UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

WESTERN RESERVE LIFE ASSURANCE COMPANY OF OHIO, Plaintiff, vs. CONREAL LLC, HARRISON CONDIT, FORTUNE FINANCIAL SERVICES, INC., and ANTHONY PITOCCO, Defendants;	C.A. No.: 09-470-WS
TRANSAMERICA LIFE INSURANCE COMPANY, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ESTELLA RODRIGUES, EDWARD MAGGIACOMO, JR., LIFEMARK SECURITIES CORP., and PATRICK GARVEY, Defendants;	C.A. No.: 09-471-WS
WESTERN RESERVE LIFE ASSURANCE COMPANY OF OHIO, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ADM ASSOCIATES, LLC, EDWARD HANRAHAN, THE LEADERS GROUP, INC., and CHARLES BUCKMAN, Defendants;	C.A. No.: 09-472-WS

WESTERN RESERVE LIFE ASSURANCE COMPANY OF OHIO, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., DK LLC, EDWARD HANRAHAN, THE LEADERS GROUP, INC., and JASON VEVEIROS, Defendants;	)	C.A. No.: 09-473-WS
WESTERN RESERVE LIFE ASSURANCE COMPANY OF OHIO, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., NATCO PRODUCTS CORP., EDWARD HANRAHAN, and THE LEADERS GROUP, INC., Defendants;	)	C.A. No.: 09-502-WS
TRANSAMERICA LIFE INSURANCE COMPANY, Plaintiff, vs. LIFEMARK SECURITIES CORP., JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC. and EDWARD MAGGIACOMO, JR., Defendants; and	)	C.A. No. 09-549-WS

WESTERN RESERVE LIFE ASSURANCE COMPANY OF OHIO, Plaintiff,	)	
vs.	)	C.A. No. 09-564-WS
JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., HARRISON CONDIT, and FORTUNE FINANCIAL SERVICES, INC., Defendants.	)	

CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS WESTERN RESERVE LIFE ASSURANCE COMPANY OF OHIO AND TRANSAMERICA LIFE INSURANCE COMPANY'S OBJECTION TO DEFENDANTS' MOTIONS TO STAY

Plaintiffs Western Reserve Life Assurance Company of Ohio ("Western Reserve") and Transamerica Life Insurance Company ("Transamerica") submit this memorandum of law in opposition to Defendants Joseph Caramadre, Edward Hanrahan, Raymour Radhakrishnan, Edward Maggiacomo (collectively, the "Targets") and Harrison Condit's (collectively, the "Movants") motions to stay all seven of the civil actions.[1] *See Defendants' Consolidated Memorandum of Law* (hereinafter "Memo").

Movants propose an extraordinary remedy – a complete and indefinite stay of the civil cases until the completion of the related federal grand jury investigation and the resolution of any criminal actions resulting therefrom – despite the fact that to date, none of the Movants has been indicted. Movants fail to carry their heavy burden under the test established by the First Circuit in *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385

[1] The plaintiffs file this identical Consolidated Memorandum in all seven lawsuits listed in the caption above.

F.3d 72 (1st Cir. 2004), and they fail to demonstrate why they should be permitted to use the related criminal investigation as a shield to indefinitely delay these civil cases. Plaintiffs should be allowed to conduct discovery and to move these cases toward resolution without being forced to wait for an indefinite and lengthy time period while the government and grand jury complete their investigations, possibly bring indictments, and then litigate the resulting criminal cases. Plaintiffs request that the Court deny Movants' motions for a general stay of these civil actions. If the Court deems entry of a stay necessary and appropriate, Plaintiffs submit that entry of a limited and temporary stay, as described below, will appropriately and reasonably balance the interests of the parties, the court, and the public. In that instance, Plaintiffs specifically propose that all testimonial discovery of the Targets be stayed for a period of three months, with the parties allowed to move forward with other discovery in these cases. After three months, this Court can assess the status of the parallel proceedings and determine whether an extension of the limited stay is appropriate.

