

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Civil Action No. 05-CV-0480-MSK-CBS

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

JOSEPH P. NACCHIO,
ROBERT S. WOODRUFF,
ROBIN R. SZELIGA,
AFSHIN MOHEBBI,
GREGORY M. CASEY,
JAMES J. KOZLOWSKI,
FRANK T. NOYES,

Defendants.

**UNOPPOSED MOTION OF DEFENDANT JOSEPH P. NACCHIO
FOR A PROTECTIVE ORDER DEFERRING HIS ANSWER
AND CERTAIN DISCOVERY AGAINST HIM**

Defendant Joseph P. Nacchio, through his undersigned counsel, respectfully submits this unopposed motion for a limited protective order pursuant to Fed. R. Civ. P. 26(c)(2) & (3) providing, in accordance with the agreement of Mr. Nacchio and the Securities and Exchange Commission ("SEC"),¹ as follows: (1) Mr. Nacchio's time to answer the SEC's current complaint is adjourned until June 5, 2007; (2) Mr. Nacchio's time to serve initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1) is adjourned until June 29, 2007; (3) the SEC's First Set of Interrogatories and Request for Production of

¹ The agreement was reached in e-mail exchanges and telephone conferences on May 15 and 16, 2007, conducted pursuant to D.C.COLO.LCivR 7.1(A), between Joel M. Silverstein (on behalf of Mr. Nacchio) and Polly A. Atkinson and Thomas J. Krysa (on behalf of the SEC).

Documents to Mr. Nacchio are withdrawn and Mr. Nacchio and the SEC shall not serve any interrogatories on each other in this action; (4) Mr. Nacchio and the SEC shall not serve requests for admission on each other until 90 days before the close of fact discovery; and (5) Mr. Nacchio's shall be the last fact deposition taken in this action.

But for the relief to which Mr. Nacchio and the SEC have agreed, Mr. Nacchio, before his post-trial motions and any appeal in the parallel criminal action against him are decided, would face a Hobson's choice in testifying at a deposition or responding to interrogatories or requests for admission in this action: He could testify or otherwise respond to such discovery, but thereby waive his Fifth Amendment privilege despite the possibility that his conviction will be reversed and the criminal charges against him retried, *or* he could assert his Fifth Amendment privilege, but thereby forgo his defense of this action and risk incurring the ruinous penalties the SEC seeks: disgorgement of all "salary, bonuses, [and] proceeds from stock sales" that Mr. Nacchio received over several years as the CEO of Qwest, "plus pre-judgment interest" and various "civil penalties." Amended Complaint, dated April 12, 2006, Prayer for Relief, ¶¶ 3, 4.

By deferring discovery from Mr. Nacchio until such time as both his post-trial and any appeal may well be resolved, the requested relief is intended to obviate Mr. Nacchio's current dilemma, without prejudicing the interests of the other parties or the public. If Mr. Nacchio's post-trial motions are denied, and his conviction affirmed on appeal, his Fifth Amendment concerns will become moot. Alternatively, the possibility that the conviction will be overturned underscores the unfairness of forcing Mr. Nacchio to choose between waiving of his Fifth Amendment privilege and incurring crushing civil liability should he assert that privilege.

In contrast, neither the other parties nor the public will be prejudiced, much less substantially, by grant of the relief to which Mr. Nacchio and the SEC have agreed. As the Court is aware, apart from discovery from Mr. Nacchio, there remains ample discovery to be taken in this action, including some one to two hundred other depositions. As Mr. Nacchio is prepared to participate in the scheduling and completion of that and all other discovery, the limited, temporary deferral of discovery here requested will not *delay* discovery; it will simply *order* it such that testimonial discovery from Mr. Nacchio – the only defendant in this action involved in parallel criminal proceedings – will be taken at the end of the fact discovery period. Significantly, as detailed within, *the parties already contemplate deferring until the last three months of fact discovery the depositions of all defendants in this action.*

To balance Mr. Nacchio's interests with those of the other parties and the public, Mr. Nacchio, with the consent of the SEC, asks that this Court enter the requested protective order under Federal Rule of Civil Procedure 26(c)(2) & (3).

ARGUMENT

I. This Court Has the Unquestioned Authority to Enter the Limited Protective Order Requested to Protect Important Fifth Amendment Interests

Courts have long recognized the challenges faced by an individual grappling simultaneously with civil litigation and a parallel criminal proceeding arising out of the same subject matter. In these situations, the defendant faces a fundamental tension in attempting simultaneously to defend against (i) the criminal prosecution and (ii) the potential of devastating civil liability. *See, e.g., Wehling v. CBS*, 608 F.2d 1084, 1089 (5th Cir. 1979) (characterizing the civil litigant's choice as "between his silence and his

lawsuit"); *Goodman v. Mady*, No. 04-75011, 2005 WL 2417209, at *17 (E.D. Mich. Sept. 30, 2005) (describing the dilemma as "having to choose between preserving his right to invoke the Fifth Amendment privilege in the criminal case or foregoing a defense in this civil matter"); see also *Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd.*, 1 F. Supp. 2d 523, 528-29 (D.N.J. 1998) (because "[t]he individual defendants in this [civil] action who are targets of the [related] grand jury investigation must choose between waiving their Fifth Amendment rights and defending themselves in the civil lawsuit or asserting the privilege and probably losing the civil case" they face a "strong potential for an unjust result.").

