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14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF NEVADA**

16 **FEDERAL TRADE COMMISSION,**

17 Plaintiff,

18 v.

19 **SEQUOIA ONE, LLC, et al.,**

20 Defendants.
21

Case No. 2:15-cv-01512-JCM-CWH

**FEDERAL TRADE
COMMISSION'S OPPOSITION
TO DEFENDANT JASON
KOTZKER'S MOTION TO STAY
PROCEEDINGS PENDING
RESOLUTION OF CRIMINAL
PROCEEDINGS**

22
23 Plaintiff Federal Trade Commission ("FTC"), by its attorneys, respectfully
24 submits this memorandum of points and authorities in opposition to Defendant Jason Kotzker's
25 motion to stay proceedings pending resolution of criminal proceedings (Dkt. No. 22) ("Motion to
26 Stay").
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1 **INTRODUCTION**

2 The FTC initiated this civil enforcement action alleging that Kotzker and his co-
3 defendants violated Section 5 of the FTC Act, 15 U.S.C. § 45, by engaging in unfair practices.
4 As alleged in the Complaint, Defendants sold sensitive personal and financial information
5 gathered from consumer payday loan applications to non-lenders who had no legitimate need for
6 the information. Kotzker and his co-defendants continued this practice even though they had
7 numerous indicators that the non-lenders were using consumers’ sensitive information to debit
8 consumers bank accounts without the consumers’ knowledge or consent. As a result of their
9 practices, Defendants caused millions of dollars in injury to consumers.

10 Kotzker’s activities have apparently caught the eye of criminal law enforcement
11 authorities and he believes he is the subject of a criminal investigation. He requests the Court
12 stay this proceeding pending the resolution of that investigation and “any other later
13 proceedings” because he may have to invoke his Fifth Amendment right against self-
14 incrimination. (Def.’s Mem. Points and Authorities (“Def. Memo”) [Dkt. No. 22] at 7.)

15 Although Kotzker has a right to invoke the Fifth Amendment in this proceeding if he
16 feels it necessary, he does not have a right to a stay of this proceeding. Courts regularly reject
17 requests for stays where, as here, the defendant has not been criminally indicted and the
18 requested stay is an open-ended one that could last for years. The possibility that Kotzker may
19 want to assert the Fifth Amendment in this proceeding is not enough to overcome the prejudice
20 such a stay would have on the FTC, the public, the consumer victims, and the judicial system.
21 Indeed, analyzing the factors identified by the Ninth Circuit in *Keating v. Office of Thrift*
22 *Supervision*, 45 F.3d 322 (9th Cir. 1995), demonstrates that Kotzker’s motion to stay should be
23 denied.

24 **ARGUMENT**

25 Although it is within a district court’s power to stay a civil action pending a criminal
26 proceeding, “such action is not required by the Constitution.” *FSLIC v. Molinaro*, 889 F.2d 899,
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1 902 (9th Cir. 1989); *Keating*, 45 F.3d at 324 (“The Constitution does not ordinarily require a stay
2 of civil proceedings pending the outcome of criminal proceedings.”). Instead, a court should
3 consider “the particular circumstances and competing interests involved in the case.” *Molinaro*,
4 889 F.2d at 902.

5 The Ninth Circuit has identified several interests a court should consider in determining
6 whether to grant a stay. A court “should consider the extent to which the defendant’s Fifth
7 Amendment rights are implicated.” *Id.* In addition, a court should consider: “(1) the interest of
8 the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the
9 potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the
10 proceedings may impose on defendants; (3) the convenience of the court in the management of
11 its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the
12 civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.”
13 *Keating*, 45 F.3d at 324-25.

14 Kotzker, as the proponent of the stay, “bears the burden of establishing its need.” *Doe v.*
15 *City of San Diego*, 2012 WL 6115663, at *1 (S.D. Cal. Dec. 10, 2012). He has failed to meet
16 this burden. As explained below, the extent to which his Fifth Amendment rights are implicated
17 is unclear and speculative. Further, each of the additional *Keating* factors weighs against
18 granting a stay in this action.

