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9 *Attorney For Defendant CLARK WARREN BAKER*

10
11 UNITED STATES BANKRUPTCY COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 LOS ANGELES DIVISION

14 In re
15 CLARK WARREN BAKER
16 Debtor

17 _____
18 JAMES MURTAGH, M.D.
19 Plaintiff

20 vs.

21 CLARK WARREN BAKER
22 Defendant

Case No. 2:15-BK-20351-BB

Adv. 2:15-ap-01535-BB

Before the Honorable Sheri Bluebond

Chapter 7

**NOTICE OF MOTION AND MOTION TO
STAY CASE AND PROCEEDING UNDER
5TH AMENDMENT PRIVILEGE AGAINST
SELF-INCRIMINATION AND FOR
PROTECTIVE ORDER; MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: March 14, 2017

Time: 11:00 am

Location: Courtroom 1539, 15th Floor
255 E. Temple Street
Los Angeles CA 90012

23 **TO THE HONORABLE SHERI BLUEBOND AND PLAINTIFF JAMES MURTAGH, M.D.**
24 **AND HIS ATTORNEY OF RECORD:**

25 PLEASE TAKE NOTICE that on the above-captioned date time and place, Debtor and
26 Defendant CLARK WARREN BAKER (hereinafter referred to as "Defendant") will move this Court
27 TO STAY CASE AND PROCEEDING UNDER 5TH AMENDMENT PRIVILEGE AGAINST SELF-
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1 INCRIMINATION AND FOR PROTECTIVE ORDER.

2 The *Motion* will be based on this Notice, on the attached Memorandum of Points and
3 Authorities, on such supplemental declarations, affidavits, memoranda of points and authorities as
4 may hereafter be filed with the Court, on all the papers and records on file in this action, and on such
5 oral and documentary evidence as may be presented at the hearing of the application.

6 Pursuant to Local Bankruptcy Rule 9013-1, any objection or response to this *Motion* must be
7 stated in writing, filed with the Clerk of the Court and served on Defendant and her counsel no later
8 than fourteen days prior to the hearing. Failure to so state, file and serve any opposition may result in
9 the Court failing to consider the same.

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11 DATED: February 7, 2017

LAW OFFICE OF BARUCH C. COHEN
A Professional Law Corporation

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By /s/ Baruch C. Cohen
Baruch C. Cohen, Esq.
Attorney for Defendant CLARK WARREN BAKER

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1 I. MEMORANDUM OF POINTS & AUTHORITIES

2 A. FACTS

3 1. THIS COURT'S CRIMINAL REFERRAL - OF DEFENDANT

4 On 1-18-2017, this Court referred the Defendant to the United States Attorney's Office to
5 investigate criminally whether the Defendant engaged in witness tampering of [REDACTED] within
6 the meaning of 18 U.S.C. § 1512(b).¹

7 In anticipation of the fact that Defendant "may" face criminal charges arising from the same
8 matters at issue herein, Defendant must proceed with extreme caution in order to protect his rights and
9 interests, that Defendant must protect his 5th Amendment rights against self-incrimination and
10 therefore cannot testify substantively in this proceeding.

11 B. ARGUMENT

12 1. GOOD CAUSE EXISTS FOR AN ORDER STAYING THE INSTANT
13 PROCEEDINGS PENDING THE OUTCOME OF ANY CRIMINAL
14 INVESTIGATION AND PROCEEDINGS AGAINST DEFENDANT

15 In general, the Constitution does not require a stay of civil proceedings pending the outcome
16 of criminal proceedings. (*Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995).)
17 "In the absence of substantial prejudice to the rights of the parties involved, [simultaneous] parallel
18 [civil and criminal] proceedings are unobjectionable under our jurisprudence." (*Id.*, quoting *Securities*
19 *& Exchange Commission v. Dresser Industries*, 628 F.2d 1368, 1374 (D.C. Cir. 1980) ("*Dresser*")
20 (original brackets).) The decision whether to stay civil proceedings while a parallel criminal case is
21 pending "is left to the sound discretion of the district court." (*IBM Corp. v. Brown*, 857 F. Supp. 1384,
22 1387 (C.D.Cal. 1994) (citing *Dresser*, 628 F.2d at 1375).) The Court's determination turns upon the
23 "particular circumstances and competing interests involved in the case." (*Keating*, 45 F.3d at 324,
24 quoting *Federal Savings & Loan Insurance Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989).)

