IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GRANITE HOLDINGS, a California Trust, A.C.T.S., LTD., ATLANTIC STAR INVESTMENTS, LDC, BACHMAN CAPITAL PARTNERS LIMITED, BLUE ISLAND HOLDINGS, LTD., BOLTIC SERVICES, INC., CEMA TRUST, a Missouri Trust, ARUN K. DOSAJ, A.J. GLENN III, BO LINNE, MORGAN, WEINSTEIN & CO., LTD., PARAGON TRADING CORPORATION, DONALD D. ROSE, SIERRA FINANCIAL SERVICES, LLC, SOUTHEASTERN OKLAHOMA INDIAN CREDIT ASSOCIATION, JURGEN TAGERT-STAVENOW, LEE I. TURNER, and MENNO D. WAGNER,

Plaintiffs,

vs. No. 00-2098 G

DAVID JOHNSON, individually and as Trustee for Hammersmith Trust LLC,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO STAY

On February 4, 2000, plaintiffs brought this action against defendant David Johnson seeking damages for breach of contract, fraudulent misrepresentation, negligent misrepresentation, and violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq. The court now considers Johnson's March 2, 2000 motion for judgment on the pleadings

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pursuant to Federal Rule of Civil Procedure 12(c), or[1] in the alternative, to stay the proceedings.

Plaintiffs allege that they entered into Hammersmith Trust, LLC Borrowing Agreements ("Borrowing Agreements" or "Agreements") with Hammersmith Trust, LLC ("Hammersmith") at various times during 1998. (Compl. ¶¶ 22-23.) Pursuant to the terms of the Agreements, plaintiffs allegedly loaned Hammersmith in excess of fourteen million dollars "to purchase U.S. government obligations or other comparable obligations," and in return, would receive interest payments at a 240% annual interest rate. Id. Ex. 1 ¶¶ 2.01, 5.01(a). Hammersmith used the money to create two accounts: the Paymaster Account, in which the obligations and the interest they generated would be deposited, and a Master Custodial Account, in which a separate U.S. Treasury obligation would be deposited as security for the loan. Id. Ex. 1 ¶ 2.02. The Borrowing Agreements named Johnson as Trustee, as well as joint signatory to the Paymaster Account and the Master Custodial Account. Id. Ex. 1 at 10.

On February 23, 1999, Hammersmith sent a letter to "Hammersmith Trust LLC Client[s]," admitting that it was "behind in its obligations" to its clients. Id. Ex. 3. In late February and throughout March 1999, plaintiffs allegedly made repeated requests to Hammersmith for the return of their respective principal payments, and were told they would receive

[1] Although Johnson has styled this motion as one for "judgment on the pleadings," it is more accurately described as a motion for "partial judgment on the pleadings," as it does not address plaintiffs' claims of breach of contract and negligent misrepresentation.

it upon the "unwinding" of the principal. Id. ¶ 31. During that period, Johnson sent letters to several plaintiffs, assuring them that the principal of their loans was secured by treasury bills lodged in the Trust's Master Custodial Account. Id. Exs. 4-6. On March 31, 1999, Hammersmith again sent a letter to "Hammersmith Trust LLC Clients," which was co-signed by Johnson, that promised to "begin a steady and reliable payment process that will completely retire all arrearage that has accrued as of March 30, 1999." Id. Ex. 7.

Plaintiffs allege, however, that they never received the promised "steady and reliable" payments of interest nor were they repaid the principal of their respective loans as they allegedly requested. Id. ¶¶ 37, 43. Furthermore, they contend that

> Johnson acting with full knowledge of the pertinent facts and circumstances acted negligently, intentionally, with conflicts of interest arising from his services to Hammersmith and Gilliland [the trust fund manager] and in concert with Hammersmith and Gilliland to conceal the misapplication, waste, diversion, and embezzlement of assets belonging to Plaintiffs by certain insiders of Hammersmith.

Id. ¶ 45.

