UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TRACY MORGAN, et al., Plaintiffs, v. **WAL-MART STORE, INC., et al.,** Defendants.	Civil Action No. 14-4388 (MAS)(LHG) **ORDER**

This matter has been opened to the Court by way of a motion filed on November 14, 2014 by Kevin Roper ("Roper"), seeking to intervene in this civil action and to stay these proceedings pending the resolution of criminal charges that have been filed against him (the "Motion"). [Docket Entry No. 14]. Plaintiffs Tracy Morgan, Ardley Fuqua, Jr., Jeffrey Millea, and Krista Millea (hereinafter "Plaintiffs") filed opposition to the Motion on December 1, 2014. [Docket Entry No. 18]. Roper filed a brief in reply on December 8, 2014 [Docket Entry No. 21] and Plaintiffs filed a sur-reply on December 14, 2014 [Docket Entry No. 29]. Defendants Wal-Mart Stores, Inc., and Wal-Mart Transportation, LLC ("Defendants") have indicated that they take no position on the Motion. [Docket Entry No. 19]. The Court has considered the moving and responding papers without oral argument pursuant to Local Civil Rule 78.1. For the reasons set forth below, and for good cause shown, Roper's Motion is denied without prejudice.

I. BACKGROUND

Plaintiffs commenced this action in the aftermath of an automobile accident that took place on June 7, 2014. The Complaint alleges that a truck owned by Defendants and operated by

Roper struck a limousine carrying Plaintiffs Morgan, Fuqua, and Jeffrey Millea (henceforth the "Passenger Plaintiffs"), causing them serious injury. Complaint ("Compl.") ¶ 1 [Docket Entry No. 1]. Plaintiffs contend, *inter alia*, that Defendants' course of conduct prior to the accident reflects a disregard for various federal regulations and that they condoned the practice of having their employee truck drivers regularly drive more hours than permissible. Compl. ¶¶ 75-82. The outcome of this alleged practice was that drivers routinely drove over large distances and for prolonged periods of time while fatigued. Compl. ¶ 78. Plaintiffs argue that this practice exposed motorists to unsafe conditions, and Plaintiffs suffered their injuries as a result of this conduct. Compl. ¶ 83-84.

Before the filing of the Complaint, Roper was criminally charged by the Middlesex County Prosecutor's Office based on his involvement in the accident. *See* Motion to Intervene at ¶ 3 [Docket Entry No. 14]. To date, Roper has not been indicted. *See* Plaintiffs' Opposition to Kevin Roper's Motion to Intervene ("Opp'n") at 2 [Docket Entry No. 18].

II. DISCUSSION

The Motion presents three distinct questions: whether Roper may intervene as of right pursuant to Federal Rule of Civil Procedure 24(a)(2); whether the Court should exercise its discretionary powers and allow Roper to intervene in accordance with Federal Rule of Civil Procedure 24(b)(1); and, if Roper is permitted to intervene, whether a stay is appropriate until resolution of the criminal charges pending against Roper. Although the parties address the request for a stay first, the Court must begin its analysis with Roper's request to intervene. If that

request is unsuccessful, the Court need not address the request for a stay because Roper would lack standing to seek to stay this civil action.

A. WHETHER ROPER MAY INTERVENE AS OF RIGHT

1. ARGUMENTS OF THE PARTIES

In arguing that he may intervene as of right, Roper relies upon a four-factor test that requires consideration of the timeliness of the motion, whether the applicant has an interest in the suit, the practical effects the case has on those interests, and whether those interests are adequately represented by a party to the suit. Roper's Memorandum of Law in Support of Motion to Intervene for Purpose of Requesting Stay of Discovery to Protect Constitutional Rights of Kevin Roper ("Roper's Mem.") at 3 [Docket Entry No. 14-4].

Roper argues that the motion is timely because this case is still in its infancy and the parties have not yet exchanged discovery. Roper's Mem. at 3. With regard to his interest in the matter, Roper argues that he need only show a "tangible threat to a legally cognizable interest" and cites to "constitutional criminal procedural and due process rights" that would be affected if his application were denied and the parties were permitted to exchange discovery. Roper's Mem. at 3-4. Specifically, he claims that he has interests in avoiding any self-incriminating statements, preserving his right to a fair trial in his criminal case, ensuring that the prosecution does not gain access to information that would not ordinarily be discoverable in a criminal case, and preventing the prosecution from learning his defense strategies. Roper's Mem. at 4 (citing *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980)); Reply Brief in Support of Motion to Intervene

for Purpose of Requesting Stay of Discovery to Protect Constitutional Rights of Kevin Roper ("Reply") at 13 [Docket Entry No. 21].

