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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID M. LEWIS, D.M.D., et al.,  
Plaintiffs,  
V.  
WILLIAM MICHAEL STEMLER, INC.,  
et al.,  
Defendants.

Civ. No. S-13-0574 KJM EFB

ORDER

Plaintiffs’ motion to stay proceedings pending a criminal investigation against plaintiff David Lewis is currently before the court. The court heard argument on January 17, 2014. Eric Brenneman and Craig Farmer appeared for plaintiffs; John Provost appeared for defendants William Michael Stemler, Inc. dba Delta Health Systems (“Delta”) and Northern California General Teamsters Security Fund (“Fund”) (collectively “defendants”). After considering the parties’ argument, the court GRANTS the motion in part and DENIES it in part.

I. BACKGROUND

In a first amended complaint (“FAC”) filed August 15, 2013, plaintiffs David M. Lewis, D.M.D., individually (“Lewis”) and David M. Lewis, D.M.D., Inc. (“Corporation”; collectively “plaintiffs”) challenge the defendants’ alleged failure to pay for dental services rendered under the Teamsters’ dental plan. Plaintiffs brought nine claims for relief: (1) recovery

1 of ERISA benefits, 29 U.S.C. § 1132(a)(1)(B); (2) breach of implied contract; (3) breach of an  
2 oral contract; (4) quantum meruit; (5) open book account; (6) unjust enrichment; (7) violation of  
3 California Health & Safety Code § 1371; (8) violation of California Health & Safety Code  
4 § 1371.35; and (9) violation of California's Unfair Competition Law (UCL), CAL. BUS. & PROF.  
5 CODE §§ 17200, *et seq.* ECF No. 9.

6 Defendants moved to dismiss plaintiffs' state law claims, arguing they are  
7 preempted by Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). ECF No. 12. The  
8 court granted defendants' motion as to plaintiffs' second, third, fourth, fifth, sixth, seventh and  
9 eighth claims and also granted it as to the ninth claim, insofar as that claim was based on a  
10 violation of California Health & Safety Code §§ 1371 and 1371.5, but denied the motion insofar  
11 as the ninth claim alleged that defendants' actions were unfair. ECF No. 18.

12 On September 27, 2013, the Fund filed a counterclaim against Lewis and David  
13 Lewis D.M.D, Inc., alleging that sometime in 2007 Lewis began performing dental procedures on  
14 Fund members and discovered the benefits under the plan were more generous than most plans.  
15 ECF No. 19 ¶ 7. Thereafter Lewis began to solicit Fund members by offering cash payments for  
16 referrals; he ultimately performed dental services that were not medically necessary on plan  
17 members and misrepresented that dental work had been performed when in fact it had not been.  
18 *Id.* ¶ 9. Between 2007 and 2012, counterdefendants billed the Fund \$2,500,000 for services to  
19 Plan members and beneficiaries, representing the services were medically necessary and  
20 appropriate; the Fund relied on these representations to pay the claims. *Id.* ¶ 10. The Fund  
21 alleges upon information and belief that many of the services were not medically necessary or  
22 were not provided. *Id.* ¶ 11. The counterclaim then describes services the Fund believes were  
23 either not performed or not necessary but for which counterdefendants billed and the Fund paid.  
24 The Fund, as counterclaimant, brings the following claims: (1) a violation of the Racketeering  
25 and Corrupt Organizations Act ("RICO") against Lewis only; (2) a RICO violation against both  
26 counterdefendants; (3) common law fraud against both counterdefendants; (4) a UCL violation  
27 against both counterdefendants. *Id.* ¶¶ 18-31.

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1                   Plaintiffs filed their Second Amended Complaint (“SAC”) on October 10, 2013.  
2 ECF No. 23. They allege the Fund operates a health plan that includes dental benefits for  
3 individual plan members under terms of their contract with the Fund. Complaint, ECF No. 22  
4 ¶ 10. Delta administers the health plan and processes and pays claims submitted by dental  
5 providers who have treated plan members. *Id.* ¶ 12. Lewis, an out-of-network provider under the  
6 Teamsters’ plan, provided dental services to individual plan members, who assigned their  
7 contractual rights under the health plan to plaintiffs. *Id.* ¶¶ 13-14. After treating plan members,  
8 plaintiffs submitted claims for the reasonable and customary rate for services to Delta, but Delta  
9 failed timely to respond to the claims; unreasonably denied the claims; failed to provide proper  
10 information; requested information not required by the claim procedures and promised claims  
11 would be paid if plaintiffs provided this information, but thereafter denied the claims and/or failed  
12 to pay the required contractual benefits under the plan. *Id.* ¶ 16. They allege two claims for  
13 relief: (1) recovery of ERISA benefits, 29 U.S.C. § 1132(a)(1)(B) and (2) violation of  
14 California’s Unfair Competition Law (UCL), CAL. BUS. & PROF. CODE §§ 17200, *et seq.*