19 **I. The Extent to which Kotzker’s Fifth Amendment Rights Are Implicated Is**
20 **Speculative and Kotzker Should Bear the Consequences of Asserting those**
21 **Rights in this Proceeding.**

22 As noted, Kotzker has not been indicted, nor does Kotzker point to anything in his
23 motion that suggests his indictment is imminent. To the contrary, the last interaction with
24 criminal law enforcement authorities mentioned in his motion was in January 2015,
25 approximately nine months ago. (Def. Memo at 3.) Without an indictment pending against him,
26 the extent to which his Fifth Amendment rights may be implicated in this civil proceeding is
27 speculative and unclear. Indeed, as the Ninth Circuit has explained, “[t]he case for staying civil

1 proceedings is weak when no indictment has been returned.” *SEC v. Global Express Capital*
2 *Real Estate Inv. Fund*, 289 Fed. Appx. 183, 191 (9th Cir. 2008).

3 Kotzker’s arguments do not bolster this “weak” case for a stay. He argues that because
4 he may want to assert his Fifth Amendment right in this action, he “will be unable to defend
5 himself in any meaningful fashion.” (Def. Memo at 5.) However, courts in this circuit have
6 made it clear that the Constitution does not protect Kotzker “from being forced to choose
7 between the consequences of asserting or waiving his Fifth Amendment rights” in a civil
8 proceeding. *Grimes v. Knife River Constr.*, 2014 WL 1883812, at *2 (E.D. Cal. May 12, 2014).

9 Further, Kotzker overstates the extent to which his Fifth Amendment rights may hinder
10 his defense in this case. The assertion of the Fifth Amendment must be made “on a question-by-
11 question basis.” *Doe v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000). As a result, Kotzker “will
12 be able to participate to some degree in the discovery process.” *Doe*, 2012 WL 6115663, at *4.
13 Moreover, even if asserting the Fifth Amendment may make it more difficult for Kotzker in this
14 action, this is not enough to compel a stay, particularly when the other relevant interests are
15 considered. *See Molinaro*, 889 F.2d at 903 (“The possibility that criminal indictments would be
16 brought against Molinaro may have made responding to civil charges more difficult for him, but
17 the court did not abuse its discretion by deciding that this difficulty did not outweigh the other
18 interests involved.”).

19 Indeed, Kotzker’s request for a stay here is no small thing. Where there has been no
20 indictment, stays of civil proceedings pending the resolution of a criminal investigation “could
21 easily last as long as the five- or six-year limitations period in the criminal cases, or even longer
22 if the government initiates criminal prosecutions shortly before the end of that period.” *Blue*
23 *Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr.*, 490 F.3d 718, 724 (9th Cir. 2007);
24 *see also Sanrio, Inc. v. Ronnie Home Textile Inc.*, 2015 WL 1062035, at *3 (C.D. Cal. March 10,
25 2015) (“A stay for an ‘indeterminate period’ is more likely to cause prejudice to the plaintiff.”).
26 As explained below, Kotzker’s request, if granted, would prejudice the FTC, the court system,

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1 the consumer victims of his actions, and the public. When he has not been indicted (and may
2 never be indicted), Kotzker's "fears regarding asserting his Fifth Amendment privilege in the
3 context of this civil enforcement action are simply too attenuated to justify entry of a stay given
4 the weight of Plaintiff's (and the public's) countervailing interests." *SEC v. Sandifur*, 2006 WL
5 1719920, at *2 (W.D. Wash. June 19, 2006). To the extent Kotzker believes it is necessary to
6 assert his right against self-incrimination, the consequences of asserting that right should be
7 placed on Kotzker, not others.

8 **II. The *Keating* Factors Weigh against Granting a Stay.**

9 When balanced against the competing interests that would be prejudiced by a stay,
10 Kotzker's speculative argument that his Fifth Amendment rights may be implicated by this civil
11 proceeding fails. As explained below, each of the factors identified by the Ninth Circuit in
12 *Keating* weighs against granting Kotzker's motion to stay.

13 **A. The Interests of the FTC Will Be Prejudiced by a Stay**

14 A stay of this proceeding will negatively impact the FTC in several different ways and
15 this factor therefore weighs against a stay. First, the FTC has an interest in seeing the prompt
16 enforcement of the statutes and rules that it has statutorily been tasked with enforcing. *See SEC*
17 *v. Loomis*, 2013 WL 4543939, at *3 (E.D. Cal. Aug. 27, 2013) (recognizing the SEC's interest
18 "in enforcing securities laws as quickly as possible"); *United States v. Ogbazion*, 2012 WL
19 4364306, at *2 (S.D. Ohio Sep. 24, 2012) ("Conduct that Congress deems so offensive that it can
20 be permanently enjoined inherently require[s] prompt civil enforcement which cannot await the
21 outcome of a criminal investigation"). Kotzker argues that this interest will not be prejudiced
22 because he is not currently engaged in the same conduct alleged in the Complaint. (Def. Mem. at
23 6.) However, there is nothing to stop him from starting up the same or similar practices, and
24 enforcement of the FTC Act is therefore still vital. *See FTC v. Sharp*, 782 F. Supp. 1445, 1454
25 (D. Nev. 1991) (explaining that the FTC Act authorizes the FTC to seek permanent injunctions
26 even when the activity at issue has ceased if there is a "cognizable danger of recurrent
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1 violation”). It would be “perverse” if the FTC were to receive “slower justice than other
2 plaintiffs” simply because Kotzker’s alleged behavior “is sufficiently egregious to have attracted
3 the attention of the criminal authorities.” *Sterling Nat’l Bank v. A-1 Hotels Int’l, Inc.*, 175 F.
4 Supp. 2d 573, 575 (S.D.N.Y. 2001).

5 A second interest of the FTC is the need to proceed expeditiously to avoid destruction or
6 loss of evidence. A delay in this action “inherently increases the risk that witnesses’ memories
7 will fade and evidence will become stale.” *Blue Cross & Blue Shield of Ala.*, 490 F.3d at 724
8 (quoting *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002)). The Complaint in this action
9 alleges illegal conduct starting in at least 2011. (Compl. ¶ 14.) A stay would hinder the FTC’s
10 ability to ensure that relevant evidence, not all of which is in the hands of the Defendants, is
11 preserved. This is particularly vital for the evidence relating to the early years of the scheme,
12 where destruction of evidence or memory loss is most likely.

13 Finally, Kotzker requests a stay of proceedings solely against himself. (Def. Mem. at 7.)
14 This action will thus presumably proceed as to the corporate defendants, Sequoia One, LLC
15 (“Sequoia One”) and Gen X Marketing Group, LLC (“Gen X”), and the FTC will need to be able
16 to prove its case against those entities. Kotzker, however, is the owner, member, and/or manager
17 of Sequoia One and a manager of Gen X, and is a central player to the scheme alleged in the
18 complaint. (*See* Compl. ¶ 8.) In order to pursue effectively and efficiently its action against the
19 corporate entities, the FTC will undoubtedly need to seek discovery from Kotzker. *See Sandifur*,
20 2006 WL 1719920, at *3 (denying request for stay because, among other things, “a stay would
21 force Plaintiff to forego discovery from a key participant”). Although Kotzker may assert his
22 Fifth Amendment right as to some of this discovery, as noted above, it is likely his Fifth
23 Amendment right will not be implicated as to every question asked of him.

24 **B. There Are No Additional Burdens on Kotzker By Proceeding**

25 This factor weighs against a stay when defendants “have not identified any legitimate
26 burden that could result from this [a]ction proceeding, other than Defendants’ ‘Fifth Amendment
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1 concerns.” *Sanrio*, 2015 WL 1062035, at *3. Other than his Fifth Amendment concerns,
2 Kotzker has not identified any other burdens that proceeding with this action would place on
3 him. (Def. Mem. at 6.) This factor, therefore, also weighs against granting his motion.

4 **C. Judicial Efficiency Weighs Against Granting the Stay**

5 “Judicial efficiency also weighs against issuing a stay since the district court ‘ha[s] an
6 interest in clearing its docket.’” *Christian v. Rutkowski*, 2015 WL 5456600, at *2 (C.D. Cal.
7 Sept. 17, 2015) (quoting *Molinaro*, 889 F.2d at 903)). The burden on the court is particularly
8 pronounced here where there is no indictment and the request is for an indefinite stay that may
9 last for years. *See Sanrio*, 2015 WL 1062035, at *4.

10 Further, as noted, Kotzker requests a stay only as to himself and the case would likely
11 therefore proceed as to the corporate Defendants. If a stay is granted, “the court will have
12 essentially bifurcated the action, resulting in a duplication of its efforts to resolve it.” *Grimes*,
13 2014 WL 1883812, at *4. “This *de facto* bifurcation will have an impact on the witnesses for
14 both plaintiff and defendants, as they might be subject to two rounds of discovery and two
15 trials.” *Id.*

16 Kotzker argues that because this case is in its early stages, a stay is warranted and cites to
17 *Taylor, Bean & Whitaker Mortgage Corporation v. Triduanium Financial*, 2009 WL 2136986
18 (E.D. Cal. 2009) in support. (Def. Mem. at 6.) Yet the facts underlying that decision are
19 meaningfully different from this case. As an initial matter, the stay requested in *Taylor, Bean &*
20 *Whitaker* was of the entire action, not of one individual defendant. *Id.* at *1. In addition, the
21 request in that action was not for an indefinite stay, as here, but for a stay of mere months. *Id.*
22 Further, perhaps the largest difference between that case and the present case is that, in *Taylor,*
23 *Bean & Whitaker*, two of the named defendants had already been indicted. *Id.* The court was
24 therefore able to conclude that allowing the criminal matter to proceed first would promote
25 efficiency because common issues of fact could be resolved in the criminal matter. *Id.* at *4. In
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1 this case, neither Kotzker (nor any other defendant) has been indicted and any purported
2 efficiency in letting a criminal proceeding go first is purely speculative.

3 **D. The Interests of Non-Parties Will Be Prejudiced by a Stay**

4 The victims of the scheme engaged in by Kotzker and his co-Defendants also have an
5 interest in seeing this matter proceed expeditiously. As alleged in the Complaint, Kotzker's
6 actions led to over \$7 million in injury to consumers. (Compl. ¶ 24.) The FTC seeks restitution
7 for these victims to the extent possible and practicable. (*See id.* ¶ 37.) A delay in this action
8 would also be a delay in providing redress to the consumer victims.

9 In addition, because of their inability to pay, the FTC was only able to receive \$15,000
10 from the three individual defendants who have settled this action. (*See* Final Orders for
11 Permanent Injunction and Settlement of Claims [Dkt. Nos. 11, 13].) That leaves a large gap
12 remaining between the consumer injury here and the available money for restitution to
13 consumers. A delay of this proceeding would permit Kotzker to continue to spend money that is
14 not rightfully his and dissipate assets that should properly be part of the consumer restitution pot
15 or, at the very least, disgorged as ill-gotten gains.

16 Kotzker argues that a stay would benefit non-parties because it would avoid "wasteful
17 depositions and discovery from non-parties, when the resolution of the criminal proceeding
18 could have a direct impact on issues in the civil action." (Def. Memo at 7.) As explained above,
19 however, because there is no indictment against Kotzker, the scope of any criminal proceeding
20 (and any purported efficiencies to be gained from letting the criminal matter proceed first) is
21 purely speculative. In addition, because the elements of a violation of Section 5 of the FTC Act
22 differ from the elements of any crime, it is simply incorrect to suggest that granting a stay here
23 will help to avoid depositions and discovery from non-parties.

24 **E. The Interests of the Public Will Be Prejudiced by a Stay**

25 The FTC brought this civil enforcement action to enforce a federal consumer protection
26 law, the FTC Act. "[B]ecause this is a civil enforcement action, the public also has a general
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1 Dated: October 15, 2015

Respectfully submitted,

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25 **CERTIFICATE OF SERVICE**

26 The undersigned hereby certifies that on October 15, 2015, a true and
27 correct copy of the foregoing was filed electronically with the United States District Court
for the District of Nevada using the CM/ECF system, which sent notification to all parties of
interest participating in the CM/ECF system.

/s/Gregory A. Ashe
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