Finally, Roper avers that his interests are not adequately represented because he is not a party to the case and there is a likelihood that his interests will conflict with those of Defendants. Roper's Mem. at 4; Reply at 14-15.

Plaintiffs rely on the same test as Roper but argue that it counsels against intervention. Opp'n at 18. Plaintiffs do not contest the timeliness of the Motion but instead focus on the remaining three prongs of the test. Opp'n at 18. They argue that Roper has failed to articulate a specific interest relating to the property or transaction at issue in this case that would be directly affected by allowing the proceeding to continue, instead making only vague assertions that fail to meet his burden. Opp'n at 18-19. They also take issue with Roper's assertion that this matter can impact his criminal case. He has not specified what the effect would be and the outcome of this matter would not be admissible in the criminal case. Opp'n at 19; Plaintiffs' Sur-Reply in Opposition to Kevin Roper's Motion to Intervene ("Sur-reply") at 2 [Docket Entry No. 29]. They emphasize that neither Plaintiffs nor Defendants have expressed any need to seek discovery from Roper; if such discovery is sought, it could be done at the end of fact discovery, by which time Roper's criminal action may have been concluded. Opp'n at 13; Sur-reply at 2.

With regard to the impact discovery in this case might have on Roper's criminal proceeding, Plaintiffs argue that Roper's fears are entirely speculative and therefore insufficient.

Finally, they contend that his interests are adequately protected because Defendants, his employers at the time of the accident, are parties to this litigation.

2. ANALYSIS

Federal Rule of Civil Procedure 24(a) governs intervention as of right. In relevant part, Rule 24 requires courts to grant intervention to anyone with "an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2); s*ee Kleissler v. United States Forest Service*, 157 F.3d 964, 969 (3d Cir. 1998). Thus, a party seeking to intervene as of right must establish four factors: First, the application must be timely; second, there must be a significantly protectable interest in the property or transaction at issue; third, there must be "a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action;" and finally, the movant must prove that none of the current parties will adequately represent the interest identified in the second prong. *Kleissler*, 157 F.3d at 969. Because the parties do not contest the timeliness of the Motion, the Court begins its analysis with the second prong.

The Third Circuit has observed that the interest mentioned in Rule 24(a) evades precise definition. *Kleissler*, 157 F.3d at 970. Accordingly, courts must engage in a factual analysis to ensure that the interest is in fact direct, capable of definition, and "directly affected by the relief sought" in the underlying suit. *Kleissler*, 157 F.3d at 972. "'[T]he interest must be a legal interest as distinguished from interests of a general and indefinite character. . . . The applicant

must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene.'" *Mt. Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995) (citing *Harris v. Pernsley*, 820 F.2d 592, 601 (3d Cir. 1987)) (ellipses in original). In certain circumstances, privileges and principles of confidentiality may qualify as interests for the purposes of intervening in discovery under the Rule. *See, e.g., United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980) (interest in preventing disclosure of materials protected by work product privilege); *Shire Dev. LLC v. Mylan Pharm. Inc.*, 2013 WL 6858319 at *1 (M.D. Fl. Dec. 30, 2013) (interest in protecting confidential, proprietary business information).

Roper relies heavily on *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980), in support of his argument that he has a significantly protectable interest in the subject matter of this suit. In *Dresser*, a corporate entity moved to quash a subpoena issued by the SEC when both the SEC and federal grand jury were independently investigating whether that entity had misused corporate funds. The entity expressed a concern that responding to the subpoena would effectively expand the grand jury's investigative ability. *Dresser*, 628 F.2d at 1370-74. To the extent that the *Dresser* court addressed intervention in the opinion, it was in the context of whether a corporate defendant could adequately represent the confidentiality interests of its employees. *Id.* at 1390.

