

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-60493-CIV-COHN

SECURITIES AND EXCHANGE COMMISSION,

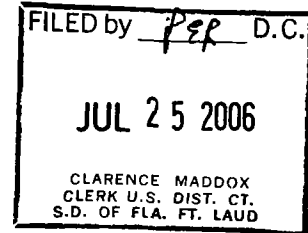
Plaintiff,

Magistrate Judge Snow

vs.

JOHN W. SURGENT, et al,

Defendants.



**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

THIS CAUSE is before the Court upon Plaintiff's Motion for Summary Judgment as to Defendant John Surgent [DE 121]. The Court has carefully considered the motion and is otherwise fully advised in the premises. A response to the motion was initially due by July 3, 2006. On July 11, 2006, this Court entered an Order to Show Cause to Defendant Surgent as to why Plaintiff's motion should not be granted. On July 17, 2006, Defendant Surgent sent a letter to the Court opposing the motion, which the Court docketed as a response to the motion. The Court has carefully considered the motion and Defendant Surgent's letter response, and is otherwise fully advised in the premises.

**I. BACKGROUND**

On April 16, 2004, the SEC filed this case against various individuals, including Defendant Surgent as the de facto principal of Orex Gold Mines ("Orex"). (Compl. ¶¶ 1, 4). The SEC contends Surgent knowingly or recklessly used false and misleading promotional materials and statements to promote and sell shares of unregistered Orex

stock in violation of section 10(b) and 10b-5 of the Securities Exchange Act of 1934, and sections 5(a), 5©, and 17(a) of the Securities Act of 1933. (Compl. ¶¶ 2, 13, 14, 17). The SEC seeks an injunction preventing Surgent from engaging in any further securities violations, disgorgement of “ill-gotten gains”, and civil penalties. In late July 2005, Surgent was convicted after a jury trial of conspiracy, securities fraud and money laundering charges stemming from the same activities relating to Orex as in this case. United States v. Surgent, Case No. 04-CR-0364 (JG) (E.D.N.Y.). See Joint Scheduling Report [DE 113]. This civil action was stayed by this Court from August 9, 2004 through August 15, 2005. See Orders at DE’s 53, 74, 100, 104 and 106. Following a period of discovery after the criminal trial was completed, the SEC filed the present motion for summary judgment.

## II. DISCUSSION

### **A. Summary Judgment Standard**

The Court may grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323(1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The movant “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party’s case. Id. at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). According to the plain language of Fed. R. Civ. P. 56(e), the non-moving party “may not rest upon the mere allegations or denials of the adverse party’s pleadings,” but instead must come forward with “specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. “A mere ‘scintilla’ of evidence supporting the opposing party’s position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party.” Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party “is merely colorable, or is not significantly probative, then summary judgment may be granted.” Anderson, 477 U.S. at 249-50.

#### **B. Surgent’s Response**

In his one page letter response to this Court’s Order to Show Cause, Defendant

Surgent seeks a stay of this civil action until the United States Court of Appeals for the Second Circuit rules upon his appeal of his related criminal conviction. In addition, Surgent opposes the Plaintiff's motion for summary judgment by denying all allegations that the government relies upon. Finally, Surgent requests a hearing on these issues. Surgent states that he did not respond earlier because he was "being held in the special housing unit (the box) pending transfer to FCC Petersburg Low, Petersburg, Virginia.

In reviewing the docket of the related criminal case, the Court notes that Defendant Surgent remained on bond during the pendency of his criminal trial until his conviction on July 26, 2005. At the time of conviction, Surgent was remanded to the custody of the U.S. Marshal, presumably housed in the Metropolitan Detention Center in Brooklyn, New York. See DE 85 in 04-CR-0364 (E.D.N.Y.) Surgent was sentenced on May 17, 2006. Id. at DE 156/157 in 04-CR-0364 (E.D.N.Y.). The date of his transfer to Petersburg FCC is unclear based upon the information available to this Court at this time, but presumably it occurred during the second half of June, 2006. The present motion was filed on June 16, 2006.

#### 1. Stay Request

Defendant Surgent first requests a stay of this matter until his criminal appeal is ruled upon. The Court notes that the present civil case was stayed for a year on motion by the intervenor, United States of America. Defendant Surgent opposed the initial motion to stay (See DE 57), arguing that as the activities he was being sued upon were already nearly five years old at that time, a stay would be prejudicial to him. Surgent relied upon the test described in Federal Savings & Loan Insurance Corp. v.

Molinaro, 889 F.2d 899, 902-03 (9th Cir. 1989). The Court granted the motion to stay over his objection, and as explained above, granted several more stays for a total stay period of one year. Now that the criminal case was resolved against him, Surgent seeks a stay of this civil action.

