

Nos. 1-19-0619 and 1-19-0640, Consolidated

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

YVONNE AMBROSE, individually and as Administrator)	Appeal from the
for the Estate of Desiree Robinson, deceased,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 17 L 4979
)	
BACKPAGE.COM, L.L.C.; BACK PAGE, L.L.C.;)	
MEDALIST HOLDINGS, L.L.C.; LEEWARD)	
HOLDINGS, L.L.C.; CAMARILLO HOLDINGS, L.L.C.;)	
DARTMOOR HOLDINGS, L.L.C.; IC HOLDINGS,)	
L.L.C.; UGC TECH GROUP C.V.; WEBSITE)	
TECHNOLOGIES, L.L.C.; POSTING SOLUTIONS)	
L.L.C.; AMSTEL RIVER HOLDINGS, L.L.C.; AD TECH)	
BV; CEREUS PROPERTIES LLC; CARL FERRER;)	
ATLANTISCHE BEDRIJVEN C.V.; JOSEPH HAZLEY;)	
CHARLES MCFEE; MICHAEL LACEY; JAMES)	
LARKIN; SCOTT SPEAR; DAN HYER; ANDREW)	
PADILLA; JOYE VAUGHT; ANTONIO ROSALES;)	
ELIZABETH MCDUGALL; MEDALIST HOLDINGS,)	
INC.; and JOHN "JED" BRUNST,)	The Honorable
)	Christopher E. Lawler,
Defendants-Appellants.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court of Cook County denying motion to stay plaintiff's civil complaint during criminal proceedings against some defendants based on

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the same subject matter as alleged in the complaint is affirmed in part and reversed in part; the trial court did not abuse its discretion in denying defendants' requests to stay proceedings in their entirety and permitting discovery to continue against unindicted individual and corporate defendants; discovery against corporate defendants may only proceed as to matters that can be responded to with a nontestimonial and nonincriminating answer as to the person responding; and the trial court abused its discretion in denying individual indicted defendants' requests for a stay, accordingly that portion of the trial court's order is reversed.

¶ 2 Desiree Robinson was killed by Anthony Rosales when she was 16-years old after Rosales met Robinson through an online classified ad on the shuttered website backpage.com (hereinafter, "the website"). Plaintiff, Yvonne Ambrose, is Robinson's mother and the administrator of her estate. Plaintiff filed a complaint and ultimately a fifth amended complaint against the individuals and corporate entities responsible for the operation of the website. Some of those individuals are the subject of criminal prosecutions in multiple states and they, along with the entities they represent, sought to stay this case until those criminal prosecutions are resolved. The issue of whether to stay this case was fully briefed by the affected parties and the trial court further ordered plaintiff to submit a statement of what discovery could proceed should the court issue the stay. Plaintiff complied with the trial court's order in the form of a sur-reply to the relevant defendants' filings in support of the stay. After all of the documents were filed, the trial court, without holding a hearing on the filings related to the stay or on plaintiff's statement of what discovery may proceed, issued an order denying the requests for a stay and issuing an order for discovery to proceed as stated in plaintiff's sur-reply.

¶ 3 **BACKGROUND**

¶ 4 Plaintiff alleges the website was used for the sex trafficking of minors, including Robinson. Specifically, the complaint alleges in part that defendants (1) "knowingly developed a reputation for www.backpage.com as a website where sex traffickers and prostitutes advertise commercial sex to customers;" (2) "intentionally helped sex traffickers create and develop the

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content of their ads;” and (3) instructed staff responsible for “moderating” ads on the website to “edit the text of adult ads to conceal the true nature of the underlying transaction,” which ads were then posted after “sexually suggestive text and images were removed.” Plaintiff alleges Hazley and McFee trafficked Robinson for sex acts using the website and that “[a]s a result of being advertised for sex on [the website,] upon information and belief, [Robinson] was sexually abused and exploited by men, including [Rosales.]” Plaintiff alleges that after arranging to pay Hazley for a second meeting with Robinson, Rosales attempted to rape, and then killed, Robinson. The complaint alleges the Cook County State’s Attorney charged Rosales with first degree murder and aggravated sexual abuse and that case is still pending; Hazley was indicted in federal court for sex trafficking of children by force, fraud, or coercion, transporting victims including Robinson to engage in prostitution, and conspiring with McFee to engage in sex trafficking; and McFee was indicted in federal court for sex trafficking of children by force, fraud, or coercion and conspiring with Hazley to engage in sex trafficking. The complaint alleged McFee pleaded guilty to conspiracy to engage in sex trafficking of a minor.

¶ 5 Plaintiff’s complaint alleges the United States Attorney for the District of Arizona indicted the following individual defendants for facilitating prostitution and/or concealment, transactions, and international promotional money laundering; and/or conspiracy to commit these offenses:

Lacey;

Spear;

Larkin;

Hyer;

Padilla;

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Vaught;

Brunst.

Subsequently Ferrer pleaded guilty to conspiracy in federal district court in Arizona. As part of his plea agreement Ferrer agreed to shut down the website and to forfeit corporate assets including bank accounts, cryptocurrency, and other financial instruments. The complaint also alleges that Backpage.com, L.L.C. pleaded guilty to money laundering conspiracy and that Ferrer signed the guilty plea as Backpage.com, L.L.C.'s authorized representative.

¶ 6 Plaintiff filed a complaint in the circuit court of Cook County against several (1) business entities she alleged “owned, operated, designed and controlled the website;” (2) individuals she alleged owned the website or owned a portion of the website and, as an officer or employee, “operated, designed, and controlled the website;” and (3) acted as an agent of the entities owning and operating the website. (Plaintiff’s complaint also contains counts directed against Rosales, Hazley, and McFee, who are not parties to this appeal.)

¶ 7 The individuals and entities named as defendants in the complaint can be divided into two groups: the “Backpage Defendants” and “the Medalist Defendants” (collectively, “defendants”). The Backpage Defendants include the following individual and corporate defendants:

Carl Ferrer;

Backpage.com, L.L.C.;

Dartmoor Holdings, L.L.C.;

IC Holdings, L.L.C.;

Ad Tech, BV;

Website Technologies, L.L.C.;

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Posting Solutions L.L.C.;

Amstel River Holdings, L.L.C.;

Atlantische Bedrijven C.V.;

UGC Tech Group C.V.

¶ 8 The Medalist Defendants include the following individual and corporate defendants:

Michael Lacey;

James Larkin;

Scott Spear;

John Brunst;

Medalist Holdings, Inc.;

Camarillo Holdings, LLC;

Leeward Holdings, LLC;

Cereus Properties LLC.

