

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION**

RICHARD BARTON,)
JOANNA M. RIEDL,)
NICHOLAS W. HAMILTON,)
CARLA TOMLINSON,)
)
Plaintiffs,)
)
v.) Case No.: 2:21-cv-00319-JRS-MG
)
STEVE GALELLA, DDS,)
ORTHOMATRIX CORP., INC.)
JOHN'S DENTAL LABORATORY, INC.,)
)
Defendants.)

KARAN GILL)
HYE YOON,)
CRYSTAL NASSOURI,)
)
Plaintiffs)
)
v.) Case No.: 2:21-cv-00338-JRS-MG
)
LVI GLOBAL, LLC)
STEVE GALELLA, D.D.S.)
ORTHOMATRIX CORP., INC.)
JOHN'S DENTAL LABORATORY, INC.)
)
Defendants.)

STEPHANIE O'CONNOR,)
ARI SILBERMAN,)
AMANDA HAYS,)
)
Plaintiffs,)
v.) Case No.: 2:21-cv-00374-JRS-MG
)
JOHN'S DENTAL LABORATORY, INC.)
STEVE GALELLA, D.D.S.)
ORTHOMATRIX CORP., INC.,)
)
Defendants.)

AKIKO SHOSHIDO,)	
ROBON STROEBEL,)	
IRIS MATARO,)	
)	
Plaintiffs,)	
v.)	Case No.: 2:21-cv-00438-JRS-MG
)	
JOHN’S DENTAL LABORATORY, INC.)	
STEVE GALELLA, D.D.S.)	
ORTHOMATRIX CORP., INC.,)	
)	
Defendants.)	

DEFENDANTS’ MEMORANDUM IN SUPPORT OF JOINT MOTION TO STAY

This memorandum of law is filed on behalf of Defendants, Steve Galella, D.D.S., John’s Dental Laboratory, Inc. and OrthoMatrix Corp., Inc. (“**Defendants**”) in support of their joint motion seeking a stay of the instant matter.

INTRODUCTION

The instant lawsuit involves claims brought by 15 Plaintiffs who have alleged that they sustained injuries as a result of the installation of a dental appliance known as the Anterior Growth Guided Appliance (“AGGA”) into their mouths. Plaintiffs have named three Defendants in their cases, all of whom were purportedly involved in the manufacture and sale of AGGA and/or the dissemination of information relating to AGGA.

The U.S. Attorney's Office for the Western District of Tennessee and/or the U.S. Department of Justice launched criminal investigations to determine whether criminal charges will be filed against Defendants OrthoMatrix Corp., Inc. (“**OrthoMatrix**”), Dr. Steve Galella D.D.S. (“**Dr. Galella**”) and John’s Dental Laboratory, Inc. (“**John’s Dental**”) based upon the same factual allegations alleged in Plaintiffs’ Complaints. Accordingly, Defendants bring this motion to stay the civil action until these criminal proceedings have concluded.

LEGAL ARGUMENT

“[T]he 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.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *United States ex rel. Chepurko v E-Biofuels, LLC*, 2014 US Dist LEXIS 117958, at *3-4 (SD Ind Aug. 25, 2014, No. 1:14-cv-00377-TWP-MJD). To exercise this power to stay proceedings, the Court must first weigh any competing interests. *Id.*; see also *Radio Corp. of Am. v. Igoe*, 217 F.2d 218, 220 (7th Cir. 1954) (“Benefit and hardship will be set off, one against the other, and upon an ascertainment of the balance the court will exercise a discretionary judgment in the exercise of its power”). District courts are afforded a wide latitude of discretion in deciding whether to stay proceedings, and their decisions will not be reversed save for an abuse thereof. *Northfield Ins. Co. v. City of Waukegan*, 701 F.3d 1124, 1133 (7th Cir. 2012).

Courts often grant such stays when a criminal action is simultaneously pending and the interest in protecting one’s rights and liberty outweighs the burden that a stay of litigation would impose. See, e.g., *Jones v. City of Indianapolis*, 216 F.R.D. 440, 450 (S.D. Ind. 2003); *Smith v. Bravo*, 2000 U.S. Dist. LEXIS 11437, 2000 WL 1051855 at *4 (N.D. Ill. 2000). When considering such a motion to stay, courts can weigh several factors, including but not limited to: (1) whether the civil and criminal proceedings involve the same subject matter; (2) whether the government has initiated both proceedings; (3) the posture of the criminal proceeding; (4) the effect on the public interest of granting or denying a stay; (5) the interest of [the parties] in proceeding expeditiously, and the potential prejudice that [the parties] may suffer from a delay; and (6) the burden that any particular aspect of the civil case may impose on [the parties] if a stay is denied. See *United States ex rel. Chepurko*, 2014 US Dist LEXIS 117958 at *4-5.

