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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

IN RE:

SK FOODS, L.P.

Debtor.

BRADLEY SHARP,

Plaintiff,

v.

SSC FARMS 1, LLC, et al.,

Defendants.

CIV. NO. S-10-1492 LKK

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IN RE:

SK FOODS, L.P.

Debtor.

CIV. NO. S-10-1493 LKK

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IN RE:

SK FOODS, L.P.

Debtor.

BRADLEY SHARP,

Plaintiff,

v.

CSSS, L.P., et al.,

Defendants.

CIV. NO. S-10-1496 LKK

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1 IN RE:

2 SK FOODS, L.P.

3 Debtor.

4 BRADLEY SHARP,

CIV. NO. S-10-1497 LKK

5 Plaintiff,

6 v.

7 FRED SALYER IRREVOCABLE  
8 TRUST, et al.,

9 Defendants.

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10 IN RE:

11 SK FOODS, L.P.

12 Debtor.

13 BRADLEY SHARP,

CIV. NO. S-10-1498 LKK

14 Plaintiff,

15 v.

16 SKF AVIATION, LLC., et al.,

17 Defendants.

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18 IN RE:

19 SK FOODS, L.P.

20 Debtor.

21 BRADLEY SHARP,

CIV. NO. S-10-1499 LKK

22 Plaintiff,

23 v.

24 SCOTT SALYER, et al.,

25 Defendants.

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1 IN RE:

2 SK FOODS, L.P.

3 Debtor.

4 BRADLEY SHARP,

CIV. NO. S-10-1500 LKK

5 Plaintiff,

6 v.

O R D E R

7 SCOTT SALYER, et al.,

8 Defendants.

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10 Before the court are several appeals of an order of the  
11 Bankruptcy Court denying Appellants' motion for a stay of  
12 proceedings pending resolution of a related criminal matter also  
13 before this court, U.S.A. v. Salyer, No. 2:10-cr-00061-LKK. The  
14 Appellee moves to dismiss the appeal on jurisdictional grounds and  
15 opposes the appeal on the merits. For the reasons described below,  
16 the order of the Bankruptcy Court is reversed.

17

#### I. BACKGROUND

18

##### A. The Criminal Proceeding

19

20 On January 5, 2010, the government filed a sealed complaint  
21 against Frederick Scott Salyer ("Salyer"). An arrest warrant was  
22 issued by a magistrate judge later that day. On February 4,  
23 2010, Federal Bureau of Investigations ("FBI") officers arrested  
24 Salyer. On February 18, 2010, the U.S.A. filed an indictment.

24

25 On April 29, 2010, the government filed a superseding  
26 indictment. It brings twelve counts and two forfeiture  
allegations against Salyer. These include two counts under 18

1 U.S.C § 1962(c) for conducting and conspiring to conduct the  
2 affairs of an enterprise though a pattern on racketeering  
3 activity, three counts under 18 U.S.C. § 1343 for wire fraud,  
4 one count under 18 U.S.C. § 1519 for destruction, alteration, or  
5 falsification of records in a federal investigation, and five  
6 counts under 15 U.S.C. § 1 for conspiracy in restraint of  
7 trade.<sup>1</sup>

8 With respect to the first count of racketeering, the  
9 government alleges that Salyer was the primary leader of SK  
10 Foods. Superceding Indictment 3. It claims that Salyer was part  
11 of an enterprise that, *inter alia*, "increas[ed] SK Foods'  
12 profits by fraudulently inducing certain of SK Foods' customers  
13 to pay for adulterated and misbranded processed tomato products  
14 by causing the falsification of . . . grading factors and data  
15 contained on the quality control documents that accompanied  
16 customer-bound shipments of processed tomato products that were  
17 produced, purchased, and sold by SK Foods . . . ." Id. at 10.  
18 The U.S.A. alleges that Salyer engaged in these activities from,  
19 approximately, January 1998 through April 2008. Id. at 13. The  
20 government further alleges numerous acts that it claims  
21 constitute a pattern of racketeering activity. These include  
22 several claims of wire and mail fraud relating to the sale of  
23 tomato products to various entities, including creditors in the

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24  
25 <sup>1</sup> As is almost self evident the court has found the case  
26 complex within the meaning of the Speedy Trial Act, which results  
in the case not subject to the time strictures of the act.

1 instant bankruptcy proceedings, and claims of bribery.

