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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FEDERAL INSURANCE COMPANY,

Plaintiff,

v.

No. C 12-04708 WHA

KEVIN LANEY; CHARLES BURNETTE;  
BRANDON HOURMOUZUS; MARKE  
ZEMBRYCKI; KELLY LANEY; MIGUEL  
IBARRIA; BRIAN FEDERICO; BURNETTE  
ENGINEERING RESOURCES LLC AKA BER  
CONSULTANTS LLC; ROGUE  
CONSULTANTS; UT RADAR CONSULTING;  
HOURMOUZUS & SONS, LLC; and IMPERIAL  
SHOTCRETE, INC.,

**ORDER GRANTING  
MOTION TO STAY  
PROCEEDING AND  
MOTION FOR JOINDER**

Defendants.

\_\_\_\_\_  
IMPERIAL SHOTCRETE, INC.,

Third party plaintiff,

v.

BRIAN FEDERICO,

Third party defendant.  
\_\_\_\_\_

**INTRODUCTION**

In this fraud and misappropriation action, defendants move to stay civil proceedings pending resolution of a criminal case involving a number of the defendants herein.

1 Defendant Kevin Laney moves to join defendant Charles Burnette in this motion to stay.

2 Only to the extent stated below, defendants' motions are **GRANTED**.

3 **STATEMENT**

4 Matrix Service Company provides engineering, procurement, fabrication, construction,  
5 repair and maintenance services principally to the petroleum, petrochemical, power, bulk  
6 storage, terminal, pipeline and industrial gas industries. Matrix had an insurance policy with  
7 plaintiff Federal Insurance Company which provided indemnity for loss caused by employee  
8 theft. Matrix submitted to plaintiff a claim based on the alleged acts, and after an investigation,  
9 plaintiff paid Matrix \$1,433,114 for its claim. Plaintiff now sues defendants in its capacity as  
10 subrogee and assignee of Matrix, pursuant to the terms of the insurance policy which entitles  
11 plaintiff to pursue subrogation rights against third parties responsible for the losses plaintiff has  
12 paid under the policy (2d Amd. Compl. ¶¶ 16–17).

13 Defendants Charles Burnette, Brandon Hourmouzous, Mark Zembrycki, Kevin Laney  
14 and Kelly Laney worked for Matrix as project managers. They were authorized to hire  
15 subcontractors, procure materials, and approve invoices for payment. Imperial Shotcrete, Inc.  
16 was a contractor hired by Matrix as a concrete supplier (*id.* at ¶¶ 32–33). Defendants Miguel  
17 Ibarria and Brian Federico worked for Imperial (*id.* at ¶ 35).

18 In an alleged conspiracy and scheme, defendants Burnette, Hourmouzous, Kevin and  
19 Kelly Laney created four separate companies (*id.* at ¶¶ 18–30). Imperial retained these four  
20 separate companies as subcontractors to provide goods and services to Imperial in connection  
21 with Matrix construction projects. Defendants Burnette, Hourmouzous, Kevin and Kelly Laney,  
22 through the separate companies they created, allegedly submitted to Imperial fraudulent invoices  
23 for goods that were never delivered and services that were never rendered. Defendants Ibarria  
24 and Federico, allegedly knowing the invoices were fraudulent, included those amounts in their  
25 own invoices submitted to Matrix by Imperial. Defendant Zembrycki allegedly used, without  
26 consent, the name of a legitimate company to create fraudulent invoices which were also sent to  
27 Imperial; the amount of those invoices were also included in the invoices submitted to Matrix by  
28 Imperial. When defendants received these invoices in their capacity as Matrix project managers,

1 they approved them (*id.* at ¶ 35). These acts allegedly occurred for about four years (*id.* at ¶ 34).  
2 The sum of fraudulent invoices submitted to Matrix by Imperial was of \$1,655,249.10 (*id.* at  
3 ¶ 35).

4 In September 2012, plaintiff filed a civil complaint against the individual defendants  
5 and the companies that were created by the individual defendants. Plaintiff alleges fraud,  
6 concealment, misappropriation, breach of fiduciary duty, and unjust enrichment.