¶ 9 The Backpage Defendants filed a motion to stay proceedings on plaintiff's complaint "(i) to protect Mr. Ferrer's constitutional rights against self-incrimination under the Fifth Amendment to the U.S. Constitution, and (ii) to avoid undue interference in the three ongoing federal and state criminal cases where Mr. Ferrer has agreed to serve as a cooperating witness in the federal prosecution of other defendants." The Backpage Defendants' motion to stay asserts Ferrer and Backpage.com, L.L.C. have pleaded guilty to criminal charges in federal court in Arizona and to state charges in California and Texas, none of those plea agreements have been accepted by any of the courts, and no sentences have been imposed. The motion states the federal plea expressly permits Ferrer to withdraw his guilty plea and permits the federal government to vacate his plea agreement if California or Texas reject Ferrer's plea in those state

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matters. A withdrawal of the plea agreement would permit the federal government to fully prosecute Ferrer. The motion also notes that Ferrer's admissions to the factual basis for his guilty plea do not completely overlap with plaintiff's allegations in this case; and any responses to pleadings or discovery in this case deemed inconsistent with Ferrer's admissions in the guilty plea could subject him to criminal penalties. The motion argues that Ferrer's status as a cooperating witness for the government weighs in favor of staying proceedings in this case to "protect the interests of the United States and of Texas and California in these ongoing criminal cases." The motion also notes that in addition to testifying Ferrer has agreed to forfeit all property that constitutes proceeds of the offense and to enter into a stipulated restitution order of up to \$500 million.

¶ 10 The Backpage Defendants' motion to stay argues that because the plea agreements have not been accepted and the criminal cases are still pending, Ferrer and Backpage.com, L.L.C. "face very real prejudice in defending themselves in this case, and a stay would avoid putting [them] in the position of choosing whether to invoke their Fifth Amendment rights and risk losing the civil action or to answer discovery requests in the civil action and risk criminal prosecution." The motion argues Ferrer would necessarily need to invoke his Fifth Amendment rights in this case which "will, in turn, lead to a certain loss on summary judgment as (1) Ferrer has forfeited Backpage's documents to the government and cannot produce documentary evidence to support any possible defense and (2) Backpage's former owners (Defendants Michael Lacey and James Larkin) and other former Backpage employees (*e.g.*, Dan Hyer) are similarly under indictment, and will also invoke the Fifth Amendment." The motion also asserts that "[s]taying a case *** against [d]efendants that have already forfeited their assets to the United States offers little prejudice to [p]laintiff[]." The motion argues the claims in both cases

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“rely on claims alleging the editing of escort and adult ads to conceal the true nature of the services being offered in those ads” thus Ferrer cannot answer or defend the claims in this case without risking self-incrimination in the criminal proceedings and cannot invoke his Fifth Amendment rights in this case without creating adverse inferences that undermine the defense of this case.

¶ 11 The Medalist Defendants filed a response in support of the Backpage Defendants’ motion to stay this case stating they agreed that the trial court “should stay this case during the pendency of federal criminal proceedings in the United States District Court for the District of Arizona involving the Medalist Defendants and the Backpage Defendants.” The Medalist Defendants’ response stated the individual Medalist Defendants Lacey, Larkin, Brunst, and Spear had not entered guilty pleas and argued “[c]onsequently, the threat to their constitutional rights against self-incrimination is even greater than for the other defendants if this case were to proceed.” The Medalist Defendants argued “[a]ny question of whether the Fifth Amendment remains an issue for the Backpage Defendants in light of their plea agreements has no relevance with respect to the individual Medalist Defendants.” The response also asserted the indictment against Lacey “asserts the same themes and theories that [p]laintiff alleges in this case.” The response argued that overlap between the two cases prevents the individual Medalist Defendants from “mounting a defense or answering questions in this case without undermining their constitutional rights against self-incrimination.” The individual Medalist Defendants also argued that because of the overlap between the civil case and the criminal cases they cannot respond to or rebut the factual bases of the Backpage Defendants’ plea agreements or any testimony the Backpage Defendants may give in this case without being forced to choose between forfeiting their Fifth Amendment rights and responding or preserving the right not to respond and risking adverse inferences

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against them for doing so. They further argued the fact that the criminal charges involve only similar acts or misconduct, rather than acts and/or misconduct specific to Robinson, does not detract from the need for a stay and note that Lacey and Larkin have had their assets seized by the government in connection with the criminal prosecution. The Medalist Defendants argued the trial court should stay all deadlines and discovery in this case as to all defendants “against whom claims are brought based on operation of the Backpage.com website.”

¶ 12 Plaintiff filed a response to the motion to stay and to the response in support of the motion to stay arguing that the requests for a stay were “untimely and unnecessary.” Plaintiff argued a stay is unnecessary because the defendants in the civil case (1) represent corporations who do not have fifth amendment rights, (2) are individuals who acted as officers of those corporations, (3) are individuals who have pleaded guilty to the issues that would arise in the civil case, (4) are individuals who have already pleaded their fifth amendment rights in related matters, and (5) are individuals who have yet to appear in the civil case. Plaintiff argued any request for a stay is “untimely” because “parties are not yet at issue” and a motion to dismiss the civil case still needs to be filed and briefed by which time any defendant whose fifth amendment rights may be implicated “may well have been sentenced or tried.”

¶ 13 Plaintiff’s response to the request for a stay acknowledges defendants’ fifth amendment rights “may be differently affected” but argues the minimal prejudice to defendants “is not enough to warrant a stay in this case.” Plaintiff argued Ferrer’s guilty plea lessens the impact of civil proceedings on his fifth amendment rights and it is unlikely he will be required to respond to discovery before he is sentenced. Plaintiff also argued because “the government is not a party to the present civil action” there is “no danger that the government may use civil discovery to obtain evidence and information in criminal prosecution.” As to Lacey, Larkin, and Spear,

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plaintiff argued those defendants “are not at issue” because they intend to file a motion to dismiss the complaint and “as such the parties are far from those stages of discovery.” Moreover, plaintiff argued the individual Medalist Defendants have previously asserted their fifth amendment rights in hearings before the United States Senate into the activities of the website and it is “disingenuous” to now argue that asserting their fifth amendment rights in this civil proceeding would be prejudicial. Plaintiff’s response also argued the corporate defendants have no ability to claim a fifth amendment privilege and the officers of those corporations can plead fifth amendment privilege “as to what is within their personal knowledge, but not as to what is documentary and corporate in nature.” Specifically, plaintiff argued discovery can proceed against Ferrer as a corporate officer without fear of prejudicing his fifth amendment rights. Further, plaintiff argued “[a]ny potential prejudice to *** Lacey, Larkin, and Spear would only apply as to those allegations and discovery that goes to their individual culpability in the action,” but a majority of plaintiff’s allegations “implicate the actions of the individual defendants as agents of the Backpage entities.” Plaintiff asserted Lacey, Larkin, and Spear would be free to assert their fifth amendment rights as to discovery that goes to their individual actions but a stay would be inefficient because “the risk of potential prejudice is low and *** easily controlled.”