2 In the second count of racketeering, the government claims  
3 that Salyer conspired with persons employed by and associated  
4 with SK Foods to conduct the acts described above during the  
5 same time period. Id. at 39-40.

6 The three counts of wire fraud include communications to  
7 purchasers of SK Foods' tomato product. Id. at 40-49. Each  
8 concerns allegations of bribery of certain employees of the  
9 purchasing companies. These companies include creditors in the  
10 instant bankruptcy proceedings.

11 With respect to the count of destruction, alteration, or  
12 falsification of records in a federal investigation, the  
13 government alleges that Salyer altered and falsified, or caused  
14 others to alter and falsify, the minutes of a December 14, 2007  
15 Board of Directors meeting for the SK Foods Entities. Id. at 51.  
16 It claims that he caused the removal of references to Randy  
17 Rahal as a Director and Officer of SK Foods several months after  
18 Rahal pled guilty to a three count information in this court.  
19 Id. at 50. The factual basis for Rahal's plea indicated that he  
20 served on the SK Foods Board of Directors from 2004 to 2008 and  
21 routinely paid bribes on behalf of SK Foods. Id. at 50-51.

22 The five counts of price fixing concern alleged  
23 conspiratorial activity to fix the price of SK Foods tomato  
24 products for several companies, including creditors in the  
25 instant bankruptcy proceedings. Id. at 52-61.

26 The two forfeiture allegations seek recovery of all real

1 and personal property that constitute or is derived from the  
2 proceeds traceable to the racketeering and wire fraud counts,  
3 which would apparently include property and proceeds otherwise  
4 subject to the bankruptcy proceeding.

5 **B. The Bankruptcy Proceedings**

6 On appeal is an order of the Bankruptcy Court denying  
7 Appellants' motion to stay proceedings in seven adversarial  
8 actions. These include (1) an action to substantively  
9 consolidate various non-debtor SK Foods entities with the SK  
10 Foods estate, No. 10-02014; (2) an action to avoid a fraudulent  
11 transfer of a drum line to CSSS, an Appellant entity, pursuant  
12 to a written contract, No. 09-02543; (3) an action seeking title  
13 to three parcels of real property on the grounds that SK Foods  
14 provided funds for the purchase of the property and was not  
15 repaid, No. 09-02692; (4) a claim of breach of fiduciary duty  
16 against Salyer premised on the allegations in the previous three  
17 actions, No. 10-02015; (5) an action to avoid allegedly  
18 preferential and fraudulent transfers, No. 10-02016; (6) an  
19 action to recover money that was allegedly loaned by SK Foods to  
20 Salyer to pay for a life insurance policy, No 10-02017; and (7)  
21 an action for substantive consolidation of the SK Foods and the  
22 RHM Estates, No. 09-29162. The RHM Estates are not parties to  
23 this appeal.

24 **C. Procedural Posture**

25 On April 28, 2010, Salyer, the Scott Salyer Revocable  
26 Trust, SK PM Corp., SKF Canning, LLC, Blackstone Ranch

1 Corporation, Monterey Peninsula Farms, LLC, Salyer Management  
2 Company, LLC, SK Farms Services, LLC, SK Frozen Foods, LLC, SS  
3 Farms, LLC, SSC Farms I, LLC, SSC Farms II, LLC, SSC Farms III,  
4 LLC, SKF Aviation, LLC, CSSS, LP, Fred Salyer Irrevocable Trust,  
5 and Gerard Rose as Trustee of Fred Salyer Irrevocable Trust  
6 ("Appellants") filed a motion to stay the seven adversary  
7 proceedings discussed above pending resolution of the criminal  
8 proceedings against Salyer. They argued that a stay should be  
9 issued, *inter alia*, to protect Salyer's Fifth Amendment rights  
10 and the due process rights of the other Appellants who, they  
11 contend, require Salyer's testimony to mount a defense to the  
12 adversary proceedings. On May 4, 2010, Appellants filed in the  
13 bankruptcy proceedings a request for judicial notice of the  
14 Superceding Indictment of Salyer, which was filed on April 29,  
15 2010. They did not attempt to amend or revise their motion in  
16 light of the Superceding Indictment.

