

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

U.S. COMMODITY FUTURES )  
TRADING COMMISSION, )  
Plaintiff(s) )  
) **CASE NO. 09-3332 (MJD/FLN)**  
v. )  
)  
TREVOR COOK, ET AL., )  
Defendants. )  
R.J. ZAYED, )  
Receiver. )

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UNITED STATES SECURITIES )  
AND EXCHANGE COMMISSION, )  
Plaintiff(s), )  
) **CASE NO. 09-3333 (MJD/FLN)**  
v. )  
)  
TREVOR G. COOK, AND )  
PATRICK J. KILEY, ET AL., )  
Defendants, )  
)  
BASEL GROUP, LLC, ET AL., )  
Relief Defendants. )  
)  
R.J. ZAYED, )  
Receiver. )

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UNITED STATES SECURITIES )  
AND EXCHANGE COMMISSION, )  
Plaintiff, ) **CASE No. 11-574 (MJD/FLN)**  
)  
v. )  
)  
JASON BO-ALAN BECKMAN, )  
ET AL., )  
Defendants, )  
)  
HOLLIE BECKMAN, )  
Relief Defendant. )  
R.J. ZAYED, )  
Receiver. )

**MEMORANDUM IN SUPPORT OF MOTION TO  
INTERVENE AND STAY PROCEEDINGS**

The United States, by and through its attorneys B. Todd Jones, United States Attorney for the District of Minnesota, and Assistant United States Attorney Tracy Perzel, respectfully seeks an order of this Court (a) permitting the United States to intervene in this matter, and (b) temporarily staying the proceedings in this case until the resolution of related, criminal litigation.<sup>1</sup>

**I. BACKGROUND**

In U.S. District Court for the District of Minnesota, there are three open civil cases that address the same investment fraud scheme that is at issue in two open criminal cases, also filed in the District of Minnesota.

**A. Civil Cases**

On November 23, 2009, plaintiff Securities and Exchange Commission (SEC) filed its Complaint (Civil No. 09-3333

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<sup>1</sup> To the extent the United States seeks a stay, the United States excludes from its request any and all efforts by the Receiver to pursue claims, obtain assets, and disburse funds to investors including, but not limited to, all pending and any future litigation by the Receiver. Previously, the United States filed a similar motion in the SEC case involving Tom Petters and related entities, resulting in an Order of Judge Ann Montgomery staying the proceedings and excepting the actions of the Receiver from that stay. (Civil no. 09-1750 (ADM/JSM) (Dkt. 110)).

(MJD/FLN), Dkt. 1) against Trevor Cook (Cook), Patrick Kiley (Kiley), identified investment companies (those used by Cook and Kiley to solicit investors for a foreign currency investment), and also several relief defendants. In its complaint, plaintiff SEC alleged that defendants had engaged in violations of the securities laws, were continuing to solicit investors for the purported investment, and had spent, lost, or otherwise dissipated tens of millions of dollars in investor assets. (Id.). Plaintiff SEC also moved for the freezing of assets, the appointment of a Receiver, and other emergency relief. (Id., Dkt. 2). Multiple supporting exhibits accompanied the SEC's complaint and motion. (Id., Dkt. 4-6, 8-11).

The same day, November 23, 2009, plaintiff Commodity Futures Trading Commission (CFTC) filed a complaint against Cook, Kiley, identified investment companies (those used by Cook and Kiley to solicit investors for a foreign currency investment), and several additional defendants. In its complaint, plaintiff CFTC alleged that Kiley and Cook had engaged in violations of the Commodity Exchange Act and CFTC Reauthorization Act. (Civil No. 09-3332(MJD/FLN), Dkt. 1). Plaintiff CFTC also moved for a temporary restraining order

and a preliminary injunction. (Id., Dkt. 2-3). Multiple supporting declarations and exhibits accompanied these motions. (Id., Dkt. 6-16).

On March 7, 2011, plaintiff SEC filed a complaint against Jason Bo-Alan Beckman (Beckman), his wife (Hollie Beckman), and Beckman's registered investment advisory firm (Oxford Private Client Group). (Civil no. 11-574 (MJD/FLN), Dkt. 1). In its complaint, plaintiff SEC alleged that Beckman had engaged in violations of the Securities Act and the Exchange Act. Plaintiff SEC also moved for an asset freeze, a preliminary injunction, and appointment of a receiver. (Id., Dkt. 2). Declarations and exhibits supported the complaint and the motions. (Id., Dkt. 4-7).