¶ 14 Plaintiff also argued she will be prejudiced if a stay is granted because she “should not be required to receive slower justice” and, despite defendants’ claims the prejudice to plaintiff is reduced because their assets have been seized, some property remains “within the indicted individuals’ control, to be liquidated or hidden as time goes on, putting[p]laintiff at a disadvantage with each day that passes” and some defendants “have had no assets seized.” Plaintiff also claimed (1) she “has no guarantee that she will be compensated by the federal case

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or any future victim compensation fund;” (2) a stay will “lengthen the time in which [plaintiff and Robinson’s family] must address the traumatic events which led to the filing of this matter;” and (3) she risks the loss of electronic and physical evidence because “evidence is being seized by federal authorities and Backpage.com itself has been shut down.” Plaintiff argued a stay will inconvenience the trial court in the management of its docket in that defendants “have not made clear the endpoint or length of the stay requested” and a trial date has been set but “[t]here is no guarantee that the criminal proceedings *** would be resolved in time *** to prepare the parties for trial [in the civil case].” Plaintiff argued the interests of the public and nonparties favor denying the request for a stay because other potential plaintiffs against defendants have an interest in seeing this case resolved so that they can seek compensation before the ability to do so disappears and because the public has an interest in swift resolution of claims of this type involving the trafficking and death of a 16-year-old.

¶ 15 Alternatively, plaintiff’s response asked the trial court to limit the stay so that “it should (1) come into effect only after the parties reach the discovery phase, (2) be limited to only that discovery that affects the 5th Amendment rights of Defendants, and (3) only apply as to those Defendants whose 5th Amendment rights are potentially implicated.” Plaintiff stated a motion to dismiss the complaint is forthcoming thus the motion to stay the proceedings should be continued “until such time discovery requests or deposition questions implicate Defendants [*sic*] 5th Amendment rights.” Plaintiff also argued a stay could “be narrowly tailored to include only those interrogatories, requests for production, and deposition questions that go to the individual conduct that cannot be attributed to corporate actions” and the stay should not apply to “discovery into the corporate entities or those actions taken by the Individual Defendants as officers or agents.” Finally, plaintiff argued a stay should not be granted to Lacey, Larkin, and

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Ferrer “as they have already invoked their 5th Amendment privilege in a related matter.”

Plaintiff argued a limited stay should only issue as to Spear.

¶ 16 The Medalist Defendants and Ferrer and the Backpage Defendants filed separate replies in support of a stay. Hyer filed a joinder and response in support of the requests for a stay. Padilla and Vaught filed a motion to join the motion for a stay.

¶ 17 The trial court entered an order granting defendants time to answer or otherwise plead after the motion to stay is ruled upon. In that order, the court granted plaintiff leave to file any supplementary material regarding what discovery can go forward if a stay were to enter. The court also granted Brunst, Padilla, and Vaught leave to join the motion for a stay and adopted and incorporated plaintiff’s response as to Padilla and Vaught.

¶ 18 Plaintiff filed a sur-reply to defendants’ motion to stay asserting the trial court “can and should limit the stay to the discovery and depositions that may implicate 5th Amendment rights; to those individuals whose 5th Amendment rights are potentially implicated, and limit it in time” as described in plaintiff’s sur-reply. The sur-reply included a discovery plan and attached examples of discovery that plaintiff believed could go forward with the restrictions she described. The discovery plan laid out in plaintiff’s sur-reply is reproduced in its entirety below:

“The following Discovery to go forward at this time:

- (1) Requests for Production and Interrogatories for the Defendant Corporations. See Sample, attached hereto as Ex. A.
- (2) Requests for Production and Interrogatories for the Defendants who have been served and have not appeared.
- (3) Requests for Production and Interrogatories for Elizabeth McDougall.

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- (4) Requests for Production to Defendants Ferrer, Hyer, Lacey, Larkin, Spear, Padilla, Vaught and Brunst as to corporate books and papers.
- (5) Requests for Production to Defendants Ferrer, Hyer, Lacey, Larkin, Spear, Padilla, Vaught and Brunst wherein the Defendants can plead the 5th with leave to amend automatically after sentencing and criminal trial dates have occurred.
- (6) Interrogatories to Defendants Ferrer, Hyer, Lacey, Larkin, Spear, Padilla, Vaught and Brunst, wherein the Defendants can plead the 5th with leave to amend automatically after sentencing and criminal trial dates have occurred.
- (7) Depositions of corporate representatives, agents and employees not named as Defendants in this civil matter or criminally indicted in relation to Backpage.com.
- (8) Depositions of fact witnesses and Ill. S. Ct. R. 213(f)(1) witnesses not named as Defendants in this civil matter or criminally indicted in relation to Backpage.com.
- (9) Depositions of Defendants McDougall, Hazley, McFee, and Rosales.
- (10) Depositions of any and all Ill. S. Ct. R. 213(f)(2) witnesses and 206(a)(1) witnesses not named as Defendants in this civil matter or criminally indicted in relation to Backpage.com.
- (11) Written and oral discovery issued to Plaintiffs and her identified witnesses.

The following discovery to go forward after Defendant Ferrer and Hyer have been sentenced:

- (1) Deposition of Defendant Ferrer.
- (2) Deposition of Defendant Hyer.
- (3) Supplement to any Interrogatories wherein Defendants Hyer or Ferrer previously pled their 5th Amendment rights.

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- (4) Supplement to any Requests for Production wherein Defendants Ferrer and Hyer previously pled their 5th Amendment rights.

The following discovery to go forward after the January 20, 2020 Trial

- (1) Supplement to any Interrogatories wherein Defendants Lacey, Larkin, Spear, Padilla, Vaught and Brunst previously pled their 5th Amendment rights.
- (2) Supplement to any Requests for Production wherein Defendants Lacey, Larkin, Spear, Padilla, Vaught and Brunst previously pled their 5th Amendment rights.
- (3) Depositions of Defendants Lacey, Larkin, Spear, Padilla, Vaught and Brunst.”

¶ 19 The trial court, without conducting a hearing on the parties’ filings regarding a stay, issued a written order denying defendants’ requests to stay proceedings. The court’s order found plaintiff’s proposed discovery schedule as described in her sur-reply “fair and reasonable” and adopted the schedule as described. The court’s order separately listed a discovery schedule and ordered the parties to submit agreed-upon discovery dates. The discovery schedule in the trial court’s written order stated as follows:

“(1) Defendants’ motion to stay proceedings is DENIED.

(2) The Court adopts Plaintiffs’ proposed discovery schedule as described in her Sur-Reply Regarding Discovery to Defendants’ Motion to Stay Proceedings.

(3) The following discovery to continue as follows:

- (i) Requests for production and interrogatories for defendant-corporations.
- (ii) Requests for production and interrogatories for served Defendants who have not filed appearances.
- (iii) Requests for production and interrogatories for Elizabeth McDougall.