To alleviate such conflicts, district courts have the inherent power to stay an entire civil action pending the resolution of parallel criminal proceedings—a far more serious consequence to civil litigants compared to the temporary postponement of some discovery requested here. See *United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970).

In addition to their inherent stay power, district courts enjoy broad discretion under Federal Rule of Civil Procedure 26(c) to control the timing of discovery through the issuance of protective orders. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) ("Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." (footnote omitted)); *Kordel*, 397 U.S. at 9 (where no one can answer interrogatories addressed to corporation without risk of incrimination, "the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action").

II. THE PERTINENT FACTORS TIP DECIDEDLY IN FAVOR OF THE REQUESTED PROTECTIVE ORDER

Courts look to a variety of factors in deciding whether to issue a protective order because of a parallel criminal proceeding. These include the similarity of the issues underlying the civil and criminal proceedings, the status of the case, the burden of the civil litigation on the defendant, the interests of the plaintiff in proceeding with the civil litigation, judicial efficiency, and the public interest. See *Walsh*, 1 F. Supp. 2d at 526-27; accord Transcript of 4/26/2007 Status Conference in this action at 8:17-9:6. A weighing of these factors tips decidedly in favor of the temporary, limited protective order to which Mr. Nacchio and the SEC have agreed.

A. Similarity of Subject Matter

The similarity of issues has been termed “the most important issue at the threshold” in determining whether or not to grant relief from civil discovery on account of a parallel criminal proceeding. Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 203 (1989); accord *SEC v. HealthSouth Corp.*, 261 F. Supp. 2d 1298, 1326 (N.D. Ala. 2003); *Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd.*, 1 F. Supp. 2d 523, 526-27 (D.N.J. 1998).

Recognizing that this action and the parallel criminal proceeding against Mr. Nacchio arise out of the same subject matter, this Court previously (1) embargoed some twenty-nine witnesses at the request of the Government pending the conclusion of Mr. Nacchio’s criminal trial; (2) stayed all discovery by and against Mr. Nacchio, pending the conclusion of the criminal proceedings or as otherwise directed by the court (2/28/2007 Order Regarding Discovery [#176] ¶¶ 1(b), 3, 1(a) and 1(e)); and (3) adjourned his time

to answer until after the conclusion of the criminal case (4/18/2007 Minute Order [#197]); see also 4/6/2007 Courtroom Minutes/Minute Order [#288] at 2.

The similarity of issues between this action and the criminal proceeding against Mr. Nacchio weighs heavily in favor of granting the requested protective order.

B. Status of the Case and Burden on the Defendant

The “strongest case for a stay of discovery in the civil case occurs during a criminal prosecution after an indictment is returned.” *Walsh Sec., Inc.*, 7 F. Supp. 2d at 527. Mr. Nacchio has been indicted, tried, convicted of 19 counts, and acquitted of 23. Sentencing and the hearing of Mr. Nacchio’s post-trial motions to set aside the verdict and for a new trial is scheduled for July 27, 2007, and Mr. Nacchio has announced that he will certainly appeal.

The advanced stage of the criminal proceedings against Mr. Nacchio does *not* mitigate against the issuance of a protective order; indeed, the opposite is true. Were Mr. Nacchio to testify at a deposition before the criminal proceedings against him were finally resolved, the SEC would be permitted to impeach him with his prior conviction based on the same subject matter. This would be patently unfair because the conviction might well be reversed. If instead Mr. Nacchio opted to invoke his Fifth Amendment privilege, the SEC could attempt to avoid a trial, arguing that it was entitled to summary relief based on adverse inferences.

It is just such a dilemma that courts seek to avoid through the issuance of stays or protective orders. See *Wehling*, 608 F.2d at 1088; *Goodman*, 2005 WL 2417209 at *17; *Walsh Sec.*, 7 F. Supp. 2d at 528; see also *Volmar Distribs., Inc., v. N.Y. Post Co.*,

152 F.R.D. 36, 39 (S.D.N.Y. 1993) (“[D]enying a stay might undermine a defendant's Fifth Amendment privilege against self-incrimination.”); *Brock*, 109 F.R.D. at 120 (“[T]he defendant's dilemma . . . certainly undercuts the protections [of the Fifth Amendment], and a Court can exercise its discretion to enable a defendant to avoid this unpalatable choice.”).

