

IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI  
FIRST JUDICIAL DISTRICT

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES PLAINTIFF

VS. CASE NO. 25CI1:22-cv-00286-EFP

MISSISSIPPI COMMUNITY EDUCATION CENTER, INC., et al DEFENDANTS

**PLAINTIFF MISSISSIPPI DEPARTMENT OF HUMAN SERVICES'S RESPONSE TO**  
**DEFENDANTS NANCY WHITTEN NEW AND ZACHARY W. NEW'S**  
**MOTION TO STAY**

Plaintiff Mississippi Department of Human Services ("MDHS") submits this Response to the Motion to Stay Discovery or, Alternatively, for Protective Order [Dkt. 71] filed by Defendants Nancy Whitten New and Zachary W. New (the "New Defendants") and states as follows:

**INTRODUCTION**

MDHS is not the *prosecutor* of any criminal actions arising out the New Defendants' misuse of TANF funds. The Hinds County District Attorney is. In accusing MDHS of filling its Complaint with "far-reaching criminal theories," the New Defendants confuse criminal and civil law. While many non-lawyers may not understand that fraud can be a civil claim *or* a criminal charge (just like conspiracy, or RICO, or many other claims), surely the New Defendants' counsel does. The examples the New Defendants provide—allegations of fraudulent conduct, false pretexts, sham contracts, and diverted funds—are all the bases of MDHS's *civil* claims for fraud and conspiracy.

MDHS makes no criminal allegations, because it has no power to criminally prosecute. The Complaint does not allege criminality; it alleges tortious conduct. Tortious conduct need not be proven beyond a reasonable doubt, and the remedy is not prison. The fact that the Complaint alleges more and different transactions than those to which the New Defendants pleaded guilty

should be of no surprise to anyone, given the different standard for criminal and civil actions, the different remedies, and the fact that different entities are pursuing the New Defendants.

A criminal's allocution to multiple state crimes in this Court is binding. Yet after affirming their guilty pleas of defrauding the government, in the same breath, the New Defendants claim MDHS is "no victim." Nancy New's own petition to enter a guilty plea contradicts that claim and specifically states that MDHS was a victim of her action:

**Count 45 – RICO**

On or about and between September 1, 2018 and February 4, 2020, Nancy New, while acting in concert with and/or aiding and abetting and assisting John Davis and others, did conduct, organize, supervise or manage, directly or indirectly, an association of two (2) or more persons who engaged in the conduct of, and who were associated for the purpose of, effectuating the transfer or sale of services or information by acting as a subgrantee for TANF funds granted to the State of Mississippi and its Department of Human Services that had a pecuniary value **that causes a loss to a victim, being the State of Mississippi and its Department of Human Services,** and which conduct, organization, supervision, or management involved the fraud enterprise engaging in repeated violations of MS Code 97-19-83, by transmitting money obtained by criminal fraud and forgery across state lines to RISE MALIBU in California on numerous occasions in violation of MS Code 97-43-3.1.

*See* Exhibit "A," N. New's Petition to Enter a Plea of Guilty.

The New Defendants nevertheless seek to have the Court and the public absolve them of liability by pointing the finger back at MDHS, despite the fact that the New Defendants admit that they bribed MDHS's Executive Director. *See* Exhibit "A"; *see also* Exhibit "B," Z. New's Petition to Enter a Plea of Guilty; Exhibit "C," Transcript of Allocution Hearing. But no public official or employee can approve fraudulent payments or waive statutory requirements. This strategy may generate media attention, but it is no legal defense to civil liability.

The aim of MDHS's civil suit is the same as any civil tort case: to recover damages, whether through settlement or through obtaining and executing on a judgment. It is in the public's best interest that MDHS do so without unnecessary delays. The New Defendants raise no

arguments that warrant a stay of this case, and MDHS asks that the Court deny the New Defendants' Motion to Stay.

### ARGUMENT

Having already pleaded guilty,<sup>1</sup> the New Defendants cannot claim that discovery in this case will impact their criminal defense. Instead, they contend that they “cannot fully and freely participate in discovery with *further* criminal consequences waived in their faces.” *See* Motion [Dkt. 71] at ¶ 11. But *any* civil defendant faces the risk of criminal consequences based on his or her admissions in discovery. This is why civil defendants are allowed to raise the Fifth Amendment's privilege against self-incrimination at a civil deposition or at trial.

The New Defendants cite *no* Mississippi case granting a stay pending a criminal trial, let alone a case granting a stay following submission of a criminal guilty plea. The only state decision they cite is *Prescott v. Leaf River Forest Prods.*, 740 So. 2d 301, 304 (Miss. 1999), which affirmed a trial court's denial of a stay of a civil case pending resolution of a related civil appeal. Not only is this case not on point, but it does not actually contain the language the New Defendants claim it does. The words “substantial and irreparable prejudice” appear nowhere in the opinion.

Given that *Prescott* is not on point, the New Defendants primarily rely upon the unpublished decision of a federal magistrate judge to claim, “[i]n Mississippi, courts consider the following factors in determining whether a stay is warranted...” A more accurate statement would

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<sup>1</sup> Following Zachary New's guilty plea, the Federal Bureau of Prisons advised that for Z. New to serve his time of incarceration in the federal system, the federal charges must pre-date the state charges. Therefore, the Court entered an Order of Nolle Prosequi with respect to Zachary New. *See State of Mississippi v. New*, 25CI1:21-cv-00003-EFP, April 26, 2016 Order [Dkt. 8].

Nancy New's criminal case remains open. The Court entered an Order on May 2, 2022, changing Nancy New's plea from not guilty to guilty. *See State of Mississippi v. New*, 25CI1:22-cr-00002-EFP-1, May 2, 2022 Order [Dkt. 9]. However, Ms. New's Petition to Enter a Plea of Guilty is not of record on the docket. Nonetheless, Mississippi Today published copies of both petitions to enter guilty pleas on April 22, 2022. *See* <https://mississippitoday.org/2022/04/22/nancy-new-zach-new-plead-guilty-welfare-scandal/>.

be that *federal* courts consider those factors. *McCoy v. Yazoo City*, 2014 U.S. Dist. LEXIS 177646, at 3 (S.D. Miss. Dec. 29, 2014). And the New Defendants’ claim that the *McCoy* magistrate judge opinion was “interpreting Mississippi law” is cut from whole cloth. *McCoy* was a *federal* civil rights claim that the court stayed pending a criminal assault trial against the police officers. It relied only upon other federal cases.

If the Court chooses to follow federal law, the weight of federal authority holds that when a defendant has pleaded guilty to criminal charges, a stay of a parallel civil case is *not* warranted. In *De’Omilia Plastic Surgery, PC v. Sweeton*, Civil Action No. 12-06415 (FLW), 2013 U.S. Dist. LEXIS 163601, at \*7-8 (D.N.J. Nov. 18, 2013), a civil breach of contract and fraud suit, the defendant entered a plea agreement with the U.S. Attorney’s office on parallel charges. *Id.* at \*3-4. She moved to stay the civil case against her and her corporation. *Id.* The Court found that although the issues raised in the plea agreement and the civil complaint were the same, “[T]here will be no criminal trial, and thus no concern that the government may be unfairly advantaged by any admissions she makes in the course of the civil action.” *Id.* at \*7. The *De’Omilia* court relied on *Arden Way Assocs. v. Boesky*, 660 F. Supp. 1494 (S.D.N.Y. 1987), in which the Court rejected a stay of civil proceedings when the defendant had “negotiated and cooperated with the Government and entered a plea of guilty as part of an arrangement, thereby substantially decreasing if not extinguishing the risk of his further prosecution.” *Id.* at 1499.

The greatest risk of self-incrimination has passed once a defendant pleads guilty to criminal charges. Therefore, in *Russ v. Ecklund Logistics, Inc.*, No. 19-CV-2719 (DSD/JFD), 2022 U.S. Dist. LEXIS 67599 (D. Minn. Apr. 12, 2022), a court lifted a stay in the civil case upon receiving notice that defendant had pleaded guilty to criminal charges (but before sentencing). The *Russ* court found, “The Court does not minimize Mr. Michaels’s interest in the severity of his sentence,

but the chief harm against which his Fifth Amendment right could have potentially played a role in protecting him—being found guilty of a crime—has now come to pass.” *Id.* at \*4. Likewise, in *In re N.J. Tax Sales Certificates Antitrust Litig*, Civil Action No. 12-1893 (MAS) (TJB), 2014 U.S. Dist. LEXIS 154977, at \*40-41 (D.N.J. Oct. 31, 2014), the Court found that a stay was not warranted after the defendant had pleaded guilty to criminal charges and awaited sentencing.

The federal factors, therefore, do not weigh in favor of a stay. The civil case and the criminal cases, to which the New Defendants have pleaded guilty, overlap to some extent. They are not “seemingly identical.” The New Defendants admit this in Paragraph 4 of their Motion. The *De’Omilia* court found that although the extent of overlap is ordinarily the most important factor, when the defendant has pleaded guilty, this factor’s importance diminishes. 2013 U.S. Dist. LEXIS 163601, at \*7-8. This factor, therefore, weighs against a stay.

The New Defendants’ position that “proceedings are ongoing” is disingenuous, given their guilty pleas. This is not a situation where the New Defendants are preparing for a criminal trial and must be cautious of what admissions in the civil case could be used against them. The New Defendants have already confessed their crimes. *See* Exhibits “A,” “B,” & “C.” This factor does *not* weigh in favor of a stay.

MDHS’s interests will be prejudiced by a delay. Nancy and Zachary New, and the entities they controlled, are the hub of the majority of the allegations of the Complaint. The New Defendants and their company, Defendant MCEC, refused to cooperate with the Office of the State Auditor or with MDHS’s independent auditor, Clifton Larson Allen. MDHS does not have all of the New Defendants’ emails or text messages, though apparently many journalists in Mississippi do. Without the ability to obtain discovery from the New Defendants, MDHS will be prejudiced

in its ability to effectively conduct discovery against the other Defendants. This factor weighs against a stay.

It is further prejudicial to MDHS and the citizens of Mississippi to allow MCEC and the New Defendants to continue to use the discovery process when it suits them and fall behind the shield of their Motion to Stay when it does not. It is hypocritical, for example, for Nancy New to provide her personal text messages with Brett Favre to MCEC so that it could then include them as 30 separately filed exhibits [see Docket No. 131] available to the public—while claiming at the same time in this Motion that Nancy New should not have to disclose *any* of her text messages to MDHS.

The New Defendants' claim that they will be harmed is conclusory; they point to no specific harm that will befall them from having to participate in discovery. This factor weighs against a stay.

The New Defendants' threats of discovery fights likewise should not weigh in favor of a stay. It is unlikely the New Defendants will need to assert the Fifth Amendment to protect themselves from any harm in the criminal cases, in which they have entered plea agreements, and the risk of further prosecution is speculative at best. This factor weighs against a stay.

Finally, the public's interest is in the expeditious recovery of misspent TANF funds. There is no reason why discovery cannot be full, fair, and complete. This factor weighs against a stay.

On balance, the federal factors do not weigh in favor of staying discovery against the New Defendants. They certainly do not weigh in favor of staying discovery against those defendants who are not subject to criminal proceedings.

With respect to the New Defendants' alternative requests, MDHS has withdrawn its prior notices of deposition; there is no need to quash them. MDHS is more than willing to confer in good faith with Defendants on a proposed scheduling order.

### CONCLUSION

The Court should not countenance the New Defendants' attempt to avoid, or at least delay, liability for their actions. MDHS asks this Court to deny the New Defendants' motion to stay.

Respectfully submitted,

MISSISSIPPI DEPARTMENT OF HUMAN  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this date filed the foregoing with the Court's MEC system, which sent notice to all counsel of record.

This the 11<sup>th</sup> day of October, 2022.

/s/ Kaytie M. Pickett

KAYTIE M. PICKETT