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- (iv) Requests for production to Defendants Carl Ferrer; Dan Hyer; Michael Lacey; James Larkin; Scott Spear; Andrew Padilla; Joye Vaught; and John “Jed” Brunst’s books and papers.
- (v) Requests for production for Defendants Carl Ferrer; Dan Hyer; Michael Lacey; James Larkin; Scott Spear; Andrew Padilla; Joye Vaught; and John “Jed” Brunst. These defendants may invoke their Fifth Amendment rights in their production with leave to automatically amend after a court sets criminal trial and sentencing dates.
- (vi) Interrogatories to Defendants Carl Ferrer; Dan Hyer; Michael Lacey; James Larkin; Scott Spear; Andrew Padilla; Joye Vaught; and John “Jed” Brunst. These defendants may invoke their Fifth Amendment rights in their interrogatories with leave to automatically amend after a court sets criminal trial and sentencing dates.
- (vii) Depositions of corporate representatives, agents, and employees not named as Defendants in this civil matter or criminally indicted in relation to Backpage.com.
- (viii) Depositions of fact witnesses and Illinois Supreme Court Rule 213(f)(1) witnesses not named as Defendants in this civil matter or criminally indicted in relation to Backpage.com.
- (ix) Depositions of Defendants Elizabeth McDougall, Joseph Hazley, Charles McFee, and Antonio Rosales.
- (x) Depositions of any and all Illinois Supreme Court Rule 213(f)(2) witnesses and Rule 206(a)(1) witnesses not named Defendants in this civil matter or criminally indicted in relation to Backpage.com.
- (xi) Written and oral discovery issued to Plaintiff and her identified witnesses.

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(4) The following discovery to continue after Defendants Carl Ferrer and Dan Hyer are sentenced:

- (i) Deposition of Defendant Carl Ferrer.
- (ii) Deposition of Defendant Dan Hyer.
- (iii) Supplements to any interrogatories in which Defendants Carl Ferrer and Dan Hyer invoked their Fifth Amendment rights.
- (iv) Supplements to any requests for production in which Defendants Carl Ferrer and Dan Hyer invoked their Fifth Amendment rights.

(5) The following discovery to continue after the trial set for January 20, 2020:

- (i) Supplements to any interrogatories in which Defendants Michael Lacey; James Larkin; Scott Spear; Dan Hyer; Andrew Padilla; Joye Vaught; and John “Jed” Brunst invoked their Fifth Amendment rights.
- (ii) Supplements to any requests for production in which Defendants Michael Lacey; James Larkin; Scott Spear; Dan Hyer; Andrew Padilla; Joye Vaught; and John ‘Jed’ Brunst invoked their Fifth Amendment rights.
- (iii) Depositions of Defendants Michael Lacey; James Larkin; Scott Spear; Dan Hyer; Andrew Padilla; Joye Vaught; and John ‘Jed’ Brunst.”

¶ 20 This appeal followed.

¶ 21 ANALYSIS

¶ 22 The first issue we must address is this court’s jurisdiction over this interlocutory appeal from the trial court’s order denying defendants’ requests to stay proceedings. “Courts have treated the denial of a motion to stay as a denial of a request for a preliminary injunction.”

Lundy v. Farmers Group, Inc., 322 Ill. App. 3d 214, 216 (2001). Illinois Supreme Court Rule

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307(a)(1) (eff. Nov. 1, 2017) “provides that an appeal may be taken from an interlocutory order granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction.” *Id.*

In this appeal plaintiff argues the trial court’s order denying the motion for a stay and ordering discovery to proceed pursuant to the restrictions stated in plaintiff’s sur-reply is a discovery order that “can be considered noninjunctive because [it does] not form a part of the power traditionally reserved to equity courts. Instead, [it is] a part of the inherent power possessed by any court to compel witnesses to appear and give testimony and to control its docket.” Plaintiff cites *Short Brothers Construction, Inc. v. Korte & Luitjohan Contractors, Inc.*, 356 Ill. App. 3d 958, 960 (2005), for the proposition that “[o]rders of the circuit court that regulate only the procedural details of the litigation before the court *** cannot be the subject of an interlocutory appeal.

[Citation.] Examples of such order include *** discovery orders.” *Short Brothers Construction, Inc.*, 356 Ill. App. 3d at 960. We reject plaintiff’s argument. “This court has consistently held that a motion requesting a court to stay its own proceedings pending resolution of a related case is in effect a request for an injunction, and a decision either granting or denying such a motion is immediately appealable under Rule 307(a)(1).” *Disciplined Investment Advisors, Inc. v. Schweih*s, 272 Ill. App. 3d 681, 691 (1995). Accordingly, we find we have jurisdiction over defendants’ appeal.

¶ 23 “When a criminal action is pending during the course of a civil action, a court can stay the civil action to protect a party’s right against self-incrimination. [Citation.] However, the party moving for a stay ‘must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative.’ [Citation.]” *Davies ex rel. Harris v. Pasamba*, 2014 IL App (1st) 133551, ¶ 36. “Courts are willing to defer civil proceedings in such a manner *inter alia*: to protect a party from making admissions or furnishing other proof of a

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crime; to protect the party from not being able to defend a civil suit regarding the same matter; to protect the party from abuse of discovery in the criminal matter; and to protect the party from otherwise prejudicing his criminal case.” *People ex rel. Hartigan v. Kafka & Sons Building & Supply Co.*, 252 Ill. App. 3d 115, 119 (1993). This court reviews the trial court’s decision whether to stay a civil suit to prevent undermining a litigant’s right against compulsory self-incrimination for an abuse of discretion. *Pasamba*, 2014 IL App (1st) 133551, ¶ 37; see also *Securities and Exchange Comm’n v. Dresser Industries, Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980) (“The noncriminal proceeding, if not deferred, might undermine the party’s Fifth Amendment privilege against self-incrimination[,] *** expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case.”). “An abuse of discretion occurs when ‘the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view.’ [Citation.]” *Pasamba*, 2014 IL App (1st) 133551, ¶ 37.

¶ 24 On appeal, defendants argue the trial court erred in denying the stay in this case because all of the factors used to evaluate the propriety of a stay when a civil lawsuit and criminal prosecution overlap favor granting the stay and because the trial court failed to apply the proper criteria or to explain its decision.

“[A] court will consider certain factors before a defendant has testified or provided evidence of his wrongful conduct in determining whether a stay should be granted when a civil proceeding is pending and there is a criminal investigation pending or likely to occur. [Citation.] Those factors include: (1) the plaintiff’s interest in an expeditious resolution of the civil case and any prejudice to the plaintiff in not proceeding; (2) the interests of and burdens on the defendant, including the extent to which defendant’s fifth amendment rights are implicated;

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(3) the convenience to the court in managing its docket and efficiently using judicial resources; (4) the interests of persons who are not parties to the civil proceeding; and (5) the interests of the public in the pending civil and criminal actions. [Citations.]” *Pasamba*, 2014 IL App (1st) 133551, ¶ 52 (citing *Jacksonville Savings Bank v. Kovack*, 326 Ill. App. 3d 1131, 1136 (2002)).