In the instant matter, the U.S. Attorney's Office for the Western District of Tennessee and the U.S. Department of Justice is currently conducting a criminal investigation which, it is anticipated, will ultimately result in the presentation of evidence to a grand jury relating to the facts in this case. Based on the foregoing, the interests of justice require a stay in this case and it is within this Court's discretion to award such relief.

I. RELATIONSHIP BETWEEN CIVIL AND CRIMINAL MATTERS

Presently, the U.S. Attorney's Office and the Department of Justice are in the process of evaluating potential criminal charges against the Defendants in this matter based upon the identical facts alleged in the Complaint at issue. The investigations relate to Defendants involvement with the Anterior Growth Guided Appliance ("AGGA"), the dental appliance at issue in this case, specifically, Defendants' alleged marketing of the appliance, purported role in disseminating information about the efficacy of the appliance and their alleged involvement with the fabrication of the appliance. The investigations and information sought by the government is, essentially, the same documents Plaintiffs' counsel has requested from Defendants in the instant matters (and other cases pending in New York, Nevada and Connecticut).

Thus, the first factor weighs heavily in favor of a stay of the proceedings, as these civil matters involve the same subject matter as the parallel criminal investigations of the same parties. 31 U.S.C. § 3730(b)(1); *Doe v. City of Chicago*, 360 F. Supp. 2d 880, 881 (N.D. Ill. 2005) (stay was warranted where the criminal investigation "...pertain[s] to the same time period and same general sets of allegations made in the Plaintiffs' civil suit"); *United States ex rel. Chepurko*, 2014 US Dist LEXIS 117958 at *6.

II. WHETHER THE GOVERNMENT IS A PARTY IN BOTH CASES

While the government is not a party in this civil case, the claims asserted herein appear to be virtually identical to any potential charges that may be asserted by the U.S. Attorney's Office or the Department of Justice against the Defendants.

III. POSTURE OF THE CRIMINAL PROCEEDINGS

The posture of the case creates a risk that civil discovery as to all Defendants could very likely compromise the criminal investigations. *Salcedo v. City of Chicago*, 2010 US Dist. LEXIS 67991, at *7 (ND Ill July 8, 2010, No. 09-cv-05354); *United States v. Michelle's Lounge*, 1992 U.S. Dist. LEXIS 11627, 1992 WL 194652, at *5 (N.D. Ill. Aug. 6, 1992) (“Conducting civil discovery while the related criminal investigation is continuing would compromise that investigation.”); *see also Campbell v. Eastland*, 307 F.2d 478, 486-87 (5th Cir. 1962) (stating that concerns related to criminal prosecutions could lead a judge in an “unstayed” civil case to limit discovery).

IV. EFFECT OF THE STAY ON THE PUBLIC INTERESTS

The public has an interest in ensuring that a criminal investigation can proceed untainted by civil litigation and this interest weighs in favor of a stay. *Chagolla v. City of Chicago*, 529 F Supp 2d 941 (ND Ill 2008); *Jones v. City of Indianapolis*, 216 F.R.D. 440, 452 (S.D. Ind. 2003). The possibility that the orderly progress of the criminal case and investigation - particularly those involving the exact same incidents at issue in the present case - will be hindered by issues that could arise from ongoing civil discovery. Discovery in criminal cases is by design more narrow than civil discovery, and “[t]he public has an interest in ensuring the criminal discovery process is not subverted.” *United States SEC v. Salis*, 2016 US Dist LEXIS 173237, at *6 (ND Ind Dec. 14, 2016, No. 2:16-cv-231); *Morris v. Am. Fed'n of State, Cnty, & Mun. Emps.*, 2001 U.S. Dist. LEXIS 1208, 2001 WL 123886, at *2 (S.D.N.Y. Feb. 9, 2001). In addition, the public has an interest in

the effective prosecution of those who violate laws that counsels in favor of temporarily putting off the civil matter until after the criminal investigation and prosecution are resolved. *See Salis, supra; In re Worldcom, Inc. Sec. Litig.*, 2002 U.S. Dist. LEXIS 23172, 2002 WL 31729501, at *8 (S.D.N.Y. Dec. 5, 2002); *see also Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962) (“Administrative policy gives priority to the public interest in law enforcement.”).

