

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO</p> <p>Court Address: 1437 Bannock St., Denver, CO 80202</p> <hr/> <p>Plaintiffs:</p> <p>HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL; GDA REAL ESTATE SERVICES, LLC; AND GDA REAL ESTATE MANAGEMENT, LLC</p> <p>v.</p> <p>Defendants:</p> <p>GARY J. DRAGUL, BENJAMIN KAHN, THE CONUNDRUM GROUP, LLP, SUSAN MARKUSCH, ALLEN C. FOX, ACF PROPERTY MANAGEMENT, INC., MARLIN S. HERSHEY, PERFORMANCE HOLDINGS, INC., OLSON REAL ESTATE SERVICES, LLC, JUNIPER CONSULTING GROUP, LLC, and JANE DOES 1-10, and XYZ CORPORATIONS 1-10.</p>	<p>DATE FILED: June 23, 2022 CASE NUMBER: 2020CV30255</p> <hr/> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2020 CV 30255</p> <p>Ctrm: 414</p>
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ORDER RE: DEFENDANT GARY DRAGUL’S ALTERNATIVE MOTION FOR STAY

THIS MATTER is before the court on Defendant Gary Dragul’s Alternative Motion for Stay, filed June 8, 2022 (“Motion”). The court, having reviewed the Motion, the Receiver’s Response thereto filed June 16, 2022, the court record, the applicable law, and being otherwise fully advised the premises, hereby FINDS and ORDERS as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Dragul was indicted by the state grand jury on April 12, 2018 in a nine count securities fraud indictment focusing on material misrepresentations or omissions in connection with the issuance of promissory notes to ten separate investors under C.R.S. §11-51-501(1)(b) (Counts One through Eight), as well as a single course of business count pertaining to all such investors under C.R.S. §11-51-501(1)(c) (Count Nine). Venue for the matter was designated as Arapahoe County District Court, and it was assigned case number 2018 CR 1092. Motion, Ex. 1. Pursuant to the People’s motion filed April 26, 2021, the court dismissed Counts One through Eight for lack of jurisdiction pursuant to the statute of limitations. 2018 CR 1092, Order of April 26, 2021. The sole remaining count, Count Nine, is currently set for trial commencing on November 7, 2022.

The state grand jury returned a second five count securities fraud indictment against Defendant Dragul on February 28, 2019, focusing on course of business theories with respect to the sale of membership interests in two specific LLCs, both commercial shopping center joint ventures, one located in Plainfield, Indiana, and the other in Buford, Georgia (Counts One and Five), and three counts involving alleged fraudulent statements or omissions with respect to three separate individual investors in the Plainfield, Indiana shopping center, alleging the sale of membership interests in the LLC at times when more than 100% of such interests had already been sold (Counts Two, Three and Four). Venue for this second matter was also designated as Arapahoe County, where the case was assigned docket number 2019 CR 610. It has trailed 2018 CR 1092 in Arapahoe County, and is not currently set for trial, nor is speedy trial running with respect to it.

This matter was filed on January 21, 2020, and the First Amended Complaint was filed on June 1, 2020. Receiver Sender asserts twelve separate claims for relief against ten named defendants. Eight claims are asserted against Defendant Dragul, including five separate species of securities law violations, as well as negligence, negligent misrepresentation, civil theft, violations of the Colorado Organized Crime Control Act (COCCA), breach of fiduciary duty, fraudulent transfer, and unjust enrichment. The allegations in this matter are considerably broader than those asserted in either of the criminal indictments, positing the existence of a general Ponzi scheme, solicitation of investor funds not only in the project in Buford, Georgia, but also the Market at SouthPark in Littleton, Colorado, and Fort Collins WF 02, LLC, real estate transfers between Dragul and Defendant Fox pertaining to Prospect Square, various actions by Dragul and other defendants to thwart the Receiver's efforts and conceal or impermissibly transfer receivership estate assets, as well as the payment of unauthorized commissions. Earlier this week, the court denied Dragul's Renewed Motion to Dismiss, and has required that Dragul answer the First Amended Complaint by July 5, 2022. Thus, the first two and a half years of the lifespan of this case has been consumed entirely with dispositive motions and an aborted interlocutory appeal. At a status conference on April 22, 2022, the court declared the matter to be at issue, and will shortly adopt the parties' Amended Proposed Case Management Order as an order of the court.

Defendant Dragul now moves the court for a stay of proceedings, based upon the pendency of the criminal matters in Arapahoe County, and his declared intention to assert his right against self-incrimination pursuant to the Fifth Amendment to the United States Constitution with respect to virtually all discovery directed to him in this matter.

LEGAL STANDARDS

As the court of appeals observed in *People v. Shifrin*, 342 P.3d 506, 513 (Colo. App. 2014),

“[A] stay of [a] civil case to permit the conclusion of a related criminal proceeding has been characterized as an extraordinary remedy.” *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98-100 (2d Cir. 2012)(internal quotation marks omitted) (explaining the defendants face a heavy burden “in overcoming a district court’s decision to refrain from entering a stay”).

Deciding whether a stay is appropriate “generally requires balancing the interests of the plaintiff in moving forward with the litigation against the interests of a defendant asserting Fifth Amendment rights who faces the choice of being prejudiced in the civil litigation if those rights are asserted or prejudiced in the criminal litigation if those rights are waived.” *AIG Life Ins. Co. v. Phillips*, No. 07-cv-00500, 2007 WL 2116383, at *2 (D. Colo. July 20, 2007)(internal quotation marks omitted). In weighing such interests, courts have considered the following six factors:

- 1) the extent to which the issues in the criminal case overlap with those presented in the civil case; 2) the status of the case, including whether the defendants have been indicted; 3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; 4) the private interests of and burden on the defendants; 5) the interests of the courts; and 6) the public interest.

Id. Because these factors “do no more than act as a rough guide for the [trial] court as it exercises its discretion,” the ultimate decision “requires and must rest upon a particularized inquiry into the circumstances of, and the competing interests in, the case.” *Louis Vuitton Malletier S.A.*, 676 F. 3d at 99 (internal quotation marks omitted).

See, Securities and Exchange Commission v. Bongiorno, 2022 WL 891811, *2 (N.D. Ohio, 2022)(citing identical six factors, derived from *FTA v. EMA Nationwide, Inc.*, 767F.3d 611, 627 (6th Cir. 2014), quoting *Chao v. Fleming*, 498 F. Supp. 2d 1034, 1037 (W.D. Mich. 2007). “The Constitution does not generally require a stay of civil proceedings pending the outcome of criminal proceedings, absent substantial prejudice to a party’s rights.” *Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir.2009), citing *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D. C. Cir. 1980).

ANALYSIS

The court will consider each of the six *Shifrin* factors in turn.

1. Overlap

While there certainly is some overlap between the two criminal cases and this case, due primarily to the number of defendants and breadth of the allegations in this case, the court concludes that this factor weighs against a stay of the proceedings.

As noted above, Defendant Dragul is the sole criminal defendant under both indictments, and the original nine counts in the first indictment, including the sole remaining Count Nine, seem to be based exclusively upon allegations regarding his solicitation of investments in exchange for promissory notes. The second indictment concerns the sale of membership interests

in the LLCs in two shopping center joint ventures, and the sale of such memberships to three specific individuals at a time when more than 100% of such memberships had already been sold. By contrast, this civil case involves ten named defendants, and an alleged course of business conduct that amounted to a decade-long Ponzi scheme, involving several additional shopping center ventures, real estate exchanges, efforts to thwart the Receivers efforts and either conceal or fraudulently transfer receivership estate assets, and the payment of unauthorized commissions, among other issues. On the basis of the pleadings, it is unclear to the court exactly how much overlap there is between the alleged scheme to exchange promissory notes for investments upon which the first indictment was based, the sale of membership interests in LLCs which are the subject of the second indictment, and the more broadly-based and multifaceted Ponzi scheme which is the subject of this litigation. However, it seems clear that there are discrete areas of discovery involving persons other than Defendant Dragul, and circumstances and alleged conduct separate from that which is alleged in the criminal cases, upon which the parties' discovery may be focused, at least initially, and without the necessity of Defendant Dragul claiming his Fifth Amendment privilege.

2. Status of the Case

Obviously, Defendant Dragul was indicted before this civil case was filed, but it is worth repeating that eight of the original nine counts in the first indictment have now been dismissed on the People's motion on what the court characterized as jurisdictional grounds, and therefore are unlikely to be reinstated at any point. The one remaining count from the first indictment is set for trial in November, but the five counts contained in the second indictment have not yet been set for trial, and that case is trailing the first indictment, and is apparently not on the speedy trial clock. It seems possible that the parties wish to allow the trial of the first criminal case to serve as something of a bellweather for the second, in which event the second criminal case may not be set for trial, if at all, until the first is resolved, which of course would involve separate and additional delay. Of course, there is always the possibility that the result in the trial court will be appealed, potentially resulting in several years delay. Needless to say, a potentially indefinite stay of these proceedings, based solely upon potential prejudice resulting to Defendant Dragul from his assertion of his Fifth Amendment rights, would dramatically affect the rights of the alleged victims of Dragul's conduct, as well as the state's interest in prosecuting such conduct. On balance, the court finds that this factor also weighs against the granting of a stay.

3. Private Interests of the Plaintiff

This matter has now been pending for nearly two and a half years, all of which have been consumed with time-consuming motions practice and an unsuccessful attempt at an interlocutory appeal. Receiver Sender obviously wishes to move forward with discovery and trial preparation in this matter, which, to the court's understanding, is the only remaining action brought by the Receiver to marshal the assets and vindicate the rights of the receivership estate. Needless to say, the remedies sought in this civil securities fraud litigation are different in kind and potential effect from any satisfaction the Receiver and the individual alleged victims would derive from one or more criminal convictions of Mr. Dragul. At the same time, there is no question that continued delay of this matter will compromise the Receiver's ability to pursue the litigation. There are, of course, the usual problems with witnesses' memories fading and other evidence being lost or becoming stale if the stay requested turned into an interminable delay as Defendant

Dragul pursues all avenues, including an appeal to at least one level of the Colorado appellate courts should he be convicted.

Again, the court finds that this factor also weighs in favor of denying a stay.

4. Private Interest and Burden Upon Defendant

The value of the privilege against self-incrimination under the Fifth Amendment requires no elaboration. However, as noted, discovery in this matter can go forward with respect to many parties and much alleged conduct without Defendant Dragul being put to the decision as to whether to assert or waive his Fifth Amendment rights. There are ten named defendants, dozens of alleged victims, and much discoverable information which is certainly not within the exclusive possession of Defendant Dragul, upon which the parties could focus initially. Of course, the Fifth Amendment privilege must be asserted in a timely and particularized manner, and Defendant's indication that he intends to assert the privilege with respect to all matters would amount to a blanket assertion, which is impermissible.

In addition, there would no doubt be a certain burden placed upon Defendant Dragul arising from his needing to simultaneously defend both his criminal cases and this one. In that respect, whatever overlap there is between the two would tend to lessen the burden that might otherwise exist, especially in view of the fact that Defendant Dragul appears to be being defended both criminally and civilly by the same law firm. Moreover, this burden is unavoidable in the context of conduct which results in simultaneous criminal and civil proceedings, and therefore cannot alone be the basis for granting a stay.

On balance, the court interprets this factor as also weighing against granting a stay.

5. The Interests of the Court

This court is obligated to dispose of pending litigation as expeditiously as due process and the rights of the parties allow. The relevant Chief Justice Directive sets a goal that the Second Judicial District have no more than 10% of civil cases open for more than a year, and a benchmark that no more than 20% of a judicial officer's cases are to be open for more than 18 months. CJD 08-05. This case is already well beyond those timeframes, and Defendant Dragul has yet to answer the First Amended Complaint, discovery occur and the matter be set for trial. Needless to say, the fading of witnesses' memories and the staleness of evidence has the potential of severely impacting the quality of justice obtainable in the courts. All of these considerations weigh against granting the requested stay.

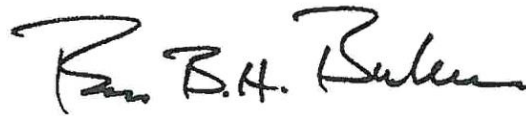
6. The Public Interest

Needless to say, the public certainly has an acute interest in resolving both criminal and civil matters expeditiously. The old adage that "justice delayed is justice denied" must certainly be a touchstone in analyzing the advisability of the stay requested in this case. Moreover, the fact that this case arises out of an enforcement action brought by the Attorney General under the state's securities laws, as well as multiple common law causes of action, and in an effort to protect the rights of and compensate allegedly defrauded investors, strongly suggests that the public interest will be served by the case proceeding expeditiously with discovery and trial, regardless of the ultimate result.

Considering the six *Shifrin* factors as a whole, the court concludes that a stay of these proceedings is inadvisable, and therefore DENIES THE MOTION IN ITS ENTIRETY. The court will certainly consider, if the parties are unable to so stipulate, ordering that discovery be taken in a certain order, and at least initially focus upon parties and issues not involved in the criminal matters, as well as utilizing protective orders to, for instance, seal Defendant Dragul's deposition, should he give one while one or more of the criminal cases remain pending, and assert his Fifth Amendment privilege to all or some of the questions asked.

DATED this 23d day of June, 2022.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Ross B.H. Buchanan". The signature is written in a cursive style with some loops and flourishes.

Ross B.H. Buchanan
Denver District Court Judge