Much of Roper's reliance on *Dresser* is in its discussion of a stay, which bears little to no relevance here. In that section, the *Dresser* court explained that a stay may be appropriate when parallel proceedings—*i.e.*, simultaneous civil and criminal actions against the same defendant that are based upon the same course of action—run the risk of prejudicing the defendant's Fifth Amendment privilege against self-incrimination, surreptitiously expanding criminal discovery, or

forcing the defendant to reveal defense strategies. *Dresser*, 628 F.2d at 1375-76. Nothing in that opinion suggests that those same concerns create an independent and legally cognizable interest for the purposes of intervention.

Even if the opinion could be read in the manner suggested by Roper, the burden remains on Roper, as the party seeking to intervene, to show that those interests apply here. Instead, he mimics the language from *Dresser* with barely even a skeletal demonstration of how those concerns are relevant. In fact, the situation contemplated in *Dresser* is drastically different from the matter at bar. Roper is a defendant only in the criminal action; there are no civil proceedings pending against him. Roper has neither alleged nor suggested that this civil action was initiated to give the prosecution access to information not available in criminal discovery, nor has he explained how this case might compel him to reveal his defense theories or strategies. *See Dresser*, 628 F.2d at 1375-76 (discussing the propriety of a stay "when there is evidence of agency bad faith or malicious tactics" and when a civil case runs the risk of "expos[ing] the basis of the defense to the prosecution in advance of [the] criminal trial").

Roper contends that the media attention this case has attracted is tainting the pool of potential jurors in his criminal suit. *See* Reply at 14 n. 7 and accompanying text. These concerns, however, are more appropriately addressed by the court overseeing his criminal action, which has

> various trial management techniques [that it can employ] to assure that the defendant's right to an impartial jury is not compromised. One available option is a change in venue. Other means of protecting the defendant's constitutional rights include the use of searching *voir dire* examinations, [and] the impaneling of "foreign jurors" to augment the pool of eligible jurors in the vicinage . . . .

State v. Biegenwald, 106 N.J. 13, 32, 524 A.2d 130, 139 (1987); *see also Harris v. Cathel*, *2009 WL 539898* (D.N.J. Mar. 4, 2009) *aff'd sub nom. Harris v. Ricci*, 607 F.3d 92 (3d Cir. 2010). Furthermore, even if Roper were allowed to intervene there is no reason to believe that intervention or even a stay would result in a bar to the release of information to the media, nor is such a bar sought by way of the Motion.

Roper has not cited a single case in which a criminal defendant was allowed to intervene in a civil case in which he was not named to protect his rights in his criminal case. *But see Nunley v. Pioneer Pleasant Vale School District # 56*, 149 F.Supp. 2d 1283 (W.D. Okla. 2001) (former high school coach had an interest in protecting his reputation in a parallel civil suit brought against the school district and school principal alleging that the coach had repeatedly raped and otherwise abused her). He has placed substantial weight behind his Fifth Amendment privilege against self-incrimination, which provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend V. Though by its terms the Fifth Amendment limits application of the privilege against self-incrimination to criminal cases, it is well established that this privilege is available in civil cases, *see McMullen v. Bay Ship Mgmt.*, 335 F.3d 215, 218 (3d Cir. 2003), and extends to witnesses as well as party-defendants. *See RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275 (3d Cir. 1986). "[A] mere blanket invocation of the privilege," however, is prohibited; instead it must be invoked on a question by question basis. *Nat'l Life Ins. Co. v. Hartford Acc. & Indem. Co.*, 615 F.2d 595, 598 (3d Cir. 1980); *Doe v. Glanzer*, 232 F.3d 1258, 1265-66 (9th Cir. 2000).

Although the Constitution empowers Roper with a Fifth Amendment privilege to protect against self-incrimination, occasion for invocation of that privilege has not yet come to pass and,

more importantly, may never come about. The Complaint focuses on Defendants' actions and potential violation of various regulatory schemes, rather than on Roper's involvement in the accident; Roper is mentioned by way of contextualizing the accident and drawing a causal connection between Defendants and Plaintiffs' injuries. No relief is sought from Roper, nor has either party sought any discovery from him. Plaintiffs have stated that they are willing to wait until the end of the fact discovery period to engage in such discovery if it becomes necessary. As such, to the extent that Roper has an interest in this civil action based upon the Fifth Amendment, it is both general and speculative; allowing him to intervene would be incongruous with the requirement that the Rule 24(a) interest be concrete and directly affected by the pending suit.