15                   On October 24, 2013, defendants filed an answer, raising numerous affirmative  
16 defenses. ECF No. 25.

17                   On November 8, 2013 plaintiffs filed an answer to the counterclaim. ECF No. 27.  
18 In that answer, plaintiff Lewis asserted his right against self-incrimination and so declined to  
19 answer many of the allegations. ECF No. 27.

20                   The parties’ evidence in support of and opposition to the current motion shows the  
21 following: In October 2011, an investigator for California’s Dental Board contacted John  
22 Provost, the Fund’s lawyer, in connection with an investigation of plaintiffs’ possible fraud  
23 against the Fund. Decl. of John Provost, ECF No. 33 ¶ 2. Also in October 2011, Provost  
24 received a letter from Jamidi Daiess, an investigator for the United States Department of Labor  
25 (“DOL”), requesting Fund documents related to Lewis’s provision of dental services to Fund  
26 participants. *Id.* ¶ 3. In November 2011, the Dental Board served a search warrant on Provost,  
27 also seeking records related to Lewis. *Id.*

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1 In February 2012, the Dental Board’s Administrative Law Judge (ALJ) held a  
2 hearing seeking an interim suspension order against Lewis based on an accusation alleging Lewis  
3 had billed the Fund for unnecessary dental work performed on Fund participants or for  
4 procedures he had not performed at all. *Id.* ¶ 4. The ALJ issued an interim suspension order  
5 pending a full evidentiary hearing on revocation of the license. *Id.* The full evidentiary hearing  
6 before the Dental Board, scheduled for August 2012, was cancelled when Lewis surrendered his  
7 license to practice in California. *Id.* ¶ 6.

8 In December 2012, Provost provided Fund records about Lewis and his treatment  
9 of Fund participants to the United States Attorney’s Office (“USAO”) for this district. *Id.* ¶ 7.  
10 Provost received another subpoena from the United States Attorney’s Office in May 2013. *Id.*

11 After this motion was submitted, Lewis was indicted on one count of conspiracy to  
12 commit health care fraud and mail fraud, 18 U.S.C. § 1349; seventeen counts of health care fraud,  
13 18 U.S.C. § 1347; and forfeiture, 18 U.S.C. §§ 981(a)(1)(C) & 982(a)(1), 28 U.S.C. § 2461(c).  
14 *United States v. Lewis*, Cr. S-14-0045 MCE, ECF No. 1. Lewis has been arraigned on the  
15 indictment; a status conference is set for March 27, 2014.

## 16 II. STANDARD

17 A party has no constitutional right to a stay of civil proceedings during the  
18 pendency of a criminal investigation or prosecution nor does the Constitution protect a party from  
19 being forced to choose between the consequences of asserting or waiving his Fifth Amendment  
20 rights in the civil proceedings. *Baxter v. Palmigiano*, 425 U.S. 308, 318-19 (1976); *Fed. Sav. &*  
21 *Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989) (“*Molinaro*”). Even so, after  
22 considering “the particular circumstances and competing interests involved in the case,” a court  
23 has discretion either to stay the entire proceeding or fashion some other, less drastic way to  
24 protect a party’s Fifth Amendment rights. *Keating v. Office of Thrift Supervision*, 45 F.3d 322,  
25 324 (9th Cir. 1995); *see also eBay, Inc. v. Digital Point Solutions, Inc.*, No. C 08-4052 JF (PVT),  
26 2010 WL 702463, at \*5 (N.D. Cal. Feb. 10, 2010) (considering plaintiff’s proposed alternatives to  
27 a stay, but ultimately denying the stay); *In re CFS-Related Secs. Fraud Litig.*, 256 F. Supp. 2d  
28 1227, 1236 (N.D. Okla. 2003) (“A general stay is just one of several procedures available. Other

1 options may be utilized in lieu of imposing a stay. These alternate tools include the imposition of  
2 protective orders, sealed interrogatories, a stay for a finite period of time, or a stay limited to a  
3 specific subject matter.”).

