

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ERVIN AND ASSOCIATES, INC.,  
et al.,

Plaintiffs,

v.

HELEN DUNLAP, et al.,

Defendants.

C.A. No. 96-1253 (WBB)

**FILED**

MAR - 5 1997

NANCY MAYER-WHITTINGTON, CLERK  
U.S. DISTRICT COURT

FEDERAL DEFENDANTS' MOTION TO STAY  
PROCEEDINGS IN THIS ACTION FOR 60 DAYS  
DUE TO PENDING PARALLEL CRIMINAL INVESTIGATION

The federal defendants, through their undersigned counsel, hereby move the Court for an order staying all proceedings in the above-captioned action for a period of 60 days due to the pendency of a criminal investigation into some of the same allegations of misconduct as are alleged in the plaintiffs' second amended complaint. The basis for this motion is that discovery in this action could compromise the integrity of the criminal investigation. In addition, the federal defendants are unable properly to answer the second amended complaint or respond to discovery requests because the pendency of the criminal investigation precludes the federal defendants from presenting a unified government position as to the truth of many of the plaintiffs' allegations of misconduct. In support of this motion, the Court is respectfully referred to the attached memorandum of points and authorities.

On May 5, 1997, Raymond M. Larizza, counsel for the federal defendants, telephoned Wayne G. Travell, counsel for plaintiffs,

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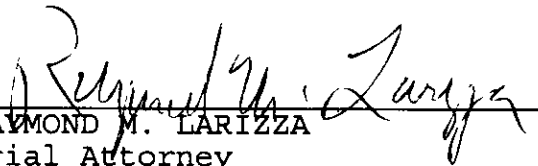
to discuss this motion. Mr. Travell stated that the plaintiffs are opposed to the granting of this motion. Also on May 5, 1997, Mr. Larizza telephoned Terrence O'Donnell, counsel for Helen Dunlap to discuss this motion. Mr. O'Donnell stated that Ms. Dunlap does not oppose the granting of this motion.


Respectfully submitted,

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Assistant Attorney General

Robert M. Hollis  
Assistant Director  
Commercial Litigation Branch

Michael Sitcov  
Assistant Director  
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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 1997, I served the Federal Defendants' Motion to Stay Proceedings in this Action for 60 Days Due to Pending Parallel Criminal Investigation and the Memorandum of Points and Authorities in Support of Federal Defendants' Motion to Stay Proceedings in this Action for 60 Days Due to Pending Parallel Criminal Investigation by personally delivering copies thereof to the offices of:

Wayne G. Travell, Esq.  
Daniel M. Hawke, Esq.  
Tucker, Flyer & Lewis  
1615 L Street, N.W., Suite 400  
Washington, D.C. 20036

Terrence O'Donnell  
J. Andrew Keyes  
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Raymond M. Larizza

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ERVIN AND ASSOCIATES, INC.,  
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MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF FEDERAL DEFENDANTS' MOTION  
TO STAY PROCEEDINGS IN THIS ACTION FOR 60 DAYS  
DUE TO PENDING PARALLEL CRIMINAL INVESTIGATION

NANCY MAYER-WHITTINGTON, CLERK  
U.S. DISTRICT COURT

The Court has directed the federal defendants to answer the second amended complaint in the above-captioned action and has decided to permit the parties to engage in discovery. As is demonstrated below, and in the attached letter from the Office of the United States Attorney for the District of Columbia, proceedings in this action may jeopardize an ongoing criminal investigation. Accordingly, the federal defendants seek a 60-day stay of proceedings in this action, during which time the criminal investigation may progress sufficiently to determine whether criminal prosecution may be instituted.

Discovery is likely to lead to the disclosure of information that could impair a pending criminal investigation into some of the same allegations that are alleged to form the basis of liability in this civil action. It is a common practice for the courts to stay civil proceedings where it is necessary to do so to protect the integrity of a related, ongoing criminal investigation. Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir.

1962), cert. denied, 371 U.S. 955 (1963); Capital Engineering and Manufacturing Co. v. Weinberger, 695 F. Supp. 36, 41 (D.D.C. 1988). Accordingly, the Court should exercise its authority to stay proceedings in this matter for 60 days as requested by the federal defendants.