Moreover, a stay in this matter is also in the public interest because it will “avoid a duplication of efforts and a waste of judicial time and resources.” *See S.E.C. v. Gordon*, 2009 U.S. Dist. LEXIS 66427, 2009 WL 2252119, at *5 (N.D. Okla. July 28, 2009). Civil discovery pending in a parallel criminal trial will always be at least potentially redundant, because the trial may preclude certain of Defendants' defenses in the event of a guilty verdict. *S.E.C. v. Nicholas*, 569 F. Supp. 2d 1065, 1070-71 (C.D. Cal. 2008). And piecemeal discovery is likely to be inherently inefficient. *See S.E.C. v. Carroll*, 2009 U.S. Dist. LEXIS 66427, 2020 WL 1272287, at *5 n.2 (S.D.N.Y. Mar. 17, 2020).

In the instant case, because the issues raised in the civil litigation and criminal investigations are identical, there is no doubt that both of those proceedings running in tandem will result in redundant and inefficient discovery.

V. PLAINTIFF'S INTEREST IN PROCEEDING QUICKLY

There is no evidence to suggest that a delay in proceeding in the civil matter would impose a significant burden on Plaintiffs. As the government is actively investigating the activities of Defendants, the investigations are moving forward and, ultimately, the stay would not be in perpetuity. Plaintiffs cannot demonstrate irreparable harm or prejudice if the Court grants a stay during this limited period prior to the resolution of the criminal investigations and proceedings.

Moreover, there is no doubt that the subject criminal investigations were triggered by Plaintiff's counsel and several Plaintiffs in these cases contacting media outlets, including CBS,

in an effort to have them run a story regarding the subject dental appliance being a “threat to public health and safety.” Specifically, Plaintiff’s counsel has conceded that he “...answered inquires and cooperated with a story by a media outlet concerning allegations about a product that continues to be sold to the public.” (See Exhibit A). To the extent Plaintiffs object to the instant stay because it could potentially delay the resolution of the civil, this Court should reject such a proposition because Plaintiff’s counsel’s and Plaintiff’s parading of their allegations to the media is what ultimately triggered the subject investigation.

VI. THE BURDEN IMPOSED ON DEFENDANTS REGARDING ANY PARTICULAR ASPECTS OF A CIVIL LITIGATION

Any individual Defendant who is forced to respond to discovery requests will face the choice of whether to claim or waive his or her Fifth Amendment privilege against self-incrimination and thereby face the risk of adverse inference in his civil case. *Salcedo v. City of Chicago*, 2010 US Dist LEXIS 67991, at *9 (ND Ill July 8, 2010, No. 09-cv-05354); *Chagolla*, 529 F. Supp. 2d at 947; *Hare*, 2008 U.S. Dist. LEXIS 36886, 2008 WL 1995062, at *3. Given the nearly identical subject matter between the instant cases and the criminal investigation, the likelihood is overwhelming that Dr. Galella will claim his right to privilege and thereby face the risk that Plaintiffs in the civil case will use that privilege invocation to help prove his liability. Moreover, given that Dr. Galella is an officer of OrthoMatrix and Plaintiffs have, essentially, alleged OrthoMatrix should be held liable for the same reasons Dr. Galella should be held liable, Dr. Galella’s claim to privilege will also result in Plaintiffs’ using that privilege invocation to help prove liability against OrthoMatrix. “A civil defendant in this situation who is effectively backed into a corner in which he has no viable choice but to claim the privilege is forced to face a significant risk of unfair prejudice that may be virtually impossible to remedy.” *Chagolla*, 529 F Supp 2d at 947.

Moreover, proceeding with the civil case at this time will require all of the Defendants to bear the burden of defending both civil and criminal proceedings at the same time. These Defendants may be called upon to testify in any upcoming criminal proceedings. These possibilities weigh in favor of a stay. *Salcedo*, 2010 US Dist LEXIS 67991, at *9-10.

And while OrthoMatrix and John's Dental have no Fifth Amendment privilege against self-incrimination, staying the case only as to certain Defendants would be an inefficient way of resolving the case. Where, as here, Dr. Galella is a central figure in both civil and criminal proceedings, a stay is appropriate to all Defendants, including the corporate Defendants. *Id.*; See, e.g., *United States v. All Meat & Poultry Prods.*, 2003 US Dist LEXIS 17677 (ND Ill Oct. 2, 2003, No. 02 C 5145).

Defendants pray that this Court will consider the factors and determine that a stay is appropriate as it pertains to the instant matters, all discovery as well as any trial settings in this case pending the outcome of any criminal proceedings relating to the same underlying facts.

