UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- X

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

16 CV 6848 (DLI)

- against -

PLATINUM MANAGEMENT (NY) LLC,
PLATINUM CREDIT MANAGEMENT, L.P.,
MARK NORDLICHT,
DAVID LEVY,
DANIEL SMALL,
URI LANDESMAN,
JOSEPH MANN,
JOSEPH SANFILIPPO and
JEFFREY SHULSE,

Defendants.

- X

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the accompanying Government's Memorandum of Law in Support of Application To Intervene and To Stay Civil Proceedings, the United States will move this Court on a date and time to be designated by the Court, before the Honorable Dora Lizette Irizarry, Chief United States District Judge, at the United States Federal Courthouse, 225 Cadman Plaza, Brooklyn, New York 11201, pursuant to Rule 24 of the Federal

Rules of Civil Procedure, for intervention for the purpose of seeking a stay of civil proceedings (with the sole exception that the stay not apply to receiver Bart Schwartz (the "Receiver") or to any work performed or matters related to the Receivership or any future expansion of the Receivership), and for such other relief as the Court deems appropriate.

Dated: Brooklyn, New York
January 23, 2017

Respectfully submitted,

ROBERT L. CAPERS
United States Attorney

__/s/ Alicyn L. Cooley____
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Cc: Clerk of the Court (DLI)
All Counsel (By ECF)

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GOVERNMENT'S MEMORANDUM OF LAW IN SUPPORT OF APPLICATION TO INTERVENE AND TO STAY CIVIL PROCEEDINGS

Date of Service: January 23, 2017

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PRELIMINARY STATEMENT

The government respectfully submits this memorandum of law in support of its motion to intervene in the above-captioned civil case (the "Civil Case") and to stay civil proceedings because of the pendency of the parallel criminal case, United States v. Mark Nordlicht et al., 16 CR 640 (DLI) (the "Criminal Case"), which has been filed in this district, and a related, ongoing grand jury investigation. The same underlying facts are at issue in both the civil and the criminal matters. The government respectfully requests, as the sole exception to the requested stay, that the stay not apply to receiver Bart Schwartz (the "Receiver") or to any work performed or matters related to the Receivership or any future expansion of the Receivership.

Defendant Uri Landesman[1] has advised the government through counsel that he does not oppose the government's motion for a stay of the Civil Case. Defendant Jeffrey Shulse has advised the government through counsel that he opposes the government's motion for a stay of the Civil Case. Defendants Platinum Management (NY) LLC, Platinum Credit Management, L.P., Mark Nordlicht, David Levy, Joseph Mann and Daniel Small have advised the government through their respective counsel that they will take a position on the government's motion to stay the Civil Case only after reviewing the government's motion papers. The government also has consulted with the U.S. Securities and Exchange Commission ("SEC"), which does not oppose the entry of the requested order to stay the Civil Case.[2]

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[1] All seven defendants in the Criminal Case were arrested on December 19, 2016 and released on bond. Each of the defendants in the Criminal Case has retained counsel.

[2] On January 16, 2017, the government emailed counsel for all defendants asking if the defendants would oppose the government's motion for a stay of the Civil Case. On January 20, 2017, the government emailed counsel for all defendants except defendant Jeffrey Shulse

A stay is appropriate because the government's motion is timely and the same alleged fraudulent schemes are at issue in both the Civil and Criminal Cases. Moreover, a stay of proceedings is necessary, as the individual defendants should not be permitted to use civil discovery in the Civil Case to avoid the restrictions on criminal discovery that would otherwise pertain to them in the Criminal Case. A stay is also necessary to preserve the secrecy of the ongoing grand jury proceedings, and could promote judicial economy. Accordingly, the United States respectfully requests that the Court: (1) permit the government to intervene pursuant to Federal Rule of Civil Procedure 24; and (2) order, pursuant to the Court's inherent power, that civil proceedings in the Civil Case be stayed until the conclusion of the related Criminal Case and the ongoing grand jury investigation (except that the stay shall not apply to the Receiver or to any work performed or matters related to the Receivership or any future expansion of the Receivership).

