UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-v-

ELEK STRAUB, TAMAS MORVAI, and ANDRAS BALOGH,

Defendants.

No. 11 Civ. 9645 (RJS)
ORDER

RICHARD J. SULLIVAN, District Judge:

Plaintiff Securities and Exchange Commission ("SEC") commenced this action against Defendants Straub, Balogh, and Morvai on December 29, 2011. (Doc. No. 1.) On October 12, 2012, the Court entered a case management plan ordering that initial disclosures be completed by November 2, 2012 and that initial document requests, interrogatories and requests for admission be served by November 15, 2012, but the Court stayed all other discovery pending resolution of Defendants' anticipated motion to dismiss. (Doc. No. 33.) On February 8, 2013, the Court denied Defendants' joint motion to dismiss the Complaint and ordered the parties to submit a joint case management plan. (Doc. No. 48.) The parties disagree as to how many months are needed to complete discovery and the appropriate date for the deposition of Defendants, and both sides have submitted numerous letters in support of their positions.[1] Both parties agree that discovery in this case will be quite extensive. The SEC proposes that Defendants be required to appear for

[1] In issuing this decision, the Court has considered the following: Defendants' letter, dated March 25, 2013; the SEC's letter, dated March 27, 2013; Defendants' letter, dated March 28, 2013; arguments made at the April 3, 2013 conference; Defendants' letter, dated May 2, 2013; and, the SEC's letter, dated May 6, 2013. The Court also considered all exhibits and attachments accompanying each of the aforementioned letters. These letters are being docketed under a separate Order.

depositions during the week of July 15, 2013 and that all fact discovery conclude by April 3, 2015. Defendants request that the depositions of the individual Defendants not occur prior to December 7, 2014, when the statute of limitations on their potential criminal liability has run, and that the deadline for fact discovery fall more than one year later, on December 31, 2015. For the reasons that follow, the Court will not stay Defendants' depositions and the deadline for fact discovery shall be January 31, 2015.[2]

Defendants' Depositions

The Department of Justice ("DOJ") previously conducted a criminal investigation into Defendants' activities that are the subject of this civil case brought by the SEC. Since early on in this litigation, Defendants have stated that they would assert their Fifth Amendment rights at any deposition unless they received an unambiguous written statement from the DOJ that they will not be indicted in connection with the activities that are the subject of this lawsuit. On March 4, 2013, the DOJ provided Defendants with letters stating that the DOJ Fraud Section "has closed its investigation of Magyar Telecom and its executives, including [Defendants], and the Fraud Section does not intend to file criminal charges against [Defendants]." The letter further stated that, "if additional information or evidence should be made available to us in the future, we reserve the right to reopen our inquiry."

Defendants argue that the DOJ's letter leaves open the possibility that the investigation will be re-opened and that Defendants' deposition testimony is exactly the type of additional information that could trigger such action by the DOJ. Therefore, Defendants argue that they should not be

[2] The parties also disagree as to the location of Defendants' depositions. The SEC requests that they take place in a location that permits the depositions to be conducted according to the Federal Rules of Civil Procedure. Defendants argue that the depositions should take place in Hungary. The Court declines to decide this issue at this time because it has not been formally raised with the Court or briefed by the parties.

deposed until after the criminal statute of limitations has run in December 2014. Defendants posit that there is no prejudice to the SEC because there is still a great deal of discovery that can occur in the meantime and, even under the SEC's more ambitious discovery schedule, four months of discovery would still remain after Defendants' depositions. The SEC counters that the DOJ letter means that Defendants' alleged fear of criminal prosecution is baseless or purely speculative; it is more efficient to depose Defendants first because this will help determine what other witness depositions are necessary; and, even if Defendants plan to assert their Fifth Amendment privilege, they must do so on a question-by-question basis.

As a preliminary matter, even where an actual criminal proceeding has been commenced, the Constitution does not require staying a contemporaneous civil proceeding concerning the same subject matter. *See Nosik v. Singe*, 40 F.3d 592, 596 (2d Cir. 1994) (citing *United States v. Kordel*, 397 U.S. 1, 11 (1970)). In fact, a party can be called to testify in a civil proceeding and his assertion of the Fifth Amendment there may be offered as probative evidence against him. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Here, Defendants are not requesting a total stay of the case but are requesting, in effect, a protective order from being deposed altogether until the criminal statute of limitations runs. However, the Court does not find any persuasive grounds for issuing such a blanket order that would permit Defendants to not even appear for a deposition for nearly eighteen months. While a party may have valid grounds for asserting the Fifth Amendment privilege in response to certain questions, the party is, nonetheless, generally required to appear for the deposition and either provide an answer or assert a privilege on a question-by-question basis. *See Estate of Fisher v. C.I.R.*, 905 F.2d 645, 649 (2d Cir. 1990) (contrasting refusal to respond to the majority of questions on Fifth Amendment grounds with "an impermissible blanket claim of Constitutional privilege" (citing *United States v. Malnik*, 489 F.2d 682, 686 (5th Cir. 1974) (judges

cannot speculate "that any response to all possible questions would or would not tend to incriminate the witness"))); *see also Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, No. 00 Civ. 7352 (GEL), 2004 WL 1418201, at *1–2 (S.D.N.Y. June 23, 2004) ("Of course, the general reasonableness of a fear of potential self-incrimination does not justify a refusal to answer any and all questions; the appropriateness of assertions of privilege must be determined on a question-by-question basis."). Therefore, the Court declines to grant the eighteen-month blanket deferral that Defendants seek. If Plaintiff chooses to notice and depose Defendants prior to December 7, 2014, Defendants will need to appear and then decide on a question-by-question basis whether or not assertion of the Fifth Amendment privilege is appropriate.