Because he already filed a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, Johnson filed this motion pursuant to Rule 12(c), which provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). Nevertheless, since Johnson's motion simply alleges that plaintiffs' complaint has failed to state a claim, it should be

reviewed under the standard set forth for 12(b)(6) motions. See Morgan v. Church's Fried Chicken, 829 F.2d 10, 11 (6th Cir. 1987) ("Where the Rule 12(b)(6) defense is raised by a 12(c) motion for judgment on the pleadings, we must apply the standard for a Rule 12(b)(6) motion in reviewing the district court's decision."); cf. Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 n.1 (6th Cir. 1988) ("[A]s a matter of motions practice, [a 12(b)(6) motion filed after a responsive pleading] may be properly considered as one for judgment on the pleadings under Fed. R. Civ. P. 12(c), and evaluated, nonetheless, under the standards for dismissal under Rule 12(b)(6).") As the Court of Appeals for the Sixth Circuit recently commented,

> The standard of review for entry of judgment on the pleadings under Rule 12(c) is indistinguishable from the standard of review for dismissals based on failure to state a claim under Rule 12(b)(6); the difference between the two rules is simply the timing of the motion to dismiss. For a dismissal under Rule 12(b)(6), the moving party must request judgment in a pre-answer motion or in the answer itself, whereas a motion for dismissal under Rule 12(c) may be submitted after the answer has been filed.

Jackson v. Heh, No. 98-4420, 2000 WL 761807, at **3 (6th Cir. June 2, 2000)

In considering a Rule 12(b)(6) motion to dismiss, or in this case, a Rule 12(c) motion for judgment on the pleadings, the court is limited to examining whether the complaint sets forth allegations sufficient to make out the elements of a cause of action. Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983). The complaint should not be dismissed "unless it appears beyond doubt that the [p]laintiff can prove no set of facts in

support of his claim which would entitle him to relief." Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 724 (6th Cir. 1996) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In reviewing the complaint, the court's duty is to "construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." Conley, 355 U.S. at 45-46.

When fraud is alleged, as it is here, Federal Rule of Civil Procedure 9(b) further requires that "the circumstances constituting fraud . . . be stated with particularity." Fed. R. Civ. P. 9(b). "The Sixth Circuit reads this rule liberally, however, requiring a plaintiff, at a minimum, to 'allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.'" Coffey v. Foamex L.P., 2 F.3d 157, 161-62 (6th Cir.1993) (quoting Ballan v. Upjohn Co., 814 F. Supp. 1375, 1385 (W.D. Mich. 1992)). The Sixth Circuit bases its liberal reading on the need to balance the dictates of Rule 9 with the equally important requirements of Rule 8 of the Federal Rules of Civil Procedure:[2]

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[2] Rule 8 provides:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Fed. R. Civ. P. 8(a).

> In ruling upon a motion to dismiss under Rule 9(b) for failure to plead fraud "with particularity," a court must factor in the policy of simplicity in pleading which the drafters of the Federal Rules codified in Rule 8. Rule 8 requires a "short and plain statement of the claim," and calls for "simple, concise, and direct" allegations. Indeed, Rule 9(b)'s particularity requirement does not mute the general principles set out in Rule 8; rather, the two rules must be read in harmony. See, e.g., Credit & Finance Corp., Ltd. v. Warner & Swasey Co., 638 F.2d 563, 566 (2d Cir. 1981). "Thus, it is inappropriate to focus exclusively on the fact that Rule 9(b) requires particularity in pleading fraud. This is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules." 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1298, at 407 (1969).

Michaels Bldg. Co. v. Ameritrust Co., N.A., 848 F.2d 674, 679 (6th Cir. 1988). Consequently, the court of appeals has held that "Rule 9(b) does not require omniscience; rather the Rule requires that the circumstances of the fraud be pled with enough specificity to put defendants on notice as to the nature of the claim." Id. at 680.

Johnson advances two separate arguments in support of his motion for judgment on the pleadings. First, he contends that plaintiffs have not alleged all of the requisite elements for fraud with sufficient particularity in their complaint. Second, he maintains that he merely acted as an outside counsel to Hammersmith and thus did not "participate, directly or indirectly, in the conduct" of an illegal enterprise, in violation of 18 U.S.C. § 1962(c) ("subsection 1962(c)").[3] Should

[3] Johnson also advances an argument for dismissal of the claims brought against him under 18 U.S.C. § 1962(d) ("subsection 1962(d)"), but this argument relies on the court finding that plaintiffs' claims under subsection 1962(c) are deficient. Since the court denies Johnson's motion for judgment

the court rule against him on both arguments, Johnson asks this court to stay further resolution of this case, while a criminal proceeding against him is pending.