FACTUAL BACKGROUND

I. The Civil Case

On December 19, 2016, the SEC filed a complaint (the "SEC Complaint") (Dkt. No. 1) against defendants Platinum Management (NY) LLC and Platinum Credit Management, L.P., as well as individual defendants Mark Nordlicht, David Levy, Daniel Small, Uri Landesman, Joseph Mann, Joseph SanFilippo and Jeffrey Shulse (collectively, the "Civil Defendants"). The complaint alleges that, in or about and between 2012 and 2016, various of the Civil Defendants

(whose counsel already had stated his opposition to the motion), attaching the proposed order to stay the Civil Case and requesting anew the remaining defendants' responses regarding their positions on the stay and the proposed order. As of the date of this filing, the government has not received a response from counsel for defendant Joseph SanFilippo regarding his position on the government's motion.

concealed from investors and prospective investors a growing liquidity crisis at Platinum Partners' flagship hedge fund, Platinum Partners Value Arbitrage Fund L.P. ("PPVA"); fraudulently overvalued PPVA's interest in one of its largest investments; and concealed the purpose for various inter-fund loans and other transactions – which purpose was, primarily, to meet PPVA's liquidity needs, in violation of the funds' governing documents. See SEC Complaint at ¶¶ 2-4, 38-43, 50-75. Additionally, the SEC Complaint alleges that certain of the Civil Defendants paid out select investors' requested redemptions of their investments in PPVA ahead of and/or in lieu of other investors', and concealed that practice from investors and prospective investors. See id. at ¶¶ 9, 127-137. The SEC Complaint further alleges that certain of the Civil Defendants defrauded holders of public bonds of Black Elk Energy Offshore Operations LLC ("Black Elk") – one of PPVA's largest investments – by rigging a vote of the bondholders and diverting nearly $100 million in proceeds of a Black Elk asset sale to preferred shares held mostly by PPVA and its affiliates. See id. at ¶¶ 5, 77-102.

II. The Criminal Case

On December 14, 2016, a federal grand jury sitting in the Eastern District of New York returned a sealed indictment charging all seven of the individual Civil Defendants with, among other things, the same conduct as alleged in the SEC Complaint. The indictment was unsealed on December 19, 2016, the date of the individual defendants' arrests in the Criminal Case.

Specifically, the indictment alleges that, in or about and between November 2012 and December 2016, defendants Nordlicht, Levy, Landesman, SanFilippo and Mann, together with others, engaged in a scheme to defraud investors and prospective investors through material misrepresentations and omissions relating to, among other things: (i) the performance of some of

PPVA's assets; (ii) PPVA's liquidity; (iii) the purpose of certain short-term, high-interest-rate note offerings issued by Platinum and the use of those offerings' proceeds; (iv) PPVA's preferential redemption process; and (v) related party transactions involving PPVA and another Platinum fund, Platinum Partners Credit Opportunities Master Fund, L.P. ("PPCO"). See Indictment, United States v. Nordlicht et al., No. 16-CR-640 (DLI) (Dkt. No. 1), at ¶ 42. The indictment further alleges that the foregoing defendants fraudulently overvalued some of PPVA's assets in order to, among other things, boost performance numbers, attract new investors, retain existing investors and extract high management and incentive fees, and that such overvaluation precipitated a severe liquidity crisis, which Platinum initially attempted to mitigate through high-interest loans between Platinum's funds. Id. In addition, the indictment alleges that, when such inter-fund loans proved insufficient to resolve PPVA's liquidity problems, Platinum began selectively paying some investors ahead of others, contrary to the terms of its governing documents. Id.

The indictment also alleges a second scheme by defendants Nordlicht, Levy, Small and Shulse, together with others, in or about and between November 2011 and December 2016, to defraud third-party holders of Black Elk bonds and deprive those bondholders of the proceeds of a lucrative Black Elk asset sale through material misrepresentations and omissions about, among other things, Platinum's ownership of and control over the bonds. Id. ¶ 73.

