

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action No. 5:24-cv-00455

**ROSS BAILEY and R&R DELIVERY
SERVICE, INC.,**

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR STAY

Comes now, Defendants Ross Bailey and R & R Delivery Service, Inc. (collectively, "Defendants"), by John D. (Jody) Wooton, Jr., R. Brandon Johnson, and WOOTON, DAVIS, HUSSELL & JOHNSON, PLLC, and hereby files this Memorandum in Support of Defendants' Motion for Stay. In support of this Motion, Defendants state the following.

INTRODUCTION

This is a newly filed civil action in which the Complaint has been filed and served and a response to the Complaint is coming due soon. Specifically, this is an action by the United States of America ("United States") against Defendants to recover treble damages and civil penalties under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33, civil penalties under the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), partially codified at 12 U.S.C. § 1833a, and to recover money for common law or equitable causes of action for contractual damages and unjust enrichment based upon Defendants' receipt of COVID-19 Economic Injury and Disaster Loan ("EIDL") funds which were allegedly used for unauthorized purposes allegedly

in violation of federal and common law. But, at the same time, Defendant Ross Bailey ("Mr. Bailey") is embroiled in a criminal matter concerning the very same allegations and alleged violations of law. *See* Indictment, attached hereto as Exhibit A.

Given that a concurrent criminal matter is ongoing concerning the very same allegations and alleged violations of law as in this civil suit, during the pendency of that criminal matter, this Court should issue a stay in this civil action to prevent the criminal and civil courts from addressing legal and factual issues that are identical. This, of course, is to prevent conflicting outcomes, unnecessary duplicated efforts by the parties, and to preserve judicial economy. Otherwise, the parties could be exposed to overlapping issues and the possibility of inconsistent rulings. Thus, for these important reasons, as set forth in greater detail below, this Court should grant this Motion.

ARGUMENT

I. Legal Standard.

As has long been the case, a court has discretionary power to stay proceedings in its own court. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936). This power to stay is "incidental to the power inherent in every court to control the disposition of the causes of action on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.*; *see also United States v. Ga. Pac. Corp.*, 562 F.2d 294, 296 (4th Cir. 1977).

When criminal and civil matters against the same defendant are concurrently proceeding, a stay of civil proceedings may be appropriate when the pending civil and criminal proceedings involve substantially similar issues. *See, e.g., Ellis v. Kirkman*, Civil Action No. 9:19-cv-2163-RMG-MGB, 2020 U.S. Dist. LEXIS 210781 (D.S.C. Oct. 16, 2020) (citations omitted). In considering whether to grant a stay due to concurrent criminal and civil cases, the court must "rest

on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

The Fourth Circuit has not identified a particular test when deciding whether to stay civil actions pending criminal proceedings. Doe v. City of Gauley Bridge, No. 2:21-CV-00491, 2022 U.S. Dist. LEXIS 197563, 2022 WL 16554698, at *2 (S.D.W. Va. Oct. 31, 2022) (Johnston, J.). But the United States District Court for the Southern District of West Virginia has done so and has held that the Court should consider the following factors when ascertaining whether to stay a civil action:

- (1) the interest of the plaintiffs in proceeding expeditiously with [the] litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay,
- (2) the burden which any particular aspect of the proceedings may impose on defendants;
- (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources;
- (4) the interests of persons not parties to the civil litigation; and
- (5) the interest of the public in the pending civil and criminal litigation.

Ashworth v. Albers Med., Inc., 229 F.R.D. 527, 530 (S.D.W. Va. 2005) (Copenhaver, J.) (citations omitted). "The court in Ashworth considered, in addition to these five factors, the 'relatedness' of the criminal and civil proceedings, asking whether they 'involve substantially similar issues.'" Doe, 2022 WL 16554698, at *2 (citing Ashworth 229 F.R.D. at 531); *see also* Blanda v. Martin & Seibert, L.C., No. CV 2:16-0957, 2017 U.S. Dist. LEXIS 2169, 2017 WL 63027, at *3 (S.D. W. Va. Jan. 5, 2017) (Copenhaver, J.) (applying the same six factors); *see*

also Shaikhutdinov v. Smith, No. 5:23-cv-00653, 2024 U.S. Dist. LEXIS 75708, at *2-3 (S.D. W. Va. Apr. 25, 2024).

