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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SECURITIES AND EXCHANGE  
COMMISSION,  
  
vs.  
  
PRESTO TELECOMMUNICATIONS, INC.,  
AND ALFRED LOUIS VASSALLO, JR. aka  
BOBBY VASSALLO,  
  
Defendants.

CASE NO. 04cv163-IEG(WMc)  
  
Order Granting in Part Defendant's  
Motion to Stay Civil Contempt  
Proceedings

This matter is presently before the Court on the motion filed by Defendant Alfred Louis Vassallo, Jr. ("Vassallo") to stay the civil contempt proceedings until the criminal charges against him are resolved. Upon consideration of the parties' arguments, for the reasons explained herein, the Court GRANTS IN PART Vassallo's motion.

**Background**

By order filed October 26, 2010, the Court found there was clear and convincing evidence Vassallo violated the August 23, 2005 permanent injunction in this case by failing to pay disgorgement, civil penalties, and the Receiver's costs. The Court bifurcated the SEC's allegations that Vassallo had violated the permanent injunction by engaging in conduct in violation of federal securities laws, and referred that matter to the United States Attorney for prosecution of criminal contempt under Fed. R. Crim. P. 42 and 18 U.S.C. § 401. The government has not yet

1 filed charges based on that referral. In addition, the government is conducting an investigation to  
2 determine whether to file independent criminal conspiracy charges against Vassallo, in either this  
3 District or the Central District of California, based upon conduct relating back to the Presto  
4 Telecommunica-tions fraud in 2004 and earlier.

### 5 Legal Standard

6 “The Constitution does not ordinarily require a stay of civil proceedings pending the  
7 outcome of criminal proceedings.” Keating v. OTS, 45 F.3d 322, 324 (9<sup>th</sup> Cir. 1994). However,  
8 the court may exercise its discretion to stay a civil proceeding “when the interests of justice seem  
9 [to] require such action.” SEC v. Dresser Indus., 628 F.2d 1368, 1375 (D.C. Cir. 1980).

10 The strongest case for deferring civil proceedings until after completion of criminal  
11 proceedings is where a party under indictment for a serious offense is required to  
12 defend a civil or administrative action involving the same matter. The noncriminal  
13 proceeding, if not deferred, might undermine the party’s Fifth Amendment  
privilege against self-incrimination, expand rights of criminal discovery beyond the  
limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense  
to the prosecution in advance of trial, or otherwise prejudice the case.

14 Id. at 1376.

15 In determining whether to stay the civil proceedings in the face of a parallel criminal  
16 proceeding, the first consideration is “the extent to which the defendant’s fifth amendment rights  
17 are implicated.” Keating, 45 F.3d at 325 (citing FSLIC v. Molinaro, 889 F.2d 899, 902 (9<sup>th</sup> Cir.  
18 1989)). The court should also consider the following factors:

19 (1) the interest of the plaintiffs in proceeding expeditiously with the litigation or  
20 any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the  
21 burden which any particular aspect of the proceedings may impose on defendants;  
22 (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 interests of the public in the pending civil and criminal  
litigation.

23 Keating, 45 F.3d at 325.

### 24 Discussion

25 Vassallo argues the Court should stay these civil contempt proceedings because he is  
26 unable to demonstrate his inability to pay the amounts set forth in the permanent injunction  
27 without waiving his Fifth Amendment rights. Vassallo is facing incarceration as the certain penalty  
28 for his civil contempt, and the only way he could purge himself of that contempt would be to

1 waive his Fifth Amendment rights. Under these circumstances, and considering the other Keating  
2 factors, Vassallo argues a stay is appropriate.

3 *I. Vassallo's Fifth Amendment right*

4 In order to avoid a finding of civil contempt, Vassallo has the burden of demonstrating he  
5 is currently unable to comply with the permanent injunction. United States v. Bright, 596 F.3d  
6 683, 695 (9<sup>th</sup> Cir. 2010). The SEC argues Vassallo has not demonstrated that his Fifth Amendment  
7 rights would be implicated if he submits evidence of his inability to pay the amounts as ordered.