4 In considering whether to stay the proceedings, the court “should consider ‘the  
5 extent to which the defendant’s fifth amendment rights are implicated.’” *Keating*, 45 F.3d at 324  
6 (quoting *Molinaro*, 889 F.2d at 902) (lack of capitalization as in original). In addition, the court  
7 should consider the following factors:

8 (1) the interest of the plaintiffs in proceeding expeditiously with  
9 this litigation or any particular aspect of it, and the potential  
10 prejudice to the plaintiffs of a delay; (2) the burden which any  
11 particular aspect of the proceedings may impose on defendants;  
12 (3) the convenience of the court in the management of its cases, and  
the efficient use of judicial resources; (4) the interests of persons  
not parties to the civil litigation; and (5) the interest of the public in  
the pending civil and criminal litigation.

13 *Id.* at 325.

14 Although most cases consider a defendant’s request to stay civil proceedings, a  
15 plaintiff is not absolutely barred from seeking a stay of an action he filed. Nevertheless, as a  
16 general rule, “[t]he plaintiff who retreats under the cloak of the Fifth Amendment cannot hope to  
17 gain an unequal advantage against the party he has chosen to sue” because “a civil plaintiff has no  
18 absolute right to both his silence and his lawsuit.” *Wehling v. Columbia Broad. Sys.*, 608 F. 2d  
19 1084, 1087, 1088 (5th Cir. 1980) (“*Wehling I*”). If a court concludes a plaintiff’s request to stay  
20 the case he has filed should be granted, the court must be careful not to enter an “expansive stay”  
21 but rather focus only on the discovery that exposes the party to a risk of self-incrimination.  
22 *Wehling v. Columbia Broad. Sys.*, 611 F.2d 1026, 1027 (5th Cir. 1980) (“*Wehling II*”). The  
23 court recognizes that in this case Lewis and the Corporation are not only plaintiffs but are  
24 counterdefendants in the Fund’s counterclaim alleging RICO violations and fraud. Given the  
25 counterclaims, the court declines to resolve the parties’ competing positions on the question  
26 whether plaintiff was forced to file when he did because of the statute of limitations. Moreover,  
27 as *Wehling I* recognizes, even a plaintiff may seek a stay under limited circumstances.

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1 III. ANALYSIS

2 A. Plaintiffs' Fifth Amendment Rights/The Burden From Proceeding

3 "When simultaneous civil and criminal proceedings involve 'the same or closely  
4 related facts,' the Fifth Amendment concerns may be sufficient to warrant a stay." *eBay*, 2010  
5 WL 702463, at \*3 (quoting *Chao v. Fleming*, 498 F. Supp. 2d 1034, 1037 (W.D. Mich. 2007)).

6 There is overlap between the criminal charges and the counterclaim: the *Lewis*  
7 indictment identifies twelve patients on whom Lewis allegedly performed unnecessary dental  
8 work, two of whom are named in the counterclaim in this case. Indictment at 18-23 &  
9 Counterclaim at 13 (patients R.I. and C.M.). In addition, the conspiracy count describes a  
10 scheme to defraud the Plan by billing for services not performed or performed but unnecessary  
11 and excessive, Indictment at 4, and the Counterclaim at 3 ¶ 9.

12 Nevertheless, Lewis is not the only plaintiff/counterdefendant, a fact plaintiffs do  
13 not address until their reply: the motion discusses the Fifth Amendment implications of the  
14 investigation as though Lewis alone was involved. It is well settled, however, that the  
15 Corporation has no Fifth Amendment rights and that Lewis can be compelled to produce  
16 corporate records in his capacity as corporate representative. *Braswell v. United States*, 487 U.S.  
17 99, 104-10 (1988).

18 Also only in the reply do plaintiffs argue that the corporation is dissolved<sup>1</sup> and  
19 that, somehow, Lewis's (former) license and the professional and specialized nature of the  
20 practice means he alone will be able to provide the requested records, rendering this action of  
21 production testimonial. Plaintiffs do not support this argument with citation to any authority.