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26 _____
27 ¹A true and correct copy of this Court's 1-18-2017 Criminal Referral of Clark Warren Baker
28 for Investigation for Witness Tampering is attached hereto as Exhibit "1" and is incorporated
herein by this reference. [Docket # 200]

1 Specifically, the Court properly considers the following factors: (1) the interest of the Plaintiff in
2 proceeding expeditiously with this litigation and the potential prejudice to the Plaintiff caused by a
3 delay; (2) the burden which any particular aspect of the proceedings may impose on the Defendants;
4 (3) the convenience of the Court in the management of its cases and the efficient use of judicial
5 resources; (4) the interests of persons or entities not parties to the civil litigation; and (5) the interest
6 of the public in the pending civil and criminal litigation. (*Id.*, citing *Molinero*, 889 F.2d at 903.)

7 The Fifth Amendment of the United States Constitution, provides: “No person ... shall be
8 compelled in any criminal case to be a witness against himself” California secures the right against
9 self-incrimination constitutionally (Cal. Const., art. I, §15) and by statute (*See*, Evidence Code §940
10 (“To the extent that such privilege exists under the Constitution of the United States or the State of
11 California, a person has a privilege to refuse to disclose any matter that may tend to incriminate
12 him.”).) (*People v. Macias*, 16 Cal.4th 739, 748 (1997); *see also*, *People v. Cahill*, 5 Cal.4th 478, 486
13 (1993).) “This principle has been construed to allow assertion of the privilege against
14 self-incrimination “in any proceeding, civil or criminal, administrative or judicial, investigatory or
15 adjudicatory” [Citations.] [Citation.] Privileged matters thus lie beyond the reach of discovery
16 and trial courts may not compel individuals to make responses that they reasonably believe could tend
17 to incriminate them or subject them to criminal prosecution.” (*Fuller v. Superior Court*, 87 Cal
18 .App.4th 299, 305 (2001); *see also*, *Segretti v. State Bar*, 15 Cal.3d 878, 886 (1976).)

19 The privilege against self-incrimination, however, is not absolute in matters that subject a
20 defendant to civil liability or penalties. (*In re Scott*, 29 Cal.4th 783, 815 (2003); *Blackburn v. Superior*
21 *Court*, 21 Cal.App.4th 414, 426 (1993).) The holding in *Blackburn, supra*, provides:

22 “There may be cases where the requirement that a criminal defendant participate in
23 a civil action, at peril of being denied some portion of his worldly goods, violates
24 concepts of elementary fairness in view of the defendant’s position in an inter-related
25 criminal prosecution. On the other hand, the fact that a man is indicted cannot give
26 him a blank check to block all civil litigation on the same or related underlying subject
27 matter. Justice is meted out in both civil and criminal litigation The court, in its
28 sound discretion, must assess and balance the nature and substantiality of the injustices
claimed on either side.” (*People v. Coleman, supra*, 13 Cal.3d at p. 885, quoting
Gordon v. Federal Deposit Insurance Corporation (D.C. Cir. 1970) 427 F.2d 578, 580
... .) (*Ibid.*)

1 “‘To sustain the privilege, it need only be evident from the implications of the question, in the
2 setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot
3 be answered might be dangerous because injurious disclosure could result.’ [Citations.]” (*In re*
4 *Marriage of Sachs*, 95 Cal.App.4th 1144, 1150-1151 (2002).)

5 Here, Defendant’s proposed testimony at his trial in this lawsuit might be dangerous because
6 of the criminal investigation into the allegation that Defendant criminally engaged in witness
7 tampering within the meaning of 18 U.S.C. § 1512(b).

8 Such beliefs are reasonable, as the instant proceedings demonstrate Plaintiff’s action against
9 Defendant herein mirror, and derive from, the exact defense of Defendant - that it was Plaintiff who
10 intimidated ██████ that it was Plaintiff who fabricated evidence against Defendant.

11 Counsel cannot be faulted in advising his client Defendant that he should affirmatively act to
12 protect his interests. Defendant seeks to reserve, and does not want to take any action which would
13 effectively waive any rights, denials, or defenses which he may have to any and all allegations which
14 may be brought against him.

