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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: **DEWEY & LEBOEUF LLP,** **Debtor.**	**Case No. 12-12321 (MG)** **Chapter 11**
ALAN M. JACOBS, as Liquidating Trustee of the Dewey & LeBoeuf Liquidation Trust, **Plaintiff,** **v.** **STEPHEN H. DiCARMINE and JOEL I. SANDERS,** **Defendants.**	**Adv. Pro. No. 13-01765 (MG)**

LIQUIDATING TRUSTEE'S OPPOSITION TO
DEFENDANTS' MOTION FOR A COMPLETE STAY

(This pleading responds to Adv. Dkt. 26 & 29)

Alan M. Jacobs, as the Liquidating Trustee ("Trustee") of the Dewey & LeBoeuf Liquidation Trust, files this opposition to the Application for A Complete Stay of The Action ("Motion to Stay") filed by Stephen DiCarmine ("DiCarmine") and joined by Joel Sanders ("Sanders" and, together with DiCarmine, "Defendants") (Adv. Dkt. 26, 28, 29).

SUMMARY

The Defendants want to stay this case for at least a year pending their criminal trial because this case bears similarities to the criminal action against them.[1] But the overlap between the Trustee's fraudulent *transfer* claims and the State of New York's *criminal* fraud allegations is mostly superficial, and there is little substantive overlap.

The chart at **Appendix A** shows the elements of each of the Trustee's claims and the potential overlap, if any, with the criminal charges brought against the Defendants. With the exception of just two elements – both of which the Trustee can establish without resort to Defendants' testimony – there is no overlap at all.

Courts only grant the "extraordinary remedy" of a stay in a civil case pending a criminal trial where the claims in the civil case match the claims in the criminal case. That is simply not the case here. The balance of interests favors allowing this case to proceed. And, the public interest, this Court's interest, and the Trustee's interest all weigh against a stay. The public and the Trustee have a strong interest in the prompt resolution of the estate for the benefit of the Debtor's hundreds of individual creditors. This Court has a strong interest in avoiding

[1] The Defendants suggest, but of course cannot guarantee, that their criminal trial will begin in January 2015 and will last from four to six months. That would take us to July 2015. That estimate does not include time for delays, mistrials, appeals, retrials, etc., any of which is possible. The request for a stay is, in effect, a request for an indefinite suspension of this case.

duplicative litigation of identical issues in multiple cases. Insolvency is just one such issue. The clawback cases should be tried together, on the same schedule, to the extent possible.

The Defendants' interests, in contrast, are more limited and can be accommodated without a complete stay. The Defendants' concern that they will be distracted by parallel proceedings rings hollow because each is represented by law firms with hundreds of lawyers. Certainly those firms can handle a civil and criminal case at the same time (as, in fact, they already have for the last several months). The Defendants' Fifth Amendment interest is already adequately accommodated by this Court's instruction that it will not require the Defendants to be deposed at this time. The narrow issue of whether the Defendants must testify against themselves, and whether the Trustee needs that testimony at all, may be revisited in the future.

Finally, regardless of whether a stay of the Trustee's affirmative claims is appropriate, there is little doubt that the Defendants are not entitled to a stay of litigation of their own proofs of claim. The Trustee stands as the defendant with respect to those claims, and Courts are loathe to allow a plaintiff who has commenced an action to retreat behind the cloak of the Fifth Amendment. Put another way, a party has no absolute right to both his silence and his lawsuit. The Defendants ought not be permitted to stay the Trustee's defense of their proofs of claim.

This case has been pending before the Court for seven months. Discovery is underway. We have an agreed scheduling order in place. We are already in the middle of motion-to-dismiss briefing. There is no reason to impose a complete stay on this case, right now, when more surgical relief can be granted, as this Court has done and can continue to do if the need arises.

LEGAL STANDARD

"[I]t is universally agreed that the mere pendency of a criminal investigation standing alone does not require a stay." *Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 175 F. Supp. 2d 573,

578 (S.D.N.Y. 2001). "Absent a showing of undue prejudice upon defendant or interference with his constitutional rights," a plaintiff "should not be delayed in its efforts to diligently proceed to sustain its claim." *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 97 (2d Cir. 2012). A stay pending criminal trial is an "extraordinary remedy" that is within the discretion of the court. *Id.* at 97, 99-100.