II. The Court Should Issue a Stay in This Civil Case and Hold the Case in Abeyance till Resolution of the Criminal Case Because They Involve Identical Facts and Concern Identical Statutes and Legal Issues.

Based on the above-cited law, in the case at bar, the Court should issue a stay to prevent the strong likelihood of inconsistent rulings due to identical, overlapping issues of law and fact. Indeed, the very same claims, statutes, legal and factual issues prevail in both the criminal and civil cases. In other words, if a stay is not issued and this case proceeds, it is highly possible that this Court could find one way on these issues and the criminal court in the criminal action could find another way. Therefore, when applying the six factors applied in the Fourth Circuit for issuance of a stay, each factor strongly militates in favor of issuing a stay. First, Plaintiff, the United States, will suffer no prejudice from a stay. Instead, the Government's identical criminal trial will first proceed, allowing the Government to fully garner all its evidence and testimony, and thereby in no way prejudicing the identical civil case from it merely being held in abeyance during the pendency of the criminal matter. Second, concurrently defending against an identical criminal and civil case will surely prejudice Mr. Bailey. For instance, Mr. Bailey may prevail in the criminal action or evidence may come to light in the criminal case that exculpates Mr. Bailey from the civil action. Thus, handling the criminal case first before the civil case is the best use of Mr. Bailey's financial and legal resources, which will not unnecessarily force him to defend against two identical actions at the same time. Third, the convenience to the court and preservation of judicial resources also strongly favors a stay. As implied previously, staying the pending civil matter till resolution of the criminal case makes sense because the disposition of the criminal case

could resolve entirely the civil case, making it moot, if exculpatory evidence comes to light or the criminal court makes certain legal rulings. Fourth, the interests of persons not parties to the litigation is minimal because no such parties exist. Fifth, the interests of the public in the criminal and civil actions will not be prejudiced because the actions will go forward, just not at the same time. Instead, the criminal action will go first and if it then makes sense to continue with the civil matter, it can follow next with no discernable prejudice to the public. Lastly, as described previously, the sixth factor of the similarity between the criminal and civil cases overwhelmingly favors a stay. Indeed, the cases are identical. They involve identical facts. They involve identical statutes. They involve identical law. Thus, for these reasons, and because all six factors strongly demand a stay in the interests of judicial economy, justice, fairness, and consistency, this Court should grant this Motion.

CONCLUSION

For the reasons set forth above, the Court should grant this Motion for Stay and stay this action pending the outcome of the concurrent criminal case.

**ROSS BAILEY and R&R DELIVERY
SERVICE, INC.,**

By Counsel

/s/ John D. (Jody) Wooton, Jr.
John D. (Jody) Wooton, Jr. (WVSB #10571)
R. Brandon Johnson (WVSB #5581)
WOOTON, DAVIS, HUSSELL & JOHNSON, PLLC
Post Office Box 2600
Beckley, West Virginia 25802-2600
(304) 255-2188
jody.wooton@wdhjlaw.com
brandon.johnson@wdhjlaw.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action No. 5:24-cv-00455

**ROSS BAILEY and R&R DELIVERY
SERVICE, INC.,**

Defendants.

CERTIFICATE OF SERVICE

John D. (Jody) Wooton, Jr., R. Brandon Johnson, and WOOTON, DAVIS, HUSSELL & JOHNSON, PLLC, do hereby certify that the foregoing DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR STAY was served upon all parties via the CM/ECF Court System, on this 19th day of September, 2024:

Fred B. Westfall, Jr.
Assistant United States Attorney
300 Virginia Street East, Room 4000
Charleston, West Virginia 25301

/s/ John D. (Jody) Wooton, Jr.
John D. (Jody) Wooton, Jr. (WVSB #10571)
R. Brandon Johnson (WVSB #5581)
WOOTON, DAVIS, HUSSELL & JOHNSON, PLLC