7 Three months after the civil complaint was filed, the indictment in *United States v.*  
8 *Ibarria*, no. 4:12-cr-00862-YGR was filed. Defendants Charles Burnette, Kevin Laney, Miguel  
9 Ibarria, Brian Federico, and Brandon Hourmouzus are defendants in that criminal case, assigned  
10 to Judge Yvonne Gonzalez Rogers. The indictment charges these defendants with conspiring  
11 to commit mail fraud and mail fraud, the same subject matter as the present civil action.

12 Defendant Charles Burnette filed this motion to stay proceedings pending resolution of  
13 criminal case and defendant Kevin Laney filed a joinder.

14 The hearing on this motion was held on February 14, 2013. Defendants are scheduled  
15 to appear at the Oakland Courthouse on February 22, 2013, for a status conference hearing  
16 regarding *United States v. Ibarria*. No notice to relate the two cases has been filed by any party.

## 18 ANALYSIS

### 19 1. MOTION FOR JOINDER.

20 Defendant Kevin Laney moves to join in defendant Charles Burnette’s motion to stay  
21 civil proceedings pending resolution of criminal case (Dkt. No. 75). Plaintiff argues that the  
22 arguments by defendant Laney must be contained with those in defendant Burnette’s motion.  
23 Not so. Defendant Laney’s motion for joinder is **GRANTED**.

### 24 2. MOTION TO STAY PROCEEDING PENDING 25 RESOLUTION OF CRIMINAL CASE.

26 “The Constitution does not ordinarily require a stay of civil proceedings pending the  
27 outcome of criminal proceedings.” *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324  
28 (9th Cir. 1995) (citing *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir.  
1989)). “[A] court may decide in its discretion to stay civil proceedings . . . when the interests

1 of justice seem to require such action.” *Ibid.* (quoting *Sec. & Exch. Comm’n v. Dresser Indus.,*  
2 *Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980)) (internal quotations and citations omitted).

3 The decision whether to stay civil proceedings in the face of a parallel criminal proceeding  
4 should be made in light of the particular circumstances and competing interests involved in the  
5 case. *Ibid.* (quoting *Molinaro*, 889 F.2d at 902) (internal quotations omitted). Our court of  
6 appeals has held that:

7 the decisionmaker should consider the extent to which the  
8 defendant’s *fifth amendment* rights are implicated. In addition,  
9 the decisionmaker should generally consider the following factors:  
10 (1) the interest of the plaintiffs in proceeding expeditiously with  
11 this litigation or any particular aspect of it, and the potential  
12 prejudice to plaintiffs of a delay; (2) the burden which any  
13 particular aspect of the proceedings may impose on defendants;  
14 (3) the convenience of the court in the management of its cases,  
15 and the efficient use of judicial resources; (4) the interests of  
16 persons not parties to the civil litigation; and (5) the interest of the  
17 public in the pending civil and criminal litigation.

18 *Keating*, 45 F.3d at 324–325 (quoting *Molinaro*, 889 F.2d at 903) (emphasis in original).

19 **A. Defendants’ Fifth Amendment Privilege.**

20 “The strongest case for deferring civil proceedings is where a party under indictment  
21 for a serious offense is required to defend a civil or administrative action involving the same  
22 matter.” *Dresser*, 628 F.2d at 1375-76. The parallel proceeding “might undermine the party’s  
23 Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery  
24 beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense  
25 to the prosecution in advance of criminal trial, or otherwise prejudice the case.” *Id.* at 1376.

26 Many district court decisions applying the *Molinaro* multi-factor test have held that if the  
27 defendant in both criminal and civil proceedings is an individual who has been indicted and  
28 the issues in both proceedings are the same, the defendant’s Fifth Amendment privilege will be  
implicated. *See e.g., Taylor, Bean & Whitaker Mortg. Corp. v. Triduanum Fin., Inc.*, 2009 U.S.  
Dist. LEXIS 60849, at \*6 (E.D. Cal. July 15, 2009) (Judge Frank Damrell, Jr.); *Jones v. Conte*,  
2005 U.S. Dist. LEXIS 46962, at \*3 (N.D. Cal. Apr. 19, 2005) (Judge Susan Illston); *Allied*  
*World Nat’l Assur. Co. v. SK PM Corp.*, 2011 U.S. Dist. LEXIS 82602, at \*9–10 (E.D. Cal.  
July 28, 2011) (Judge Oliver Wanger).

