

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BRENDA A. SMITH, BROAD REACH CAPITAL,
LP, BROAD REACH PARTNERS, LLC, and
BRISTOL ADVISORS, LLC,

Defendants.

Hon. Madeline Cox Arleo

Civ. No. 19-cv-17213

PLEASE TAKE NOTICE that Rachael A. Honig, Acting United States Attorney for the District of New Jersey (by Catherine R. Murphy, Assistant U.S. Attorney), will move before the Honorable Madeline Cox Arleo, U.S.D.J., on May 17, 2021 for an Order: (1) granting the United States leave to intervene in the above-captioned civil action (the "SEC Case"); and (2) staying the SEC Case until the conclusion of criminal proceedings in *United States v. Brenda Smith*, Crim. No. 20-475 (MCA), including trial.

A Memorandum of Law in support of this motion is attached.

Respectfully submitted,

RACHAEL A. HONIG
Acting United States Attorney

By: /s/ Catherine R. Murphy
CATHERINE R. MURPHY
Assistant United States Attorney

Dated: April 22, 2021

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Defendants.

Hon. Madeline Cox Arleo

Civ. No. 19-cv-17213

MEMORANDUM OF LAW IN SUPPORT OF THE
MOTION OF THE UNITED STATES FOR LEAVE
TO INTERVENE AND FOR A STAY

RACHAEL A. HONIG
Acting United States Attorney
970 Broad Street
Newark, New Jersey 07102
(973) 645-2700

On the Memorandum:
CATHERINE R. MURPHY
Assistant United States Attorney

PRELIMINARY STATEMENT

The allegations in this civil enforcement action filed by the United States Securities and Exchange Commission (“SEC”) (the “SEC Case”) against Brenda Smith (“Smith”), Broad Reach Capital, LP (“Broad Reach”), Broad Reach Partners, LLC (“Broad Reach Partners”), and Bristol Advisors, LLC (“Bristol”) (collectively, “Defendants”) substantially overlap with an active criminal case filed in this District against Brenda Smith that is captioned *United States v. Brenda Smith*, Crim. No. 20-475 (MCA) (the “Criminal Case”).

The United States of America, through the United States Attorney for the District of New Jersey (the “United States”), moves to (1) intervene in the SEC Case pursuant to Rule 24 of the Federal Rules of Civil Procedure; and (2) stay further proceedings and discovery in the SEC Case in order to preserve the integrity of the prosecution of the Criminal Case, advance the public interest, and prevent Smith from circumventing the narrow confines of criminal discovery through broad civil requests and related litigation.

STATEMENT OF FACTS/PROCEDURAL HISTORY

On August 22, 2019, the United States Attorney’s Office for the District of New Jersey filed a criminal complaint, under seal, against Brenda Smith, charging her with four counts of wire fraud, in violation of 18 U.S.C. § 1343, and one count of securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff and 17 C.F.R. § 240.10b-5 (“Criminal Complaint”). The Criminal Complaint alleged that between February 2016 and August 2019, Smith “orchestrated a fraudulent scheme pursuant to which she made misrepresentations to investors and

promised she would invest their funds in particular trading strategies that Broad Reach Capital was allegedly optimally situated to execute.” See Crim. No. 20-475 (ECF No. 1).

On August 27, 2019, the SEC filed a complaint against the Defendants (“SEC Complaint”). The charges in the Criminal Complaint arose from the same scheme set forth in the SEC Complaint. Specifically, the SEC Complaint alleges that from February 2016 through 2019, “Defendants solicited over \$100 million from investors for purported investment in sophisticated trading strategies. However, Smith took the vast majority of these funds for unrelated companies, to pay back other investors, and for personal use.” (SEC Complaint ¶ 1).

