

1 information to debit the consumers' bank accounts without the consumers' knowledge or consent.
2 (*Id.* at 8-10.)

3 On August 7, 2015, the FTC brought this lawsuit against defendants, alleging a claim for
4 violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45, and seeking
5 monetary and injunctive relief. (*Id.* at 11-12.) Defendants Theresa D. Bartholomew, John E.
6 Bartholomew, Jr., and Paul T. McDonnell subsequently entered into consent judgments, leaving
7 Kotzker, Sequoia One, and Gen X as the only remaining defendants in this case. (*See* Order
8 Granting Mot. for Perm. Inj. as to Def. Paul McDonnell (ECF No. 11); J. (ECF. No. 12); Order
9 Granting Mot. for Perm. Inj. as to Defs. Theresa Bartholomew and John Bartholomew (ECF No.
10 13); J. (ECF No. 14).)

11 Kotzker now moves to stay this case, arguing there is an ongoing federal criminal
12 investigation against him by various federal agencies and that a stay of this case pending the
13 conclusion of the criminal investigation and any later criminal proceedings is necessary to protect
14 his Fifth Amendment rights. The FTC responds that Kotzker has not met his burden of establishing
15 that a stay is appropriate because Kotzker has not been indicted and because the requested stay is
16 indefinite. Without a pending indictment, the FTC argues the extent to which Kotzker's Fifth
17 Amendment rights may be implicated in this case is speculative. The FTC also argues that the
18 possibility that Kotzker may want to assert his Fifth Amendment privilege in this case does not
19 overcome the prejudice the stay would have on the FTC, the public, the consumer victims, and the
20 judicial system. Kotzker replies that whether an indictment is imminent is irrelevant to his valid
21 exercise of his Fifth Amendment rights in this case.

22 II. ANALYSIS

23 "The Constitution does not ordinarily require a stay of civil proceedings pending the
24 outcome of criminal proceedings." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th
25 Cir. 1995). Absent "substantial prejudice" to the parties, parallel civil and criminal proceedings are
26 unobjectionable under Ninth Circuit precedent. *Id.* (quotation omitted). In determining whether to
27 stay a civil proceeding pending a parallel criminal proceeding, the court must consider "the extent
28 to which the defendant's Fifth Amendment rights are implicated." *Id.* (quotation omitted). This

1 consideration should be made “in light of the particular circumstances and competing interests
2 involved in the case.” *Id.* (quotation omitted). Additionally, the court should consider (1) the
3 plaintiff’s interest in proceeding expeditiously with the case or any particular aspect of it, and the
4 potential prejudice to the plaintiff of a delay; (2) the burden that any particular aspect of the
5 proceedings may impose on the defendant; (3) the court’s convenience in managing its cases and
6 judicial efficiency; (4) non-parties’ interests; and (5) the public’s interest in the pending civil and
7 criminal proceedings. *Id.* at 324-25. It is within the court’s discretion to determine whether to stay
8 a civil case pending the outcome of a criminal proceedings. *Keating*, 45 F.3d at 324.

9 **A. Fifth Amendment**

10 Kotzker argues this case implicates his Fifth Amendment rights because it is based on some
11 of the same facts that are currently under investigation by the United States Postal Inspection
12 Service, the United States Department of Justice, and the United States Attorney’s Office for the
13 District of Nevada. Kotzker further argues that his Fifth Amendment rights will be implicated in
14 every stage of this case, including responding to the complaint, responding to written discovery,
15 and sitting for depositions, and that he should not be forced to choose between defending himself in
16 this case and in preserving his Fifth Amendment rights.

17 The FTC responds that the extent to which Kotzker’s Fifth Amendment rights are
18 implicated in this case is speculative because Kotzker has not been indicted. The FTC further
19 argues that Kotzker does not point to any evidence suggesting his indictment is imminent and that
20 Kotzker’s last reported interaction with criminal law enforcement authorities was in January of
21 2015. Given that there is no indictment, the FTC also argues that a stay would be potentially
22 indefinite and is therefore inappropriate. Although it is somewhat unclear, the FTC seems to
23 equivocate as to whether it is aware of a criminal investigation against Kotzker.

24 Kotzker replies that it is not speculative whether his Fifth Amendment rights will be
25 implicated because the Department of Justice has proposed that Kotzker plead guilty to a felony.
26 Kotzker submits a declaration from his attorney stating that the Department of Justice submitted a
27 plea offer to Kotzker proposing that Kotzker plead guilty to a felony, and that the Department of
28 Justice trial attorney assigned to the case confirmed that the criminal investigation is ongoing. A

1 redacted version of the plea agreement is attached to Kotzker's attorney's declaration. Kotzker
2 further replies that federal criminal investigations routinely last for months, if not years.

3 Given that there is not an indictment against Kotzker, the extent to which the civil and
4 criminal proceedings overlap is unknown. The court therefore is unable to evaluate the degree to
5 which Kotzker's Fifth Amendment rights would be implicated in this case, if at all. Although the
6 fact there might be an indictment at some point in the future may make it more difficult for Kotzker
7 to defend the civil case, "[a] defendant has no absolute right not to be forced to choose between
8 testifying in a civil matter and asserting his Fifth Amendment privilege." *Keating*, 45 F.3d at 326.
9 The court therefore finds that the current lack of an indictment weighs against staying the case. *See*
10 *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 889, 903 (9th Cir. 1989) (stating that the case
11 for staying a civil case is "far weaker" when an indictment has not been returned and the Fifth
12 Amendment privilege is not threatened, even though the possibility a criminal indictment may be
13 brought makes responding to a civil case more difficult).

14 **B. Plaintiff's Interest and Defendant's Burden**

15 Kotzker argues that he would be burdened to a significant degree if this case is not stayed
16 because allowing this case to proceed in parallel with the criminal investigation would effectively
17 force Kotzker to choose between defending himself in this case and preserving his Fifth
18 Amendment rights. Kotzker further argues that staying this case would not prejudice the FTC
19 because there is no evidence Kotzker is currently engaging in any of the conduct alleged in the
20 complaint. Specifically, Kotzker argues the complaint alleges the activity at issue ended in early
21 2013 and does not allege it is ongoing. Kotzker also references the fact that other defendants in this
22 case have entered into consent judgments, which the court also understands to be an argument that
23 the activity resulting in the complaint is no longer ongoing.

24 The FTC responds that Kotzker has not identified any burdens that proceeding with this
25 case would place on him besides the Fifth Amendment concerns. As for the prejudice it will suffer,
26 the FTC argues that given the lack of an indictment, the delay to the FTC in this case is potentially
27 indefinite. The FTC argues it has an interest in prompt enforcement of the FTC Act, particularly
28 because there is no injunction in place to stop Kotzker for starting up the same or similar practices

1 in another business. The FTC further argues that if the case is stayed, there is a risk that evidence
2 will be destroyed and witnesses' memories will fade. The FTC also argues that it will be
3 prejudiced in pursuing this case against Sequoia One and Gen X, who have not requested a stay,
4 because Kotzker is the owner, member, and/or manager of these companies.

5 Kotzker replies that the fact one agency of the government is pursuing a civil action when
6 another agency is pursuing a criminal investigation is a problem of the government's own making.
7 Kotzker further replies that the government has taken an inconsistent position in another case in
8 this district regarding whether a stay of a civil case is appropriate pending the resolution of a
9 criminal case.

10 This case has been pending for fewer than five months, thus, the court does not find the
11 FTC has been prejudiced in pursuing its case up until this point. However, the fact that Kotzker is
12 requesting an open-ended stay of this case would impede the FTC's discovery of witnesses and
13 other evidence in support of this case going forward. Although it was the government's decision to
14 pursue both the civil and criminal proceedings simultaneously, there is no indication that the FTC
15 is working with the criminal investigators or using the parallel criminal proceedings to its
16 advantage. As for Kotzker's argument that the complaint does not allege the conduct at issue is
17 ongoing, the court finds this argument does not weigh strongly in favor of a stay given that there is
18 not an injunction that would prevent similar conduct in different businesses. Although Kotzker
19 faces the burden of presenting his civil defense in a manner that protects his Fifth Amendment
20 rights, this burden does not outweigh the FTC's interest in moving forward. Thus, taken together,
21 these factor weigh against a stay.

22 **C. Judicial Efficiency**

23 Kotzker argues that because the case is in its preliminary stages, staying the case promotes
24 judicial efficiency and avoids potentially unnecessary discovery. For instance, Kotzker argues a
25 stay will avoid having to take discovery from non-parties. The FTC responds that judicial
26 efficiency weighs against staying the case because Kotzker's request for a stay is indefinite and
27 could last for years and because staying the case as to Kotzker effectively would result in
28 bifurcation of the case as to Sequoia One and Gen X. The FTC also argues that staying the case

1 will not eliminate discovery from non-parties because the elements of the FTC's claim differ from
2 the elements of any crime.

3 This case is in the early stages of litigation as to Kotzker, Sequoia One, and Gen X. No
4 answers have been filed, no scheduling order has been issued, and no dispositive motions have
5 been filed. However, given that Sequoia One and Gen X did not move to stay this case, the FTC
6 would be forced to pursue its case against these defendants while waiting completion of the
7 criminal investigation and potential criminal proceedings against Kotzker. The fact that staying the
8 case as to Kotzker would result in a de facto bifurcation of his case from those of Sequoia One and
9 Gen X weighs against staying the case on the basis of judicial efficiency. Further, the fact that the
10 case would proceed against Sequoia One and Gen X means that non-party discovery may not be
11 eliminated. Thus, this factor weighs against a stay.

12 **D. Non-Parties and Public's Interests**

13 Kotzker argues the public's interest in the integrity of the criminal case is entitled to
14 precedence over the civil case. The FTC responds that the public's interest in protecting the
15 criminal process is minimal given that there is no indictment against Kotzker. The FTC further
16 responds that the consumer victims' interests will be prejudiced because a delay in this case means
17 a delay in providing financial redress to consumers. The FTC also argues that a stay potentially
18 could prevent the FTC from fully recovering the consumers' alleged losses given that the FTC only
19 has received \$15,000 from the defendants who have entered into consent judgments in this case and
20 that delays in this case would permit Kotzker to dissipate assets that should be paid toward
21 consumer restitution. Although asserting the Fifth Amendment may make responding this case
22 more difficult for Kotzker, the court finds that this difficulty does not outweigh the other interests
23 involved, such as the consumers victims' interests in maximum financial recovery. Further, the
24 court finds that the public's interest in the criminal proceedings is minimal given that it is still in
25 the investigatory phase. Thus, this factor weighs against a stay.

26 **E. Balancing of Factors**

27 Taken together, the *Keating* factors weigh strongly against staying this case pending this
28 case. The court therefore will deny Kotzker's motion.

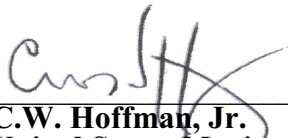
1 **III. CONCLUSION**

2 IT IS THEREFORE ORDERED that Defendant Jason A. Kotzker's Motion to Stay Civil
3 Action Pending Resolution of Criminal Proceedings (ECF No. 22) is DENIED.

4 IT IS FURTHER ORDERED that Defendant Kotzker must answer or otherwise respond to
5 the Government's Complaint (ECF No. 1) on or before January 18, 2016.

6 IT IS FURTHER ORDERED that the telephonic motion hearing set for Thursday, February
7 4, 2016, at 9:00 a.m. is VACATED.

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9 DATED: December 23, 2015.

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13 **C.W. Hoffman, Jr.**
14 **United States Magistrate Judge**
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