Each of these cases has at its core the investment fraud scheme for which Beckman, Durand, and Kiley are now charged by indictment (Criminal No. 11-228 (MJD/JJK)) and for which defendants Cook and Pettengill were charged by information (Criminal Nos. 11-192 (MJD) and 10-75 (MJD), respectively).

**B. Criminal Cases.**

There are two open and separate criminal cases, both being prosecuted by the U.S. Attorney's Office, that parallel the SEC and CFTC civil actions.

In United States v. Jason Bo-Alan Beckman, Gerald Joseph Durand, and Patrick Joseph Kiley, Criminal No. 11-228 (MJD/JJK), (Dkt. 17), a federal grand jury returned an indictment on July 19, 2011. Beckman, Durand and Kiley face charges of mail fraud, wire fraud, conspiracy to commit mail and wire fraud, and money laundering, all of which stem from their participation in the investment fraud scheme at issue in the civil cases.<sup>2</sup>

In United States v. Christopher Pettengill, Criminal No. 11-192 (MJD), (Dkt. 4), Pettengill made his first appearance and entered a plea of guilty to an information charging securities fraud, conspiracy to commit mail fraud, and engaging in a monetary transaction on June 21, 2011. The fraud scheme in which Pettengill admitted participating is the same investment fraud scheme at issue in the civil cases.

**C. Position of SEC and CFTC on Intervention**

The United States now seeks to intervene in the civil proceedings - those initiated by the SEC and the CFTC - for the purpose of seeking a stay of those proceedings pending resolution of the underlying criminal litigation. This stay would be subject to an exception for any and all actions of

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<sup>2</sup> Pettengill was not, however, a named defendant in the instant civil cases.

the receiver to pursue claims, obtain assets, and disburse funds to investors. Neither the SEC nor the CFTC oppose this motion.

**II. INTERVENTION IS APPROPRIATE.<sup>3</sup>**

Intervention is governed by Rule 24 of the Federal Rules of Civil Procedure. Intervention may be of right or at the discretion of the Court. Both types of intervention are appropriate in this case.

The standards for intervention as a matter of right are set out in Fed. R. Civ. P. 24(a)(2), which provides that "anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is protected by existing parties." To intervene as of right under Rule 24(a)(2), the applicant must demonstrate three things: That (1) "it has a recognized interest in the subject matter of the litigation; (2) the interest might be

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<sup>3</sup> Previously, the United States moved to intervene in Civil No. 09-3332 (MJD/FLN) as to a narrow discovery issue, and the Court granted the United States' motion to intervene.

impaired by the disposition of the case; and (3) the interest will not be adequately protected by the existing parties.” Chiglo v. City of Preston, 104 F.3d 185, 187 (8th Cir. 1997). To intervene as a matter of right, a potential intervenor must satisfy all three of the Chiglo conditions.

Discretionary intervention under Rule 24(b)(2) may be allowed “when the applicant’s claim or defense and the main action have a question of law or fact in common.” Permissive intervention is discretionary, and the Court must factor into its decision the impact that allowing intervention would have on the rights of parties already in the lawsuit.

In situations where civil enforcement or injunctive actions - such as those of the SEC and similar entities - are running in parallel with Justice Department criminal prosecutions, federal district courts have routinely allowed intervention by the Justice Department for the purpose of seeking a stay of proceedings to include a stay of discovery. SEC v. Downe, 1993 WL 22126 at \*11 (S.D.N.Y. Jan. 26, 1993) (“it is well established that the United States Attorney may intervene in a federal civil action to seek a stay of discovery, when there is a parallel criminal proceeding, which is anticipated or already underway, that involves common

questions of law or fact"). Such interventions have been granted both as a matter of right under Fed. R. Civ. P. 24(a)(2), see, e.g., SEC v. Mutuals.com, Inc., 2004 WL 1629929 (N.D. Tex. July 20, 2004), and as a matter of discretion under Fed. R. Civ. P. 24(b)(2), see, e.g., SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988); SEC v. Mersky, 1994 WL 22305 (E.D.Pa. Jan. 25, 1994); Downe, 1993 WL 22126 at \*11.