#### STATEMENT OF FACTS

The federal defendants in this action are represented by attorneys from the Commercial Litigation Branch and the Federal Programs Branch of the Civil Division of the United States Department of Justice (hereinafter "counsel for the federal defendants" or "Civil Division counsel"). Counsel for the federal defendants have prepared a draft answer to the second amended complaint in this action. That answer was based upon interviews with approximately 17 individuals having knowledge of the facts, as well as the review of a number of documents. However, Civil Division counsel are also aware that the Office of the United States Attorney for the District of Columbia, in conjunction with the Office of Inspector General of the Department of Housing and Urban Development (HUD), is currently investigating possible criminal conduct arising out of some of the same allegations that are asserted against the federal defendants by the plaintiffs in this civil action. Accordingly, Civil Division counsel requested the United States Attorney's Office to review the draft answer to determine whether any of the admissions, denials, or averments therein conflicted with

evidence obtained in the criminal investigation, or would otherwise impair that investigation.

By letter dated March 5, 1997, the United States Attorney's Office declined the request to review the draft answer to the complaint.<sup>1</sup> The letter explained that to comment on the draft answer could lead to waiver of the law enforcement investigative privilege, thereby impairing the conduct of the criminal investigation.<sup>2</sup>

The United States Attorney's Office also concluded that discovery in the civil case further threatened the criminal investigation through disclosure of information not normally available to a criminal defendant prior to the commencement of a criminal trial.<sup>3</sup> Accordingly, the United States Attorney's Office requested that Civil Division counsel seek a stay of proceedings in this case for a period of 60 days.<sup>4</sup> At the end of that period, the United States Attorney's Office should be in a better position to determine whether the criminal investigation will result in criminal prosecution.<sup>5</sup> If criminal prosecution appears likely, Civil Division counsel will seek an appropriate

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<sup>1</sup> Letter of March 5, 1997, from Ramsey Johnson, Principal Assistant United States Attorney, to Gary G. Grindler, Deputy Assistant Attorney General, Civil Division, Department of Justice ("Johnson Letter"), a copy of which is attached hereto.

<sup>2</sup> Johnson Letter, pp. 1-2.

<sup>3</sup> Johnson Letter, p. 2.

<sup>4</sup> Id.

<sup>5</sup> Id.

extension of the stay. On the other hand, if prosecution is not contemplated, the stay could be lifted and the civil action could then proceed.

#### ARGUMENT

##### I. Discovery In The Civil Action Would Adversely Effect The Criminal Investigation

A widely-recognized ground for staying all proceedings in this action for 60 days is that civil discovery threatens to impair the criminal investigation by permitting the disclosure of information that would normally not be available to a criminal defendant prior to the commencement of a criminal trial.

"Numerous cases support the proposition that a court properly vested with jurisdiction may exercise broad discretion in deciding to stay a civil action in favor of a related criminal proceeding." R.J.F. Fabrics, Inc. v. United States, 651 F. Supp. 1437, 1440 (Ct.Int'l.Trade. 1985); see, e.g., United States v. Kordell, 397 U.S. 1, 11 n.27 (1970) (observing that the "[f]ederal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions where the interests of justice seemed to require such action . . . ."); Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963); Capital Engineering and Manufacturing Co. v. Weinberger, 695 F. Supp. at 41; The Founding Church of Scientology of Washington, D.C. v. Kelley, 77 F.R.D. 378, 380 (D. D.C. 1977); United States v. Any And All Assets, Etc., 147 F.R.D. 99, 101 (M.D.N.C. 1993) (when a civil proceeding may interfere with a criminal investigation, it is common for the United States to

move for a stay of discovery, and such motions are presumptively reasonable, nothing else appearing); United States v. Hugo Key and Son, Inc., 672 F. Supp. 656, 657 (D.R.I. 1987) (power to stay civil proceedings is appropriately exercised where the ends of justice are threatened by the concurrent development of related civil and criminal proceedings).

One of the principal reasons for staying a civil case pending the conclusion of a related criminal proceeding is to prevent harm to the criminal prosecution resulting from disclosure of information through the use of civil discovery. Courts "attempt to avoid concurrent civil and criminal suits" because "'the broader scope of discovery permissible in civil cases should not be used to compromise parallel criminal proceedings.'" St. Paul Fire and Marine Insurance Co. v. United States, 24 Cl. Ct. 513, 516 (1991) (quoting Litton v. United States, 215 Ct. Cl. 1056, 1058 (1978)); Campbell v. Eastland, 307 F.2d at 487 (a court "should be sensitive to the difference in the rules of discovery in civil and criminal cases"); Capital Engineering and Manufacturing Co. v. Weinberger, 695 F. Supp. 36, 41 (D.D.C. 1988) (courts are "widely acknowledged" to possess the authority to stay discovery in civil cases in order to prevent litigants from circumventing the more restrictive rules applicable to criminal discovery).

"' [W]here such a compromising situation is considered likely, the public's interest in law enforcement surfaces and mandates that criminal proceedings be given priority over

concurrent civil proceedings." St. Paul Fire and Marine Insurance Co. v. United States, 24 Cl. Ct. at 516 (quoting C3, Inc. v. United States, 4 Cl.Ct. 790, 791 (1984)); Campbell v. Eastland, 307 F.2d at 487 ("Administrative policy gives priority to the public interest in law enforcement"). The policy giving priority to criminal proceedings is equally applicable where a criminal investigation is pending, even where no case has been presented to a grand jury, no indictments have been issued, and no criminal trial is in progress. The Founding Church of Scientology of Washington, D.C. v. Kelley, 77 F.R.D. at 381 n.4; Capital Engineering and Manufacturing Co. v. Weinberger, 695 F. Supp. at 42 (granting stay of civil discovery due to pendency of criminal investigation); St. Paul Fire and Marine Insurance Co. v. United States, 24 Cl. Ct. at 101 (court has "authority to stay civil proceedings pending resolution of criminal investigations").

Traditionally, the courts have recognized three reasons why permitting broad civil discovery could impair a parallel criminal investigation: (1) broad disclosure of the prosecution's case could lead to perjury and manufactured evidence; (2) disclosure of the identity of prospective witnesses could create the opportunity for intimidation of those witnesses; and (3) information developed in civil discovery could be used to surprise the prosecution at the criminal trial. The Founding Church of Scientology of Washington, D.C. v. Kelley, 77 F.R.D. at 381; Raphael v. Aetna Casualty and Surety Co., 744 F. Supp. 71,

75 (S.D.N.Y. 1990). The potential for harm to the criminal investigation is high where the issues in the civil and criminal proceedings are related and substantially similar and, consequently, will involve "a substantial, if not total, overlap of witnesses and documentary evidence." St. Paul Fire and Marine Insurance Co. v. United States, 24 Cl. Ct. at 516.

When the government seeks a stay of civil proceedings due to the pendency of a related criminal investigation or proceeding, the government and the actual or prospective criminal defendant frequently are on opposite sides of the civil case. Although that is not the case here, discovery, nevertheless, poses the same type of threat to the criminal investigation that has been recognized as a ground for a stay of civil discovery at the request of the government.

The second amended complaint filed in this action by plaintiff Ervin and Associates, Inc. (Ervin), contains numerous allegations of misconduct by present and/or former HUD employees. As previously discussed, at least some of these allegations are currently the subject of the criminal investigation being conducted by the United States Attorney's Office. As the criminal investigation progresses, it is possible that additional allegations of the complaint will come under the scrutiny of the United States Attorney's Office.

It would not be appropriate for the United States Attorney's Office to identify the persons who have become subjects or targets of the criminal investigation or to reveal the precise

allegations under review in that investigation. Moreover, the subject matter of the criminal investigation may possibly expand as additional evidence is gathered. This uncertainty as to the scope of the criminal investigation serves only to increase the risk that the civil discovery will compromise potential criminal proceedings.

Ervin has an interest in developing evidence through discovery that would establish the truth of its allegations of misconduct and that would identify the particular present or former HUD employees, or others outside of HUD, who engaged in that misconduct. Since some of those same allegations of misconduct are the focus of the criminal investigation, Ervin's discovery requests will, of necessity, involve the same witnesses and documentary evidence that would be examined in the criminal investigation and relied upon by the government in any subsequent prosecution that might result from that investigation. In other words, Ervin will be attempting to develop through civil discovery the very same type of evidence that the United States Attorney's Office would be using in any subsequent criminal prosecution.

The HUD officials that the plaintiffs will seek to depose may well include persons who are, or will become, subjects of the criminal investigation and might, thereafter, become defendants in a criminal prosecution. Those persons will, during the course of depositions conducted by the plaintiffs, be shown documents, also produced in civil discovery, that Ervin believes will

establish the alleged misconduct by HUD officials. In addition, questions posed by the plaintiffs at depositions might permit the deponents to infer the nature of additional evidence that might establish their misconduct. In this way, civil discovery could provide potential criminal defendants with far more extensive knowledge of the evidence that might someday be used against them in a criminal prosecution than they could obtain under the restrictive discovery rules applicable to criminal cases. Accordingly, civil discovery could compromise future criminal prosecutions, notwithstanding that the potential criminal defendants may not be parties to the civil action.

II. Preparation Of The Answer In The  
Civil Action Potentially Jeopardizes  
The Ongoing Criminal Investigation

As noted above, Civil Division counsel have prepared a draft answer to the second amended complaint, and requested the United States Attorney's Office to review the draft answer to determine whether any of the admissions, denials, or averments therein conflicted with evidence obtained in the criminal investigation, or would otherwise impair that investigation.<sup>6</sup> However, the United States Attorney's Office has declined to engage in the

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<sup>6</sup> Under Rule 11(b)(4), F.R.Civ.P., an attorney signing an answer is certifying that on the basis of "an inquiry reasonable under the circumstances," the "denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." Under the circumstances, the Rule 11 requirement for an "inquiry reasonable under the circumstances" can be reasonably read to require Civil Division counsel to consult with the United States Attorney's Office prior to filing an answer to the second amended complaint.

type of information exchange that would be necessary to determine whether the Civil Division's draft answer is consistent with the evidence developed thus far in the pending criminal investigation. As explained in the March 5, 1997 letter from Ramsey Johnson, Principal United States Attorney, to Gary G. Grindler, Deputy Assistant Attorney General, Civil Division, Department of Justice, such an exchange of information risks waiver of the law enforcement investigative privilege,<sup>7</sup> thereby impairing the conduct of the criminal investigation.

In civil litigation, a plaintiff is normally permitted, through discovery, to determine the factual basis for admissions and denials set forth in the defendant's answer to a complaint. If the Civil Division's answer in the civil case were to be based in part upon consultation with the United States Attorney's Office, the information exchanged during such consultation might well become subject to disclosure in response to discovery requests in the civil case. In other words, to reveal information derived from the criminal investigation to the Civil Division in the course of commenting on the draft answer would entail a substantial risk of waiving the law enforcement investigatory privilege and, thereby, impair the criminal investigation.<sup>8</sup>

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<sup>7</sup> The law enforcement investigative privilege protects against the release of information where disclosure might reveal law enforcement techniques or sources. Tuite v. Henry, 98 F.3d 1411, 1413 (D.C. Cir. 1996).

<sup>8</sup> Johnson Letter, p. 2.

Accordingly, the United State's Attorney's Office has declined to provide its views as to the Civil Division's draft answer to the complaint in this action.<sup>9</sup>

Given that there is an ongoing, but incomplete, criminal investigation, the filing of an answer to the complaint based only on the information currently available to the Civil Division might eventually impair any future criminal prosecution resulting from the criminal investigation. For example, Civil Division counsel might submit an answer denying a particular allegation of misconduct based on the information now in the possession of Civil Division counsel. Subsequently, however, the United States Attorney's Office, relying on information developed in the criminal investigation, might reach a different conclusion regarding the same alleged misconduct and might institute a criminal prosecution based on that same alleged misconduct. In that event, the answer filed by the Civil Division denying misconduct might be used as an admission against the Government in the subsequent criminal prosecution based on the same facts.<sup>10</sup> Accordingly, to require the federal defendants to file an answer while the criminal investigation is in progress would

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<sup>9</sup> Id. As a result, counsel for the federal defendants herein may be unable to make the certification otherwise required by Rule 11(b)(4), F.R.Civ.P.

<sup>10</sup> Under Rule 801(d)(2) of the Federal Rules of Evidence, inconsistent allegations contained in prior pleadings are admissible as evidence in subsequent litigation. LWT, Inc. v. Childers, 19 F.3d 539, 542 (10th Cir. 1994). The Federal Rules of Evidence are generally applicable to criminal proceedings. See Rule 1101(b) of the Federal Rules of Evidence.

not only be premature, but potentially prejudicial to the United States.

Moreover, it is important that the answer filed in this action represent the position of the government, and not simply the views of a single agency. "Except as otherwise provided by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516. Consistent with this statutory provision:

[t]he Justice Department has the sole responsibility for representing executive branch agencies in litigation. The Supreme Court has recognized that the main purposes of centralizing litigation in the Justice Department is to assure that the United States should speak with one voice "that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people."

Town of Norfolk v. United States Army Corps of Engineers, 968 F.2d 1438, 1459 (1st Cir. 1992) (quoting United States v. Providence Journal Co., 485 U.S. 693, 706 (1988) (emphasis supplied)).

In order to satisfy the obligation of the United States to speak with "one voice" in the present case, it is necessary for the Civil Division of the Department of Justice and the United States Attorney's Office to arrive at a single position regarding the truth of any of the allegations of misconduct in the complaint that might form the basis of a criminal prosecution.

It is, however, presently impossible to formulate such a common position because the United States Attorney's Office has reached no conclusion as to whether criminal prosecution may be instituted and, consequently, the government does not yet have a definitive position regarding the truth of many of the allegations in the complaint.

Given the inability to consult with the United States Attorney's Office, there is no means of knowing whether the attorneys conducting the criminal investigation have obtained any evidence that would contradict the information developed by Civil Division counsel in the course of developing the draft answer. Accordingly, as long as relevant information that has been, or may be, developed in the criminal investigation remains unknown to Civil Division counsel, they are unable to present a unified government position as to the truth of many of the allegations in the complaint filed in the civil case. It would be inappropriate to file an answer which may later be contradicted by the results of the criminal investigation. Cf. United States v. Millan, 817 F. Supp. 1072, 1085 (S.D.N.Y. 1993) (observing that it was "truly irresponsible" for a federal prosecutor to vouch for the credibility of a witness offered by the government at a criminal trial when that same witness was, himself, then the subject of an undisclosed pending federal criminal investigation).

III. The Balance Of Interests Justifies  
A Stay Of The Civil Proceeding

Under the present circumstances, a stay of the civil case is warranted for 60 days at this time. As previously discussed, Civil Division counsel are unable to file an answer to the complaint representing the position of the government due to the pendency of the criminal investigation. Moreover, to file an answer based on incomplete information not only implicates Rule 11 concerns but may also ultimately impair potential criminal proceedings.

And also as discussed above, civil discovery poses a serious risk of compromising future criminal proceedings. This is not a case in which discovery could proceed under a more narrowly framed protective order. Because the precise scope of the ongoing pre-indictment criminal investigation has not been determined, and cannot be shared with Civil Division counsel, it would be impossible to identify which, if any, issues could be made the subject of some limited form of civil discovery without impairing the criminal investigation. United States v. Any and All Assets, Etc., 147 F.R.D. at 102 (where a criminal investigation is pending prior to indictment, and where government cannot fully provide answers to discovery, a relatively short stay of discovery is preferable to attempting to fashion a workable plan for limited discovery).<sup>11</sup>

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<sup>11</sup> In some cases, a court should consider options such as limiting discovery as to certain matters to interrogatories to be held under seal pending completion of the criminal trial.

(continued...)

The United States Attorney's Office states that within the next 60 days, it hopes to be in a position to determine whether criminal prosecution may be instituted. By that time, it is possible that the criminal investigation will have ruled out the potential of any prosecution, or at least narrowed the scope of any future prosecution. In that event, the issue of a protective order may be moot, or it may be possible to fashion a protective order that would permit discovery to proceed at least with respect to some of the issues and some of the individuals involved. On the other hand, if criminal prosecution is still a possibility, it may be appropriate for the government to seek a further stay of civil proceedings as to some or all of the issues and witnesses involved.

Ervin has a substantial interest in the prompt determination of its civil case against HUD. However, where, as here, civil discovery could compromise a criminal investigation, "the public's interest in law enforcement . . . mandates that criminal proceedings be given priority over the concurrent civil proceedings." St. Paul Fire and Marine Insurance Co. v. United States, 24 Cl. Ct. at 516; Campbell v. Eastland, 307 F.2d at 487.

The federal defendants are not proposing an indefinite stay

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<sup>11</sup>(...continued)  
McSurely v. McClellan, 426 F.2d at 671. Such an alternative is not feasible here. For the reasons previously discussed, Civil Division counsel are in no better position to answer interrogatories than they would be to answer the complaint.

of the civil case.<sup>12</sup> Instead, the federal defendants are requesting a stay for 60 days to permit the United States Attorney's Office to proceed with the criminal investigation, with the goal of reaching definite conclusions as to whether criminal prosecutions may be instituted. Such a limited stay is well within the Court's discretion. See, e.g., Souza v. Schiltgen, 1996 WL 241824 (N.D. Ca. 1996) (staying civil proceeding for 90 days and directing the government to file a report at the end of that period on the status of the criminal investigation); United States v. Any and All Assets, Etc., 147 F.R.D. at 102 (granting stay of civil proceeding of four months, government to report on status of criminal investigation if no indictment issued within that time).

#### CONCLUSION

For the foregoing reasons, the federal defendants' motion for a 60-day stay of this action should be granted.

Respectfully submitted,

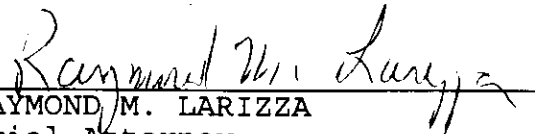
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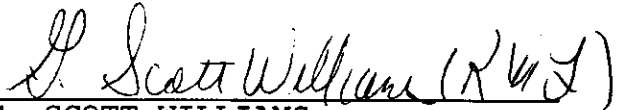
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<sup>12</sup> In the absence of a pressing need, a court may abuse its discretion by issuing a stay of indefinite duration. McSurely v. McClellan, 426 F.2d 664, 671 (D.C. Cir. 1970).

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Attorneys for Federal Defendants



U.S. Department of Justice

United States Attorney

District of Columbia

Attachment

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March 5, 1997

FILED

MAR - 5 1997

NANCY MAYER-WHITTINGTON, CLERK  
U.S. DISTRICT COURT

Gary G. Grindler  
Deputy Assistant Attorney General  
Civil Division  
Department of Justice  
Washington, D.C. 20530

Re: Ervin and Associates, Inc. v. Helen  
Dunlap, et al., D. D.C., No 96-1253 (WBB)

Dear Mr. Grindler:

This is in response to your request for the Office of the United States Attorney for the District of Columbia to review a draft of an answer prepared by the Civil Division of the Department of Justice for filing in response to the second amended complaint filed in the above-referenced civil case. In that complaint, plaintiff Ervin & Associates, Inc., alleges, inter alia, corruption, discrimination and favoritism in the award and administration of numerous contracts by the Department of Housing and Urban Development (HUD), and claims that the plaintiff's efforts to publicly expose these alleged illegal practices has resulted in the plaintiff's de facto debarment from future HUD contracts.

The United States Attorney's Office, in conjunction with the Office of the Inspector General of the Department of Housing and Urban Development, is currently investigating possible criminal conduct arising out of some of the same facts as are alleged to form the basis of liability in the above-referenced civil case. You requested our review of the Civil Division's draft answer in order to determine whether any of the admissions, denials, and averments therein conflict with evidence developed in the criminal investigation, or would otherwise adversely impact on that investigation.

We must, however, respectfully decline your request to review the Civil Division's draft answer. Any views this office might express regarding the content of the draft answer would, of necessity, be based upon information derived from the ongoing criminal investigation. Such information is subject to the law enforcement investigative privilege that protects against the

release of information that might reveal law enforcement investigative techniques or sources. In civil litigation, a plaintiff is normally permitted, through discovery, to determine the factual basis for admissions and denials set forth in the defendant's answer to a complaint. If the Civil Division's answer in the civil case were to be based in part upon consultation with the United States Attorney's Office, the information exchanged during such consultation might well become subject to disclosure in response to discovery requests in the civil case. In other words, to reveal information derived from the criminal investigation to the Civil Division in the course of commenting on the draft answer would entail a substantial risk of waiving the law enforcement investigatory privilege and, thereby, impair the criminal investigation. Accordingly, we are unable to review, much less comment upon, the draft answer to the second amended complaint in the civil case.

Moreover, because the criminal investigation is still in progress, any comment the United States Attorney's Office might offer regarding the content of the Civil Division's draft answer would be of doubtful value. While, for example, a denial in the draft answer of a particular allegation might not presently conflict with information available to the United States Attorney's Office, such a conflict might later arise as additional information is developed in the ongoing criminal investigation.

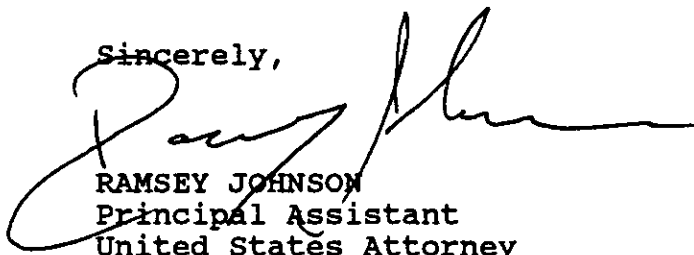
Furthermore, even without an exchange of information between the United States Attorney's Office and the Civil Division, discovery in the civil case could compromise the criminal investigation. We cannot, of course, publicly reveal the precise scope of the criminal investigation. We can say, however, that some of the allegations under review in the criminal investigation are substantially similar to allegations made in the second amended complaint in the civil case. It also appears that the principal witnesses in the civil case are the same persons who would be expected to testify in any prosecution that might result from the criminal investigation. Moreover, the subject matter of the criminal investigation may expand as the investigation progresses. It is, therefore, possible that as the criminal investigation proceeds, there will be an increasing overlap between the issues involved in the criminal investigation and the civil case.

Because the scope of discovery is far more restricted in criminal cases than in civil cases, and because of the primacy of criminal investigations, courts regularly grant stays of civil actions where, as in this case, civil discovery could adversely impact on the criminal enforcement process. Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963). To proceed with discovery in the above-referenced civil case would present a significant risk that information relevant to possible future criminal prosecutions would be publicly disclosed. As a result, potential criminal defendants would have the ability

to gain access to information that would not normally be available to a defendant in a criminal prosecution prior to commencement of the criminal trial. Such information could present defendants in future criminal proceedings with the opportunity to manufacture evidence, to identify and possibly intimidate witnesses, and to surprise the prosecution at the criminal trial with information obtained in civil discovery. The Founding Church of Scientology of Washington, D.C. v. Kelley, 77 F.R.D. 378, 381 (D. D.C. 1977). Thus, discovery in the civil case would have an adverse impact on our pending criminal investigation. Accordingly, we request that you seek a stay of discovery in the civil case for a period of 60 days. By that time, we hope to be in a position to determine whether the criminal investigation may result in criminal prosecution.

Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Ramsey Johnson", written in black ink. The signature is fluid and extends across the width of the typed name below it.

RAMSEY JOHNSON  
Principal Assistant  
United States Attorney