Courts also consider the posture of the criminal proceeding and whether both actions were brought by the government. *CHB Uptown Properties, LLC v. Financial Place Apartments, LLC*, 378 Ill. App. 3d 105, 108-09 (2007). In this case defendants argue the most significant factor to consider is the procedural posture of the criminal proceedings. See *CMB Exp., LLC v. Atteberry*, No. 4:13CV04051SLDJEH, 2014 WL 4099721, at *3 (C.D. Ill. Aug. 20, 2014) (“The procedural posture of the criminal proceedings is the most significant factor because it influences almost all of the others; like a bowling ball on a trampoline, everything else rolls its way.”).

¶ 25 According to defendants the status of the criminal proceedings indisputably weighs in their favor because the individual defendants have been criminally indicted. Defendants also argue the civil and criminal cases overlap. Defendants specifically argue the civil and criminal cases are both “based on the ownership, design, and control of the [website], its moderating or editing practices, and the intent underlying them.” Defendants argue these facts demonstrate the overlap between the civil and criminal cases which is also a factor federal courts have considered in determining whether to stay civil proceedings when there is a related criminal prosecution. See *Atteberry*, 2014 WL 4099721, *3. As to the extent to which defendant’s fifth amendment rights are implicated defendants argue that given the overlap between the civil and criminal cases, “[r]esponding to claims and allegations in this case would jeopardize the right against self-incrimination in several ways.” Turning to the remaining factors, defendants argue the prejudice

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to plaintiff from a delay in these proceedings does not outweigh the prejudice to defendants' fifth amendment rights given that (1) the trial court set a briefing schedule on a motion to dismiss the complaint at the same time it denied the stay, (2) defendants' trial and/or sentencing date has been set, and (3) plaintiff is only seeking damages and defendants' assets have been seized by the government. Defendants argue the public interest lies in protecting fifth amendment rights which is at best equal to the public's interest in the swift resolution of this case. They also argue the trial court's interests would be served by a stay because the "motion practice *** over the scope of the [fifth amendment] privilege, and whether and when it is properly raised, could be avoided."

¶ 26 Plaintiff responds the requests to stay proceedings were premature; "not all defendants joined the motion or the appeal, and that weighs in favor of the court's discretionary decision not to indiscriminately stay all discovery;" and those individual defendants who invoked their fifth amendment privilege before the United States Senate cannot invoke the right in this case.

Plaintiff further argues her interests lie in stopping others from engaging in similar conduct as defendants and to serve as "a bellwether for others in her position who will hear about and join similar litigation." Plaintiff argues defendants' past conduct give her cause for concern that defendants' assets and information in defendants' possession may become unavailable. As for prejudice to defendants, plaintiff argues the trial court's discovery order affords them adequate protection and represents the trial court's management of its docket. Finally, plaintiff argues the public has an interest in having these claims resolved expeditiously.

¶ 27 Defendants reply the trial court's discovery order jeopardizes their fifth amendment rights in that the order places the individual defendants in the position of being forced to choose between waiving their fifth amendment rights in this case—jeopardizing them in the criminal

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cases—and exercising their fifth amendment rights in this case—causing them to potentially face adverse inferences in the civil case. Defendants also argue the provision in the order allowing individual defendants to invoke the fifth amendment and later to amend their responses does not protect them from adverse consequences including the use of negative inferences from their silence and their inability to answer a motion by plaintiff for summary judgment. The Medalist Defendants specifically argue that “the Fifth Amendment can (and will) be invoked in response to interrogatories and requests for admission, to anything other than sheer production of documents, and to requests for corporate documents where production would be testimonial.” The Medalist Defendants further argue their request to stay was not premature because plaintiff has requested discovery for proceedings on motions to dismiss the complaint and the fact some defendants are not parties to this particular issue has no bearing on the propriety of the request to stay the proceedings. They also argue the fact some defendants invoked their fifth amendment rights in Senate proceedings does not undermine—but actually supports—their exercise of that right in this case because “consistent invocation of the Fifth Amendment is required to avoid waiving the privilege.” (Emphasis omitted.)

¶ 28 After an examination of the factors courts consider to determine whether to stay civil proceedings (*supra* ¶ 25; *Kovack*, 326 Ill. App. 3d at 1136) we find the trial court abused its discretion in failing to grant a stay as to the individual defendants. Plaintiff offers no tenable argument in opposition to a stay as to the individual defendants. First, plaintiff’s reliance on *In re Anicom Inc. Securities Litigation*, 00 C 4391, 2002 WL 31496212, at *2 (N.D. Ill. Nov. 8, 2002), for the proposition that defendants who invoked their fifth amendment rights in Senate proceedings may not do so here is misplaced. In *Anicom*, the court found that the defendants had already invoked the fifth amendment privilege “in this litigation during discovery and before the

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Securities and Exchange Commission. Thus, it is disingenuous for [the defendants] to now argue that they will be prejudiced for exercising a right that they have repeatedly invoked in the past.” *Id.* (citing *U.S. v. Private Sanitation Industry Ass’n of Nassau/Suffolk, Inc.*, 811 F. Supp. 802, 807 (E.D. New York October 20, 1992)). In both *Anicom* and *Private Sanitation*, the court expressed doubt as to whether the defendants in those cases would suffer the purported prejudice they claimed from exercising their fifth amendment privilege. In *Anicom*, the court found that the defendants “face the dilemma of invoking their Fifth Amendment right against self-incrimination or risk a negative inference for invoking such right in the instant civil case. However, because no indictment has been returned, no Fifth Amendment privilege is threatened.” The court also noted that the burden on the defendant from other witnesses’ exercise of their fifth amendment privilege was equally shared by the plaintiff “because it is not clear which party, if either, would benefit from such testimony.” *Id.* at *2. In *Private Sanitation*, the court found that “the record belies the fact that [the defendant] will even be prejudiced should he be compelled to invoke the privilege in opposition to the government’s motion.” *Private Sanitation*, 811 F. Supp. at 807. In questioning whether the defendant would suffer any prejudice at all, the *Private Sanitation* court noted that the defendant “has continually invoked the Fifth Amendment privilege in responding to the government’s interrogatories in this case and in answering questions during his deposition in an earlier proceeding,” thus, “it is disingenuous for [the defendant] to now argue that he will be prejudiced by exercising the privilege which he has repeatedly invoked in the past.” In this case, plaintiff has raised no serious question that individual defendants will not suffer some prejudice should this case continue and defendants are forced to choose between waiving their fifth amendment privilege or invoking the privilege and facing the potential adverse consequences of doing so. As will be explained below, the factors

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courts use to determine the propriety of a stay in these circumstances weigh in favor of staying the proceedings as to the individual defendants; their prosecutions are certain and the similarities between their criminal cases and this case are almost absolute. We do not find defendants' efforts in this regard disingenuous.

¶ 29 Next, plaintiff's arguments regarding the prejudice she will suffer from delaying these proceedings is also not persuasive. In *Kovack*, the court, in addressing the first factor (*supra* ¶ 25), noted "[i]t would be perverse if plaintiffs who claim to be the victims of criminal activity were relegated to receive slower justice than other plaintiffs simply because the behavior they allege is egregious enough to attract the attention of criminal authorities." *Kovack*, 326 Ill. App. 3d at 1136. In that case, however, criminal charges had not yet been filed and the plaintiff asserted that "if the trial court stayed the civil proceedings, Kovack might dissipate his assets, making *** recovery *** impossible." *Id.* at 1133. *Kovack* is distinguishable because this case is in a different procedural posture than the civil case in *Kovack*. Here, criminal trial dates have been set for the individual defendants who did not plead guilty and a sentencing date has been set for the individual defendant who did plead guilty. Although there will be a delay for plaintiff in seeking a remedy that delay is not indefinite. The *Kovack* court considered this fact in assessing the convenience to the trial court. See *id.* at 1137 ("Kovack was seeking to delay the civil case indefinitely, with no predictability as to when the case could have returned to the trial court's active docket. This would have burdened the court's ability to manage its cases.") We find this fact also weighs in favor in granting a stay when considering a plaintiff's interests in an expeditious resolution of the civil case. See *U.S. ex rel. Shank v. Lewis Enterprises, Inc.*, 2006 WL 1064072, *4 (S.D. Ill. April 21, 2006) (discussing "the interests of the plaintiffs in proceeding expeditiously with this litigation and the potential prejudice to plaintiffs of a delay")

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and noting the “concern about the indefinite nature of a potential stay in this matter is very real.”). We also find that consideration of any prejudice to plaintiff’s ability to recover from not proceeding at this time weighs in favor of a stay. Here, unlike in *Kovack*, defendants’ assets have been seized or forfeited. Despite plaintiff’s undefined concerns about a diminishing ability to recover from defendants we do not find plaintiff will be severely prejudiced in this regard by the issuance of a stay.

¶ 30 We also find that defendants’ interests weigh in favor of granting the stay. The *Kovack* court noted that “[w]hen issues in a criminal matter significantly overlap with those in civil proceedings, self-incrimination is more likely.” *Kovack*, 326 Ill. App. 3d at 1136-37. Nonetheless, the court held that if and when *Kovack* invoked his fifth amendment privilege in the civil proceeding “that limitation, though significant, will not bar him from taking the stand and asserting his fifth amendment rights as needed, while presenting a vigorous defense through cross-examination and other means available to him.” *Id.* The court’s decision in *Kovack* suggests the court found the trial court did not abuse its discretion in finding this factor weighed against granting a stay in the circumstances of that case. See *id.* at 1134. In this case, we find it would be an abuse of discretion to weigh this factor against granting a stay. In *Securities and Exchange Comm’n v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980), cited in *Kafka & Sons Building and Supply Co., Inc.*, the court stated that other than in circumstances not present here “the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.” *Securities and Exchange Comm’n*, 628 F.2d at 1376.

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¶ 31 In this case, defendants' wrongdoing is not ongoing, in light of the virtual equivalence of the civil and criminal proceedings the individual defendants' fifth amendment concerns are significant and not speculative, and no appreciable amount of discovery has yet taken place. *Cf. CMB Export, LLC v. Atteberry*, 2014 WL 4099721, *4 (comparing the plaintiffs' interests and the defendants' interests and finding that because of the ongoing nature of the defendants' misconduct "to impose a stay because of a criminal investigation that may ripen into future proceedings would unfairly prejudice [the plaintiff]," while the fact that "no criminal charges [had] been filed" made the defendants' fifth amendment concerns "speculative in nature, scope, and timing" such that the potential burden to the defendants was "significantly outweighed by the actual burden facing" the plaintiffs); *Doe v. City of Chicago*, 360 F. Supp. 2d 880, 881 (N.D. Ill. January 18, 2005) (finding facts weigh in favor of granting a stay in the civil case where the criminal charges pertain to the same time period and same general set of allegations as the civil case and the same subject matter is involved in both proceedings); *Admiral Insurance Co. v. Federal Security, Inc.*, 1997 WL 695727, *3 (N.D. Ill. November 4, 1997) (citing prior finding that "[b]ecause these defendants waited so long into the discovery period to assert their desire to stay discovery we felt they had, under the facts of this particular case, prejudiced the equitable considerations which might ordinarily weigh in their favor").

¶ 32 We also find that the interests of the court, nonparties, and the public weigh in favor of granting the stay. In considering this factor, the *Kovack* court found that "[c]ourts have indicated that an announced charge against a defendant weighs heavily in the defendant's favor in deciding whether to stay civil proceedings." *Kovack*, 326 Ill. App. 3d at 1137. Here, unlike in *Kovack*, the individual defendants have been criminally charged and, moreover, trial and sentencing dates have been set; thus, unlike *Kovack*, there is not a concern that it is not clear how long the civil

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proceedings would have to be stayed and the burden on the trial court's ability to manage its cases is lessened. *Cf. id.* Finally, we find that the interests of any potential victims of defendants' alleged and admitted misconduct who might come forward and the public's interest in a swift resolution of the civil proceedings does not outweigh the interests in protecting defendants' fifth amendment rights. "The right against self-incrimination is one of the most fundamental rights under the Constitution of the United States." *CHB Uptown Properties, LLC*, 378 Ill. App. 3d at 108. Denying individual defendants' requests for a stay, where in this case their fifth amendment rights would be unduly burdened by proceeding with the civil action, would be an abuse of discretion.

¶ 33 The trial court attempted to protect the individual defendants' fifth amendment rights by permitting them to invoke their fifth amendment privilege and later to amend their responses to discovery after their criminal proceedings ended. Nonetheless, we find the means the trial court employed to do so were inappropriate. The trial court's order forces individual defendants who have been indicted to invoke their fifth amendment rights in discovery and expose themselves to the adverse consequences of doing so. See, e.g., *Anderson v. City of Rockford*, 2018 WL 2332066, *17 (N.D. Ill. May 23, 2018). Although "it is not unconstitutional to force a party to choose between his Fifth Amendment Rights and risking adverse inferences in a civil action, the risk of impairing a party's Fifth Amendment rights is rather severe, especially in circumstances where the issues in the civil and criminal proceedings are nearly identical. [Citation.] Consequently, courts have found that the strongest case for granting a stay is where a party under criminal investigation is required to defend a civil proceeding involving the same subject matter. [Citation.] Here, these burdens are brought to bear on the indicted individual defendants *** and their circumstances are persuasive in favor of a stay of the civil proceedings." *United States v.*

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All Meat & Poultry Products, No. 02 C 5145, 2003 WL 22284318, at *4 (N.D. Ill. Oct. 3, 2003).