ARGUMENT

POINT ONE

INTERVENTION IS APPROPRIATE

I. Applicable Law

Rule 24 of the Federal Rules of Civil Procedure provides that a party may intervene in a civil action either as a matter of right or on a permissive basis. Either avenue justifies

intervention by the United States in the present action. See In re Air Cargo Shipping Servs. Antitrust Litig., M.D.L. No. 1775, No. 06-MD-1775, 2010 WL 5027536, at *1, *3 (E.D.N.Y. Dec. 3, 2010) (granting motion, noting that "[w]hether as of right under Rule 24(a) or by permission under Rule 24(b), courts in the Second Circuit have routinely granted motions made by prosecuting authorities seeking to intervene in civil actions for the purpose of obtaining stays of discovery").

Federal Rule of Civil Procedure 24(a) provides that a person may intervene as of right when the applicant:

> claims 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). Intervention is appropriate under Federal Rule of Civil Procedure 24(a) if the application is timely, the party has an interest in the transaction that is the subject of the action, the action may impede the party's ability to protect that interest, and the party's interests are not adequately represented in the action. See Mastercard Int'l, Inc. v. Visa Int'l Serv. Ass'n, 471 F.3d 377, 389 (2d Cir. 2006); Cascade Natural Gas Co. v. El Paso Natural Gas Co., 386 U.S. 129, 132-36 (1967) (permitting State of California to intervene under Rule 24(a) in antitrust case to protect state's "interest" in promoting competition in California).

Additionally, a court may permit intervention when an applicant files a timely motion and has a "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(2). Intervention under Federal Rule of Civil Procedure 24(b) is "wholly discretionary with the trial court." U.S. Postal Service v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978). In exercising their discretion, courts consider the nature and extent of the intervener's interests, whether the intervention will unduly delay or prejudice the adjudication of

the rights of the original parties, and whether the interests of the proposed intervener are adequately represented by the existing parties. See Berroyer v. United States, 282 F.R.D. 299, 302-03 (E.D.N.Y. 2012); Miller v. Silbermann, 832 F. Supp. 663, 673-74 (S.D.N.Y. 1993); SEC v. Shkreli, No. 15-CV-7175 (KAM), 2016 WL 1122029, at *3 (E.D.N.Y. Mar. 22, 2016) (granting permissive intervention because there were "significant overlaps between the SEC complaint and the indictment in the criminal case" and "[b]oth actions share a great number of common legal and factual questions").

II. Discussion

Allowing the United States to intervene in this case under Rule 24 is appropriate. The government's motion to intervene is timely, as it is being filed before any discovery has taken place in the Civil Case and no party has suffered prejudice. Moreover, as demonstrated above, the same alleged fraudulent schemes are at issue in both the Civil Case and the Criminal Case.

When government prosecutors have advised courts that they are conducting criminal prosecutions or investigations of individuals involved in a pending civil action, the courts have routinely permitted the government to intervene to request a stay of proceedings or discovery in the ongoing civil cases. See, e.g., SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (permitting government intervention to seek stay of civil discovery in SEC action pending completion of a criminal investigation involving the same underlying facts was not an abuse of discretion under either Rule 24(a) or Rule 24(b)); see also SEC v. Doody, 186 F. Supp. 2d 379, 381 (S.D.N.Y. 2002); Bridgeport Harbour Place I, LLC v. Ganim, 269 F. Supp. 2d 6, 8 (D. Conn. 2002); SEC v. Downe, No. 92 Civ. 4092 (PKL), 1993 WL 22126 at *11 (S.D.N.Y. Jan. 26, 1993); Twenty First Century Corp. v. LaBianca, 801 F. Supp. 1007, 1009 (E.D.N.Y. 1992).

Intervention is warranted as a matter of right under Rule 24(a)(2) in light of the strong interest of the government and the public in the enforcement of criminal laws. See, e.g., Cascade Natural Gas Co., 386 U.S. at 132-36 (permitting intervention as of right by State in antitrust proceedings because of public interest in effective competition); SEC v. Realty & Improvement Co., 310 U.S. 434, 458-60 (1940) (SEC should have been permitted to intervene in bankruptcy proceeding because resolution of that proceeding might "defeat the public interests which [the SEC] was designated to represent"). That interest may be substantially impaired if civil proceedings were allowed to continue in this matter before the resolution of the Criminal Case, as explained further in Point II below.