17 On May 12, 2010, the Official Committee of Unsecured  
18 Creditors filed an opposition to Appellants' motion to stay.<sup>2</sup>  
19 Also on May 12, 2010, Bradley Sharp, the Bankruptcy Trustee  
20 ("Appellee" or "Trustee") filed a response to the motion to  
21 stay. The Trustee argued, *inter alia*, that the indictment and  
22 the adversary proceedings are not based on the same matter or  
23 same or closely related facts, that prosecution of the adversary  
24 proceedings will not impair Salyer's Fifth Amendment rights, and  
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26 <sup>2</sup> Only the Trustee has opposed the instant appeal.

1 that a stay is otherwise not appropriate.

2 On June 1, 2010, the Bankruptcy Court denied Appellants'  
3 motion for a stay. It decided, *inter alia*, that, with one minor  
4 exception, the factual allegations in the adversary proceedings  
5 bear no significant relationship to the allegations in the  
6 indictment. The court continued to balance the so-called Keating  
7 factors, from which it determined that a stay of proceedings was  
8 not proper. See infra Section III.B.1 (discussion of Keating  
9 factors). This order was issued in all of the seven adversarial  
10 proceedings discussed above.

11 On June 16, 2010, Appellants filed notices of appeal of  
12 this order in each of the seven proceedings. On June 17, 2010,  
13 Salyer filed in the criminal action an Emergency Application to  
14 Enjoin and Stay Discovery of the bankruptcy proceedings. On June  
15 18, 2010, the court temporarily stayed discovery in the  
16 bankruptcy proceedings in light of the June 17, 2010 motion. On  
17 August 3, 2010, the court held a hearing on the emergency  
18 application. As a result of the hearing, the court continued the  
19 stay until resolution of the instant appeals.

20 On August 4, 2010, Appellants filed an opening brief. They  
21 argue that, *inter alia*, the criminal indictment and the  
22 adversary proceedings overlap, that the denial of the stay  
23 offends the due process rights of the non-debtor entities, and  
24 that the Bankruptcy Court did not properly apply the Keating  
25 factors. On August 19, 2010, the Trustee filed a brief in  
26 opposition. He contended that the Appellants failed to show that

1 the Bankruptcy Court abused its discretion in denying the stay  
2 of proceedings. Appellants filed a reply on August 3, 2010.

3 The Trustee also filed two motions relating to the appeals.  
4 First, on August 16, 2010, the Trustee filed a motion to dismiss  
5 the appeals on the grounds that the court lacks jurisdiction to  
6 hear them. Second, the Trustee filed a motion to strike a  
7 declaration filed in support of Appellants' brief on the ground  
8 that the evidence was not presented to the Bankruptcy Court. The  
9 court heard oral argument on the appeals and motions on October  
10 12, 2010.

## 11 **II. STANDARD**

12 The standard of review of bankruptcy court decisions by  
13 district courts is well-established, and uncontested in the  
14 instant action. See Appellants' Opening Brief re: Stay at 4;  
15 Appellants' Opening Brief re: Preliminary Injunction at 2;  
16 Appellee's Opening Brief re: Stay at 2-3. When reviewing  
17 decisions of a bankruptcy court, district courts apply standards  
18 of review applicable to the courts of appeals when reviewing  
19 district court decisions. In re Baroff, 105 F.3d 439, 441 (9th  
20 Cir. 1997); see also In re Fields, No. CIV. S-09-2930 FCD, 2010  
21 WL 3341813, \*2 (E.D. Cal. 2010) ("A district court's standard of  
22 review over a bankruptcy court's decision is identical to the  
23 standard used by circuit courts reviewing district court  
24 decisions.") (citation omitted).

25 The bankruptcy court's conclusions of law are reviewed *de*  
26 *novo*. In re Sunnymead Shopping Center Co., 178 B.R. 809, 814

1 (9th Cir. 1995) (citing In re Pecan Groves of Arizona, 951 F.2d  
2 242, 244 (9th Cir. 1991)). District courts review the bankruptcy  
3 court's findings of fact for clear error. In re Sunnymead  
4 Shopping Center Co., 178 B.R. at 814 (citing In re Siriani, 967  
5 F.2d 302, 303-04 (9th Cir. 1992)); see also Fed. R. Bank. P.  
6 8013 ("Findings of fact, whether based on oral or documentary  
7 evidence, shall not be set aside unless clearly erroneous . . .  
8 .")