We hold that, rather than allowing discovery to proceed with leave to individual defendants to amend their discovery responses should they invoke their fifth amendment privilege, the case against the individual defendants who have been indicted should be stayed.

¶ 34 We turn next to the issue of whether plaintiff’s case against the corporate defendants should also be stayed. Defendants argue the trial court should have granted the stay in full—that is, as to the individual defendants and the corporate defendants—because the prejudice to the individual defendants is not mitigated by the corporate form of certain defendants. This, they argue, is so, because the corporate defendants must rely on the individual defendants to answer discovery requests and therefore the corporate defendants “face the same impediments” as the individual defendants. Defendants argue that only the individual defendants are available to respond to discovery requests upon the corporate defendants and those individual defendants cannot do so without imperiling self-incrimination or adverse inferences from their refusal to answer.

¶ 35 Defendants argue the individual defendants can still invoke their fifth amendment rights in responding to discovery requests in their corporate capacity. Defendants rely on *City of Chicago v. Reliable Truck Parts Co., Inc.*, 768 F. Supp. 642, 646 (N.D. Ill. June 14, 1991), which recognizes that the fact the corporation cannot assert a fifth amendment privilege does not “bar its officers and employees from doing so where the information sought is within their knowledge *and is testimonial*, rather than documentary and corporate, in nature.” (Emphasis added.) *Reliable Truck Parts Co., Inc.*, 768 F. Supp. at 646. The *Reliable* court held the lower court could not compel a corporate defendant with no fifth amendment privilege against self-incrimination to testify as to information in the possession of individual defendants—all

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corporate officers and employees—who had exercised their fifth amendment privilege because the court cannot compel those individual defendants to respond to inquiries by the corporation (in that case, an outsider designated to testify on the corporation’s behalf) “where the information sought is within their knowledge and is testimonial, rather than documentary and corporate in nature.” *Id.* at 646-47. *Reliable* does not stand for the proposition that in such instances a stay as to both the individual and corporate defendants should issue.¹ Instead, as further explained below, the question as to the propriety of proceeding with discovery against a corporate defendant in the face of the exercise of fifth amendment privilege by its corporate officers is whether “the information sought is *** testimonial, rather than documentary and corporate, in nature.” See *id.* at 646.

¶ 36 Defendants also cite *U.S. v. All Meat and Poultry Products Stored at Lagrou Cold Storage 2102 West Pershing Road, Chicago, Illinois. et al.*, 2003 WL 22284318, *4, which held that where the defendants included indicted individuals, unindicted individuals, and indicted corporate entities, and “the indicted individual defendants appear to be the central figures in both the civil and criminal proceedings, courts have determined that the better course is to enter a stay as to all defendants.” *Lagrou*, 2003 WL 22284318, *4. However, that the *Lagrou* court chose that course does not shed any light on whether the trial court in this case abused its discretion in following a different path. We note again that “[a]n abuse of discretion occurs when ‘the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view.’

¹ On the contrary, the *Reliable* court’s order suggests a stay should *not* issue. In *Reliable*, the court held the plaintiff may wish to depose the individual defendants “even if only to confirm for the record the scope of the privilege the individual defendants intend to assert, rather than rely upon the representations of [the corporation’s] counsel.” *Reliable Truck Parts Co., Inc.*, 768 F. Supp at 647. The court further held that “Should the individual defendants refuse to respond to questions propounded in the course of such a deposition, however, the City may make full use of the negative inference of their silence at trial—as it relates to the liability of both the individual defendants themselves and *Reliable*, which has been rendered unable to provide the City with further discovery as a result.” *Id.* at 647.

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[Citation.]” *Pasamba*, 2014 IL App (1st) 133551, ¶ 37. “Under the abuse of discretion standard, the question is not whether this court might have decided the issue differently, but whether any reasonable person could have taken the position adopted by the trial court.” *In re Marriage of Samardzija*, 365 Ill. App. 3d 702, 708 (2006). For the reasons discussed below, we hold discovery may proceed against corporate defendants without offending the fifth amendment.

Therefore, we cannot say that no reasonable person would take the view that a stay for purposes of protecting defendants’ fifth amendment rights was not warranted as to corporate defendants.

¶ 37 For guidance on the propriety of a stay as to the corporate defendants we turn first to the decision of the United States Supreme Court in *Braswell v. U.S.*, 487 U.S. 99 (1988). In that case, the petitioner sought to resist a subpoena for corporate records on the ground the act of production would incriminate him. *Braswell*, 487 U.S. at 101. The Court first noted that corporations are not protected by the fifth amendment. *Braswell*, 487 U.S. at 102. After reviewing the development of the “collective entity rule” (see *id.* at 104-08), the Court held that whether a subpoena is directed to a corporation or an individual in his or her capacity as a custodian of corporate records, the subpoena cannot be opposed on fifth amendment grounds. *Id.* at 108-09. The petitioner argued those cases held only that the contents of corporate records “are not private and therefore are not protected by the Fifth Amendment” (*id.* at 109) but the act of producing those records may be protected and the privilege may be available “without regard to the entity whose records are being sought” (*id.*). The court rejected that argument holding as follows:

“[T]he Court has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. Artificial entities such as corporations may act only through their agents,

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[citation], and a custodian’s assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government. Under those circumstances, the custodian’s act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege.” *Braswell v. United States*, 487 U.S. 99, 109-10 (1988).

¶ 38 The petitioner also argued that because the Court “recognizes that the act of production is potentially testimonial, such an act may not be compelled if it would tend to incriminate the representative personally.” *Id.* at 113-14. The Court rejected that argument as well. The Court recognized that its precedent shows that the Court “understood the testimonial nature of the act of production.” *Id.* at 114. Regardless, that precedent “apparently did not note any self-incrimination problem [with the testimonial significance of the act of production] because of the undertaking by the custodian with respect to the documents.” *Id.* (quoting *Fisher v. U.S.*, 425 U.S. 391, 430 n9 (Brennan, J., concurring)).

¶ 39 In *Fisher*, the Court addressed the “proposition that the Fifth Amendment prevents compelled production of documents over objection that such production might incriminate.” *Fisher*, 425 U.S. at 406. The Court held “the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating.” *Id.* at 408. The Court turned to the question of “what, if any, incriminating testimony within the Fifth Amendment’s protection, is compelled by a documentary summons.” *Id.* at 409. In *Fisher*, a

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case involving documents a taxpayer had turned over to his attorney for purposes of obtaining legal advice, the Court answered that question as follows:

“The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. *It also would indicate the taxpayer’s belief that the papers are those described in the subpoena.* [Citation.] The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both ‘testimonial’ and ‘incriminating’ for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof.” (Emphasis added.) *Id.* at 410. (citing *Curcio v. United States*, 354 U.S. 118, 125 (1957)).