Defendants rely primarily on two cases – *United States v. Certain Real Property and Premises*, 55 F.3d 78, 80 (2d Cir. 1995) and *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187 (2d Cir. 1994) – in support of their position, but those cases are inapposite, at least at this stage. The *Certain Real Property and Premises* case concerned a forfeiture proceeding in which the defendant had asserted the Fifth Amendment privilege in response to the government's interrogatories but then sought to withdraw this assertion and submit an affidavit after the government moved for summary judgment. *Certain Real Property and Premises*, 55 F.3d at 80. In that case, the Second Circuit actually *affirmed* the district court's refusal to allow the defendant to withdraw his assertion of the privilege and submit an affidavit at that late stage. *Id.* Nonetheless, Defendants point to the following language of the decision as supportive of their request:

> [C]ourts, upon an appropriate motion, should seek out those ways that further the goal of permitting as much testimony as possible to be presented in the civil litigation, despite the assertion of the privilege. Thus, if there is a timely request made to the court, the court should explore all possible measures in order to select that means which strikes a fair balance . . . and . . . accommodates both parties. In doing this, it should give due consideration to the nature of the proceeding, how and when the privilege was invoked, and the potential for harm or prejudice to opposing parties.

Id. at 84 (internal quotations and citations omitted).

The language cited by Defendants from this opinion does not alter the Court's analysis. First, despite Defendants' argument to the contrary, the Court finds that the SEC would be prejudiced by an order forcing it to wait eighteen months before it could depose Defendants or even know to what questions they would assert the privilege. Moreover, as is evident from the text itself and the posture of the *Certain Real Property and Premises* case, this instruction to district courts cited by Defendants pertains to situations in which a party has already asserted the privilege but now seeks to offer testimony. This case is not yet at that stage. Further, this same opinion cited by Defendants also notes that the instruction for district courts to balance these competing interests "[does] not mean that a district court . . . is necessarily required to stay a forfeiture action while a claimant seeks to resolve a parallel criminal action or that it must enter a protective order which would keep a claimant's testimony from being used in any other proceeding." *Id.* at 83, n.4 (citations omitted).

The *Graystone Nash* case is also unavailing. There, the Second Circuit reviewed the sanction that the district court imposed – namely, precluding defendants from offering any evidence in response to plaintiff's summary judgment motion – because of defendants' refusal to answer questions during discovery depositions in reliance on the Fifth Amendment right against self-incrimination. *Graystone Nash*, 25 F.3d 187. Once again, Defendants here have not yet formally asserted the privilege, and of course the SEC has not yet made a motion for an adverse inference or other sanction based on such an assertion. Hence, *Graystone Nash* has little relevance to the issue currently before the Court.[3]

[3] Two other cases cited by Defendants are similarly inapposite. *In re WorldCom* deals with whether to draw an adverse inference from a non-party witness who asserted the Fifth Amendment privilege. 377 B.R. 77, 109 (S.D.N.Y. 2007). *Federal Trade Commission v. Sharp* concerns whether a party who had previously asserted the Fifth Amendment privilege should be permitted to later submit an affidavit. 782 F. Supp. 1445, 1452–53 (D. Nev. 1991).

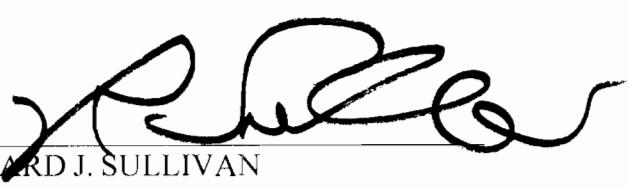
In sum, the Court will not prohibit Plaintiff from noticing and taking Defendants' depositions before the statute of limitations has run. In order to ensure that Defendants have sufficient time to adequately review the considerable document discovery in this case prior to those depositions, however, the depositions of Defendants shall not occur prior to October 1, 2013, unless the parties agree otherwise.

Length of discovery

This case was filed roughly seventeen months ago and involves conduct that took place primarily in 2005 and 2006. Pursuant to the initial case management plan in this action, initial disclosures as well as initial document requests, interrogatories and requests for admission were to be served in November 2012. The SEC has represented, and Defendants do not dispute, that their document production is essentially complete. Moreover, the SEC has simplified the case by not pursuing bribery charges in connection with the alleged scheme in Montenegro. Although the Court is sensitive to the large number of documents in this case and the complexities involved in this litigation, each party's discovery proposal is not simply leisurely but excessively so. The Court finds that a period of eighteen additional months should provide the parties with sufficient time to complete fact discovery and thus sets a deadline of January 31, 2015 for the completion of fact discovery. Accordingly, the parties are to comply with the Case Management Plan and Scheduling Order being filed simultaneously under a separate Order.

SO ORDERED.

Dated: August 5, 2013
New York, New York



RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE