

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ex rel.
ERVIN AND ASSOCIATES,

Plaintiff,

v.

THE HAMILTON SECURITIES GROUP,
INC., et al.,

Defendants.

)
)
)
)
) Civil Action No. 96-1258CRR
)

) FILED UNDER SEAL
)

FILED

NOV 14 1996

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF THE UNITED STATES' MOTION
FOR AN EXTENSION OF TIME UNTIL THIRTY
(30) DAYS AFTER COMPLETION OF THE CRIMINAL
INVESTIGATION AND ANY RESULTING CRIMINAL PROCEEDINGS

Pursuant to 31 U.S.C. § 3730 (b)(3), the United States moves this Court for an extension of time during which to provide the Court with notice of its election to intervene, from November 18, 1996, until thirty days after the completion of ongoing criminal investigation in this matter, and any resulting criminal proceedings. The Government requests that during the period of this extension, the complaint and other documents filed in this qui tam action under the False Claims Act remain under seal, unless otherwise ordered by this Court. The Relator concurs with this motion. This is the second request for an extension.

I. Statement of Facts

Pursuant to § 3730(b), relator John J. Ervin, President of Ervin and Associates, Inc. (Relator) filed the complaint in the above-captioned action on June 6, 1996, in camera under seal.

and served the Attorney General's office by hand on June 7, 1996. Relator's disclosure statement was received by the Civil Division of the United States Attorney's Office for the District of Columbia on June 28, 1996.

Relator in his qui tam complaint claims that defendants, The Hamilton Securities Group Inc., Hamilton Securities Advisory Services Inc., Goldman Sachs & Co., and BlackRock Capital Finance, L.P., conspired with each other and with Helen Dunlap, a government official not named as a defendant in this action and allegedly acting outside the scope of her employment and official capacity, to present false claims to the government in connection with the sale of HUD assets.¹

¹ On June 5, 1996, a day before the filing of the instant action, the relator filed an action against HUD, as well as one of its officials under, inter alia, a Bivens theory. In Ervin and Associates, Inc., et al. v. Helen Dunlap, et al., Civ. No. 96-1253 (D.D.C.), presently before the Judge Bryant, the plaintiffs, Ervin and Associates, Inc. ("Ervin") and EAA Capital Co., L.L.C., have filed an eight-count Second Amended Complaint against the United States of America, the United States Department of Housing and Urban Development ("HUD"), Henry Cisneros, as Secretary for HUD, and Helen Dunlap, in both her individual capacity and her official capacity as an official of HUD. The Second Amended Complaint seeks declaratory and injunctive relief against all defendants and money damages against Helen Dunlap in her individual capacity for alleged constitutional, statutory and regulatory violations arising from an alleged scheme at HUD involving contracting corruption and retaliation against the plaintiffs.

On August 14, 1996, Ervin also filed an action in the United States Court of Federal Claims seeking relief related to certain contracts Ervin presently has with HUD. Ervin & Assoc., Inc. v. United States, No. 96-504 C (Fed. Cl.). That case is currently pending.

On August 19, 1996, Ervin filed a complaint against HUD in the District of Colorado seeking declaratory and injunctive relief related to four HUD contracts to be awarded in the near future. Ervin & Assoc., Inc. v. Cisneros, et al., No. 96-1954 (D. Colo.). That case was subsequently transferred to the Honorable Judge Bryant in the District Court for the District of Columbia (Docket No. 96-2164) and dismissed without prejudice by stipulation of the parties.

Based upon the Relator's statement of material evidence supplied to the Government with the qui tam complaint as well as the allegations in the separate matter (see Footnote 1), the Inspector General of the Department of Housing and Urban Development opened an investigation. See, United States' Motion For Extension Of Time Within Which To Make Intervention Decision and Maintain Seal filed August 16, 1996.

As a result of that investigation, a referral of the allegations in the Relator's complaint and in the separate complaint, was made to the Criminal Division of the United States Attorney's Office for the District of Columbia, which has opened a criminal investigation of this matter. This investigation is active but is in its early stages. Much more work remains to be done on the very complex and multiple allegations under investigation.²

The lifting of the seal in this matter will hamper, injure and compromise the criminal investigation. So that the qui tam action does not jeopardize the ongoing active criminal investigation, the Government respectfully requests that this Court stay the period of time in which the United States must decide to intervene in this qui tam action until thirty (30) days after the completion of the

² If the Court so desires, the United States will provide an ex parte in camera explanation of the status of the criminal investigation and its complexities.

criminal investigation and any resulting proceedings. Thus, the United States will notify this Court of its decision to intervene within thirty (30) days after the completion of a criminal investigation and any resulting criminal proceedings. The United States will also report back to this Court in forty-five (45) day intervals to inform the Court of the status of the criminal matter.

II. Points and Authorities

The qui tam provisions of the False Claims Act provide in part that :

The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2).³

31 U.S.C. § 3730 (b)(2) [Footnote added].

There are several reasons for granting this motion. First, the public filing of overlapping civil false claims allegations at this time could potentially compromise or, at a minimum, complicate

³ Paragraph 2 provides as follows:

A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4 (d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action with 60 days after it receives both the complaint and the material evidence and information.