ARGUMENT

Defendants' motion for a stay should be denied because the relevant factors weigh against interrupting this case and holding it in abeyance for at least a year, and because more limited relief can accommodate the Defendants' Fifth Amendment interests.

I. The Relevant Factors Weigh Against Imposing A Stay.

Courts in the Second Circuit weigh six factors to decide whether to stay a civil case while parallel criminal proceedings are pending:

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.

Louis Vuitton, 676 F.3d at 98. These factors are a "rough guide" and cannot substitute for the Court's "studied judgment as to whether the civil action should be stayed based on the particular facts before it and the extent to which such a stay would work a hardship, inequity, or injustice to a party, the public or the court." *Id.* at 99.

Here, the factors – and the facts and circumstances of this case – weigh against a stay. There is minimal overlap with the criminal case. The public interest, this Court's interest and the Trustee's interests (and those of the hundreds of individual creditors of the Debtor) support continued and timely prosecution of this case. In contrast, the Defendants' Fifth Amendment privilege is implicated, if at all, only in a narrow way and can be accommodated without a stay.

A. There Is Only Superficial Overlap Between the Cases.

"Overlap of the issues has been recognized as one of the most important factors to take into consideration, as the extent to which issues overlap in the civil and criminal case will dictate whether self-incrimination is likely." *In re Who's Who Worldwide Registry, Inc.*, 197 B.R. 193, 196 (Bankr. E.D.N.Y. 1996). Courts deny motions to stay when there is no overlap. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. CPT Medical Services, P.C.*, 375 F. Supp. 2d 141 (E.D.N.Y.); *Sotheby's Int'l Realty, Inc. v. Black*, 472 F. Supp. 2d 481 (S.D.N.Y. 2006). Partial-overlap cases are decided on a case-by-case basis. *See Louis Vuitton*, 676 F.3d at 101.

Here, the Defendants argue that "unless this action is stayed, [the Defendants] will have to try [the criminal case] within the proceeding before this Court." (Def. Mot. at 2.) This is sheer exaggeration; Defendants base this argument on the fact that the Trustee's First Amended Complaint contains words like "fraud." (*See* Motion to Stay at 3.) But the purported overlap is superficial.

The Defendants conflate the sort of fraud alleged by the Trustee (*i.e.*, bankruptcy law fraudulent transfers where proof depends on the insolvency of the Debtor and transfers of assets to the detriment of creditors) with the common-law fraud at issue in the criminal case (*i.e.*, intentional and material misstatements of fact that induced investors to buy bonds issued by the Debtor). The two types of claims are different in two essential ways:

First, the "fraud" in "fraudulent transfer" is the Debtor's, not the Defendant's, fraud. *See, e.g., In re Actrade Fin. Techs. Ltd.*, 337 B.R. 791, 808 (Bankr. S.D.N.Y. 2005) ("[I]t is the intent of the transferor [debtor] and not the transferee [defendant] that is relevant for purposes of pleading a claim for intentional fraudulent conveyance under the Bankruptcy Code."). In the case of constructive fraudulent transfers, "fraud" is found based on the presence of insolvency and the lack of reasonably equivalent value. (*See* FAC at ¶¶ 165-98 (alleging the factual predicates for constructive fraudulent transfer claims)). In the case of actual intent fraudulent transfers, "fraud" can be proved indirectly, by reference to certain "badges" of fraud, such as a lack of arms' length negotiation. (*See* FAC at ¶¶ 133-64 (alleging badges of fraud in support of actual intent fraudulent transfers)). Whatever its importance in the criminal case, the issue of wrongful intent of the Defendants is simply not essential to the Trustee's case.

Second, the fraudulent scheme alleged in the criminal case is based on different facts than the civil case. In the criminal case, New York alleges that the Defendants lied to auditors and creditors in connection with a $150 million bond offering in 2010. The gravamen of the criminal complaint is that the Defendants defrauded bondholders by intentionally making material misstatements that induced them to buy bonds. (*See* Ex. B to FAC (Indictment) at 6-10 (describing the allegedly fraudulent bond offering).) In the civil case, by contrast, the Trustee alleges that payments to the Defendants under purported compensation agreements were not for reasonably equivalent value and were outside the Debtor's ordinary course of business.

The only area of potential overlap relates to the value of services provided by the Defendants. The Defendants' will defend against some (but not all) of the Trustee's claims by arguing that they gave reasonably equivalent value for their salaries and bonuses. As this Court noted, criminal wrongdoing by the Defendants could, if proven, mean that the Defendants were

not entitled to any remuneration under New York's faithless servant doctrine. (*See* Hearing Tr., dated May 28, 2014, at 8:4–9:8 (citing *Phansalkar v. Andersen Weinroth & Co., LP*, 344 F.3d 184 (2d Cir. 2003)). Here, one of the allegations the Trustee makes is that the Defendants faithlessly engaged in self-dealing in procuring compensation arrangements and awarding themselves discretionary bonuses through self-dealing. While a criminal conviction would buttress the Trustee's arguments on this point, it is not at all necessary to the Trustee's case.

B. The Interests of The Public, This Court and The Trustee Oppose A Stay.

The Trustee has a paramount and urgent interest in this case. As a general matter, courts recognize that all plaintiffs have "a strong interest in the expeditious resolution of [] civil proceedings." *Volmar Distributors, Inc. v. New York Post Co.*, 152 F.R.D. 36, 40 (S.D.N.Y. 1993). That interest is even stronger when a bankruptcy trustee is involved because a bankruptcy trustee "is not an ordinary litigant but rather a trustee with a fiduciary duty to creditors of the bankruptcy estate." *In re MGL Corp.*, 262 B.R. 324, 328 (Bankr. E.D. Pa. 2001) (denying motion to stay civil proceedings); *Who's Who*, 197 B.R. at 197 (denying motion to stay, holding "Plaintiff has a legitimate interest in the expeditious resolution of the adversary proceeding in order to make a distribution to the creditors of the estate."). As one Bankruptcy Court explained:

> [A] stay would severely prejudice the Trustee's legitimate interest in the expeditious resolution of this Adversary Proceeding in order to make a distribution to creditors. The longer this Adversary Proceeding is delayed, the less likely it is that the Trustee will be able to recover the assets that are sought.

In re Fin. Federated Title & Trust, Inc., 252 B.R. 834, 839 (Bankr. S.D. Fla. 2000). Here, the Trustee is pursuing claims on behalf of hundreds of individual creditors of the Debtor. Every day that the case is delayed postpones and diminishes recovery. The Trustee's urgency in

pursuing these claims is heightened by the real risk that Defendants' assets will dry up while they scramble to defend themselves against the criminal charges and other potential lawsuits.

This Court also has a strong interest in seeing this case proceed. This adversary proceeding is just one of approximately thirty pending clawback cases before this Court regarding fraudulent transfers to former partners and insiders of the Debtor. In bringing these cases, the Trustee has sought to consolidate proceedings where possible and to align cases on similar time tables for discovery and litigation. Many issues of fact and law, such as the date the Debtor became insolvent, are the same in multiple cases. If this case were stayed, the Court would face the extraordinary inefficiency of having multiple trials on the same factual issues.

Finally, the public interest is strongly advanced by allowing the Trustee to complete his litigation expeditiously in the interest of closing the estate and making final distributions to the hundreds of individual creditors of the Debtor. *See In re MGL Corp.*, 262 B.R. at 330 ("The public interest in the expeditious administration of bankruptcy cases is impaired by obstructing a trustee's efforts to collect, liquidate and distribute assets to creditors of the estate.").

C. The Defendants' Interests Are Narrowly Implicated And Can Be Accommodated.

The Defendants assert two types of prejudice. The first is their Fifth Amendment right not to incriminate themselves, which they believe would be harmed if they were forced to testify in a civil case. The second is the burden of participating in two cases at once. The first interest is only narrowly implicated and is readily accommodated without a stay. The second interest does not warrant relief because the Defendants are each represented by law firms well equipped to handle more than one case at a time.

