adler is the only person who can provide information regarding the transfer of  
20 Plaintiff’s funds to the remaining Defendants, Plaintiff fails to address its lack of  
21 diligence in pursuing its Motion to Compel against him to obtain the discovery it believes  
22 it needs to litigate its claims.

23 Further, Plaintiff attaches and cites to evidence obtained from other sources  
24 regarding the transfer of at least some funds from Volt to Defendant Altman and Aztec  
25 Solar Power Renewable Inc. There is no evidence in the record that any of the remaining  
26 individual Defendants have refused to provide discovery based on their Fifth Amendment  
27 rights. Presumably, those Defendants would have knowledge and information regarding  
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1 their own conduct.<sup>3</sup> Plaintiff also cites to Affidavits by other former employee witnesses  
2 of Volt or allegedly related entities who appear to have knowledge potentially relevant to  
3 Plaintiff's claims. (Doc. 256-9.) It is unclear what specific attempts were made by  
4 Plaintiff to locate witnesses and obtain relevant information from the Defendants and  
5 non-party witnesses other than Mr. Adler. Although the Court recognizes that Mr. Adler  
6 very likely has knowledge relevant to this case, Plaintiff fails to demonstrate that it could  
7 only have obtained discovery regarding the transfer of its funds to the other Defendants  
8 through testimony by Mr. Adler.

9 Likewise, although Plaintiff references in its Motion to Stay an inability to obtain  
10 discovery through subpoenas to the financial institutions used by the Volt entities and to  
11 "agents of service for the Volt Entities," Plaintiff never raised those issues with the Court  
12 prior to the deadline for doing so.<sup>4</sup> Plaintiff fails to explain its lack of diligence in  
13 obtaining discovery from parties and third parties in this matter.<sup>5</sup>

14 Further, it is unclear whether Mr. Adler would provide testimony to support  
15 Plaintiff's specific claims against the other Defendants once the SEC investigation and  
16 any resulting criminal proceedings conclude. Plaintiff has provided the Court with some  
17 evidence that Defendants Wenger and Altman were involved with and received money  
18 from the Volt entities. However, the only evidence it cites to indicate how Mr. Adler  
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20 <sup>3</sup> Plaintiff submitted with its briefing checks paid to Altman from Volt, other  
21 checks signed by Altman, and brief excerpts from Altman's deposition. (Docs. 256-5,  
22 256-6, 264-1, 264-2.) However, Plaintiff does not address whether it questioned Altman  
regarding the checks during her deposition and, if so, the substance of her responses. Nor  
does Plaintiff assert it was prohibited from doing so.

23 <sup>4</sup> To the extent Plaintiff is referring to its subpoena for documents to Defendants  
24 Altman and Wenger's former counsel, for the reasons provided by the Court on the  
25 record, Plaintiff requested documents covered by the attorney-client and/or work-product  
privileges that are protected from discovery, regardless of Mr. Adler's Fifth Amendment  
rights. (Docs. 208, 233, 234.)

26 <sup>5</sup> Plaintiff asserts, without explanation, in its counsel's Declaration attached to its  
27 Reply that "[w]e have requested additional documents from Wells Fargo, however at this  
28 time we cannot ascertain how many bank accounts the entities and their 'affiliates' had."  
(Doc. 264 at 2.) However, discovery has long since closed and, as stated above, Plaintiff  
failed to raise any discovery disputes with regard to subpoenas or other discovery  
requested with the Court prior to the deadline for doing so.

1 may testify during a deposition or at trial is Mr. Adler's statements in a January 14, 2014  
2 Form 10-k regarding Defendant Altman's ownership of First Power and Light, Inc. and  
3 her general control over that corporation's decisions and transactions. Mr. Adler's  
4 statements do not, however, address the specific transactions at issue in this case.  
5 Therefore, the Court finds Plaintiff's interests weigh only slightly in favor of granting a  
6 stay.

7 With regard to interests of other non-parties, the Court finds this factor is neutral.  
8 None of the parties have identified any third-party interests that bear upon resolution of  
9 Plaintiff's Motion.

10 Finally, Plaintiff asserts that a stay of this matter is in the public's interest because  
11 Defendants have "used the corporate veil to shield their personal activities, while stating  
12 on repeated occasions that there are no documents or communications in their custody  
13 with regard to a \$625,000 wire." (Doc. 254 at 15) (emphasis in original). However, as  
14 stated above, Plaintiff does not detail what specific discovery it sought directly from the  
15 Defendants (other than deposition testimony from Mr. Adler) or other witnesses that was  
16 improperly withheld. Nor did Plaintiff diligently and timely raise any such issues with  
17 the Court. Further, the public has an interest in the expeditious litigation of this matter.  
18 Therefore, at best, the Court also finds this factor to be neutral.

19 Plaintiff requests this Court stay this matter, for an indefinite amount of time, on  
20 the hope that Mr. Adler, at some point in the future after the SEC investigation and any  
21 resulting criminal proceedings conclude, will provide testimony in support of Plaintiff's  
22 claims against the remaining Defendants. After analysis of the relevant factors and  
23 interests at issue in this case, the Court finds that a stay of this case pending the SEC's

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1 investigation is not appropriate and the Court will deny Plaintiff's Motion.

2 Accordingly,

3 **IT IS ORDERED** that Plaintiff's Motion to Stay Proceedings (Doc. 254) is  
4 denied.

5 Dated this 27th day of April, 2017.

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Honorable John Z. Boyle  
United States Magistrate Judge