31 U.S.C. § 3730 (b)(2) [Emphasis added].

the criminal investigation. That is a danger which can and should be avoided. Second, as noted above, this Court has the statutory authority to grant the relief requested; that is, upon a showing of good cause -- here the existence of an active criminal investigation -- to extend the government's deadline for making an intervention decision. Moreover, courts' authority to grant a stay of proceedings derives from the power of every court "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for the litigants." Landis v. North American Co., 299 U.S. 248, 254 (1936).

Third, granting the Government's motion will contribute to judicial economy. It is well-established that a prior criminal conviction will operate as an estoppel in a subsequent civil proceeding as to those issues that were determined in the criminal matter. See, e.g., Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568-569 (1951). This principle has been codified in the False Claims Act. See 31 U.S.C. § 3731 (d). Thus, should the present criminal investigation result in an indictment and criminal conviction for practices violative of the False Claims Act, issues of liability will have been determined in a large measure, thereby limiting the issues which must be litigated in this civil case, and possibly obviating the need for extensive civil litigation.

Even if the criminal investigation does not lead to a criminal indictment and conviction, the investigation may well provide the parties with evidence and information on the issues of liability and damages, thereby reducing the amount of discovery required in

this civil action. Therefore, extending the time for initiating the civil case until the conclusion of the criminal investigation and any resulting proceedings will promote judicial economy and reduce litigative time and expense.

Fourth, denial of this motion for an extension of time will enable the defendants to use the liberal discovery procedures available in civil suits as a means of uncovering facts about the Government's criminal investigation, thereby circumventing the more restrictive discovery procedures provided in criminal cases.⁴ The integrity of any possible criminal prosecution could be compromised if the information gained in the criminal investigation is released to the defendants through civil discovery. That harm may be avoided by granting the Government's request for an extension of time. Cf. Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962) (in a motion for stay of proceedings, "a judge should be sensitive to the difference in the rules of discovery in civil and criminal cases.)⁵

⁴ The Federal Rules of Criminal Procedure, unlike the Federal Rules of Civil Procedure, do not provide for depositions, interrogatories, mental or physical examinations, or requests for admission. In addition, the Jencks Act, 18 U.S.C. § 3500, effectively eliminates pre-trial discovery of statements made by government witnesses. Dual discovery, therefore, would undermine the protections afforded the government under the Federal Rules of Criminal Procedure.

⁵ The Court in Campbell recognized that criminal prosecutions generally take priority over the rights of the litigants in civil cases:

The very fact that there is a clear distinction between civil and criminal actions requires a government policy determination of

Fifth, granting the Government's motion will protect the defendant's or HUD's employees -- if they are the subject of the investigation -- from having to choose between asserting their Fifth Amendment rights, thereby having a negative inference drawn against them in the civil case, or waiving their Fifth Amendment privileges, thereby possibly incriminating themselves for criminal purposes. Courts have often granted stays in such situations in order to protect defendants from this predicament. See e.g., National Discount Corp. v. Holzbaugh, 13 F.R.D. 236, 237 (E.D. Mich. 1952) (requiring defendant to submit to civil discovery where the "fabric of the fraud is identical with the fraud embraced by the allegations contained in the criminal proceedings . . . would be oppressive and, at least, an indirect invasion of his constitutional rights.").

Finally, an extension of time will not prejudice the United States or the Relator, Ervin and Associates, which has consented to this motion. First, a stay will enable the United States to avoid the discovery problems that may arise if the defendants employees or principals assert their Fifth Amendment privileges. Second, as noted above, a stay of the civil case might eventually enable the

priority: which case should be tried first. Administrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities.

Campbell, 307 F.2d at 487.

United States to take advantage of the doctrine of collateral estoppel if the criminal investigation results in indictments and criminal convictions.


CONCLUSION

For the foregoing reasons, the United States respectfully requests that its motion for an extension of time of thirty (30) days following the completion of the criminal investigation and any resulting proceedings during which the complaint and other documents filed in this matter remain under seal, unless otherwise ordered, be granted. In the event that this Court denies the Government's motion, the United States requests that it be granted thirty (30) days from receipt of such denial within which to finalize its decision regarding intervention and notify the Court.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

ERIC H. HOLDER, JR.
United States Attorney
District of Columbia


BARBARA VAN GELDER
Assistant United States Attorney
D.C. Bar # 265603
555 Fourth Street
Washington, D.C. 20001
Telephone: (202) 514-7238

CERTIFICATE OF SERVICE

This is to certify that on this 14th day of November, 1996, I caused copies of the foregoing UNITED STATES' MOTION FOR AN EXTENSION OF TIME, MOTION OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION and proposed ORDER, to be served by fax and first-class mail, postage prepaid, on:

WAYNE G. TRAVELL, Esquire
DANIEL M. HAWKE, Esquire
1615 L. Street, N.W., Suite 400
Washington, D.C. 20036



BARBARA VAN GELDER
Assistant United States Attorney
555 4th Street, N.W.
Washington, D.C. 20001
(202) 514-7238