The SEC Complaint further alleges that during the scheme, Smith offered limited partnership interests in Broad Reach. Since Broad Reach’s “inception, Smith raised approximately \$105 million from at least 40 investors, and investors are still owed more than \$63 million in principal.” (*Id.* ¶ 3). “To solicit and retain investors, Defendants represented that [Broad Reach] employed several profitable, sophisticated trading strategies involving highly liquid securities, including those that it was uniquely positioned to pursue because of its access to the Philadelphia Stock Exchange trading floor (“Trading Strategies”). In reality, only a small fraction of investor money was actually used for these strategies.” (*Id.* ¶ 4). Instead, the “vast majority of the funds were moved through the bank accounts of entities Smith controls and ultimately used to, among other things, make her own personal investments and to repay other investors.” (*Id.* ¶ 5).

The SEC Complaint also alleges that “[t]o lull existing investors and solicit additional investments, Defendants provided monthly account statements reflecting high returns and ‘tear sheets’ touting [Broad Reach’s] overall claimed 30%+ yearly return and that [Broad Reach] had never had a losing month. These and other performance statements were false.” (*Id.* ¶ 5).

On August 27, 2019, special agents of the Federal Bureau of Investigation arrested Smith in connection with the Criminal Complaint. Later that afternoon, Smith appeared before the Honorable Cathy L. Waldor, United States Magistrate Judge for the District of New Jersey, for an initial appearance during which Smith was ordered detained. *See* Crim. No. 20-475 (ECF Nos. 4-7).

On September 10, 2019, this Court entered a preliminary injunction, ordering that “all funds, accounts, real property, personal property, and other assets held, managed, owned, or controlled, whether directly or indirectly, by Defendants . . . are hereby frozen.” Civ. No. 19-17213 (ECF No. 7). On May 19, 2020, the SEC moved the Court to appoint Kevin Kent, Esq. as receiver over the defendant entities (Broad Reach, Broad Reach Partners, and Bristol) and affiliated entities “to preserve the status quo, protect the value of the estate for injured investors, other claimants and Smith, and, should Defendants be found liable, to facilitate an orderly distribution of assets to injured claimants.” Civ. No. 19-17213 (ECF No. 20). On June 29, 2020, the Court appointed Kevin Kent, Esq. as the receiver. Civ. No. 19-17213 (ECF No. 22).

On June 2, 2020, a federal grand jury sitting in Newark, New Jersey returned a seven-count indictment against Smith charging her with six counts

of wire fraud, in violation of 18 U.S.C. § 1343, and one count of securities fraud, in violation of 15 U.S.C. §§ 78j(b), 78ff. The charges in the Indictment arise from the same scheme set forth in the SEC Complaint.

On June 16, 2020, the Court entered an initial scheduling order setting certain discovery deadlines in the Criminal Case. See Crim. No. 20-475 (ECF No. 19). On June 29, 2020, Smith appeared before the Honorable Cathy L. Waldor, United States Magistrate Judge for the District of New Jersey, for an arraignment and entered a plea of not guilty. See Crim. No. 20-475 (ECF No. 20). Trial in the Criminal Case has not yet been scheduled.

The Government understands that a copy of the SEC Complaint was served on Smith on or about August 27, 2019. However, to date, Smith has not answered the Complaint and the Government is not aware of Smith having retained counsel in connection with the SEC Case. The SEC has advised that it does not oppose the Government's motion.

For the reasons set forth below, the Court should stay the SEC Case pending disposition of the Criminal Case.

ARGUMENT

I. THE UNITED STATES SHOULD BE PERMITTED TO INTERVENE IN THIS ACTION FOR THE LIMITED PURPOSE OF SEEKING A STAY

In its present application, the United States seeks to intervene for the limited purpose of staying this matter to protect the integrity of the ongoing prosecution of the Criminal Case. Under the Federal Rules of Civil Procedure, there are two bases for intervention: intervention as of right pursuant to Rule

24(a), or permissive intervention pursuant to Rule 24(b). The United States' intervention in the SEC Case is supported under both grounds.

A. The United States Is Entitled to Intervention as of Right

Federal Rule of Civil Procedure 24(a)(2) provides for intervention as of right as follows, in pertinent part:

On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).

“A potential intervenor must satisfy four criteria to succeed on a motion pursuant to Rule 24(a)(2): ‘(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation.’” *United States v. Terr. of the V.I.*, 748 F.3d 514, 519 (3d Cir. 2014) (quoting *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987) (citation omitted)). “Although these requirements are intertwined, each must be met to intervene as of right.” *Harris*, 820 F.2d at 596 (citation omitted).