1 Here, defendants' Fifth Amendment privilege will be implicated. Defendants Burnette  
2 and Laney were indicted for the same conduct as the civil suit. In both proceedings, defendants  
3 are accused of defrauding Matrix by knowingly submitting false and inflated invoices to Matrix  
4 that exceeded the actual work performed and the materials used (2d Amd. Compl. ¶¶ 34–35,  
5 Dkt. No. 69 Exh. 1 at 8). As a result, at least some disclosures provided in the civil proceedings  
6 will be relevant to the issues in the criminal proceedings. Allowing the civil proceedings to  
7 continue will permit the government to gain access to discovery that it would otherwise not  
8 have under the federal rules of criminal procedure, such as documents derived from initial  
9 disclosures, defendants' responses to interrogatories, pleadings and admissions at any  
10 depositions (Dkt. No. 65 Exh. A at 5).

11 Plaintiff argues that the defendants' motion should be denied because there is no  
12 constitutional right to a stay. *See Keating*, 45 F.3d at 324. While this is undoubtedly correct,  
13 defendants do not contend otherwise. Rather, defendants argue that their Fifth Amendment  
14 rights will be implicated by discovery and disclosures required in the civil action. This factor  
15 heavily weighs in favor of a stay, at least for a few months.

16 **B. Plaintiff's Interest and Defendant's Burden.**

17 Plaintiff notes that only two of the seven defendants are seeking a motion to stay.  
18 Plaintiff argues that if granted, a stay would prejudice plaintiff because it would impede its  
19 ability to timely pursue relief against the remaining defendants. This is plaintiff's most  
20 persuasive argument. Plaintiff has paid its insured for the loss and is thus entitled to be  
21 compensated in a timely manner.

22 Defendants argue that plaintiff will benefit from the stay because through the criminal  
23 proceedings, the government will conduct much of the necessary litigation that will resolve the  
24 allegations at issue in the civil proceedings, at no cost to the plaintiff.

25 This is incorrect unless the criminal prosecution goes to trial. If there are guilty pleas  
26 instead, the underlying discovery will not ordinarily be turned over to plaintiff by the  
27 government. The guilty pleas themselves may wind up being the lesser included offenses that  
28 do not read on plaintiff's claims herein.

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**C. Court’s Convenience in Managing Its Docket.**

Defendants argue that judicial resources will be saved to the extent that the resolution of the criminal proceedings resolves issues in the civil proceedings, avoiding duplication of work in two cases. Plaintiff, however, argues that a stay would require the Court to wait indefinitely for the criminal proceedings to end before the civil proceedings can proceed. To reconcile both of these issues, some courts have granted stays for a finite period of time. *Taylor, Bean & Whitaker Mortg. Corp.*, 2009 U.S. Dist. LEXIS 60849 at \*10 (motion to stay granted for six months); *Jones*, 2005 U.S. Dist. LEXIS 46962 at \*5 (motion to stay granted until the resolution of the criminal proceeding or until six months from the date of the order, whichever occurs first). Granting a short stay is reasonable, as to the moving parties only.

**D. Non-Party and Public Interests.**

Neither defendants nor plaintiff note any non-party and public interests. These factors, therefore, receive minimal consideration.

**E. Additional Arguments Made by Plaintiff.**

Citing *Landis v. North American Co.*, 299 U.S. 248, 255 (1936), plaintiff argues that defendants have not established the good cause necessary to seek a stay. The decision cited by plaintiff is inapposite. *Landis* does not address the issue of staying a civil proceeding pending the outcome of a criminal proceeding, and it does not concern a defendant who has been indicted.

**CONCLUSION**

For the foregoing reasons, defendants’ motion to stay civil proceedings is **GRANTED** only as it relates to defendants Charles Burnette and Kevin Laney. No stay is imposed as to anyone else. A case management conference will be scheduled in four months, at **11:00 A.M.** on **JUNE 20, 2013**, to re-evaluate the need for a longer stay. The Court is mindful of plaintiff’s interest in recovering gains and in due course the calculus of equities will be re-assessed. In the

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meantime, counsel and all parties, including Burnette and Laney, are ordered to preserve all evidence relevant to this case.

**IT IS SO ORDERED.**

Dated: February 14, 2013.

  
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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE