

# A New Court Approach To DOJ And SEC Parallel Proceedings

By **Gregory Baker, Rachel Maimin and Jeffrey Blumenfeld** (June 27, 2019)

On June 14, 2019, a United States district judge in the Northern District of California took a rare step: U.S. District Judge Edward J. Davila completely denied the U.S. Department of Justice's standard request to stay related proceedings brought by the U.S. Securities and Exchange Commission pending resolution of a criminal case. Such requests are often made and granted at least in part as a matter of course. The court's decision, made in the well-known Theranos case, may have far-reaching consequences in the context of parallel proceedings by the DOJ and the SEC.



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The defendant in the SEC and DOJ cases is Ramesh "Sunny" Balwani, the former president of Theranos. The DOJ moved to intervene in the SEC's lawsuit against Balwani after he issued a number of subpoenas to various blood-testing centers and medical providers, which the DOJ contended were relevant not to the civil action, but to the criminal case.[1] The court granted the DOJ's motion to intervene in the civil case — which, among other things, affords the DOJ the right to oppose subpoenas issued by Balwani to the extent that they in fact bear on only the criminal case — but took the unusual step of completely denying the DOJ's motion to stay the civil SEC proceedings.



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In coming to his decision, Judge Davila weighed the U.S. Court of Appeals for the Ninth Circuit's so-called Keating factors, which originated in the decision in *Keating v. Office of Thrift Supervision*. [2] These factors include the interest of plaintiffs and the possible prejudice to them; any burden on the defendants; convenience of the court; the interest of third parties and the public; and the defendant's right against self-incrimination. [3]



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Judge Davila found that virtually all of the Keating factors weighed against a stay. But most of the facts the court emphasized in his Keating analysis are present in nearly all cases — suggesting that Balwani will be difficult to distinguish and, though not legally persuasive, may have more far-reaching consequences. For instance, Judge Davila pointed to the fact that a stay, which would "forc[e Balwani] to halt [his civil] investigation indefinitely," [4] would "increase the likelihood that witnesses will not be able to recall information, that they will become unavailable." [5]

Likewise, Judge Davila was extremely skeptical of the DOJ's standard argument that "first resolving the Criminal Case would streamline discovery and decide a number of issues" in the civil action. [6] Judge Davila dismissed that argument out of hand — holding that, even "[a]ssuming that is correct, the Court would still be wary of abridging Balwani's procedural and discovery rights in an effort to save resources and time." [7] It is difficult to imagine a case where all these facts and considerations would not be present — suggesting that, to the extent courts are inclined to follow the court's analysis in Balwani, courts may be more likely to deny requests for complete stays of discovery.

That said, Judge Davila emphasized two factors in his analysis that can distinguish Balwani and make it easier for prosecutors to obtain stays. First, the court emphasized the timing of

the request for the stay. He noted that the government “could have moved to stay the Civil Action immediately after Balwani’s indictment, but instead it chose to let this Action proceed far enough that a stay would significantly prejudice Balwani.”[8] To the extent prosecutors want to stay criminal proceedings, therefore, we can expect after Balwani that such requests will come earlier in criminal cases.

Second, the court emphasized the fact that Balwani did not object to being put in the position, during civil discovery, of having to decide whether to invoke his Fifth Amendment rights — if, for instance, the SEC sought to depose him.[9] If defendants do not oppose stays on the basis of being put in this position, the court suggested, it is more likely that the court will not grant them.

Finally, we can also expect that such requests, if they are to succeed, may only be for partial stays of discovery. Judge Davila noted that the DOJ’s intervention in the case would permit it to challenge particular discovery requests by Balwani without stopping discovery altogether; the court even pointed to a situation in the case where a third-party subpoena was quashed. As the court explained: “[T]he system worked. Nonparty witnesses, DOJ, and SEC may object to Balwani’s discovery requests in the future, and the Court will then decide those objections on a case-by-case basis.”[10]

Indeed, prosecutors have already begun successfully seeking partial stays. For instance, in a case in the Southern District of New York, *United States v. Devon Archer et al.*,[11] the government only sought a stay of discovery that would constitute witness material discoverable under the Jencks Act.[12] The partial stay was granted.[13] As Judge Davila put it, the court “is not unsympathetic to DOJ’s concerns that Balwani may attempt to overreach in civil discovery, but the Court is capable of addressing such concerns with a scalpel instead of a saw.”[14]

Balwani may thus be used by courts to deny stays that in the past were routinely granted. Prosecutors may seek to avoid this outcome by moving for a stay early in proceedings and by moving for only a partial stay, e.g., a stay that applies only to Jencks Act material. A defendant’s position — i.e., if he does not object to having to invoke his Fifth Amendment rights — can also be expected to be a significant factor. But the DOJ should not count, as it has in the past, on courts routinely staying civil discovery in SEC actions.

But, in the end, is Balwani a win or a loss for defendants facing parallel actions? To be sure, parallel proceedings pose significant risks for those facing prosecution. For instance, if discovery is not stayed, the government — or third-party plaintiffs, such as shareholders, bringing suit — can seek to depose the defendant. If the defendant invokes his Fifth Amendment rights, then — in civil actions, unlike criminal actions — an adverse inference against the defendant is permitted to be taken by the jury. (This explains why Judge Davila emphasized Balwani’s willingness to be put in the position of considering whether to invoke his Fifth Amendment rights in denying the stay motion.)

On the other hand, civil actions afford defendants the opportunity to obtain much more discovery than in a criminal action, including depositions. That said, this opportunity is reduced in cases where, as in Balwani, the court permits the government to intervene and object to various discovery requests on a more surgical basis. Because of these competing interests, Balwani is not really a win or loss for any party; it is likely that the precedent will be used equally by the DOJ and by defendants depending on the particular facts and posture of their case.

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[1] Securities and Exchange Commission v. Balwani, 18 Civ. 1603 (EJD), Order dated June 14, 2019 (the "Order") at 3.

[2] 45 F.3d 322 (9th Cir. 1995).

[3] Id. at 4.

[4] Order at 5.

[5] Order at 5.

[6] Order at 5.

[7] Order at 5.

[8] Order at 6.

[9] Order at 7.

[10] Order at 6.

[11] 16 Civ. 3505 (WHP), Order dated August 10, 2016.

[12] See 18 U.S.C. § 3500.

[13] 16 Civ. 3505 (WHP), Order dated August 10, 2016, at 1.

[14] Order at 6.