9 District courts review a "bankruptcy court's choice of  
10 remedies . . . for an abuse of discretion, since it has broad  
11 equitable remedial powers." In re Sunnymead Shopping Center Co.,  
12 178 B.R. at 814 (citing In re Goldberg, 168 B.R. 382, 284 (9th  
13 Cir. 1994) (other citations omitted.). The Ninth Circuit has  
14 held that, "Under this standard, 'a reviewing court cannot  
15 reverse unless it has a definite and firm conviction that the  
16 court below committed a clear error of judgment in the  
17 conclusion it reached upon a weighing of the relevant factors."  
18 In re Sunnymead Shopping Center Co., 178 B.R. at 814 (quoting In  
19 re Goldberg, 168 B.R. at 384). With respect to review of a  
20 denial of a motion to stay, district courts review a bankruptcy  
21 court's "ruling on a party's request to stay proceedings for an  
22 abuse of discretion." Fed. Sav. & Loan Ins. Corp. v. Molinaro,  
23 889 F.2d 899, 902 (9th Cir. 1989) (citing Mediterranean  
24 Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1465 (9th

25 ////

26 ////

1 Cir. 1983)).<sup>3</sup>

2 **III. ANALYSIS**

3 **A. Motion to Dismiss**

4 The Trustee moves to dismiss the instant appeal on the  
5 grounds that this court lacks jurisdiction to hear it.<sup>4</sup>

6 Specifically, the Trustee contends that the order denying the  
7 stay is not a final order and is not appropriate for  
8 interlocutory review. Appellants argue that this court has  
9 jurisdiction because this order is final under the irreparable  
10 injury doctrine and the pragmatic approach to assessing finality  
11 in bankruptcy proceedings. They further argue that the appeal is  
12 properly subject to interlocutory review.

13 Under 28 U.S.C. § 158(a), "district courts . . . have  
14 jurisdiction to hear appeals . . . with leave of the court, from  
15 interlocutory orders and decrees, of bankruptcy judges entered  
16 in cases and proceedings referred to the bankruptcy judges under

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18  
19 <sup>3</sup> It appears to this court quite odd that district courts  
20 review decisions of bankruptcy courts in this manner given that  
21 bankruptcy courts are a subsidiary division of district courts. It  
22 may be that the restricted standards of review are merely a way of  
23 protecting both courts from unnecessary repetition of frivolous  
24 contentions, and that in more serious matters district courts  
25 should not apply such a deferential review. Nonetheless, this court  
26 does not consider whether district courts may depart from this  
standard of review in unusual circumstances because all parties  
agree as to the applicable standard and there appears to be no  
support for that position, in any event.

<sup>4</sup> The Trustee has also moved to strike a declaration filed in  
support of the appeal. The court will consider this motion along  
with its discussion of the merits of the appeal itself.

1 section 157 of this title.”<sup>5</sup> Section 157 allows district courts  
2 to refer any or all cases under title 11 to a bankruptcy court.  
3 The district court here so referred the instant matters on  
4 appeal to the bankruptcy court. Accordingly, district courts  
5 have “discretionary appellate jurisdiction over . . .  
6 interlocutory order[s] of a bankruptcy court.” In re Kasso  
7 ver, 343 F.3d 91, 94 (2d Cir. 2003); see Matter of Texas Extrusion  
8 Corp., 844 F.2d 1142, 1156 (5th Cir. 1988) (same); In re  
9 Laurent, 149 Fed. Appx. 833, 835 (11th Cir. 2005); see also  
10 Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 441 n.1  
11 (9th Cir. 1983) (interpreting similar language that was part of  
12 28 U.S.C. § 1334(b) prior to 1984 modification).

13 This type of appellate jurisdiction differs significantly  
14 from the jurisdiction granted to Courts of Appeal to hear  
15 appeals of interlocutory orders. See In re Kasso  
16 ver, 343 F.3d at  
17 94; Fondiller, 707 F.2d at 441 n.1. Specifically, the district  
18 court maintains original jurisdiction over bankruptcy  
19 proceedings, and merely refers such proceedings to bankruptcy  
20 courts. In re Combustion Engineering, Inc., 391 F.3d 190, 225  
21 (3d Cir. 2004) (citing 28 U.S.C. §§ 151, 157(a)); 28 U.S.C. §  
22 1334(b) (“[T]he district courts shall have original but not

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23 <sup>5</sup> The court notes that Appellants did not file a motion for  
24 leave to appeal the denial of their motion for a stay of  
25 proceedings. Under Fed. R. Bank. 8003(c), “If a required motion for  
26 leave to appeal is not filed, but a notice of appeal is timely  
filed, the district court . . . may consider the notice of appeal  
as a motion for leave to appeal.” The court so considers the notice  
of appeal in this case.