Intervention in this case by the United States is appropriate both as a matter of right and as a matter of discretion. Taking the three elements of intervention as of right in turn, first, the United States has a strong interest in the underlying civil case, specifically, in its apprehension that the proceedings including discovery in the civil case - which will proceed under the liberal discovery regime of the Federal Rules of Civil Procedure - not impair or impede the criminal case. In the criminal case, discovery will go forward in accordance with the much more restrictive Federal Rules of Criminal Procedure. This concern also satisfies the second Chiglo factor (that the interest the intervenor seeks to protect might be impaired by the disposition of the case). Third and finally, although the Justice Department, the SEC, and the CFTC are all government

agencies, the interests of the Justice Department will not automatically be protected by the SEC and the CFTC; the agencies have different objectives in their separate proceedings. The SEC's objective is to enjoin further violations of the securities laws and to recover assets for distribution to victims of securities fraud; the CFTC's objective is to enjoin further violations of the Commodity Exchange Act and to recover assets for distribution to victims of commodity futures fraud. The Justice Department's objectives are the general and specific deterrence that can be realized through a criminal prosecution.

Discretionary intervention is also appropriate in this case, since the two sets of proceedings, civil and criminal, have essentially identical facts centering on the investment fraud scheme operated by Beckman, Durand, Kiley, Cook, and Pettengill.

Finally, although not explicitly listed in Rule 24 or the cases construing it, the Justice Department's motion to intervene is timely. Discovery has not commenced in the CFTC's civil case (Civil No. 09-3332(MJD/FLN)) and has commenced but has not been completed in the SEC's civil case (Civil No 09-3333(MJD/FLN)). Indeed and as to the SEC's civil

case, defendant Kiley has failed to comply with Court-ordered discovery timelines. In Civil No. 11-574 (MJD/FLN), involving litigation by the SEC against Beckman, the discovery deadline is June 1, 2012. (11-cv-574, Dkt. 148). Accordingly, intervention and a stay would be efficient, and would not result in halting a civil case after the parties had already put substantial effort into discovery and preparation for trial.

**III. A STAY OF THE PROCEEDINGS, INCLUDING DISCOVERY BUT EXCEPTING ACTIONS OF THE RECEIVER, IS APPROPRIATE.**

This Court has the authority to stay all or any portion of this case. This authority is rooted in the district court's inherent power to control and manage its own docket. United States v. Kordel, 397 U.S. 1, 12 n. 27 (1970); Landis v. North American Co., 299 U.S. 248, 255 (1936) ("the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance"); Emerson Electric Co. v. Black & Decker, 606 F.2d 234, 237 n. 6 (8th Cir. 1979). Stays of civil cases are common when a parallel criminal proceeding is anticipated or

already underway. As the Supreme Court noted in Degen v. United States:

[T]he District Court has its usual authority to manage discovery in a civil suit, including the power to enter a protective order limiting discovery as the interests of justice require. Fed. R. Civ. P. 26(c). Decisions in the Courts of Appeals have sustained protective orders to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases.

517 U.S. 820, 826 (1996) (citations omitted).

Based on the significant differences between criminal and civil proceedings, and the various ways in which civil discovery can impair criminal proceedings, numerous courts have completely stayed civil cases brought by the SEC when there is a parallel criminal proceeding. See, e.g., SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (civil discovery in SEC enforcement action stayed on Justice Department's motion); SEC v. Doody, 186 F. Supp. 2d 379, 381 (S.D.N.Y. 2002) (same); SEC v. Tandem Mgmt., 2001 WL 1488218 at \*4 (S.D.N.Y. Nov. 21, 2001) (same); SEC v. Beacon Hill Asset Mgmt., 2003 WL 554618 at \*1 (S.D.N.Y. 2003) (same); Downe, 1993 WL 22126 at \*14 (same). Factors to be considered in deciding whether a stay of proceedings, including discovery, in an SEC or CFTC civil proceeding is justified include (1) the extent to which the issues in the criminal case overlap with those in the civil case, (2) the status of the criminal case, including whether

defendants have been indicted, (3) the private interests of plaintiffs who are prevented by the stay from proceeding expeditiously with their lawsuit, and any prejudice to plaintiffs caused by delay, (4) the private interests of, and burdens on, the private defendants, (5) the interests of the Court, and (6) the interests of the public.

All of these factors militate in favor of a stay of discovery being granted.