Based upon the same factors raised by Surgent earlier in this case, this Court concludes that another stay pending appeal of Surgent's criminal conviction is not warranted. In general, a stay of civil proceedings pending outcome of criminal proceedings is not constitutionally required, and a court has discretion to decide upon the stay in a particular case.<sup>1</sup> U.S. v. Lot 5, Fox Grove, Alachua County, Fla., 23 F.3d 359, 364 (11th Cir. 1994) (citing Securities & Exch. Comm'n v. Dresser Indus., 628 F.2d 1368, 1375 (D.C.Cir.) (en banc), *cert. denied*, 449 U.S. 993 (1980)). Applying the factors referenced in Dresser, the Court denies the request to stay. If Surgent's criminal conviction is overturned in the future, that would present a potential ground for a Rule 60(b) motion in this case.

If the Court were to interpret Surgent's request as a motion pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, the Court would deny such a motion. In general, "summary judgment should not be granted until the party opposing the motion has had an adequate opportunity for discovery." Snook v. Trust Co. of Georgia Bank of Savannah, N.A., 859 F.2d 865, 870 (11<sup>th</sup> Cir. 1988). In this case, Surgent has had a more than adequate opportunity for discovery. In addition to the one-year stay at the request of the United States during which time Surgent was not incarcerated, there was

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<sup>1</sup> As the criminal proceeding has completed, the potential Fifth Amendment concerns are not present. The Court notes that Defendant Surgent has not raised any Fifth Amendment concerns in this case.

an additional period of nine months, from August 15, 2005 through May 26, 2006, for discovery (during which time Surgent was incarcerated post-conviction and pre-sentencing in Brooklyn, New York). See Order Resetting Trial and Pretrial Deadlines [DE 116]. Although discovery was stayed for one year, Surgent presumably knew who would have knowledge of events that he could present in defense of the civil case. After completion of the criminal trial and the reopening of discovery in this case, Surgent again had the opportunity to try to conduct discovery. The Court notes that Surgent did not file any discovery-related motions in this case.

## 2. Merits of Plaintiff's Motion

In response to Plaintiff's motion for summary judgment, Defendant Surgent simply relies upon a general denial of the facts presented by the SEC in support of its motion.<sup>2</sup> Such a blanket denial is insufficient to rebut Plaintiff's motion for summary judgment. Matsushita, 475 U.S. at 587.

Upon a review of the SEC's motion, the Court concludes that the SEC has shown that there is no genuine issue of material facts regarding Surgent's violations of the securities laws as shown by the SEC in their moving papers and supporting documentation and testimony. See Plaintiff's Statement of Material Facts [DE 123] and attachments to Declaration of Andrew B. Stevens [DE 125]. Therefore, the Court will grant Plaintiff's motion for summary judgment and award the injunctive relief requested.

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<sup>2</sup> In its discretion, this Court declines Surgent's request to hold a hearing on Plaintiff's motion for summary judgment. The Court's current criminal trial docket is occupying nearly all of the Court's time for the foreseeable future.

### III. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Plaintiff's Motion for Summary Judgment [DE 121] is hereby **GRANTED** in its entirety;
2. Defendant John Surgent is hereby permanently restrained and enjoined from violating, directly or indirectly, Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act") [15 U.S.C. § 78j(b)] and Exchange Act Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5];
3. Defendant John Surgent is permanently restrained and enjoined from violating Section 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. § 77q(a)];
4. Defendant John Surgent is permanently barred from participating in an offering of penny stock, including engaging in activities with a broker, dealer or issuer for purposes of issuing, trading or inducing or attempting to induce the purchase or sale of any penny stock. All equity stocks are penny stock unless exempted per Exchange Act Section 3(a)(51) [15 U.S.C. § 78c(a)(51)(A)] and Exchange Act Rule 3a51-1 [17 C.F.R. § 240.3a51-1];
5. Defendant John Surgent, pursuant to Exchange Act Section 21(d)(2) [15 U.S.C. § 78u(d)(2)], is barred from acting as an officer or director of any issuer that has a class of securities registered pursuant to Exchange Act Section 12 [15 U.S.C. § 78] or that is required to file reports pursuant to Exchange Act Section 15(d) [15 U.S.C. § 78o(d)];
6. The joint pretrial stipulation due by August 10, 2006, shall instead be due by

August 15, 2006 as to the remaining defendants in this action.

**DONE AND ORDERED** in Chambers at Fort Lauderdale, Broward County, Florida,  
this 24<sup>th</sup> day of July, 2006.



JAMES I. COHN  
United States District Judge

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