C. The Interests of the SEC, the Public, and the Other Defendants

It is noteworthy that mere delay does not establish prejudice in the context of a protective order or stay motion. Rather, courts look for evidence of a “particularly unique” injury besides delay. See *In re Adelpia Commons Sec. Litig.*, 2003 WL 22358819 (E.D. Pa.), at *4 (refusing to vacate stay on motion for reconsideration where plaintiff did not demonstrate prejudice other than delay).

Here, as the relief to which Mr. Nacchio and the SEC have agreed poses no risk of any such “unique” injury, Mr. Nacchio should not be put to the Hobson's choice between forfeiting his Fifth Amendment rights and incurring staggering civil liability. See *Wehling*, 608 F.2d at 1089 (holding that a three-year delay was “preferable” to forcing the plaintiff “to choose between his silence and his lawsuit”); *HealthSouth Corp.*, 261 F. Supp. 2d at 1327 (finding that harm to defendant in being forced to press forward with a civil proceeding while awaiting criminal indictment “greatly outweigh[ed]” the prejudice to plaintiff due to delay); *Walsh Sec.*, 1 F. Supp. 2d at 528 (noting that “[d]elays in civil cases are fairly common” and granting a stay where the plaintiff “has asserted no injury that is particularly unique”); *Volmar Distributions*, 152 F.R.D. at 40 (finding that “under settled authority the Fifth Amendment is the more important consideration” compared to inconvenience and delay).

Further, there is no reason to believe that grant of the requested relief will delay this action *at all*. Some one to two hundred depositions other than Mr. Nacchio's remain to be taken, and, with the limited, temporary exceptions that are the subject of this motion, Mr. Nacchio is prepared to fully participate in the scheduling and completion of all discovery, and has already begun doing so. Thus, the requested relief will not *extend* the fact discovery period to be set by this Court, it will simply *order* it such that testimonial discovery from Mr. Nacchio – the only defendant in this action involved in parallel criminal proceedings – will be taken at the end of that period.

Significantly, completely apart from the relief to which Mr. Nacchio and the SEC have agreed, the parties already contemplate deferring until the last 3 months of fact discovery the depositions of *all* defendants in this action. See Proposed Scheduling Order, filed 3/28/2007 (#286), p. 6, ¶ (3) (SEC's position) (“[t]o the extent practicable, these depositions [those of the defendants herein] will be deferred until the last three months of fact discovery”); *id.* p. 7, ¶ (4) (Defendants' position) (“Depositions of the Parties to this action will be deferred until the last 3 months of the time period for fact discovery as ordered by the Court, unless all Parties agree to an earlier deposition date.”).

D. Judicial Efficiency

Granting the limited relief requested here would promote judicial efficiency by avoiding collateral litigation over issues such as the propriety of Mr. Nacchio's invocation of the Fifth Amendment privilege. See *In re Adelphia Commc'ns Sec. Litig.*, 2003 WL 22358819, at *5 (“[W]ithout a stay, the civil defendants will likely assert their Fifth Amendment rights, causing the court to decide a number of privilege issues during civil discovery.”); *Brenneman*, 2003 WL 1560155, at *3 (given “duplicity of the issues, it would conserve judicial resources to wait and see if the criminal case can quickly be disposed of rather than holding the depositions only to have defendants refuse to answer any of plaintiff s questions”); *Walsh*, 7 F. Supp. 2d at 528-29 (noting that the assertions of Fifth Amendment privilege that would occur absent a stay would “burden the Magistrate Judge and this Court with deciding a constant stream of privilege issues”).

CONCLUSION

For the foregoing reasons, Mr. Nacchio, with the consent of the SEC, respectfully requests that the Court enter a limited protective order pursuant to Fed. R. Civ. P. 26(c)(2) & (3) providing, in accordance with the agreement of Mr. Nacchio and the SEC, as follows: (1) Mr. Nacchio's time to answer the SEC's current complaint is adjourned until June 5, 2007; (2) Mr. Nacchio's time to serve initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1) is adjourned until June 29, 2007; (3) the SEC's First Set of Interrogatories and Request for Production of Documents to Mr. Nacchio are withdrawn and Mr. Nacchio and the SEC shall not serve any interrogatories on each other in this

action; (4) Mr. Nacchio and the SEC shall not serve requests for admission on each other until 90 days before the close of fact discovery; and (5) Mr. Nacchio's shall be the last fact deposition taken in this action.

Dated: May 16, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of January 2007, I electronically filed the foregoing UNOPPOSED MOTION OF DEFENDANT JOSEPH P. NACCHIO FOR A PROTECTIVE ORDER DEFERRING HIS ANSWER AND CERTAIN DISCOVERY AGAINST HIM with the Clerk of the Court using the CMECF system, which will send notification of such filing to the following e-mail addresses:

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