15 2. GOOD CAUSE EXISTS UPON WHICH THIS MOTION FOR A
16 PROTECTIVE ORDER MAY BE GRANTED

17 Federal Rules of Civil Procedure, Rule 26(c)(1), with regards to Protective Orders, provides
18 in pertinent part as follows:

19 In General. A party or any person from whom discovery is sought may
20 move for a protective order in the court where the action is pending —
21 or as an alternative on matters relating to a deposition, in the court for
22 the district where the deposition will be taken. The motion must
23 include a certification that the movant has in good faith conferred or
24 attempted to confer with other affected parties in an effort to resolve
25 the dispute without court action. The court may, for good cause, issue
26 an order to protect a party or person from annoyance, embarrassment,
27 oppression, or undue burden or expense

28 In this instance, it is appropriate and necessary that the Court enter a Protective Order that
would impose a stay of further discovery from Defendant, as well as prohibiting Plaintiff from
disseminating any of the documents or documentation that Plaintiff has obtained from Defendant or
third parties regarding Defendant. All proceedings in this adversary case should be stayed pending

1 the outcome of any potential criminal matter so as to preserve in its entirety Defendant's 5th
2 Amendment Privilege. Accordingly, a Protective Order should be granted as prayed for in this
3 Motion.

4 II. CONCLUSION

5 Defendant's continuing defense of this action is likely to prejudice or compromise Defendants'
6 defense of any criminal charges which may arise from his involvement with Plaintiff. It is therefore
7 appropriate and necessary for the Court to stay the instant action, and grant a protective order, as
8 requested herein.

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10 DATED: February 7, 2017

LAW OFFICE OF BARUCH C. COHEN
A Professional Law Corporation

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By /s/ Baruch C. Cohen
Baruch C. Cohen, Esq.
Attorney for Defendant CLARK WARREN BAKER

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DECLARATION OF BARUCH C. COHEN

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- I, BARUCH C. COHEN, declare and state as follows:
1. The facts stated below are true and correct to the best of my personal knowledge and if called upon to testify to them, I could and would competently do so.
 2. I am a member in good standing and eligible to practice before the following court(s): United State Supreme Court; California State Supreme Court; US Court of Appeals - Ninth Circuit; Bankruptcy Appellate Panel; United States District and Bankruptcy Courts for the Central, Eastern, Northern & Southern Districts of California .
 3. I am the principal shareholder and President of The Law Office of Baruch C. Cohen. A Professional Law Corporation, located at 4929 Wilshire Boulevard, Suite 940, Los Angeles California 90010.
 4. I proudly represent Defendant CLARK WARREN BAKER.
 5. This declaration is in support of the MOTION TO STAY CASE AND PROCEEDING UNDER 5TH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND FOR PROTECTIVE ORDER.
 6. On 1-18-2017, this Court referred the Defendant to the United States Attorney's Office to investigate criminally whether the Defendant engaged in witness tampering of David Bender within the meaning of 18 U.S.C. § 1512(b).²
 7. In anticipation of the fact that Defendant “may” face criminal charges arising from the same matters at issue herein, Defendant must proceed with extreme caution in order to protect his rights and interests, that Defendant must protect his 5th Amendment rights against self-incrimination and therefore cannot testify substantively in this proceeding.
 8. Here, Defendant’s proposed testimony at his trial in this lawsuit might be dangerous because of the criminal investigation into the allegation that Defendant criminally engaged in witness

² A true and correct copy of this Court’s 1-18-2017 Criminal Referral of Clark Warren Baker for Investigation for Witness Tampering is attached hereto as Exhibit “” and is incorporated herein by this reference. [Docket # 200]

- 1 tampering within the meaning of 18 U.S.C. § 1512(b).
- 2 9. Such beliefs are reasonable, as the instant proceedings demonstrate Plaintiff's action against
- 3 Defendant herein mirror, and derive from, the exact defense of Defendant - that it was Plaintiff
- 4 who intimidated Bender, that it was Plaintiff who fabricated evidence against Defendant.
- 5 10. I should not be faulted in advising my client that he should affirmatively act to protect his
- 6 interests. Defendant seeks to reserve, and does not want to take any action which would
- 7 effectively waive any rights, denials, or defenses which he may have to any and all allegations
- 8 which may be brought against him
- 9 11. I have consulted withy criminal defense counsel who advised filing this Motion.

10

11 I declare under penalty of perjury under the laws of the State of California that the foregoing

12 is true and correct. Executed February 7, 2017, at Los Angeles, California.

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By /s/ Baruch C. Cohen
Baruch C. Cohen, Esq.

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