**A. The Issues In The Cases--Civil and Criminal--Are Virtually Identical.**

The criminal indictment entered against Beckman and Kiley, like the civil complaints, describe in some detail the investment fraud scheme and Beckman's and Kiley's roles in that scheme. Both the indictment and the civil complaints discuss the purported foreign currency investment; the material misrepresentations concerning the safety, performance and liquidity of that investment; and actions by Beckman, Kiley, and others to advance the fraud. Both the civil cases initiated by the SEC and CFTC and the criminal cases initiated by the Justice Department seek public redress for the wrongs allegedly committed by Beckman, Kiley and others in this wide-reaching investment fraud, which resulted in more than 700 investors providing assets of approximately \$194 million.

**B. Beckman, Kiley and Durand Have Been Indicted.**

As noted above, Beckman, Durand and Kiley have been charged by indictment returned by a federal grand jury. Their case is scheduled for trial before the Honorable Michael J. Davis commencing on December 5, 2011. Two other defendants involved in the same investment fraud scheme - Cook and Pettengill - have pleaded guilty.<sup>4</sup> In sum, the criminal litigation involving this investment fraud scheme - and specifically the actions of Beckman, Durand, and Kiley - is at quite an advanced stage.

**C. A Stay Would Serve The Public Interest In Law Enforcement.**

Courts have routinely recognized that a pending criminal prosecution ordinarily takes precedence over related civil litigation. The reasons for this policy against civil discovery while criminal proceedings are open stem directly from the differences between civil and criminal proceedings. As the Fifth Circuit explained in Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962),

[T]he very fact that there is a clear distinction between

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<sup>4</sup> In a separate criminal matter, Jon Jason Greco also pleaded guilty to making a material false statement to a federal agent (18 U.S.C. § 1001) concerning concealment of proceeds of the instant investment fraud scheme and awaits sentencing. United States v. Greco, 11-cr-112 (MJD).

civil and criminal actions requires a government policy determination of priority; which case should be tried first. Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.

The courts have repeatedly recognized the priority that should be given to the "public interest in law enforcement". United States v. Hugo Key and Son, Inc., 672 F. Supp. 656, 685 (D.R.I. 1987); see also, Driver v. Helms, 402 F. Supp. 683, 685 (D.R.I. 1975); In re Ivan F. Boesky Securities Litigation, 128 F.R.D. 47, 49 (S.D.N.Y. 1989) ("the public interest in the criminal case is entitled to precedence over the civil litigant"). Stays have been granted to halt civil litigation that threatened to impede criminal investigations even when, unlike here, those investigations had yet to yield an indictment. See e.g., Downe, 1993 WL 22126 at \*14; Board of Governors v. Pharaon, 140 F.R.D. 634, 641 (S.D.N.Y. 1991); Hugo Key, 672 F. Supp. at 658-59; SEC v. Metals Corp., 57 F.R.D. 56, 57 (S.D.N.Y. 1972).

**D. A Stay Will Prevent Unfair Prejudice to the Prosecution in the Criminal Cases.**

A stay is also appropriate to prevent criminal defendants from taking unfair advantage of the civil discovery rules and thereby avoiding the restrictions that would otherwise pertain

to criminal discovery by a defendant in a criminal case. See, e.g., Downe, 1993 WL 22126 at \*14; Pharaon, 140 F.R.D. at 639.

As the D.C. Circuit explained:

It is well established that a litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit to avoid the restrictions on criminal discovery and, thereby, obtain documents he might otherwise not be entitled to for use in his criminal suit.

Founding Church of Scientology v. Kelly, 77 F.R.D. 378, 380 (D.C.Cir. 1977); see also, Campbell, 307 F.2d at 487 (litigants may not use civil discovery "as a dodge to avoid the restrictions in criminal discovery").

The vastly different rules that apply to discovery in civil and criminal cases are important reasons for staying the proceedings, including discovery, in civil cases where there are parallel criminal proceedings. Unlike a civil case, criminal defendants are ordinarily not entitled to depose prosecution witnesses, much less engage in the sort of far-ranging inquiry contemplated by the civil rules. See Fed R. Crim. P. 16(a). Discovery in a criminal case is circumscribed for important reasons. Traditionally, the narrow scope of federal criminal discovery has been justified by three considerations of particular concern in a criminal proceeding: (1) the broad disclosure of the essential elements of the

prosecution's case will result in perjury and manufactured evidence; (2) revelation of the identity of the prospective government witnesses may result in intimidation; and (3) criminal defendants will unfairly surprise the prosecution at trial with information gained through discovery, while the privilege against self-incrimination will effectively block any attempt by the government to discover analogous evidence from the defendants. See, Campbell, 307 F.2d at 487 n. 12.