1 exclusive jurisdiction of all civil proceedings arising under  
2 title 11, or arising in or related to cases under title 11.”);  
3 28 U.S.C. § 157 (“Each district court may provide that any or  
4 all cases under title 11 and any or all proceedings arising  
5 under title 11 or arising in or related to a case under title 11  
6 shall be referred to the bankruptcy judges for the district.”).  
7 Thus, a district court may decide to hear an interlocutory  
8 appeal of any order of a bankruptcy court subject only to review  
9 by the Court of Appeals for abuse of discretion.

10 In light of this broad authority to hear interlocutory  
11 appeals, the court does not decide whether the order at issue is  
12 final nor does it determine whether it falls within any of the  
13 exceptions briefed by the parties. Rather, the court grants  
14 Appellants leave to appeal the Bankruptcy Court’s order on the  
15 grounds that determining whether to stay the proceedings will  
16 significantly effect the nature of the bankruptcy proceedings  
17 and, conceivably, the criminal proceedings pending in this  
18 court. Thus, the Trustee’s motion to dismiss is denied.

19 **B. Merits of the Appeal**

20 **1. Standard to Stay Proceedings**

21 Stays of civil proceedings pending the outcome of criminal  
22 proceedings are not ordinarily required by the Constitution.  
23 Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th  
24 Cir. 1995) (citations omitted). The Ninth Circuit has held that,  
25 “[I]n the absence of substantial prejudice to the rights of the  
26 parties involved, [simultaneous] parallel [civil and criminal]

1 proceedings are unobjectionable under our jurisprudence." Id.  
2 (quoting S.E.C. v. Dresser Indust., Inc., 628 F.2d 1368, 1374  
3 (D.C. Cir. 1980)). A court may, however, decide in its  
4 discretion to stay civil proceedings "when the interests of  
5 justice seem [] to require such action." Id. (internal citations  
6 omitted).

7       When deciding whether to stay civil proceedings, courts  
8 should consider "the particular circumstances and competing  
9 interests involved in the case[s]." Id. (quoting Federal Sav. &  
10 Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989)).  
11 The Circuit has instructed the court to consider "the extent to  
12 which the defendant's fifth amendment rights are implicated."  
13 Id. (internal quotation omitted).

14       Additionally, courts "should generally consider the  
15 following factors:

- 16       (1) the interest of the plaintiffs in proceeding  
17       expeditiously with this litigation or any particular  
18       aspect of it, and the potential prejudice to  
19       plaintiffs of a delay;
- 20       (2) the burden which any particular aspect of the  
21       proceedings may impose on defendants;
- 22       (3) the convenience of the court in the management of its  
23       cases, and the efficient use of judicial resources;
- 24       (4) the interests of persons not parties to the civil  
25       litigation; and

26       ////

1 (5) the interest of the public in the pending civil and  
2 criminal litigation.”

3 Id. at 324-25 (citing Molinaro, 889 F.2d at 903).

4 The Ninth Circuit has cautioned, however, that, “A  
5 defendant has no absolute right not to be forced to choose  
6 between testifying in a civil matter and asserting his Fifth  
7 Amendment privilege. Not only is it permissible to conduct a  
8 civil proceeding at the same time as a related criminal  
9 proceeding, even if that necessitates invocation of the Fifth  
10 Amendment privilege, but it is even permissible for the trier of  
11 fact to draw adverse inferences from the invocation of the Fifth  
12 Amendment in a civil proceeding.” Id. at 326. Despite the  
13 generosity of the standard, it is nonetheless true that  
14 permitting simultaneous proceedings may seriously undermine the  
15 ability of a person presumed innocent to defend himself and may  
16 provide the prosecution with an undue advantage because it will  
17 have access to the evidence tendered in the bankruptcy  
18 proceedings.

## 19 **2. Factual Findings**

20 While this court reviews the Bankruptcy Court’s decision to  
21 deny the stay on an abuse of discretion standard, it may  
22 nonetheless review the factual findings of the Bankruptcy Court  
23 for clear error. Consequently, if the court finds any of the  
24 Bankruptcy Court’s findings of fact to be clearly erroneous, it  
25 may reverse those findings and any order premised on the  
26 findings.

1 In its order denying Appellants' motion for a stay, the  
2 Bankruptcy Court made the following findings of fact:

- 3 (1) That the adversary proceedings bear no significant  
4 relationship to the allegations in the superceding  
5 indictment against Salyer. Memorandum Opinion at 3-6.
- 6 (2) That the court does not foresee any testimony Salyer  
7 might give in the adversary proceedings that would  
8 legitimately be subject to Salyer's Fifth Amendment  
9 rights. Memorandum Opinion at 5.
- 10 (3) That the longer the adversary proceedings are delayed,  
11 the less likely it is that the Trustee will be able to  
12 recover the assets he seeks because there is a real  
13 risk that Appellants would dissipate the assets of the  
14 debtor entities. Memorandum Opinion at 8-9.
- 15 (4) That the public's interests in ensuring that aggrieved  
16 persons are made whole as rapidly as possible and in  
17 the prompt resolution of civil cases far outweighs the  
18 public's interest in the integrity of criminal cases  
19 here because the government has not sought to  
20 intervene in these adversary actions.<sup>6</sup> Memorandum  
21 Opinion at 10.

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22  
23 <sup>6</sup> The government has intervened in non-bankruptcy civil  
24 proceedings relating to U.S.A. v. Salyer, and a stay is in place  
25 for those cases. See Morning Star Packing Company v. SK Foods LP,  
26 2:09-cv-00208-MCE (E.D. Cal.); Four In One Company, Inc. v. SK  
Foods, LP, 2:08-cv-03017-MCE (E.D. Cal.). Stays are also in effect  
for two other non-bankruptcy civil case. See Brewer v. Salyer,  
1:06-cv-01324-AWI-DLB (E.D. Cal.); Morning Star Packing Company v.  
SK Foods, Merced County Superior Court Case No. CU 151242.

1 (5) That the interest of the Trustee and the creditors in  
2 a speedy resolution of the adversary proceedings is of  
3 prime importance in this case. Memorandum Opinion at  
4 6.

5 (6) That the joint plan of liquidation proposed by the  
6 secured creditors and the unsecured creditors are  
7 often fragile and, thus, any delays in the adversary  
8 proceedings would "almost certainly be to the  
9 detriment of creditors." Memorandum Opinion at 9-10.

10 The court finds that the fifth and sixth findings of fact  
11 are not clearly erroneous. However, the court determines that  
12 the first four findings are clearly erroneous in whole or in  
13 part.

14 **i. Relationship Between Adversary Proceedings**  
15 **and Criminal Indictment, Implication of**  
16 **Fifth Amendment**

17 The Bankruptcy Court correctly noted that, "the strongest  
18 case for deferring civil proceedings until after completion of  
19 criminal proceedings is where a party under indictment for a  
20 serious offense is required to defend a civil or administrative  
21 action involving the same matter." Dresser Indust., Inc., 628  
22 F.2d at 1375-76. Specifically, "[t]he noncriminal proceeding, if  
23 not deferred, might undermine the party's Fifth Amendment  
24 privilege against self-incrimination, expand rights of criminal  
25 discovery beyond the limits of Federal Rule of Criminal  
26 Procedure 16(b), expose the basis of the defense to the  
prosecution in advance of criminal trial, or otherwise prejudice

1 the case." Id. at 1376. In Dresser, the Court of Appeals  
2 reasoned that, "[t]he case at bar is a far weaker one for  
3 staying the administrative investigation [because no indictment  
4 has been filed and, thus,] no Fifth Amendment privilege  
5 threatened." The Ninth Circuit adopted this reasoning in  
6 Molinaro, where it held that the district court did not abuse  
7 its discretion by deciding that the burden on the defendant's  
8 Fifth Amendment privilege was negligible because no related  
9 criminal indictments were pending against him at the time of its  
10 ruling. 889 F.2d at 903.

11       Ultimately, when considering a motion to stay proceedings,  
12 courts must determine "the extent to which the defendant's fifth  
13 amendment rights are implicated." Id. at 902. Here, the  
14 Bankruptcy Court conducted a technical comparison of the  
15 specific allegations in the criminal indictment and the  
16 adversary proceedings. Accordingly, it "conclude[d] that, with  
17 one minor exception, the factual allegations in the adversary  
18 proceedings bear no significant relationship to the allegations  
19 in the indictment." Memorandum Opinion at 3. The Bankruptcy  
20 Court continued to reject Appellants' contention that the  
21 reference to an enterprise in some of the adversary complaints  
22 is the same enterprise alleged in the criminal proceeding. It  
23 found that the enterprise alleged in the indictment was premised  
24 upon allegations of "mail fraud, wire fraud, and bribery with  
25 respect to the prices charged and quality of product sold to its  
26 customers, whereas the adversary complaints allege inter-company

1 transfers among the Salyer entities themselves, commingling of  
2 assets, common ownership, management, and control, intermingling  
3 of business operations and activities, and so on.” Id. at 4.