Courts have specifically recognized that the government "has a discernible interest in intervening in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal matter." Chestman, 861 F.2d at 50; see Morris v. Am. Fed'n of State, County & Mun. Employees, No. 99 Civ. 5125 (SWK), 2001 WL 123886, at *1 (S.D.N.Y. Feb. 9, 2001) (permitting District Attorney to intervene in civil action to request stay of discovery); Bd. of Governors of Fed. Reserve Sys. v. Pharaon, 140 F.R.D. 634, 638 (S.D.N.Y. 1991) (same); First Merchs. Enter., Inc. v. Shannon, No. 88 Civ. 8254 (CSH), 1989 WL 25214 at *2-*3 (S.D.N.Y. Mar. 16, 1989) (allowing United States Attorney to intervene in civil action).

Intervention is also warranted as an exercise of this Court's discretionary authority because the Civil Defendants are charged with engaging in essentially the same schemes as are alleged in the Criminal Case. Indeed, there is substantial overlap in the core factual allegations underlying this action and the factual questions that likely will be resolved in the Criminal Case – namely, whether the defendants charged in both the Civil and Criminal Cases schemed to defraud (a) investors in Platinum's funds through misrepresentations and omissions about, among other

things, PPVA's liquidity, the valuation of some of PPVA's largest investments, and the preferential and selective payment of investor redemptions, and (b) third-party holders of Black Elk bonds. The United States seeks only a stay of the proceedings, and its intervention will not alter the parties' respective positions. In fact, the criminal proceedings may benefit the civil parties, by bringing out facts relevant to the Civil Case and streamlining the ensuing litigation. Accordingly, this Court should permit the government to intervene.

POINT TWO

A STAY OF THE CIVIL PROCEEDINGS SHOULD BE GRANTED

I. Applicable Law

District courts have the inherent authority to stay their own civil proceedings. See Landis v. N. Am. Co., 299 U.S. 248 (1936). A stay of proceedings and discovery in a civil case is particularly appropriate when, as here, a criminal indictment has been filed. See Doody, 186 F. Supp. 2d at 381 ("Once an indictment has been returned, the government often moves for and frequently obtains relief preventing a criminal defendant from using parallel civil proceedings to gain premature access to evidence and information pertinent to the Criminal Case."); Twenty First Century Corp., 801 F. Supp. at 1011 ("[C]ourts are more likely to grant [a stay] when an indictment has already been issued."). Pursuant to this discretionary authority, courts may decide to stay civil proceedings, postpone civil discovery, or impose protective orders. See SEC v. Dressler, 628 F.2d 1368, 1375 (D.C. Cir. 1980).

In determining whether to exercise its discretion to stay the civil proceedings, the Court should balance the following considerations (referred to herein as the "six factors"):

> (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case, including whether the defendants have been indicted; (3) the private interests of the plaintiff in proceeding expeditiously weighed against the prejudice to the plaintiff caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest.

Hicks v. City of N.Y., 268 F. Supp. 2d 238, 241 (E.D.N.Y. 2003); see also Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 99 (2d Cir. 2012) (recognizing district courts' application of the six factors in this context, noting that such balancing tests "act as a rough guide for the district court as it exercises its discretion," and opining that court's decision whether to grant stay of civil case "ultimately requires and must rest upon a particularized inquiry into the circumstances of, and the competing interests in, the case" (internal quotation marks and citation omitted)).

Many courts in the Second Circuit have acknowledged that the filing of an indictment in the criminal case – as has occurred here – weighs heavily in favor of a stay of the parallel civil case, as codified in the "status of the case" factor. See, e.g., Hicks, 268 F. Supp. 2d at 241, 242 (observing that "the strongest argument for granting a stay is where a party is under criminal indictment" because proceeding in both cases could prejudice one or both cases); SEC v. McGinnis, Case No. 14 Civ. 6, 2016 WL 591764, at *3-*4 (D. Vt. Feb. 12, 2016) (discussing how "status of the case" factor weighs in favor of stay when criminal indictment is imminent or has been filed, and granting defendant's request for stay of parallel SEC action over SEC's objection); SEC v. One or More Unknown Purchasers of Securities of Global Indus., Ltd., No. 11 Civ. 6500 (RA), 2012 WL 5505738, at *3 (S.D.N.Y. Nov. 9, 2012) (same, and granting government's motion for stay over defendant's objection); accord Volmar Distributors, Inc. v. New York Post Co., 152 F.R.D. 36, 39 (S.D.N.Y. 1993) (noting that "[t]he strongest case for granting a stay is where a party under criminal indictment is required to defend a civil proceeding involving the same matter").

Further, there are many recent decisions in this circuit and others where, over a defendant's objection, courts have granted a government motion for a complete stay of civil discovery in a parallel SEC case. See, e.g., Shkreli, 2016 WL 1122029, at *7 (observing that "numerous courts both in this circuit and others — as the government correctly points out — have granted complete stays of SEC actions during the pendency of parallel criminal proceedings, even over a defendant's objection," and granting government's stay motion); Order Granting Mot. to Intervene and Stay Discovery, SEC v. Dubovoy, 15 Civ. 06076 (MCA-MAH) (D.N.J. Jan. 29, 2016) (Dkt. No. 240) (granting government's request for complete stay of SEC action over objection of two fugitive defendants indicted in parallel criminal cases in District of New Jersey and Eastern District of New York); Dubovoy, Dkt. No. 152-1; Global Indus., Ltd., 2012 WL 5505738, at *4 (granting government's request for complete stay of SEC action over objection of corporate defendant); SEC v. Gordon, 09 Civ. 61 (CVE) (FHM), 2009 WL 2252119, at *5-*6 (N.D. Okla. Jul. 28, 2009) (finding that indicted defendant failed to demonstrate how he would be prejudiced by stay and granting government's request for complete stay of SEC action); SEC v. Nicholas, 569 F. Supp. 2d 1065, 1069-73 (C.D. Cal. 2008) (finding that, over objection of individual indicted defendants, "complete stay of the civil case is in the best interest of justice").

In her recent decision in SEC v. Shkreli, the Honorable Kiyo A. Matsumoto concluded that a balancing of the six factors "overwhelmingly favor[ed] a stay" where: (1) there was a "substantial overlap of the issues" in the criminal and civil cases; (2) the criminal case had proceeded past the point of indictment as to both defendants; (3) the SEC did not oppose the government's proposed stay; (4) the court had an "interest in the efficient resolution of the two proceedings[;]" and (5) there was a "strong public interest in vindication of the criminal law." Id. at *7; see id. at *4 (analyzing, with respect to the first, "particularly significant" factor, that "the

alleged wrongdoing [in the civil and criminal proceedings] is essentially the same, and "[t]he substantial similarity and overlap of the allegations in the two proceedings strongly weigh in favor of granting a stay"); id. at *6 (concluding that "the court's interests favor a stay" because, among other things, "the civil case is 'likely to benefit to some extent from the [c]riminal [c]ase no matter its outcome,'" in that "evidence gathered and presented during the criminal prosecution can be used in the civil action," and "[a] stay of the civil action while the criminal case moves forward 'would avoid a duplication of efforts and a waste of judicial time and resources'" (quoting Glob. Indus., Ltd., 2012 WL 5505738, at *4)); id. at *7 (concluding that, with respect to the last of the six factors, "the public's interest in the effective enforcement of the criminal law is the paramount public concern").

II. Discussion

A. The Circumstances Presented in This Case Favor Granting the Requested Stay

This case presents nearly identical circumstances to those that other courts have found dispositive in deciding to grant a stay of a civil case during the pendency of parallel criminal proceedings: the significant overlap between the parallel criminal and civil proceedings; the fact that a criminal indictment already has been returned in the criminal case; the public's interest in the "effective prosecution of those who violate the securities laws;" and the Court's interest in judicial economy and the desire to safeguard the criminal case from "the specific concerns against which the restrictions on criminal discovery are intended to guard," including the risk that disclosures in the parallel civil case beyond the scope permitted in the criminal case would lead to "perjury and manufactured evidence" and the "revelation of the identity of prospective witnesses." Global Indus., Ltd., 2012 WL 5505738, at *3-*6; see also Gordon, 2009 WL 2252119, at *5-*6; Nicholas, 569 F. Supp. 2d at 1069-73.