This Court has diligently protected the Fifth Amendment rights of these Defendants. From the time the indictments were issued, this Court has admonished the Trustee's counsel that

depositions of the Defendants would not proceed in the near term. The Court has also carefully instructed that Defendants would not be required to sit for depositions in which they would assert their Fifth Amendment privileges, but rather that Defendants could simply notify the noticing party of that intention. With these protections in place, litigation of these cases has proceeded and Defendants' Constitutional rights have not been impacted. There is no reason to believe this case cannot continue to make progress with similar protections in place. The Trustee intends to win summary judgment on at least some of his claims. The Trustee can pursue that relief while still affording appropriate protections to the Defendants.

The Defendants' other argument, that they should not be burdened by having to litigate two cases at once, rings hollow. Courts take a dim view of this argument. *See Paine, Webber, Jackson & Curtis, Inc. v. Malon S. Andrus, Inc.*, 486 F. Supp. 1118, 1118-19 (S.D.N.Y. 1980) ("It is noted that [the defendant] is represented in this action by separate and independent counsel from those who are defending him in the criminal prosecution. No reason has been advanced why these lawyers cannot devote themselves to matters involved in this suit while those who represent him in the criminal matter take care of his interests in that proceeding."). Even at routine status hearings, DiCarmine and Sanders are each represented by at least two, and sometimes more, attorneys. Each. Surely those law firms can handle two cases at once.

Finally, it is worth noting, with all due respect to the Defendants' Fifth Amendment rights, that they have only themselves to blame for the inconvenience of facing simultaneous civil and criminal liability. As one court put in the context of denying a motion to stay:

> It is plainly ludicrous for [the defendant] to argue that it is "unfair" to compel him to face the civil lawsuits 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. . . . 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 plaintiffs from expeditiously advancing their claim.

Arden Way Assocs. v. Boesky, 660 F. Supp. 1494, 1497 (S.D.N.Y. 1987).

II. More Tailored Relief Can Accommodate the Defendants' Alleged Interests.

The Second Circuit has made clear that, when faced with a motion to stay pending a criminal case, a court may order "alternative forms of relief, such as tailored stays, protective orders, quashing or modifying subpoenas, [and] sealing confidential material." *Louis Vuitton*, 676 F.3d at 102. This Court has already ruled that it will not require Defendants to appear at depositions in this action, fully protecting their Fifth Amendment rights. The Court can and should order further limited protections to the extent they are warranted.

III. The Trustee's Objections to Proofs of Claim Should Not Be Stayed.

The Defendants each filed proofs of claim against the Debtor's estate. In doing so, each Defendant asked this Court to adjudicate their claims and to award them recovery. The Trustee's objection to these proofs of claim are defensive, and the Trustee is entitled to pursue them.

The Defendants fail to cite a single case in which a bankruptcy court stayed litigation of a proof of claim because the claimant was later indicted. Outside of the bankruptcy context, courts are reluctant to grant a plaintiff's request for a stay once litigation is begun. *E.g. Arries v. University OB/GYN, LLC*, 2012 WL 896355, at * 2 (D. Ariz. Mar. 16, 2012) (denying plaintiff's request for a stay pending criminal trial where a stay "would seriously prejudice Defendants' ability to collect and civil judgment they may obtain [on counterclaims].").

As the Fifth Circuit has explained:

> The plaintiff who retreats under the cloak of the Fifth Amendment cannot hope to gain an unequal advantage against the party he has chosen to sue. To hold otherwise would, in terms of the customary metaphor, enable plaintiff to use his Fifth Amendment shield as a sword.

Wehling v. CBS, 608 F.2d 1084, 1087 (5th Cir. 1980). Regardless of whether the Trustee's pursuit of affirmative recovery is placed on hold, there can be no justification for preventing the Trustee from timely defending against the Defendants' affirmative claims against the Trust.

CONCLUSION

For the reasons stated herein, the Trustee respectfully requests that this Court deny Defendants' motion and grant such other relief as may be appropriate.

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