4 While the Bankruptcy Court may be correct that specific  
5 allegations of the criminal indictment are, for the most part,  
6 distinct from the specific allegations of the adversary  
7 proceedings, its conclusion that these distinctions demonstrate  
8 that Salyer’s Fifth Amendment rights are not implicated is  
9 clearly erroneous. As an initial matter, the assets sought in  
10 the criminal forfeiture proceedings overlap to a significant  
11 degree with the assets sought in the adversary proceedings.  
12 Moreover, Salyer’s Fifth Amendment rights are implicated any  
13 time that he testifies or responds to discovery requests that  
14 are admissible to prove that he engaged in the conduct alleged  
15 in the indictment. This conduct can exceed the specific  
16 allegations of the indictment. Specifically, under Fed. R. Evid.  
17 404(b), evidence of crimes, wrongs, and acts not alleged in the  
18 indictment, may be used to prove “motive, opportunity, intent,  
19 preparation, plan, knowledge, identity, or absence of mistake or  
20 accident.” Under this rule, for example, evidence that Salyer  
21 fraudulently transferred assets might be used to prove that  
22 Salyer intended to commit the fraudulent acts alleged in the  
23 indictment, or had a plan to conceal fraudulently obtained  
24 assets. Indeed the asserted concealment of assets was a  
25 predominant governmental theme relative to bail.

26 Put directly, even though the specific allegations of the

1 indictment and the adversary proceedings may differ, the  
2 bankruptcy litigation seriously implicates Salyer's Fifth  
3 Amendment rights. He has been criminally accused of engaging in  
4 an enterprise through which he allegedly obtained assets, which  
5 the Trustee is now seeking to recover and to prevent fraudulent  
6 transfer of them. Accordingly, the Bankruptcy Court's finding  
7 that the proceedings do not overlap and that Salyer's Fifth  
8 Amendment rights are not implicated in the adversary proceedings  
9 is clearly erroneous.<sup>7</sup>

10 **ii. Risk that Appellants will Dissipate Assets**

11 When considering whether the Trustee and creditors would  
12 suffer prejudice if a stay were to issue, the Bankruptcy Court  
13 reasoned as follows:

14 In the present case, the court has already been  
15 sufficiently persuaded of a . . . risk of dissipation  
16 of assets to issue a preliminary injunction against  
17 the defendants in the adversary proceedings, who are  
18 moving parties in this motion, from transferring  
19 assets previously transferred to them by or through  
20 the debtor. The moving parties now argue that the  
injunction would protect the trustee and creditors  
from any risk of further dissipation of assets during  
the pendency of a stay. The court concludes to the  
contrary - the findings and conclusions upon which the  
injunction is based persuade the court that a real  
risk continues to exist.

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21 <sup>7</sup> The court notes that the Trustee objects to the declaration  
22 of counsel for Appellants filed in support of the appeal on the  
23 grounds that it was not raised before the Bankruptcy Court. The  
24 Trustee is correct that this court should not consider evidence  
25 that was not before the Bankruptcy Court. Appellants agree that the  
26 evidence was not presented to the Bankruptcy Court, but rather was  
provided to this court to provide an overview of matters of which  
the Bankruptcy Court was aware. Because this court has not relied  
on the affidavit in reaching its conclusions, the motion to strike  
is granted.