BACKGROUND

At the heart of these cases is an investment scheme referred to as "Stranger Owned Annuity Transactions" – also known as "STATs." Under a STAT scheme, investors purchase annuities that provide benefits to the investor based on the death of a terminally ill individual who has no relationship to the investor.

Plaintiffs initiated these actions to end the STAT scheme utilized by Defendants and to recover damages incurred as a result of the scheme. Movants have been named as defendants based on their involvement in the procurement of these annuities and their

failure to disclose certain essential information to the plaintiffs. *See generally Amended Complaints*: 09-470, 09-471, 09-472, 09-473, 09-502, 09-549, 09-564.

Plaintiffs initiated these civil cases more than nine months ago. To date, the parties have participated in the depositions of three of the annuitants, and the Defendants have yet to file their Answers. At this point, justice requires that Plaintiffs be permitted to conduct discovery and move these cases forward. However, should the Court determine that the Targets require some level of protection in the form of a stay, Plaintiffs would encourage limited and well-defined restrictions that will protect the Targets' Fifth Amendment privileges against self-incrimination without creating significant prejudice to the Plaintiffs.

ARGUMENT

I. MOVANTS HAVE FAILED TO MEET THE "HEAVY BURDEN" REQUIRED TO JUSTIFY THE EXTRAORDINARY RELIEF THEY SEEK.

Plaintiffs acknowledge the Court's discretionary power to stay these civil actions in deference to parallel criminal proceedings. However, "[i]t is not inherently unconstitutional . . . to proceed with parallel civil and criminal proceedings," *Digital Equip. Corp. v. Currie Enterprises*, 142 F.R.D. 8, 11 (D. Mass. 1991), *citing Mainelli v. United States*, 611 F. Supp. 606, 615 (D.R.I. 1985), and the granting of a "total stay of civil discovery pending the outcome of related criminal matters is an extraordinary remedy appropriate for extraordinary circumstances." *Weil v. Markowitz*, 829 F.2d 166, 174 n.17 (D.C. Cir. 1987). *See also In re Who's Who Worldwide Registry, Inc.*, 197 B.R. 193, 195 (Bankr. E.D.N.Y. 1996) ("[T]he granting of a stay of civil proceedings due to pending criminal investigation is an extraordinary remedy, not to be granted lightly.") A

defendant seeking a stay must show "undue prejudice . . . or interference with his constitutional rights . . . [to] prevent plaintiff from expeditiously advancing its claim." *Paine, Webber, Jackson & Curtis, Inc. v. Malon S. Andrus, Inc.*, 486 F. Supp. 1118, 1119 (S.D.N.Y. 1980). Plaintiffs oppose the blanket and indefinite stay sought by Movants because of the significant prejudice that will result to Plaintiffs from a general stay.

While Movants address at length the choices and predicaments they face, the fact that they are currently under criminal investigation does not require or justify the complete and indefinite stay of these civil cases: a defendant "has no constitutional right to a stay simply because a parallel criminal proceeding is in the works." *Microfinancial,* 385 F.3d at 77-78, *citing United States v. Kordel,* 397 U.S. 1, 11 (1970) (observing that the Constitution does not provide parties blanket protection from the perils of contemporaneous criminal and civil proceedings). *See also Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 175 F. Supp. 2d 573, 576 (S.D.N.Y. 2001) ("The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings."); *Arden Way Assocs. v. Boesky,* 660 F. Supp. 1494, 1497 (S.D.N.Y. 1987) ("a policy of issuing stays solely because a litigant is defending simultaneous lawsuits would threaten to become a constant source of delay and an interference with judicial administration") (quotation marks omitted).

While courts have recognized the difficult choices that confront parties who face both civil litigation and criminal investigation, they have also made clear that parties like Plaintiffs herein who claim to have been victimized by frauds or other unlawful conduct are entitled to pursue their civil remedies without undue obstacles or delay. "[I]t would be perverse if plaintiffs who claim to be the victims of criminal activity were to receive

slower justice than other plaintiffs because the behavior they allege is sufficiently egregious to have attracted the attention of the criminal authorities." *Sterling*, 175 F. Supp. 2d at 575; s*ee also Paine, Webber, Jackson & Curtis, Inc.*, 486 F. Supp. at 1119 ("That defendant's conduct also resulted in a criminal charge against him should not be availed of by him as a shield against a civil suit and prevent plaintiff from expeditiously advancing its claim.").

Movants point to the "financial toll and anguish" and the "fundamentally unfair footing" which they argue will result from their being required to "defend[] the many proceedings against them," *Memo* at 4, but they downplay the fundamental principle that the Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings, as "[a] defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir.), *cert. denied*, 516 U.S. 827 (1995).[2]

As addressed in greater detail below, Movants have failed to carry the "heavy burden" required to justify the extraordinary relief they seek, *Microfinancial*, 385 F.3d at 77, and they should not be permitted to use the ongoing criminal investigation as a shield against the pending civil suits.

[2] Plaintiffs suggest that the "unfairness" argument advanced by Movants may be contextualized in light of the facts and circumstances presented by these cases. *See Arden Way*, 660 F. Supp. at 1497 ("It is plainly ludicrous for [the defendant] to argue that it is 'unfair' to compel him to face the civil law suits against him which are the creations of his own alleged misconduct. The plight which he imagines that he is in stems solely from his own activities.")

A. Movants Fail to Satisfy the Multi-Factor Test Established by the First Circuit.

A defendant cannot simply point to an ongoing, parallel criminal investigation to justify a stay of a civil case. The First Circuit has made clear that the district court's discretionary power to stay civil proceedings in deference to parallel criminal proceedings should be invoked when the interests of justice counsel in favor of such a course, a determination which involves the balancing of competing interests. *Microfinancial*, 385 F.3d at 78. The First Circuit has identified the following factors to be considered in evaluating the competing interests at stake:

(i) the interests of the civil plaintiff in proceeding expeditiously with the civil litigation, including the avoidance of any prejudice to the plaintiff should a delay transpire;
(ii) the hardship to the defendant, including the burden placed upon him should the cases go forward in tandem;
(iii) the convenience of both the civil and criminal courts;
(iv) the interests of third parties;
(v) the public interest;
(vi) the good faith of the litigants (or the absence of it); and
(vii) the status of the cases.

Id.[3]

In this case, the Movants self-created burden is no different than that faced by many civil defendants who are suspected of large scale fraud, and their burden does not outweigh the Plaintiffs' interest in proceeding expeditiously with the civil litigation or the substantial prejudice to Plaintiffs that would result from the blanket and indefinite stay sought by the Movants.

[3]In a telling attempt to shift the Court's focus from the clear articulation of factors provided by the First Circuit, the Movants cite to *Microfinancial* but starkly reorder the factors to minimize the focus on the interests of the plaintiff. *See Memo* at 8-9. The above list of factors, and the order of those factors, is taken directly from the *Microfinancial* opinion.

1. Plaintiffs would be severely prejudiced by an indefinite and complete stay of these civil cases.

This Court has recognized the importance of allowing civil plaintiffs to seek justice through litigation: "Justice is meted out in both civil and criminal litigation. The overall interest of the courts that justice be done may very well require that the compensation and remedy due a civil plaintiff should not be delayed . . . ." *Driver v. Helms*, 402 F. Supp. 683, 685 (D.R.I. 1975). Consistently, the First Circuit has found that potential financial damage to a plaintiff is enough to tip the balance toward denying a motion to stay: "the damage to the plaintiff would be the financial hardship of being forced to wait for an undefined but potentially lengthy period before receiving the money to which she may be entitled." *Austin v. Unarco Indus., Inc.*, 705 F.2d 1, 5 (1st Cir. 1983). Plaintiffs are entitled to a speedy discovery process, particularly in the context of complex litigation which must proceed in an efficient manner. *Digital Equip. Corp.*, 142 F.R.D. at 12, *citing Arden Way*, 660 F. Supp. at 1497.

A defendant's limited assets, and the potential for the dispersal and dissipation of assets, are additional burdens that weigh on a plaintiff and weigh against a stay of civil proceedings. *See Sterling*, 175 F. Supp. 2d at 579 ("It is unclear whether defendants have sufficient assets to permit any meaningful recovery, and permitting a further delay during which assets can be dispersed or hidden — or called upon for the expensive business of defending a grand jury investigation and potential criminal litigation — will increase the risks that plaintiff could succeed in the litigation, without being able to collect on any judgment."); *Arden Way*, 660 F. Supp. at 1497 ("Stalling the case for a defendant who has ample means to protect himself . . . would be counter-productive and prejudicial to

plaintiffs, especially where there are so many claimants to the potentially limited funds for satisfaction of the potential damages in this and related litigation . . . .").

The granting of the blanket and indefinite stay sought by Movants would result in significant harm to Plaintiffs. First, Plaintiffs would be forced to wait for the resolution of what could be a years-long legal battle in the criminal cases. Second, Plaintiffs have calculated their losses resulting from this STAT scheme to be in the millions of dollars, and any ability to collect on a judgment Plaintiffs obtain will be prejudiced by a granting of the requested stay. Relatedly, while Plaintiffs in these cases acted swiftly in seeking justice through civil litigation upon learning of Defendants' fraudulent scheme, there likely will be additional plaintiffs bringing future lawsuits as other companies who have been defrauded by Defendants' STAT scheme seek to recover their losses. The court in *Sterling* recognized the significance of these issues and the relative harms in denying the defendants' request for a stay.

> In contrast to the speculative and uncertain risks to defendants' interests, the interest of the plaintiffs in proceeding expeditiously with this litigation, is pronounced. This case has been pending for eight months, and most of that time has been essentially wasted due to defendants' dilatory tactics. If a further six months' delay were granted, the case would be over a year old, and discovery would still not be complete.

175 F. Supp. 2d at 579 (internal quotation and citation omitted). Thus, the significant prejudice to Plaintiffs that will result from the indefinite and blanket stay sought by Movants weighs strongly against the granting of Movants' request.

2. Movants' self-created hardship is no different than that faced by many civil defendants who are suspected of large scale fraud.

Movants' two primary arguments in support of their broad stay request focus on the "practical burdens" they will face moving forward with these civil cases. *Memo* at

10. They bemoan the time and expense attendant to the defense of these actions, but much of the parade of horribles they depict is largely disconnected from any threat to their Fifth Amendment rights. As the court in *Sterling* noted, there is no danger here that Movants will be deprived of their Fifth Amendment privilege, but only that they may be required to make the decision whether to exercise their constitutional rights or not.

> While recognizing that the exercise of Fifth Amendment rights should not be unduly or unnecessarily burdened, it is important also to note that ultimately, there is no threat that defendants will be deprived of those rights. They retain the absolute right to invoke the privilege. Ultimately, what is at risk is not their constitutional rights - for they cannot be forced to testify, and under *Baxter,* any adverse consequence in the civil litigation is consistent with the constitutional guarantee - but their strategic position in the civil case.

175 F. Supp. 2d at 578 n.4.[4]

Movants fail to distinguish in any meaningful way the logistics, and the "practical burdens," of their cases from the hurdles faced by a defendant in any large scale fraud case involving parallel proceedings. Movants' conclusory and speculative "hardship" is not by any measure extraordinary but simply reflects the challenges faced by defendants accused of substantial fraud: "[t]he only unfairness that the Court perceives is the moving party's assertion that it would be unfair to treat him normally. The defendant seems to be seeking privileged litigating status because of his own delinquencies." *Arden Way*, 660 F. Supp. at 1497.[5]

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[4] The terms of the limited stay which Plaintiffs propose, in the event the Court concludes that some protection is necessary, while not mitigating all of the "practical burdens" which Movants seek to avoid would protect Movants during the stay period from having to provide testimonial evidence and thus protect the core Fifth Amendment rights that should be the focus of the analysis. The suggested temporary, as opposed to indefinite, stay period would allow the Court and parties to revisit issues concerning the scope and timing of the stay on a periodic basis.

[5] With regard to Movants reference to the "obvious financial toll and anguish of defending the many proceedings against them," *Memo* at 4, courts have not found the burden imposed on

Movants presumably lead with these arguments concerning the practical burdens and expense of defending parallel proceedings based on their recognition that the legal basis for their stay request is weak. As noted above, "[a] defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege," *Keating*, 45 F.3d at 326, and forcing a defendant to choose between waiving his Fifth Amendment privilege or suffering the adverse inference which results in the civil case from invoking his privilege does not violate due process. *See Sterling*, 175 F. Supp. 2d at 578, *citing Kordel*, 397 U.S. at 9-10. This Court has recognized that, even post-indictment, the Fifth Amendment does not provide unwavering protection: "the fact that a man is indicted cannot give him a blank check to block all civil litigation on the same or related underlying subject matter." *Driver*, 402 F. Supp. at 685.

Here, while not determinative, it is highly significant that no indictments have been issued in connection with the criminal investigation.[6] As recognized by the First Circuit, "[t]he fact that no indictment ha[s] been handed up furnishes further reason to discount the burden on the movants." *Microfinancial*, 385 F.3d at 79. *See also Sterling*, 175 F. Supp. 2d at 576 (district courts "generally grant the extraordinary remedy of a stay only after the defendant seeking a stay has been indicted"); *Citibank, N.A. v. Hakim*, 92-

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defendants' finances to be a compelling factor. *See Digital Equip. Corp.*, 142 F.R.D. at 14 ("Although proceeding in two forums may burden the defendants' finances (citation omitted), the strain upon the defendants' finances does not outweigh other interests that militate in favor of proceeding expeditiously.) *See also Paine, Webber, Jackson & Curtis, Inc.*, 486 F. Supp. at 1118-19 (court rejected Defendant's argument of limited financial resources).

[6] Movants' argument that it is "more burdensome to defend against unknown charges," *Memo* at 12, ignores the fact that under the *Microfinancial* test, it is clearly recognized that a criminal defendant's burden increases post-indictment. It is certainly not unusual that a defendant who has not been indicted will not know the precise legal theory that will be relied upon by a prosecutor; such a situation does not create an unusual burden on these Defendants.

CIV-6233, 1993 WL 481335, at *1 (S.D.N.Y. Nov. 18, 1993); *Rothstein v. Steinberg*, 08-CV-0673, 2008 WL 5716526, at *3 (N.D. Ohio Dec. 23, 2008); *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 903 (9th Cir. 1989) (when no indictment has been returned, the case for staying proceedings is weak). "[B]ecause the risk of self-incrimination is reduced at the pre-indictment stage, and because of the uncertainty surrounding when, if ever, indictments will be issued, as well as the effect of the delay on the civil trial, pre-indictment requests for a stay are typically denied." *State Farm Mutual Automobile Ins. Co. v. Beckham-Easley*, CIV-A-01-5530, 2002 WL 31111766, at *2 (E.D. Pa. Sept. 18, 2002). In fact, "[w]hen a defendant filing a motion to stay has not been indicted, the motion may be denied on that ground alone." *Id. See also, Sterling*, 175 F. Supp. 2d at 577 ("[T]he consensus that a party seeking a stay bears a heavier burden when he has not yet been indicted derives logically from the balancing test set out by the courts of appeals that have considered the question.")

As noted above, Movants also misapprehend the protections provided by the Fifth Amendment: a party is protected from self-incrimination but not from having to make the decision of whether to invoke the protections of the Fifth Amendment. *Sterling*, F. Supp. 2d at 578; *see also Gellis v. Casey*, 338 F. Supp. 651, 653 (S.D.N.Y. 1972) ("Any witness in a civil or criminal trial who is himself under investigation or indictment is confronted with the dilemma of choosing to testify or to invoke his privilege against self-incrimination. Nevertheless, he must make the choice despite any extra-legal problems and pressures that might follow."). The First Circuit has made clear that the risk of an adverse inference does not qualify as a hardship faced by a defendant. *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir. 1996).

With regard to Movants' stated concerns regarding the government's potential exploitation of civil discovery if the actions are allowed to proceed, this is not a case in which the government is in control of both the civil and criminal proceedings, a scenario "where the fear of prejudice to a defendant is more pressing" than the situation at hand. *United Tech. Corp., Hamilton Standard Div. v. Dean*, 906 F. Supp. 27, 29 (D. Mass. 1995); s*ee also Sterling*, 75 F. Supp. 2d at 579 ("Plaintiff is a private entity, with interests distinct from those of the government. There is no reason to assume that its civil case is simply a stalking horse for the government's criminal inquiry, rather than a good faith effort to obtain compensation for its own private injuries."); *Hakim*, 1993 WL 481335, at *2 ("[T]he potential for prejudice is diminished where, such as here, a private party, not the government, is the plaintiff in the civil action; it is less likely in such cases that the civil discovery process will be used a cloak to conduct criminal discovery.") While Movants cite to multiple cases in which the government directed both the parallel civil and criminal proceedings, those cases are simply inapposite to the situation in these proceedings.

There is no question that a party facing both civil litigation and a parallel criminal investigation faces difficult choices. However, Movants here "can point to nothing that suggests the dilemma they face is more pointed or difficult than in any other case of parallel proceedings," *Sterling*, 175 F. Supp. 2d at 578, and this not uncommon scenario fails to outweigh the rights of the civil Plaintiffs who have been victimized by fraud and other unlawful conduct. Movants have failed to establish any undue hardship caused by moving ahead with discovery in the civil cases, and they have therefore failed to carry the

heavy burden required to demonstrate the need or basis for the extraordinary relief they seek in the form of an indefinite and blanket stay of the civil actions.

3. The remaining factors further support Plaintiffs' opposition to the motions to stay.

As demonstrated above, the central balancing test between Plaintiffs' and Movants' interests leans heavily in favor of the Plaintiffs, and none of the remaining factors identified in *Microfinancial* tips the scale. First, regarding Movants' expressed concerns for the health and well-being of the terminally ill annuitants, *Memo* at 14, 15, Plaintiffs represent that, absent compelling need based on newly discovered evidence or similar circumstance, they do not anticipate the need to conduct further discovery of the terminally ill annuitants outside of participating in any future deposition of annuitant Jason Veveiros if and when that deposition is scheduled by the government.[7] With specific regard to a possible future deposition of Mr. Veveiros, as recognized by the Court in establishing the protocol for conducting the annuitant depositions, the government is in the position to decide which annuitants are sufficiently healthy to participate in such a proceeding, a safeguard that should allay Movants' expressed concern for the well being of the terminally ill individuals.[8]

[7] Plaintiffs have already participated in the depositions of the only three other living annuitants on the annuity contracts issued by Plaintiffs. As related to the contracts which they issued, Plaintiffs do reserve the right to conduct appropriate discovery of family members of both living and dead annuitants.