1. The United States' Motion for Intervention is Timely

The determination of whether a motion to intervene is timely is “determined from all the circumstances and, in the first instance, by the [trial] court in the exercise of its sound discretion.” *Princeton Biochemicals, Inc. v.*

Beckman Coulter, Inc., 223 F.R.D. 326, 328 (D.N.J. 2004) (citing *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 500 (3d Cir. 1982) (quotations omitted)). Courts in the Third Circuit weigh three factors in determining timeliness: “(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay.” *Mountain Top Condo. Ass’n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir. 1995).

Here, the United States’ motion to intervene is timely. The SEC Case was initiated August 27, 2019 and no defendant has filed a responsive pleading. Furthermore, civil discovery has not yet commenced. Therefore, because the United States’ motion to intervene will cause no delay or prejudice to the parties, it is timely. *See id.* at 370 (finding no prejudice from a four-year delay in filing intervention motion because, while some written discovery and settlement negotiations had occurred prior to the motion, there were no depositions taken, dispositive motions filed, or decrees entered during the four-year period).

2. The United States Has a Compelling Interest in the SEC Case That is Not Adequately Represented by the Existing Parties, and Which May Be Adversely Affected in the Absence of Intervention

The United States has a substantial interest in the civil litigation that is not sufficiently represented by the existing parties and that may be harmed by the absence of the United States’ intervention. Courts have recognized that “[t]he government ha[s] a discernible interest in intervening in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the [parallel] criminal matter.” *S.E.C. v. Chestman*, 861 F.2d 49,

50 (2d Cir. 1988) (per curiam); *see also* *S.E.C. v. Ott*, Civ. No. 06-4195 (GEB), 2006 U.S. Dist. LEXIS 86541, at *6 (D.N.J. Nov. 29, 2006) (Bongiovanni, U.S.M.J.) (finding that “it [wa]s clear that the United States ha[d] a direct and substantial interest in th[e] [SEC civil] litigation, because the ongoing parallel criminal investigation concern[ed] the same business practices, contracts and payments at issue in th[e] [civil] matter”); *S.E.C. v. Dubovoy, et al.*, Civ. No. 15-6076 (MCA) (D.N.J. Jan. 29, 2016) (Hammer, U.S.M.J.) (Dkt. No. 240) (granting United States’ motion to intervene and stay SEC case based on same securities fraud scheme charged in criminal indictment, even though some of the defendants in the SEC case were not charged in the criminal indictment and opposed the stay request). This interest is present here, because if not stayed, the SEC Case presumably will proceed to the discovery stage and thus enable Smith to extract material from the United States that she would not otherwise be entitled to at this stage in the Criminal Case.

Furthermore, intervention is necessary because only the United States Attorney can effectively represent these interests in the SEC Case. The SEC Case and the parallel Criminal Case involve the same individual defendant, allegedly perpetrating the same fraudulent scheme, involving the same alleged victims, and carried out over a similar period of time. However, “the interests of the SEC in enforcing the provisions of the Securities and Exchange Act of 1934, and of Defendants do not represent those of the United States.” *Ott*, 2006 U.S. Dist. LEXIS 86541, at *6 (citation omitted). The United States’ interests concern safeguarding the criminal investigation and prosecution, matters separate and

apart from the SEC's interests in protecting the integrity of financial markets. See *Nuesse v. Camp*, 385 F.2d 694, 702-04 (D.C. Cir. 1967). The interests of the litigants in the SEC Case may be adverse to those of the United States to the extent they seek to discover and publicize matters that are the subject of the ongoing criminal prosecution; intervention by the United States is necessary, therefore, in order to make sure its interests are adequately represented and protected.

Based on the foregoing, the United States should be granted leave to intervene as of right pursuant to Fed. R. Civ. P. 24(a).

B. Alternatively, the United States Should be Granted Permissive Intervention Because There are Common Questions of Law and Fact in the SEC Case and the Criminal Case

Federal Rule of Civil Procedure 24(b)(1)(B) provides an alternative means for intervention—specifically, permissive intervention—where a party “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). “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.” *S.E.C. v. Downe*, Civ. No. 92-4092 (PKL), 1993 WL 22126, *11 (S.D.N.Y. Jan. 26, 1993) (citing *Chestman*, 861 F.2d at 50); *Board of Governors of the Federal Reserve Sys. v. Pharaon*, 140 F.R.D. 634, 638 (S.D.N.Y. 1991); *First Merchants Enterprise, Inc. v. Shannon*, No. 88 Civ. 8254 (CSH), 1989 WL 25214 (S.D.N.Y. Mar. 16, 1989); see also *SEC v. One or More Unknown Purchasers of Sec. of Global Indus.*, Civ. No. 11-6500 (RA), 2012

WL 5505738, *2 (S.D.N.Y. Nov. 9, 2012). “In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3).

Here, the SEC Case and the corresponding criminal prosecution of the same individual defendant arise out of numerous common questions of law and fact related to her alleged involvement in the above-described fraudulent scheme. Moreover, intervention will not cause undue delay or prejudice the parties, particularly since the civil discovery process has not commenced. Accordingly, even if the Court were to find that the United States may not intervene as of right, the Court should exercise its discretion to allow the United States to intervene in this case for the limited purpose of moving for a stay.

II. A STAY OF THE SEC CASE IS NECESSARY TO PROTECT THE INTEGRITY OF THE ONGOING CRIMINAL PROSECUTION

A. The Court Has the Authority to Issue a Stay

The United States seeks to intervene for the limited, and authorized, purpose of staying this matter. Courts have the inherent authority to stay proceedings in a civil case in the interests of justice when a parallel criminal prosecution is underway. *See RAD Services, Inc. v. Aetna Casualty & Surety Co.*, 808 F.2d 271, 279 n.3 (3d Cir. 1986); *SEC v. HealthSouth Corp.*, 261 F. Supp. 2d 1298, 1326 (N.D. Ala. 2003). It is “clearly within the power of the district court to balance ‘competing interests’ and decide that judicial economy would best be served by a stay of civil proceedings.” *United States v. Mellon Bank, N. A.*, 545 F.2d 869, 872-873 (3d Cir. 1976) (quoting *Texaco, Inc. v. Borda*, 383 F.2d 607, 609 (3d Cir. 1967)).

Factors that courts have considered in weighing whether a stay is warranted include: the extent to which the criminal and civil cases overlap; the interests of the public in the pending civil and criminal litigation; the potential prejudice to the civil parties of delaying their litigation; the interests of the court; and the status of the criminal case. See *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324–25 (9th Cir. 1995); *Walsh Sec. v. Cristo Prop. Mgmt.*, 7 F. Supp. 2d 523, 526-27 (D.N.J. 1998); *HealthSouth*, 261 F. Supp. 2d at 1326. These factors support a stay in this case.

B. The Criminal and Civil Matters Overlap

There is substantial overlap between the Criminal Case and the SEC Case. As noted, they involve the same individual defendant and the same securities fraud scheme. As a result, many of the potential witnesses in the Criminal Case also are potential witnesses in the SEC Case.

C. The Public Interest Favors a Stay

It is well-settled that “a trial judge should give substantial weight to [the public interest in law enforcement] in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.” *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962). As one court has observed, “where both civil and criminal proceedings arise out of the same or related transactions, the government is ordinarily entitled to a stay of all discovery in the civil action until disposition of the criminal matter.” *United States v. One 1964 Cadillac Coupe DeVille*, 41 F.R.D. 352, 353 (S.D.N.Y. 1966); see also *S.E.C. v. Shkreli*, 15-CV-7175, 2016 WL 1122029, *7 (E.D.N.Y. March

22, 2016) (granting government's motion to stay SEC case over the defendant's objection and noting, "the public's interest in the effective enforcement of the criminal law is the paramount public concern."); *S.E.C. v. Nicholas*, 569 F. Supp. 2d 1065, 1072 (C.D. Cal 2008) ("The criminal case is of primary importance to the public, the Defendants, and the Court"; the public's interest "is best served by resolving the criminal case in the most expeditious manner possible.").

A stay of discovery in this matter also is in the public's interest because it will prevent Smith from utilizing the expansive civil discovery rules to obtain discovery that she otherwise would not be entitled to under the narrow rules of criminal discovery. As the Third Circuit explained in *Mellon Bank*, a civil litigant should not be permitted to proceed simultaneously with an overlapping criminal matter, because "the similarity of the issues [leaves] open the possibility that [the defendant] might improperly exploit civil discovery for the advancement of his criminal case." 545 F.2d at 873. The possibility of improper use of discovery, in part, led the court in *Mellon Bank* to stay discovery. *Id.* at 874. The concern expressed in *Mellon Bank* that criminal discovery limitations not be circumvented has been echoed by many courts that have stayed civil discovery in parallel proceedings.

For example, in *Campbell*, the Fifth Circuit stated:

A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. Judicial discretion and procedural flexibility should be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the

other. In some situations it may be appropriate to stay the civil proceeding. In others it may be preferable for the civil suit to proceed – unstayed. In the proper case the trial judge should use his discretion to narrow the range of discovery.

307 F.2d at 487 (internal citation omitted).

Courts around the country, including in this District, have relied on similar logic to stay civil discovery while criminal proceedings are ongoing. See *Ott*, 2006 U.S. Dist. LEXIS 86541, at *3-10; *Dubovoy*, Civ. No. 15-6076 (D.N.J.) (Dkt. No. 240); *United States v. GAF Financial Services*, 335 F. Supp. 2d 1371, 1373 (S.D. Fla. 2004) (civil forfeiture stayed pursuant to 18 U.S.C. § 981(g)); *Downe*, 1993 WL 22126, at *12–14; *In re Ivan F. Boesky Securities Litigation*, 128 F.R.D. 47, 49-50 (S.D.N.Y. 1989); *United States v. Hugo Key & Son, Inc.*, 672 F. Supp. 656, 657-59 (D.R.I. 1987); *Founding Church of Scientology v. Kelley*, 77 F.R.D. 378, 380-81 (D.D.C. 1977); *SEC v. Control Metals Corp.*, 57 F.R.D. 56, 57-58 (S.D.N.Y. 1972).

Notwithstanding the concern that litigants will exploit the liberal civil discovery rules to their advantage, the United States does not have to demonstrate that any particular defendant already has unfairly taken advantage of the civil discovery provisions to the detriment of the United States or the public. Rather, it is presumed that criminal defendants and targets will make full use of such an unsurpassed opportunity to harm the Government's criminal cases. See *Integrated Generics, Inc. v. Bowen*, 678 F. Supp. 1004, 1009 (E.D.N.Y. 1988) (no need to find wrongful intent). Courts have recognized the unfair advantages inherent in civil discovery opportunities and have, accordingly,

stayed discovery. *See, e.g., Control Metals Corp.*, 57 F.R.D. at 57 (staying depositions of four grand jury witnesses).

In the present case, given the overlap of witnesses and issues between the SEC Case and the Criminal Case, interrogatories and deposition notices in the SEC Case could undermine or otherwise hinder the criminal prosecution. *Campbell*, 307 F.2d at 487 n.12. Even if the Defendants here “possessed the purest of motives,” allowing civil discovery to go forward would make them “the beneficiar[ies] of materials otherwise unavailable to [the]m under the criminal rules . . . thus nullifying in effect the criminal discovery limitations.” *In re Eisenberg*, 654 F.2d 1107, 1113-14 (5th Cir. 1981).

D. The Public’s Interest in Allowing the Criminal Case to Be Completed Without Interference Outweighs the Minimal Prejudice to the Defendants From a Stay

The public’s significant interest in allowing the Criminal Case to run its course must be balanced against a civil litigant’s interest in a final resolution of its case. All litigants, of course, have an interest in the swift resolution of their claims and defenses. The United States is mindful that neither the Court, the SEC, nor the Defendants want this case to be delayed unnecessarily.

Nonetheless, disposing of the SEC Case expeditiously does not outweigh the importance of conducting an unimpeded criminal prosecution. This is especially true where a stay until the completion of any trial in the Criminal Case will cause little to no particularized harm to the public, the SEC, or to the Defendants, and even could benefit Smith in light of the potential Fifth Amendment implications involved in proceeding with the SEC Case. *See*

Ironbridge Corp. v. C.I.R., 528 F. App'x 43, 46 (2d Cir. 2013) (“We also presume that parallel civil and criminal proceedings can sometimes burden the exercise of the Fifth Amendment privilege against self-incrimination.”); *S.E.C. v. McGinnis*, No. 14-CV-6, 2016 WL 591764, *3 (D. Vt. Feb. 12, 2016) (“Defendants additionally point out that proceeding in the instant case may compromise their Fifth Amendment rights to the extent not already waived”); *S.E.C. v. Oakford Corp.*, 181 F.R.D. 269, 270 (S.D.N.Y. 1998) (“Often the [stay application filed by the criminal enforcement agency] is joined by the defendant as well, who otherwise confronts the prospect of expensive dual litigation and the dilemma either of having to testify in a pre-trial deposition or, by invoking the privilege against self-incrimination, subjecting himself to a permissible adverse inference in the civil case.”) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).

E. A Stay Would Likely Narrow the Issues in the SEC Case

Finally, a stay also would benefit the public interest by potentially narrowing (or eliminating) the issues to be decided in the SEC Case. *See In re Grand Jury Proceedings (Williams)*, 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.”); *Texaco Inc.*, 383 F.2d at 609 (affirming decision to stay civil action because, among other things, “the trial of the criminal case [might] reduce the scope of discovery in the civil action . . . [a]nd . . . perhaps might also simplify the issues”); *Brock v. Tolkow*, 109 F.R.D. 116, 120 (E.D.N.Y. 1985) (“[T]he resolution of the criminal case might reduce the scope of discovery in the civil case or otherwise simplify the issues.”).

For example, if the Criminal Case results in a guilty verdict against Smith, the higher burden of proof in the criminal matter likely will mean that the jury's findings will have preclusive effect in the SEC Case. Likewise, if the Criminal Case results in a guilty plea by Smith, her admissions will undoubtedly narrow, and perhaps eliminate, the issues to be decided against her in the SEC Case. In either case, there would likely be little left to litigate civilly after a successful criminal prosecution.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court grant it leave to intervene in the SEC Case and order a stay of the SEC Case until the conclusion of the Criminal Case.

Respectfully submitted,
RACHAEL A. HONIG
Acting United States Attorney

By: /s/Catherine R. Murphy
CATHERINE R. MURPHY
Assistant United States Attorney

Dated: Newark, New Jersey
April 22, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BRENDA A. SMITH, BROAD REACH CAPITAL,
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BRISTOL ADVISORS, LLC,

Defendants.

Hon. Madeline Cox Arleo

Civ. No. 19-cv-17213

**ORDER GRANTING LEAVE
TO INTERVENE AND
A STAY**

This matter having come before the Court upon the motion of the United States for an Order: (1) granting the United States leave to intervene in the above-captioned civil action (the “Civil Case”) pursuant to Federal Rule of Civil Procedure 24; and (2) staying the Civil Case pending the conclusion of criminal proceedings in *United States v. Brenda Smith*, Crim. No. 20-475 (MCA), and any related proceedings before the United States District Court, including trial (the “Criminal Case”):

WHEREAS, on August 27, 2019, plaintiff Securities and Exchange Commission (the “SEC”) filed the Civil Case against defendants Brenda Smith (“Smith”), Broad Reach Capital, LP (“the Fund”), Broad Reach Partners, LLC, and Bristol Advisors, LLC (collectively, “Defendants”) alleging that the Defendants violated Section 17(a) of the Securities Act of 1933 [15 U.S.C. § 77q(a)], Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)], and Rule 10b-5 thereunder [17 C.F.R. § 240.10b-5].

WHEREAS, the SEC's civil complaint alleges that, among other things, the Defendants raised at least \$100 million from at least 40 investors as part of an investment advisory fraud by lying to investors about how their funds would be invested and the performance of the Fund.

WHEREAS, none of the Defendants have answered the SEC's civil complaint, and the parties have not yet exchanged discovery in the Civil Case.

WHEREAS, on June 2, 2020, a grand jury, sitting in Newark, New Jersey, returned a seven-count indictment charging Smith with six counts of wire fraud, in violation of 18 U.S.C. § 1343 (Counts One through Six), and securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff, Title 17, Code of Federal Regulations, Section 240.10b-5, and Title 18, United States Code, Section 2 (Count Seven). *See* Crim. No. 20-475 (MCA).

WHEREAS, the Criminal Case arose from an ongoing parallel criminal investigation conducted by the Federal Bureau of Investigation and the United States Attorney's Office for the District of New Jersey and similarly alleges that Smith engaged in a fraudulent scheme to solicit investments in Broad Reach Capital by making material misrepresentations and omissions to investors about how their funds would be invested and the performance of the Fund.

WHEREAS, on June 29, 2020, Smith was arraigned before this Court and entered a plea of not guilty to the charges set forth in the Indictment. *See* Crim. No. 20-475 (MCA), ECF No. 20.

WHEREAS, there is a significant overlap between the Civil Case and the Criminal Case in that the civil proceeding and the criminal prosecution involve

the same individual defendant (Smith), the same alleged scheme to defraud, and many of the same potential witnesses.

WHEREAS, a stay of the Civil Case will cause little to no particularized harm to the SEC, the Defendants, or to the public, and it will likely benefit the parties and the public by reducing the scope of discovery in the Civil Case and by narrowing or eliminating the issues to be decided in the Civil Case.

WHEREAS, the United States timely applied to intervene in the Civil Case.

WHEREAS, the United States has a sufficient interest in the Civil Case that may be affected or impaired by the disposition of the Civil Case and which is not adequately represented by an existing party in the Civil Case.

WHEREAS, the Civil Case and the Criminal Case share common questions of law and fact.

WHEREAS, this Court has the inherent authority to stay proceedings in a civil case in the interests of justice when a parallel criminal prosecution is underway.

WHEREAS, the SEC is not opposed to staying proceedings in the Civil Case until the Criminal Case has concluded.

IT IS THEREFORE ON THIS _____ DAY OF _____, 2021,

ORDERED that, pursuant to Federal Rules of Civil Procedure 24(a)(2) and 24(b)(1)(B), the United States is granted leave to intervene in the above-captioned matter; and it is further

ORDERED that, in the interests of justice, the above-captioned matter is hereby stayed until the Criminal Case is completed; and it is further

ORDERED that nothing in this Order impedes the ability of the Securities and Exchange Commission to conduct any investigation of individuals or entities not named as Defendants in the Civil Case; and it is further

ORDERED that the Preliminary Injunction (ECF No. 7), including the asset freeze, and the Order Appointing Receiver (ECF No. 22), and any order related to the receivership and all powers granted to the Receiver, shall remain in full force and effect.

HON. MADELINE COX ARLEO
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Catherine R. Murphy, an Assistant United States Attorney, hereby certify that:

On April 22, 2021, I caused a copy of the attached Motion and supporting Memorandum of Law to be served on the following persons:

John V. Donnelly, III (Via ECF)
Kelly L. Gibson
Mark Raymond Sylvester
Scott A. Thompson
U.S. Securities and Exchange Commission
1617 JFK Boulevard
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Philadelphia, PA 19103

Kevin Dooley Kent (Via ECF)
Conrad, O'Brien, Gellman & Rohn, PC
West Tower
1500 Market Street
Suite 3900
Philadelphia, PA 19102

Brenda Smith (via Certified Mail)
Essex County Correctional Facility
354 Doremus Avenue
Newark, NJ 07105

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Catherine R. Murphy
CATHERINE R. MURPHY
Assistant U.S. Attorney

Dated: Newark, New Jersey
April 22, 2021