All these factors favor a stay in the instant case. Of particular concern is the third of these factors. Specifically, depositions of the United States' witnesses would lead to discovery of the prosecution's trial strategies and progress of related and ongoing criminal investigative activities. It would be unfair to permit a criminal defendant to reap the fruits of the government's investigation by obtaining discovery to which the criminal defendant would not be entitled under the applicable Federal Rules of Criminal Procedure.

**E. A Stay Will Benefit Both Judicial Economy And The Civil Parties, Which Do Not Oppose The Motion.**

Considerations of judicial economy and the public interest in efficient use of judicial resources also favor the grant of a stay. Issues common to both cases can be resolved

in the criminal proceedings, narrowing or eliminating factual issues in the civil litigation. A stay "may streamline later discovery since transcripts from the criminal case will be available to the civil parties." Twenty First Century Corp. v. LaBianca, 801 F. Supp. at 1011; see, e.g., In Re Grand Jury Proceeding, 995 F.2d 1013, 1018 n. 11 (11th Cir. 1993) ("although stays delay civil proceedings, they may prove useful as the criminal process may determine and narrow the remaining civil issues"); United States v. Mellon Bank, 545 F.2d 869, 872 (3rd Cir. 1976); Brock v. Talkow, 109 F.R.D. 116, 119-120 (E.D.N.Y. 1985) (noting that resolution of the criminal case "might reduce the scope of discovery in the civil case or otherwise simplify the issues").

The interests of the parties similarly weigh in favor of a stay. With regard to plaintiffs SEC and CFTC, the prosecution of the criminal case will vindicate much of the same public interest underlying the SEC's and CFTC's civil cases, preventing and deterring investment fraud.

**F. A Limited Exception To The Stay To Allow The Receiver To Continue His Efforts In Locating, Securing, And Taking Possession Of Assets For Distribution To Victims Of The Fraud Scheme Is Both Efficient And In The Public Interest.**

R.J. Zayed, the Court-appointed Receiver in this matter, has expended substantial effort to identify, obtain and

disburse funds to victims of the instant fraud scheme. To allow the Receiver's efforts to continue, a limited exception should be made to any stay entered by this Court. The proposed order attached to this motion contains language effecting that result.<sup>5</sup>

The tracing, seizing, and disbursing of assets in this case is more complicated than in the "normal" or "routine" fraud case. Beckman, Durand, Kiley, Cook and Pettengill used numerous bank and foreign currency trading accounts -- both within the United States and overseas -- including but not limited to those located at UBS, AG; Crown Forex, SA; and others. The United States understands that this has added to the complexity of accounting for all investment assets provided by investors. The Receiver is, however, well down the path of tracing and recovering assets, both domestically and internationally. Specifically and since his appointment, the Receiver has worked with over 700 defrauded investors to calculate, verify, and obtain the Court's approval of claim amounts. To date, the Receiver has made interim distributions to these victims. It is in the investors' interest for the

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<sup>5</sup> If, at some point, it appears that the criminal investigation and prosecution may be compromised by use of civil discovery methods in litigation involving the Receiver, the United States may seek a protective order.

Receiver to continue his efforts and to thereby avoid the delay and duplication that would result from a shift of these efforts as the Justice Department came up to speed on this complicated and labor-intensive aspect of the case. In addition, the Court would be burdened by criminal forfeiture litigation that would, in some respects, cover ground already covered in the civil asset recovery context.

The plaintiffs SEC and CFTC are not only agreeable to such a limited exception in any stay order this Court may enter, but have informed the U.S. Attorney's Office that they actively favor such an exception being written into the Order.

**CONCLUSION**

Accordingly, the United States respectfully moves this Court for an Order in the form attached, allowing the United States to intervene in this case, staying the litigation in until the conclusion of all criminal litigation, with an exception for any and all efforts by the Receiver to pursue claims, acquire assets, and disburse funds to investors.

Dated: August 24, 2011

B. TODD JONES  
United States Attorney

s/Tracy Perzel  
BY: TRACY L. PERZEL  
Assistant U.S. Attorney