1 Memorandum Opinion at 9. The Bankruptcy Court does not in any  
2 way address why the entrance of the preliminary injunction will  
3 not protect the Trustee and the creditors. Appellants raised  
4 this serious concern before the Bankruptcy Court. Failure to  
5 provide any explanation as to why the preliminary injunction is  
6 insufficient to protect the Trustee and creditors from  
7 dissipation of assets due to debtor conduct is clear error.<sup>8</sup>

8 **iii. Balance of Public Interests**

9 In applying the Keating test, the Bankruptcy Court was  
10 tasked to evaluate the public interest. It explained that while  
11 it recognizes the public's interest in the integrity of criminal  
12 cases, that interest is relatively low in the instant case  
13 because the government has chosen not to intervene in the  
14 adversary proceedings. The court has been unable to find any  
15 case to support the contention that the weight of the public's  
16 interest in the integrity of criminal proceedings is somehow  
17 influenced by the prosecutor's decision to intervene. See, e.g.,  
18 Taylor, Bean & Whitaker Mortg. Corp. v. Triduanum, 2:09-cv-0954-  
19 FCD-EFB, 2009 U.S. Dist. LEXIS 60849, at \*10 (E.D. Cal. Jul. 15,

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20  
21 <sup>8</sup> The Bankruptcy Court may have been had in mind the Drum Line  
22 issue. But that itself requires testimony that may involve Salyer's  
23 Fifth Amendment rights. While the court may share some of the same  
24 concern about that single incident, it is, at this stage, unclear  
25 as to whether there was a violation of the temporary restraining  
26 order and, thus, relying on it seems misplaced in light of the  
serious adverse consequences. Furthermore, the parties have  
represented that the only remaining assets are real property and  
money. These assets, unlike the Drum Line, cannot be transferred  
without the approval of the Bankruptcy Court and, thereby, then  
present little or no risk that they will be wrongfully transferred  
while the preliminary injunction is in effect.

1 2009) (Court does not mention intervention by government); James  
2 v. Conte, No. C. 04-5312 SI, 2005 U.S. Dist. LEXIS 46962, \*5  
3 (N.D. Cal. Apr. 19, 2005) (same); Javier H. v. Garcia-Botello,  
4 218 F.R.D. 72, 75-76 (W.D.N.Y 2003), (court simultaneously  
5 granted a stay of proceedings and denied a motion to intervene  
6 by the government). Indeed, it seems misplaced to suggest that  
7 the prosecutor's view demonstrates the public interest in light  
8 of the constitutionally protected right of presumed innocence  
9 and the obligation of proof which falls only on the prosecution.  
10 The Bankruptcy Court has not identified any other reasons why  
11 the public interest in the integrity of this criminal case is  
12 relatively low. This conclusion is also in clear error. There is  
13 no factual basis to support the Bankruptcy Court's conclusion  
14 that the public interest in the integrity of the criminal case  
15 is "far outweighed in this case by the public's countervailing  
16 interests in ensuring that aggrieved persons are made whole as  
17 rapidly as possible . . . and by the public's interest in the  
18 prompt resolution of civil cases." Memorandum Opinion at 10  
19 (citations and internal quotations omitted).<sup>9</sup>

### 20 **3. Reversal of Bankruptcy Court's Decision**

21 For the reasons discussed above, the court finds that the  
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23 <sup>9</sup> Appellants also argue that the Bankruptcy Court made an  
24 error of law in its application of the Keating factors.  
25 Specifically, they argue that the court wrongly gave the interests  
26 of the creditors the weight of the interests of plaintiffs. Given  
the court's conclusion that there were factual errors that demand  
reversal, the court need not address the merits of this argument.

1 Bankruptcy Court made several significant erroneous factual  
2 findings in its application of the Keating factors. Based on  
3 these clearly erroneous factual findings, the court determines  
4 that the Bankruptcy Court abused its discretion in denying  
5 Appellants' motion for a stay. The remaining question in this  
6 appeal is, then, what order the court should issue. Remand with  
7 instructions might well be appropriate because this court  
8 reviews for abuse of discretion. However, the court finds that  
9 it should craft an order staying proceedings in part because it  
10 is responsible for the conduct of the criminal trial and is more  
11 familiar with the values informing criminal proceedings.

12 Accordingly, the court orders a stay of all further  
13 bankruptcy proceedings where Appellants make a credible showing  
14 that discovery from or testimony of Scott Salyer or his criminal  
15 counsel is relevant to the proceedings. The court wishes to be  
16 clear, the orders heretofore issued on a preliminary basis are  
17 unaffected by this order.

#### 18 IV. CONCLUSION

19 For the foregoing reasons the court REVERSES the decision  
20 of the Bankruptcy Court denying Appellants motion to stay as  
21 described above.

22 The court FURTHER ORDERS that the Trustee's motion to  
23 dismiss is DENIED and the Trustee's motion to strike is GRANTED.

24 IT IS SO ORDERED.

25 DATED: December 9, 2010.

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