22 It is true that the act of production may have testimonial aspects. *See, e.g., United*  
23 *States v. Sideman & Bancroft, LLP*, 704 F.3d 1197, 1201 (9th Cir. 2013). However, in *Braswell*,  
24 the Supreme Court said "the custodian's act of production is not deemed a personal act, but rather  
25 an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would  
26 be tantamount to a claim of privilege by the corporation—which of course possesses no such

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28 <sup>1</sup> The court takes notice of the fact that the California Secretary of State's website lists the  
corporation's status as "active."

1 privilege.” *Braswell*, 487 U.S. at 110; *Bellis v. United States*, 417 U.S. 85, 90 (1974) (“[T]he  
2 papers and effects which the privilege protects must be the private property of the person  
3 claiming the privilege, or at least in his possession in a purely personal capacity”) (citation &  
4 internal quotation marks omitted). It does not matter “how small the corporation may be” or if it  
5 has been dissolved: the corporation’s records do not thereby become personal records. *Braswell*,  
6 487 U.S. at 100; *Bellis*, 417 U.S. at 96 n.3 (stating that “the dissolution of a corporation does not  
7 give the custodian of corporate records any greater claim to the Fifth Amendment privilege”)  
8 (citation & internal quotation marks omitted); *United States v. Feng Juan Lu*, 248 F. App’x 806,  
9 808 (9th Cir. 2007) (recognizing that a defendant’s business documents were not personal for  
10 Fifth Amendment purposes “because she clearly intended the businesses to be separate from her  
11 in the event of a lawsuit”); *United States v. Amato*, 450 F.3d 46, 52 (1st Cir. 2006) (a defendant’s  
12 choice to incorporate carries responsibilities of corporate identity, including the production of  
13 subpoenaed records). When asked at hearing, plaintiffs conceded they have no California  
14 authority suggesting that corporate records become personal if and when a corporation is  
15 dissolved.

16           Plaintiffs also contend the Fund is seeking some of Lewis’s personal banking  
17 records, the production of which will have testimonial aspects. The Fund cites to *United States v.*  
18 *Bright*, 596 F.3d 683 (9th Cir. 2010) to argue there is no potential for incrimination when a party  
19 seeks records the government already has. In *Bright*, the Ninth Circuit said that “where ‘[t]he  
20 existence and location of the papers is a foregone conclusion and the [party] adds little or nothing  
21 to the sum total of the Government’s information by conceding that he in fact has the papers,’”  
22 requiring production “does not touch upon constitutional rights.” *Id.* at 692 (quoting *Fisher v.*  
23 *United States*, 425 U.S. 391, 411 (1976)). The court need not determine at this stage of the  
24 proceedings whether the exception applies to parties other than the government that seek the  
25 production of records or whether the act of producing personal bank records might be deemed  
26 testimonial. Given the Fund’s awareness that Delta was sending checks to plaintiffs, this aspect  
27 of the claimed privilege provides little support for the requested stay. *See, e.g.*, ECF No. 28-3 at  
28 15 (Remittance Advice form from Delta Dental to David M. Lewis DMD).

1           Finally plaintiffs argue that a corporation will be unable to defend itself if all its  
2 officers assert their Fifth Amendment rights. They have not shown, however, that Lewis is the  
3 only corporate officer or that other corporate officers and/or employees will or legitimately could  
4 assert Fifth Amendment rights in response to discovery.

5           As Lewis has Fifth Amendment rights that may be implicated during discovery,  
6 this factor favors a stay.

7           B. The Fund's Interest in Expeditious Litigation

8           The Fund argues a stay will impede its ability to investigate whether more of the  
9 approximately \$2 million paid to Lewis was based on improper billing or unnecessary  
10 procedures. ECF No. 30 at 5. It argues it will need to obtain dental records and submit them to a  
11 forensic dental expert for review, a time-consuming process. *Id.*; *see also In re CFS*,  
12 256 F. Supp. 2d at 1239 (stating a party's interest in a speedy discovery process is heightened in  
13 complex litigation, which must proceed efficiently). Plaintiffs suggest that the resolution of the  
14 criminal case may streamline discovery. ECF No. 25 at 8. However, as no criminal case has  
15 been filed or resolved, this argument is unavailing.