Accordingly, the undersigned finds that Roper has not met his burden of proving that he has a significantly protectable interest that would be impaired or impeded by this civil proceeding.

The Court therefore denies the Motion insofar as Roper seeks to intervene as of right.

B. WHETHER ROPER MAY INTERVENE AS AN EXERCISE OF THE COURT'S DISCRETION

1. ARGUMENTS OF THE PARTIES

In the alternative, Roper moves under Rule 24(b), arguing that he "has an interest that shares with the main action common questions of both law and fact. There will be no prejudice to the existing parties, or undue delay . . . ." Roper's Mem. at 5. He compares his interest with that of the intervenors in *NCAA v. Christie*, Civil Action No. 3:12-4947 (D.N.J. Dec. 11, 2012), and contends that his claim is greater than any found there. Reply at 16. He does not plan on adding

any new claims or defenses, and avers that there will be no last minute disruption of the matter because discovery has not yet commenced. Reply at 16.

Plaintiffs succinctly respond that "Roper has not met his burden of demonstrating that he has a claim or defense that shares with the main action common questions of law or fact." Opp'n at 21.

2. ANALYSIS

Permissive intervention is available to a movant who "has a claim or defense that shares with the main action a common question of law or fact," when the motion has been made in a timely manner and the intervention will not unduly delay the proceedings or prejudice the original parties. Fed R. Civ. P. 24(b)(1), (3). Courts exercise broad discretion in determining whether to grant a Rule 24(b) motion. *See Benjamin v. Dep't of Pub. Welfare of Pennsylvania*, 701 F.3d 938, 947 (3d Cir. 2012). Permissive intervention is, however, often inappropriate if intervention as of right is not available. *See Brody v. Spang*, 957 F.2d 1108, 1124 (3d Cir. 1992).

Pursuant to Rule 24(b), Roper must demonstrate that he has a claim or defense sharing common questions of law or fact with the claims of the original parties. Although there is necessarily an overlap between some factual issues in this case and the pending criminal proceeding, the gravamen of the allegations in the Complaint is that the Defendants routinely and systematically ignored federal regulations; this does not focus on Roper or his conduct. Moreover, while one or both of the parties may ultimately seek discovery from him, Roper has not explained how that contingency amounts to a claim or defense that would associate him with this action. Based on this record, the undersigned finds that Roper has not shown that he has a

claim or defense that shares common questions of law or fact with the claims of the original parties.

The Court must also consider whether permitting intervention in this matter would cause undue delay or prejudice to the original parties. Roper has not expressed an interest in joining this action as a party; his admitted purpose in moving to intervene is to stay this matter and preclude any further filings for an indefinite amount of time. Were the Court to grant Roper's motion, the case would be held in abeyance pending resolution of the criminal action, which is still in the pre-indictment stage. Suspending this case indefinitely would prevent the original parties from seeking resolution of their dispute. Accordingly, the undersigned finds that allowing intervention would cause a significant delay, to the prejudice of the parties. *See Hemy v. Perdue Farms, Inc.*, 2011 WL 6002463, at *9 (D.N.J. Nov. 30, 2011). Roper's 24(b) motion is therefore denied.

Because the Court has concluded that Roper has failed to establish that he should be allowed to intervene as of right, and also that it is inappropriate to permit Roper to intervene as a matter of the Court's discretion, the undersigned need not consider Roper's request for a stay.

Although the undersigned has determined that Roper may not intervene, his concerns are not lost on the Court. If any discovery is requested from Roper prior to the conclusion of the criminal action, Roper is instructed to communicate his concerns to the Court, by way of a motion

to quash or for a protective order, on notice to counsel; the undersigned will then address the scope, timing, and extent of any such discovery.

III. CONCLUSION

For the reasons set forth herein, and for good cause shown,

IT IS on this ___th day of February, 2015,

ORDERED that Kevin Roper's Motion to Intervene for the Purpose of Requesting Stay of Discovery to Protect Constitutional Rights of Kevin Roper [Docket Entry No. 14] is **DENIED WITHOUT PREJUDICE**.

LOIS H. GOODMAN
United States Magistrate Judge