In support of his first argument, Johnson asserts that there are five elements plaintiffs must establish to make a claim of fraud under Tennessee law:

1. that the defendant intentionally misrepresented an existing or past material fact;
2. that defendant had knowledge that its representation of the existing or past material fact was false;
3. that the plaintiff reasonably relied on the misrepresentation;
4. that the misrepresentation induced the plaintiff's action; and
5. that the plaintiff sustained damages due to reliance on the misrepresentation.

(Mem Supp. Mot for Judgment on the Pleadings at 4 (citing Harrogate Corp. v. Systems Sales Corp., 915 S.W.2d 812, 817 (Tenn. Ct. App. 1995).) Johnson concedes that plaintiffs' complaint sufficiently alleges the first, second, third, and fifth elements. Id. However, he claims that their complaint fails to allege that a misrepresentation induced plaintiffs to act. Id. at 5.

The language Johnson cites as a standard for fraud is somewhat anomalous. Tennessee courts usually list only four elements that plaintiffs must allege to claim fraud:

> (1) an intentional misrepresentation with regard to a material fact, (2) knowledge of the representation's

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on the pleadings with regard to plaintiffs' claims under subsection 1962(c), there is no need to consider Johnson's argument regarding subsection 1962(d).

> falsity -- that the representation was made "knowingly" or "without belief in its truth," or "recklessly" without regard to its truth or falsity, (3) that the plaintiff reasonably relied on the misrepresentation and suffered damage, and (4) that the misrepresentation relates to an existing or past fact, or, if the claim is based on promissory fraud, then the misrepresentation must embody a promise of future action without the present intention to carry out the promise.

Shahrdar v. Global Housing, Inc., 983 S.W.2d 230, 237 (Tenn. Ct. App. 1998) (internal citations and alterations omitted); Axline v. Kutner, 863 S.W.2d 421, 423 (Tenn. Ct. App. 1993); Dobbs v. Guenther, 846 S.W.2d 270, 274 (Tenn. Ct. App. 1993); Oak Ridge Precision Indus, Inc. v. First Tennessee Bank National Assoc., 835 S.W.2d 25, 29 (Tenn. Ct. App. 1992); Stacks v. Saunders, 812 S.W.2d 587, 592 (Tenn. Ct. App. 1990). In fact, Harrogate Corporation, the case Johnson quotes as support for the notion that there are five elements, actually cites Dobbs, which used the four-element test. Harrogate Corp., 915 S.W.2d at 817.

A close reading of Harrogate Corporation, moreover, indicates that there is not much difference between the five-element standard and the four-element standard in Dobbs. Harrogate Corporation's additional requirement that the defendant's misrepresentation must have induced the plaintiff to act is merely another way of stating that the misrepresentation must be of a material fact:

> To constitute fraud the complained of factual misrepresentations must have been false. The complaining party must have relied on the false representation in reaching its decision and the fact misrepresented must have been "so material that it determined the conduct of the party seeking relief." Dozier v. Hawthorne Dev. Co., 262 S.W.2d 705, 709

> (Tenn. Ct. App. 1953). For an alleged misrepresentation to be actionable, it must constitute a "material inducement" for the complaining party to act. Chamberlin v. Fox Coal & Coke Co., 20 S.W. 345, 346 (Tenn. 1892).

Id. at 817. Language in Chamberlin supports this interpretation. In that case, the Tennessee Supreme Court held that "[t]o rescind a contract of sale upon the ground of a misrepresentation as to the character, capacity, or quality of the property sold, it ought to be made to clearly appear that such misrepresentation was concerning a material matter, and operated as a material inducement to the purchase." Chamberlin, 20 S.W. at 345-46. The underlying concept in both Harrogate Corporation and Chamberlin, therefore, is that a defendant must misrepresent a fact that is "so material that it determined the conduct of the parties seeking relief." Coffey, 2 F.3d at 161 (6th Cir. 1993) (quoting Atkins v. Kirkpatrick, 823 S.W.2d 547, 552 (Tenn. Ct. App. 1991).[4]

Plaintiffs' complaint alleges that "Defendant Johnson has failed to disclose material facts to Plaintiffs under circumstances where he had a duty to disclose such facts," (Compl. ¶ 60), and "Plaintiffs reasonably relied upon Johnson to fully disclose all material facts to them in his status as Trustee." Id. ¶ 63. Equally important, plaintiffs have identified with particularity material facts that Johnson allegedly misrepresented:

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[4] The Coffey court specifically dealt with a claim of "fraudulent misrepresentation," but this tort is identical to one for "fraud." See Concrete Spaces, Inc. v. Sender, 2 S.W.3d 901, 904 n.1 (Tenn. 1999) (noting that the terms, "fraudulent misrepresentation" and "fraud," are "synonymous").

> 42. Notwithstanding Defendant Johnson's representations that each of the Plaintiffs' respective principal was secured by US Treasury Bills, Plaintiffs have not been repaid the principal of each of their respective loans.
>
> 43. Notwithstanding Defendant Johnson's representations that he had received monies to be deposited in his trust account and used for repayment of principal, Plaintiffs have not been repaid the principal of each of their respective Loans.
>
> 44. Notwithstanding Defendant Johnson' representations that he, as well as Hammersmith and Gilliland, intended to "perform in accordance with the representations" made to Plaintiffs, Defendant Johnson has not "performed in accordance with the representations" made to Plaintiffs.

Id. ¶¶ 43-45. Since plaintiffs have pled that Johnson misrepresented facts so material to their decision-making that they determined their conduct, with enough specificity to put Johnson on notice as to the nature of their claim, Johnson's motion for judgment on the pleadings with regard to this issue is denied.

Johnson's second argument in support of his motion for judgment on the pleadings is based on the language of RICO subsection 1962(c). That subsection provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). "To participate in the affairs of a RICO enterprise, the Supreme Court said, 'one must have some part in directing those affairs.'" Stone v. Kirk, 8 F.3d 1079, 1091 (6th

Cir. 1993) (quoting Reves v. Ernst & Young, 507 U.S. 170, 179 (1993)). In Reves, the Court, moreover, adapted an "operation or management" test, whereby "one is not liable under [subsection 1962(c)] unless one has participated in the operation or management of the enterprise itself." Reves, 507 U.S. at 183. Correspondingly, it held that the defendant, an accounting firm which had audited an allegedly fraudulent enterprise and had issued incorrect financial statements based on information provided by the enterprise, had not "participated" sufficiently in the enterprise's affairs to warrant prosecution under subsection 1962(c).

Likening himself to the defendant in Reves, Johnson maintains that he "was an outside counsel to Hammersmith Trust, LLC," his role was "confined to that or within the realm of a legal advisor," and thus his conduct "did not constitute participation in the management or operation of a RICO enterprise." (Mem. Supp. Mot. for J. on the Pleadings at 11-12.) As support, Johnson cites several cases in which courts have applied Reves and held that attorneys who provided legal services and advice to a RICO enterprise did not "participate" in the enterprise. See Nolte v. Pearson, 994 F.2d 1311, 1316-17 (8th Cir. 1993); Morin v. Trupin, 835 F. Supp. 126, 133-36 (S.D.N.Y. 1993); Biofeedtrac, Inc. v. Kolinor Optical Enters. & Consultants, S.R.L., 832 F. Supp. 585, 590-92 (E.D.N.Y. 1993) Gilmore v. Berg, 820 F. Supp. 179, 182-83 (D.N.J. 1993). In each of these cases, however, the attorney defendants only provided advisory and ministerial services to the enterprise based on

information provided by the enterprise; the attorneys neither held decision-making authority in the enterprise, nor performed the illegal activities of the enterprise. See Nolte, 994 F.2d ("The law firm prepared various documents for Music Leasing Company [based on documents and information supplied by the company] so the company could provide prospective investors information about the leasing program."); Morin, 835 F. Supp. at 135 ("[The complaint] alleges that [the attorney defendants] participated by drafting and mailing private placement memoranda, correspondence, management agreements, and purchase agreements to capacitate the operation of the enterprise," and by "sending [enterprise directors] legal documents with attached correspondence which requested that they sign the documents 'where indicated.'"); Biofeedtrac, Inc., 832 F. Supp. at 589 ("[The defendant lawyer] advised . . . how to avoid detection and to minimize the legal risks of such a scheme, negotiated with plaintiff during this period to prevent it from discovering the scheme, performed ministerial legal tasks in advancing the project, and advised one participant that he could mislead this court."); Gilmore, 820 F. Supp. at 183 ("Preparing documents for the purchase and sale of real estate, attending closings, preparing and filing Certificates of Limited Partnership and Incorporation, and serving as agent for the receipt of process for legal entities-these are all common professional services typically rendered by attorneys for their business clients.") As one court has noted, "Reves did not establish a per se rule that one cannot operate or manage an enterprise via the provision of

legal services." Thomas v. Ross & Hardies, 9 F. Supp. 2d 547 (D. Md. 1998) (citing In re American Honda Motor Co., Inc. Dealerships Relations Litig., 941 F. Supp. 528, 559-60 (D. Md. 1996)). The Court of Appeals for the Eighth Circuit summarized this point best:

> Appreciation for the unremarkable notion that the operation or management test does not reach persons who perform routine services for an enterprise should not, however, be mistaken for an absolute edict that an attorney who associates with an enterprise can never be liable under RICO. An attorney's license is not an invitation to engage in racketeering, and a lawyer no less than anyone else is bound by generally applicable legislative enactments. Neither Reves nor RICO itself exempts professionals, as a class, from the law's proscriptions, and the fact that a defendant has the good fortune to possess the title "attorney at law" is, standing alone, completely irrelevant to the analysis dictated by the Supreme Court. It is a good thing, we are sure, that we find it extremely difficult to fathom any scenario in which an attorney might expose himself to RICO liability by offering conventional advice to a client or performing ordinary legal tasks (that is, by acting like an attorney). This result, however, is not compelled by the fact that the person happens to be a lawyer, but for the reason that these actions do not entail the operation or management of an enterprise. . . . The polestar is the activity in question, not the defendant's status. Cf. In re American Honda Motor Co. Dealerships Relations Litig., 941 F.Supp. 528, 560 (D. Md. 1996)("Th[e] cases reveal an underlying distinction between acting in an advisory professional capacity (even if in a knowingly fraudulent way) and acting as a direct participant in [an enterprise's] affairs.").

Handeen v. Lemaire, 112 F.3d 1339, 1349 (8th Cir. 1997) (alterations in original).

In the case at hand, Johnson is alleged to have performed many tasks typically done by lawyers, like preparing loan agreements and drafting client letters. In addition, though, he

assumed extra duties. In accordance with the Borrowing Agreements he executed with each of the plaintiffs, Johnson was the trustee of Hammersmith and a joint signatory to the Paymaster and Master Custodial Accounts. In these roles, Johnson not only owed a fiduciary duty to the beneficiaries of Hammersmith, but more importantly for the purpose of this motion, he presumably had some control over the management of the funds deposited in the Paymaster and Master Custodial Accounts. Johnson implicitly acknowledged his control of the funds within these accounts in a letter dated May 19, 1999:

> This letter is to confirm that I am in receipt of a transfer confirmation from the Anguillian trust company employed by Hammersmith Trust, L.L.C. Such confirmation, which contains transfer tracking numbers, indicates that an amount of funds in excess of $ 2 million dollars has been sent to my trust account for the purposes of refunding Hammersmith client principal sums.

(Compl., Ex. 8.)

Moreover, assuming that the allegations of the complaint are true, the "legal" services provided by Johnson did not merely support the illegal enterprise, but were the very substance of it. The letters Johnson sent to various plaintiffs assuring them that securities securing the principal of their investments were maintained in the Master Custodial Account are the basis for plaintiffs' fraudulent misrepresentation claim. Id. ¶¶ 32-34 & Exs. 4-6. Furthermore, Hammersmith did not just rely on Johnson's services as an "outside counsel," but touted his active role with the Trust to mollify nervous investors:

> To those of you who have inquired about the Master

> Custodial Account that secures your principal with T-bills, we have asked David J. Johnson, Trustee, to place his signature below which confirms that he remains Trustee with joint signature control over the account, and that the securities underlying your investment capital are firmly in place at Hammersmith's brokerage firms.
>
> For those of you who do not know Mr. Johnson, he is a senior partner in the long-established and respected law firm of Johnson, Grusin, Kee and Surprise, PC, in Memphis, Tennessee. Mr. Johnson has been duly recognized by Martindale & Hubbell with a rating of AV, the highest professional rating assigned to lawyers and to law firms.

Id. Ex. 7.

Johnson's involvement with Hammersmith is similar to that of the attorney defendants in Thomas v. Ross & Hardies, 9 F. Supp. 2d 547 (D. Md. 1998). In Thomas, two companies, Capital Financial Group, Inc. ("Capital") and Phoenix Financial Services, Inc. ("Phoenix"), allegedly persuaded minority homeowners to mortgage their homes, turn the proceeds over to Capital and Phoenix, who would then either pay off each mortgage in full or purchase it from the mortgage company; Phoenix would then grant the homeowners a line of credit with a fixed 7.5% interest rate. Id. at 550-51. However, after receiving the mortgage proceeds, Capital and Phoenix allegedly never paid off the mortgages and the homeowners never received access to the line of credit. Id. at 551. Since Capital's lawyer "allegedly persuaded homeowners to obtain mortgages and give the proceeds to Capital, placated the mortgage companies who demanded payment, transferred proceeds between accounts, and established lines of credit for homeowners," the court concluded that he had "directed and

controlled . . . essential activities of the enterprise," and denied his Rule 12(b)(6) motion to dismiss the subsection 1962(c) claim against him. Id. at 555.

According to the complaint in this case, Johnson executed the Borrowing Agreements with plaintiffs, (Compl. ¶ 29 & Ex. 1), persuaded plaintiffs that the principal of their investments had been secured by securities within the Trust's master custodial account, id. ¶¶ 32-36 & Ex. 4-7, and managed the money in the Trust accounts. Id. ¶¶ 29, 39-41 & Ex. 8-10. While these allegations may turn out to be false, the court must accept them as true for the purposes of this motion. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) ("For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted.") Correspondingly, the court finds that the complaint alleges with sufficient particularity that Johnson "conducted and participated" in the allegedly fraudulent enterprise with Hammersmith to satisfy the standard established for subsection 1962(c). Therefore, Johnson's motion for judgment on the pleadings with regard to this issue is denied.

Having denied Johnson's motion for judgment on the pleadings in its entirety, the court must consider Johnson's request for a stay of this litigation pending the outcome of the criminal proceeding against him.[5] "[A] court may decide in its discretion to stay civil proceedings . . . 'when the interests of justice

[5] At the time this motion was filed, Johnson was a defendant in United States v. Gilliland, et al., a criminal case in the United States District Court for the Northern District of Florida.

seem to require such action, sometimes at the request of the prosecution, sometimes at the request of the defense.'" SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980) (quoting United States v. Kordel, 397 U.S. 1, 12 n.27 (1969) (citations and alterations omitted)). The only reason Johnson has given the court as to why he should be granted a stay is the unsupported assertion that "[d]iscovery in the civil case will expose the defense's theory and the defendant may be compelled to make incriminating statements during discovery in the civil proceeding." (Mem. Supp. Mot. for J. on the Pleadings at 14.) Assuming arguendo that Johnson's concerns are warranted, they nonetheless do not necessarily merit a stay of these civil proceedings:

> Certainly, a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding. Such a stay contemplates "special circumstances" and the need to avoid "substantial and irreparable prejudice." The very fact of a parallel criminal proceeding, however, [does] not alone undercut [claimant's] privilege against self-incrimination, even though the pendency of the criminal action "forced him to choose between preserving his privilege against self-incrimination and losing the civil suit." This case hardly presents the type of circumstances or prejudice that require a stay.

United States v. 566 Hendrickson Blvd., 986 F.2d 990, 997 (6th Cir. 1993) (quoting United States v. Little Al, 712 F.2d 133, 136 (5th Cir. 1983) (internal citations omitted)) (alterations in original). Furthermore, Johnson has not provided any clear proof that any of his rights would actually be infringed, if the court allowed this civil action to go forward. See 566 Hendrickson Blvd., 986 F.2d at 997 ("Claimant's failure to indicate with

precision how he would be prejudiced if the civil action went forward while the criminal action was pending in state court further leads this Court to conclude that claimant was not entitled to a stay."). Consequently, the court denies Johnson's motion for a stay of these proceedings.

For the foregoing reasons, Johnson's motion for judgment on the pleadings and motion for stay are denied in their entirety.

IT IS SO ORDERED.

Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE

March 22, 2001
DATE