The Court held that in the case before it “the act of producing *** would not itself involve testimonial self-incrimination.” *Id.*

¶ 40 We believe the holding in *Braswell* is limited to the production requested in that case and that *Fisher*, upon which *Braswell* is based, potentially affords greater protection to a corporate employee responding to a request for corporate documents. We hold that under *Fisher* a request for documents may require a testimonial response by a custodian of corporate records or corporate employee and therefore is potentially subject to fifth amendment protection. See *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (1985). In *In re Two Grand Jury Subpoenae Duces Tecum*, the United States Court of Appeals for the Second Circuit held:

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“When a corporation is asked to produce records, some individual, of course, must act on the corporation’s behalf. Usually this will not create any self-incrimination problem, for an employee who produces his corporation’s records ‘would not be attesting to his personal possession of them but to their existence and possession by the corporation.’ [Citation.] Yet even if the situation is unusual and a corporation’s custodian of records would incriminate himself if he were to act to produce the company’s records, this still does not relieve the corporation of its continuing obligation to produce the subpoenaed documents. [Citation.] In such a situation the corporation must appoint some other employee to produce the records, and if no existing employee could produce records without incriminating himself by such an act, then the corporation may be required to produce the records by supplying an entirely new agent who has no previous connection with the corporation that might place him in a position where his testimonial act of production would be self-incriminating. [Citation.] There simply is no situation in which the fifth amendment would prevent a corporation from producing corporate records, for the corporation itself has no fifth amendment privilege.” *Id.*

See also *World Music v. Arrow Vending, Inc.*, 675 F. Supp. 1131, 1132 (N.D. Ill. 1988). In *World Music v. Arrow Vending, Inc.*, the federal district court for the Northern District of Illinois wrote:

“Although the Seventh Circuit has not yet passed on the precise issue presented by this motion, little doubt exists that the position taken by other circuit courts addressing this question will be adopted. See *In re Grand Jury No. 86-3*

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(*Will Roberts Corp.*), 816 F.2d 569, 572-73 (11th Cir.1987) (collecting authority). Producing documents may in some circumstances constitute personal testimony ‘conceding the document’s existence, their possession or control, or the fact that the one producing them believes them to be documents described in the subpoena.’ *In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d at 57. The Fifth Amendment, however, protects a person only from incriminating himself by his own compelled testimonial communications and not from being incriminated by the testimonial act of a third party such as a corporation which produces requested information. *Id.* In rare situations where a corporation’s custodian of records would incriminate himself by producing the company’s records, the corporation must appoint some other employee or agent to produce the documents. *Id.* Simply put, no situation could exist which would prevent a corporation from producing corporate records as the corporation itself possesses no Fifth Amendment privilege.” *Id.*

¶ 41 The question for purposes of determining whether a response would be testimonial is not simply whether the production would implicitly admit the existence and possession of the documents. *Id.* at 411-12 (“This Court has also time and again allowed subpoenas against the custodian of corporate documents or those belonging to other collective entities such as unions and partnerships and those of bankrupt businesses over claims that the documents will incriminate the custodian despite the fact that producing the documents tacitly admits their existence and their location in the hand of their possessor.”). Rather, “[a]n examination of the Court’s application of [fifth amendment] principles in other cases indicates the Court’s recognition that, in order to be testimonial, an accused’s communication must itself, explicitly or

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implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a ‘witness’ against himself.” *Doe v. United States*, 487 U.S. 201, 208-10 (1988). The way in which a request for documents is presented can cause a response to a request for documents to be testimonial in itself. See *United States v. Hubbell*, 530 U.S. 27, 41 (2000) (“Given the breadth of the description of the 11 categories of documents called for by the subpoena, the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions.”).

¶ 42 In this case, defendants argue that based on plaintiff’s sample discovery requests any response will be testimonial in nature. Defendants argue some of the “sample” document requests are so fraught with implication that responsive production would be testimonial. See *Fisher*, 425 U.S. at 410 (act of producing documents “would indicate *** belief that the papers are those described”). We agree the potential exists that a response to some of plaintiff’s discovery requests as currently phrased, may “explicitly or implicitly[] relate a factual assertion or disclose information,” or express the content of the responding party’s mind and thus be testimonial. See *Doe*, 487 U.S. at 209-10 and n9, see also *Braswell*, 487 U.S. at 126 (Kennedy, J., dissenting) (“A custodian who is incriminated simply by the contents of the documents he has physically transmitted has not been compelled to disclose his memory or perception or cognition. A custodian who is incriminated by the personal knowledge he communicates in locating and selecting the document demanded in a Government subpoena has been compelled to testify in the most elemental, constitutional sense.”). “The difficult question whether a compelled communication is testimonial for purposes of applying the Fifth Amendment often depends on the facts and circumstances of the particular case.” *Doe*, 487 U.S. at 214-15 (citing *Fisher*, 425

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U.S., at 410). This question is best answered in the first instance by the trial court. See *U.S. v. Doe*, 465 U.S. 605, 613-14 (1984).

“To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim ‘must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.’ [Citation.]” *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951);

see also *Martin-Trigona v. Gouletas*, 634 F.2d 354, 360 (7th Cir. 1980) (“The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself[;] his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified.”).

¶ 43 Accordingly, for the foregoing reasons Parts 4 and 5 of the trial court’s order are affirmed. Parts 1 and 2 of the trial court’s order are affirmed in part and reversed in part, and part 3 of the trial court’s order is modified as follows:

(1) the order allowing requests for production and interrogatories for Elizabeth McDougall; depositions of corporate representatives, agents, and employees not named as defendants in this civil matter or criminally indicted in relation to Backpage.com; depositions of fact witnesses and Illinois Supreme Court Rule 213(f)(1) witnesses not named as defendants in this civil matter or criminally indicted in relation to Backpage.com; depositions of defendants Elizabeth McDougall, Joseph Hazley, Charles McFee, and Antonio Rosales; depositions of

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any and all Illinois Supreme Court Rule 213(f)(2) witnesses and Rule 206(a)(1) witnesses not named defendants in this civil matter or criminally indicted in relation to Backpage.com; and written and oral discovery issued to plaintiff and her identified witnesses is affirmed; and

(2) that portion of the trial court's order allowing discovery to continue as to requests for production and interrogatories for defendant corporations is affirmed in part only as to any requests for production and interrogatories where the response would be nontestimonial and/or nonincriminating as to the responding party and the trial court shall conduct a hearing on what discovery may proceed consistent with this order.

¶ 44 All remaining provisions in part 3 of the trial court's order are reversed; and as to those provisions, defendants' requests for a stay are granted in part. The case may proceed on defendants' motions to dismiss the complaint and the trial court's order to conduct discovery on those motions.

¶ 45 **CONCLUSION**

¶ 46 For the foregoing reasons, the circuit court of Cook County is affirmed in part and reversed in part, and the cause remanded for further proceedings consistent with this order.

¶ 47 Affirmed in part, reversed in part, and remanded with instructions.