[8] The health and life expectancy of the annuitants is certainly a factor that mitigates against a stay of the civil actions and weighs heavily against the indefinite stay requested by Movants. *See Austin* ,705 F.2d at 5 (1st Cir. 1983). In *Austin*, a defendant company involved in asbestos litigation argued that a co-defendant company, which was a debtor in a bankruptcy proceeding, was a necessary party to the litigation and the court considered whether an appeal of the civil litigation should be stayed in the interest of fairness to the parties and judicial economy. The First Circuit determined that a stay was not justified:

Looking more broadly at the public interest also supports moving forward with the civil cases. *See, e.g., Hakim*, 1993 WL 481335, at *3 ("[T]he public interest in financial institutions promptly recovering misappropriated funds is significant, particularly when weighed against the interest in a merely conjectural criminal prosecution"). Likewise, the "public interest in the integrity of securities markets militates in favor of the efficient and expeditious prosecution of these civil litigations." *Arden Way*, 660 F. Supp. at 1500. Furthermore, "[t]he public has a vital stake in rooting out fraud and ensuring that aggrieved parties are made whole as rapidly as possible." *Starlight Int'l, Inc. v. Herlihy*, No. CIV-A-97-2329, 1998 WL 560045, at *3 (D. Kan. Aug. 4, 1998). There is without question a compelling public interest in exposing and remediating these types of STAT schemes in order to protect unwary individuals who might be targeted under similar schemes in the future. Based on the facts at hand, the public interest cuts strongly in favor of Plaintiffs being permitted to move forward with the civil litigation.

With regard to Movants' stated desire to promote effective law enforcement and their concerns regarding the confidentiality and viability of the criminal investigation, to

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> In a number of those cases, plaintiffs and crucial witnesses are dying. We are not persuaded that the hardship to defendants of having to go forward on this appeal without [co-defendant debtor in bankruptcy], or the interests of judicial economy in avoiding relitigation of the issues, are strong enough to justify forcing plaintiff and a number of other plaintiffs to wait until bankrupt defendants are successfully reorganized in order to be able to pursue their claims. We proceed, therefore, to the merits.

Id. While testimony of three of the four living annuitants has been preserved by the Rule 15 depositions, it is desirable for many reasons that these individuals be available to provide supplemental discovery and testimony, if and as necessary. For example, it is not unlikely that discovery conducted of the Targets will disclose additional facts that need to be corroborated or disproved by the annuitants. The stay requested by Movants decreases the likelihood that this potentially important evidence will be available.

Plaintiffs' knowledge the government has not sought to intervene in this matter, and the United States Attorney's Office previously informed the Court that the government took no position with respect to Defendants' initial motion to stay discovery. *See Letter from Assistant U.S. Attorney Lee Vilker to the Honorable David L. Martin* (Oct. 20, 2009). Plaintiffs are not aware that the government has communicated any change in its position in relation to the present motion.

Finally, with respect to considerations of convenience of both the civil and criminal courts, the Court is obviously in the best position to assess these issues. A number of courts addressing this factor have recognized the burden and uncertainty that an indefinite stay can create in terms of a court's ability to manage its docket. *See Hakim*, 1993 WL 481335 at *2 ("it is unrealistic to postpone indefinitely the pending action until criminal charges are brought . . . . Such a postponement would require this court either to rely on upon fortuitous events to manage its docket or to guess what criminal acts [Defendants] might be charged with . . . .") (citations and punctuation omitted); *Digital Equip. Corp.*, 142 F.R.D. at 14 ("Although resolution of the criminal proceedings may possibly obviate contentions in this proceeding, this court finds it unrealistic to rely upon fortuitous events to manage its docket.") (citation omitted); *Sterling*, 75 F. Supp. 2d at 580 ("[t]he stay requested would substantially halt the civil litigation indefinitely, without any predictability as to when the case would return to the Court's active docket"). The uncertain status of the criminal investigation also cuts strongly against granting a stay:

> This case is shrouded with uncertainty as there is no way to predict when, if ever, the criminal investigation will ripen into an indictment or end without one. This "limbo" status weighs against a stay as it is unrealistic to postpone indefinitely the pending action until criminal charges are

> brought or the statute of limitations has run for all crimes conceivably committed by the defendants.