WHEREFORE, Defendants pray that this Court would allow Defendants' motion in the interests of justice.

Respectfully submitted,

Defendant Steve Galella, D.D.S.

By His Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2023, the foregoing *Defendants' Memorandum In Support Of Joint Motion To Stay* was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's electronic filing system.

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EXHIBIT A

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February 11, 2023

Honorable Jennifer L. Rochon
U.S. District Court, Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Kragulj v. Cortes, D.D.S., et al*, No. 1:20-cv-08390-JLR;
Letter response to defense request for conference re alleged media dissemination

Dear Judge Rochon:

I am plaintiff's counsel in the above-referenced matter, and write in response to the allegations made in the February 10, 2023 letter of counsel for defendant Galella ("defense letter").

The letter contains errant conclusions based on supposition and speculation about actions of plaintiff's counsel in regard to a forthcoming CBS news story about the AGGA product and its effect on consumers. As a preliminary matter, it is categorically false that the undersigned provided expert reports of any party to this case. The "expert reports" to which the defense letter refers are apparently independent experts that CBS itself has hired, and which apparently indicate that AGGA doesn't work as claimed by Dr. Galella.

Plaintiff's counsel did contact CBS, responded to inquiries from it, and cooperated with their story about a product which plaintiff, and apparently CBS, believe is a continuing threat to public health and safety. Such activity is a common and long-standing practice in this state and this country. In fact, United States attorneys of the Southern District as well as private lawyers routinely go significantly further, including issuing press releases to publicly condemn alleged actions of criminal and civil defendants prior to trial. For example:

1. On February 8, 2023, the office of U.S. Attorney for the Southern District of New York, Damien Williams, issued a press release entitled, Fentanyl Trafficker Arrested in Manhattan. (See <https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-charges-against-iranian-national-conducting>). In that document, U.S. Attorney Williams is quoted as follows in regard to defendants indicted by that office:
 - "The (defendant) was arrested while attempting to sell approximately 50,000 multicolored fentanyl pills to a cooperating witness in exchange for \$400,000."
 - "The pills the defendant allegedly attempted to sell were bright and colorful, which obscured their true danger."

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The U.S. Attorney’s press release quotes a New York State Police Acting Superintendent:

- “The arrest of Ms. Reyes-Sillero reinforces that we should be vigilant in stopping the flow of these dangerous drugs into our neighborhoods. Each arrest, each seizure is saving lives and decreases the additional crime that surrounds these illegal and dangerous operations.”

2. In a similar vein, see another U.S. Attorney press release, in which acting U.S. Attorney for the Southern District Joon H. Kim declares, in announcing an indictment:

- “Behzad Mesri, an Iranian national who had previously hacked computer systems for the Iranian military, allegedly infiltrated HBO’s systems, stole proprietary data...and then sought to extort HBO of \$6 million in Bitcoins... will forever have to look over his shoulder until he is made to face justice.”

See <https://www.justice.gov/usao-sdny/pr/fentanyl-trafficker-arrested-manhattan>

3. In a press release announcing a class action lawsuit against the City of New York for allegedly violating the civil rights of people with mental disabilities (See <https://www.nylpi.org/class-action-lawsuit-baerga-v-city-of-new-york/>), one of several similar quotes from the plaintiffs’ lawyers is as follows:

- “Our Plaintiffs and the class members they seek to represent have been stripped of their dignity and treated as criminals simply because they have or are thought to have mental disability by someone incapable of making that assessment. They were discriminated against and denied the rights enshrined by our constitution, including the right to be free from unlawful seizures by the police, simply because of who they are.”

The examples of prosecutors and private lawyers offering opinions or discussing allegations, through press releases and press conferences, about the guilt of defendants yet to be tried or the liability of civil defendants awaiting their day in court, abound in this district and in this country. Plaintiff’s counsel in the instant case did not engage in any such conduct.

Instead, plaintiff’s counsel answered inquiries and cooperated with a story by a media outlet, concerning allegations about a product that continues to be sold to the public. (See, e.g., <http://www.drhelenim.com/procedures/integrative-orthodontics/-agga/control-anterior-growth-guidance-appliance/>). This product, for reasons described extensively in the Third Amended Complaint – a public record- is alleged to present a significant risk to the health of a largely unsuspecting public. The allegations contained in the (pre-amendments) predecessor of that Complaint had previously been reported by the media through no actions of plaintiff or her counsel. See <https://nypost.com/2020/10/17/woman-files-10m-suit-against-dentist-after-alleged-botched-procedure/>.