16           Courts have also recognized that a stay may impact a party's ability to collect any  
17 civil judgment it might recover, a real concern in this case as plaintiffs' counsel has identified five  
18 civil actions pending against plaintiffs in Sacramento County Superior Court. *Id.*; *Arries v. Univ.*  
19 *OB/GYN, LLC.*, No. CV 10-08219-PCT-NVW, 2012 WL 896355, at \*2 (D. Ariz. Mar. 16, 2012)  
20 Decl. Craig Farmer, ECF No. 28-3 ¶ 2. Moreover, the fees plaintiffs are paying for civil and  
21 criminal representation continue to drain assets that could be used to satisfy any judgment.

22           Plaintiffs argue this factor applies only when there is evidence of active  
23 concealment, but cite no binding authority so restricting this court's consideration. This factor  
24 weighs against any stay.

25           C. The Efficient Use of Judicial Resources

26           The court has an interest in managing its caseload efficiently. *eBay*, 2010 WL  
27 702463, at \*6. In light of the indictment, the potentially indefinite nature of any stay implicates  
28 this court's interest in managing its docket and weighs against the stay. *See In re CFS*, 256 F.

1 Supp. 2d at 1242 (rejecting argument that resolution of criminal case might streamline civil  
2 issues, finding it “unrealistic to rely upon fortuitous events to manage its docket”) (citation &  
3 internal quotation marks omitted).

#### 4 D. Interests of Third Parties

5 The Fund has presented evidence that the employers’ premium and contribution  
6 rates and the employees’ share of those rates are determined by the amount of self-insured claims  
7 paid out of the Fund’s assets. Decl. of Marena Henne, ECF No. 31 ¶ 3. Given the possibility  
8 these rates might be reduced if the Fund recoups substantial assets from plaintiffs, the interest of  
9 Fund members weighs against a stay.

10 Plaintiffs counter that pursuing discovery might impact the rights of the plaintiff  
11 Corporation’s employees, who might assert their Fifth Amendment rights in response to  
12 discovery. It is unclear how the employees’ rights will be negatively impacted, particularly if  
13 their assertion of the privilege is honored.

14 This factor weighs against a stay.

#### 15 E. The Public Interest

16 Plaintiffs argue the public’s interest is served by the protection of Fifth  
17 Amendment rights, while the Fund contends the public’s interest is best served by a speedy  
18 resolution of the instant litigation. ECF No. 28-1 at 10. This factor is essentially neutral.

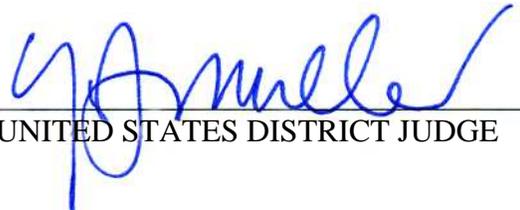
19 Although most of the *Keating* factors do not favor a stay, the application of this  
20 test is not mechanical. Two things in particular inform the resolution of the instant motion: the  
21 identity between the counterclaim and the criminal investigation on one hand and the Fund’s need  
22 to analyze dental records. Should the Fund be allowed to question Lewis, his Fifth Amendment  
23 rights will almost certainly be implicated. However, it is likely that the Fund’s analysis of the  
24 dental records will shape the questions it will pose to Lewis in interrogatories and at a deposition.  
25 Given that the analysis of the records will take some period of time, the Fund’s interest in  
26 questioning Lewis guided by the results of that analysis will not be unduly damaged by a stay of  
27 any questions directed to Lewis. A six-month stay is not warranted, however, given Lewis’s  
28 vague showing supporting the time sought.

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IT IS THEREFORE ORDERED:

1. Plaintiffs' motion for a stay of discovery is granted for a period of three months from the date of this order, to the extent that during that time defendants shall not serve interrogatories on or attempt to depose plaintiff Lewis;
2. Plaintiffs' motion for a stay of discovery is denied in all other respects; and
3. Plaintiffs are directed to file a status report within three months of the date of this order, providing detailed information about the progress of the criminal case.

Dated: March 13, 2014.

  
UNITED STATES DISTRICT JUDGE