8 “The Fifth Amendment ‘can be asserted in any proceeding, civil or criminal, ...; and it  
9 protects against any disclosures which the witness reasonably believes could be used in a criminal  
10 prosecution or could lead to other evidence that might be so used’.” United States v. Bodwell, 66  
11 F.3d 1000, 1002 (9<sup>th</sup> Cir. 1995) (quoting Kastigar v. United States, 406 U.S. 441, 444-45 (1972)).  
12 “The standard for determining whether a claim of privilege is justified is ‘whether the claimant is  
13 confronted by substantial and real, and not merely trifling or imaginary, hazards of  
14 incrimination’.” United States v. Vavages, 151 F.3d 1185, 1192 (9<sup>th</sup> Cir. 1998) (quoting United  
15 States v. Rubio-Topete, 999 F.2d 1334, 1338 (9<sup>th</sup> Cir. 1993)). Although a witness ordinarily must  
16 assert the Fifth Amendment privilege in response to specific questions, the court may permit a  
17 blanket assertion of the privilege if, based on its knowledge of the case and the expected  
18 testimony, the court concludes “the witness could legitimately refuse to answer essentially all  
19 relevant questions.” United States v. Flores-Blanco, 623 F.3d 912, 918 (9<sup>th</sup> Cir. 2010).

20 Here, the criminal contempt proceeding is based upon the SEC’s allegation that Vassallo  
21 has engaged in the following conduct: (a) offering for sale and selling unregistered securities,  
22 (b) misrepresenting his ownership and control of companies for which he is soliciting investor  
23 funds, and further misrepresenting the potential for investor profits and how investor funds will be  
24 used, and (c) misappropriating investor funds. [Notice of Criminal Contempt Proceedings, Doc.  
25 974, pp. 2-3.] Vassallo argues any explanation by him as to why he has not paid anything over the  
26 last five years is damaging to his criminal case because he will be forced to address the SEC’s  
27 allegation that he has made nearly \$400,000 during that time period from “illicit” conduct.

28 The SEC responds by arguing Vassallo has earned at least \$27,000 in the last year from

1 non-fraudulent activities. [Declaration of James P. Varley, filed October 26, 2010, ¶4.] Vassallo  
2 has not demonstrated how producing information regarding that legitimate income would be  
3 incriminating. In addition, the SEC cites several cases for the proposition that Vassallo can choose  
4 whether to invoke his Fifth Amendment privilege, and his choice does not require this Court to  
5 stay the contempt proceeding. See SEC v. Brown, 2007 U.S. Dist. LEXIS 98410 (D. Minn. July  
6 16, 2007) (where defendant had been notified he was a target of a grand jury investigation, district  
7 court denied defendant's motion to stay SEC civil enforcement action, finding defendant failed to  
8 demonstrate the issues presented in the civil and the as-yet to be filed criminal cases overlapped);  
9 IBM v. Brown, 857 F. Supp. 1384, (C.D. Cal. 1994) (in RICO action, district court denied  
10 defendant's motion to stay the civil action pending resolution of pending criminal proceedings  
11 stemming from the same transactions alleged by IBM in its civil complaint, finding the corporate  
12 defendants enjoyed no Fifth Amendment privilege and the individual defendants already testified  
13 at deposition without asserting the Fifth Amendment privilege).

14       However, the cases cited by the SEC are distinguishable from the present proceedings.  
15 The Court is persuaded that Vassallo has properly asserted the Fifth Amendment privilege in this  
16 civil contempt proceeding, because nearly all the answers Vassallo could provide regarding his  
17 inability to pay the disgorgement, civil penalties, and receiver's costs, could be used against him in  
18 the criminal contempt proceeding. Even an exculpatory explanation as to why Vassallo has failed  
19 to pay anything as ordered would provide the government with discovery with regard to the  
20 criminal contempt proceeding, to which the government is not entitled under Fed. R. Crim. P. 16.  
21 Vassallo's assertion of the Fifth Amendment privilege weighs heavily in favor of granting a stay of  
22 the civil contempt proceeding until such time as the criminal contempt is resolved. In each of the  
23 cases relied upon by the SEC, the defendant faced only the threat of monetary loss. Here, the  
24 Court has already made clear that the only realistic civil contempt sanction it could impose is  
25 incarceration. Thus Vassallo's assertion of his Fifth Amendment right may result in his

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1 incarceration, and leave him without means to purge himself of his contempt.<sup>1</sup>

2 2. Other Keating factors

3 Notwithstanding Vassallo's assertion of his Fifth Amendment privilege, many of the other  
4 Keating factors militate against granting a stay. As set forth above, the additional factors a court  
5 should consider in deciding whether to stay a civil action are as follows:

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

13 Keating, 45 F.3d at 325. The second factor, burden on defendant, favors granting a stay. In  
14 addition, the third factor, convenience of the court and efficient use of judicial resources,  
15 somewhat favors a stay because of the potential for overlapping issues between the civil and  
16 criminal proceedings.