Beckham-Easley, 2002 WL 31111766 at *3 (quotation marks omitted). For these reasons, Plaintiffs respectfully suggest that the Court's ability to manage its docket could potentially be adversely impacted by the indefinite stay requested by Movants.[9]

II. IF THIS COURT DETERMINES THAT SOME PROTECTION IS NECESSARY, THE INTERESTS OF ALL PARTIES WILL BE BEST SERVED BY A TEMPORARY, LIMITED STAY.

Plaintiffs anticipated that the Movants would, as they did in the related SEC proceeding, seek a limited stay protecting the Targets from providing testimonial evidence. *See Opp'n to the SEC Application* at 10, M.C. No. 10-52S (Docket # 3) ("no one is seeking a stay of civil proceedings pending the outcome of criminal proceedings"). However, Movants instead seek the indefinite and complete stay of all of the civil cases until the completion of the ongoing grand jury investigation and the resolution of any criminal proceedings emerging therefrom, which could be years away. *See Memo* at 1, 19. For all of the reasons addressed herein, Movants' request for an indefinite and blanket stay is unreasonable and should be denied.

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[9] The First Circuit in *Microfinancial* also included "the status of the cases" as one of the seven listed factors, but did not address the issue other than to note that no indictment had been handed up in the criminal case and that the motion for a stay was made just prior to the start of the civil trial. Other courts have found that the "status of the cases" is not an independent issue but rather is a component in the balancing-of-the-interests inquiry conducted by a court. *See, e.g., Alcala v. Texas Webb County*, 625 F. Supp. 2d 391, 399 (S.D. Tex. 2009).

The *Microfinancial* factors also include "the good faith of the litigants (or the absence of it)." To the extent this factor is measured by the timelines of the stay request, Plaintiffs do not challenge the good faith of Movants in making this request. Plaintiffs do underline the fact that the first of these cases were filed in October 2009, and none of the Defendants have yet even answered the complaints.

Should this Court determine that some level of protection must be extended to the Targets, Plaintiffs propose that the interests of all parties would be best served by a limited and temporary stay which protects the Targets' core Fifth Amendment rights while allowing all other discovery to proceed in these civil actions. Pursuant to such a stay, all testimonial discovery of the Targets, including depositions, requests for admissions, and interrogatories, could be stayed for three months. *See Digital Equip. Corp.*, 142 F.R.D. at 12 (in lieu of general stay, district court may impose a stay for a finite period of time); *Dean*, 906 F. Supp. at 29 (ordering a stay lasting less than two months of all testimonial discovery directed at the defendant). After three months, the Court, with input from the parties, will be in a position to assess developments in the criminal proceedings and to decide whether an extension of the limited stay is justified or, alternatively, whether the stay should be vacated in its entirety. The parties would be permitted to move forward with all other discovery in recognition of the Plaintiffs' compelling interest in proceeding expeditiously with this civil litigation.[10]

CONCLUSION

For the reasons addressed herein, Plaintiffs respectfully submit that consideration of the applicable factors makes clear that the balance tilts strongly against the indefinite and blanket stay of the civil actions requested by Movants. Movants' motions to stay should be denied. To the extent this Court deems entry of a stay necessary and appropriate, a limited and temporary stay should be ordered by this Court.

[10] This Court can obviously reevaluate the situation on its own initiative, or at the request of Plaintiffs or Defendants, at any time if and when the balancing of the applicable factors so dictates.

Respectfully submitted on this 13th day of July, 2010.

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CERTIFICATE OF SERVICE

I certify that the within document was electronically filed with the clerk of the court on July 13, 2010, and that it is available for viewing and downloading from the Court's ECF system. Service by electronic means has been effectuated on all counsel of record.

/s/ Michael J. Daly