17 The first, fourth, and fifth factors, however, all favor going forward with the civil contempt  
18 proceeding. The SEC, third-party investors, and the public, all have a strong interest in moving  
19 forward expeditiously with the civil contempt proceeding, to attempt to recover the disgorgement,  
20 civil penalties, and receiver's costs. Presto investors who were defrauded by Vassallo have been  
21 waiting for years for some portion of their money to be returned, and the receiver has been waiting  
22 for years to be compensated for his fees and costs. The government cannot criminally prosecute  
23 every violation of federal securities laws. The SEC must have a mechanism to not only obtain  
24 judgment against those who defraud investors, but also the ability to collect upon that judgment. If  
25 the SEC is unable to enforce its judgment against Vassallo by means of this civil contempt  
26 proceeding, the SEC, the investors, and the public are effectively left without a civil remedy.

27 Vassallo argues the looming criminal charges would necessarily include restitution to the  
28 victims. However, there is no currently pending criminal indictment encompassing the Presto

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<sup>1</sup>The IRS summons cases cited by the SEC are also distinguishable. In both United States v. Rylander, 460 U.S. 752, 758 (1983) and CFTC v. Wellington Precious Metals, 950 F.2d 1525 (11<sup>th</sup> Cir. 1992), the courts held that a contemnor must go beyond the mere assertion he is unable to comply with an order, and establish he has in good faith made all reasonable efforts to comply. In neither case did the contemnor claim a Fifth Amendment right to remain silent in the face of a pending concurrent criminal proceeding.

1 Telecommunications fraud. The pending criminal contempt proceeding pertains only to Vassallo's  
2 conduct *after* entry of the Preliminary Injunction. Therefore, that criminal contempt proceeding  
3 would not address Vassallo's liability for defrauding investors prior to 2004. Government counsel  
4 has represented to the Court and to defense counsel that there is an ongoing investigation which  
5 may result in an independent indictment against Vassallo for conduct including the Presto  
6 telecommunications fraud. Any such charges, however, are speculative at this time.

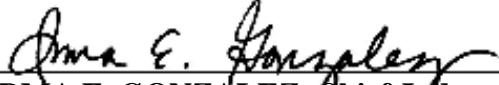
7 Balancing Vassallo's Fifth Amendment privilege against the other Keating factors, the  
8 Court concludes it would be appropriate to stay this civil contempt proceeding for a brief period of  
9 time, to allow the government to further explore whether it intends to seek an independent  
10 indictment against Vassallo, or to proceed solely based upon the parallel criminal contempt  
11 charge. If the government decides not to pursue an independent indictment encompassing the  
12 underlying Presto Telecommunications fraud, the Court believes it may be possible to move  
13 forward on the civil contempt proceeding notwithstanding a parallel criminal contempt charge. To  
14 alleviate Vassallo's Fifth Amendment concerns, and to avoid providing discovery to the  
15 government on the criminal contempt charge, the Court may be able to receive evidence *ex parte*.  
16 The SEC may also decide it prefers to move forward on the civil contempt and have the criminal  
17 contempt dismissed at this point. The Court will stay this case for a brief period of time to allow  
18 these matters to be more fully investigated by counsel.

19 **Conclusion**

20 The Court stays this civil contempt proceeding pending further order of the Court. On or  
21 before Monday, February 14, 2011, the government and SEC must each file a status report with  
22 the Court, *ex parte* and/or under seal as may be appropriate, indicating how the government and  
23 SEC intend to proceed with regard to the civil contempt, criminal contempt, and any independent  
24 criminal charges against Vassallo. The Court will hold a further hearing, or issue a further ruling  
25 on Vassallo's motion to stay, following receipt of the status reports.

26 **IT IS SO ORDERED.**

27 **DATED: December 17, 2010**

28   
IRMA E. GONZALEZ, Chief Judge  
United States District Court