Further, Judge Matsumoto's recent analysis in Shkreli, resulting in her granting a stay of the civil proceedings in that case, is apposite here. As in Shkreli, in this case, there is a "substantial overlap of the issues" in the criminal and civil matters, the individual defendants already have been indicted in the Criminal Case, the SEC does not oppose the government's proposed stay, the Court has an "interest in the efficient resolution of the two proceedings," and there is a "strong public interest in vindication of the criminal law." Shkreli, 2016 WL 1122029, at *7.

B. A Stay Will Prevent Unfair Prejudice to the Government

A stay of the civil proceedings is appropriate to prevent the individual defendants from taking unfair advantage of broad civil discovery rules in the Civil Case to avoid the restrictions that would otherwise pertain to them as defendants in the Criminal Case. The Second Circuit has recognized that the government has "a discernible interest in intervening in order to prevent discovery in [a] civil case from being used to circumvent the more limited scope of discovery [available] in [a] criminal matter." Chestman, 861 F.2d at 50. The vastly different rules that apply to discovery in civil and criminal cases are important reasons for staying civil proceedings and discovery in cases where there are parallel criminal proceedings. See, e.g., Bridgeport Harbour Place I, LLC, 269 F. Supp. 2d at 10 ("Courts are very concerned about the differences in discovery afforded to parties in a civil case and those of a defendant in a criminal case."); Twenty First Century Corp., 801 F. Supp. at 1010 (granting stay, in part, because "[a]llowing civil discovery to proceed . . . may afford defendants an opportunity to gain evidence to which they are not entitled under the governing criminal discovery rules"); SEC v. Beacon Hill Asset Management LLC, No. 02 Civ. 8855 (LAK), 2003 WL 554618, at *1 (S.D.N.Y. Feb. 27, 2003) (in context of request for civil stay of discovery due to pending criminal investigation, "the

principal concern with respect to prejudicing the government's criminal investigation is that its targets might abuse civil discovery to circumvent limitations on discovery in criminal cases"); Phillip Morris Inc. v. Heinrich, No. 95 Civ. 0328 (LMM), 1996 WL 363156, at *19 (S.D.N.Y. June 28, 1996) (without stay, targets "may have an opportunity to gain evidence to which they are not entitled under criminal discovery rules"); Governor of the Fed'l Reserve System v. Pharaon, 140 F.R.D. 634, 639 (S.D.N.Y. 1991) ("A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery") (citations omitted). Unlike in a civil case, criminal defendants ordinarily are not entitled to depose prosecution witnesses, much less engage in the type of far-ranging inquiry permitted by the civil rules. See, e.g., Fed. R. Crim. P. 15(a). Nor are they able to obtain documents reflecting prior statements of witnesses before trial. See 18 U.S.C. § 3500; Fed. R. Crim. P. 16(a)(2). Likewise, the criminal discovery rules require production only of those documents which the government intends to offer at trial, are material to preparing the defense, or were obtained from or belong to a defendant. See Fed. R. Crim. P. 16(a)(1)(E).

Discovery in criminal cases is narrowly circumscribed for important reasons entirely independent of any generalized policy of restricting the flow of information to defendants. Three major reasons regularly provided by courts in justifying narrow criminal discovery are: (1) that the broad disclosure of the essentials of the prosecution's case may lead to perjury and manufactured evidence; (2) that the revelation of the identity of prospective witnesses may create the opportunity for intimidation; and (3) that the criminal defendants may unfairly surprise the prosecution at trial with information developed through discovery, while the self-incrimination privilege would effectively block any attempts by the government to discover relevant evidence from the defendants. Nakash v. U.S. Dep't of Justice, 708 F. Supp. 1354, 1366 (S.D.N.Y. 1988);

see also Campbell v. Eastland, 307 F.2d 478, 487 n.12 (5th Cir. 1962); Raphael v. Aetna Cas. & Sur., 744 F. Supp. 71, 75 (S.D.N.Y. 1990); Founding Church of Scientology v. Kelley, 77 F.R.D. 378, 381 (D.D.C. 1977).

Here, discovery by the defendants of the notes of interviews of witnesses, or the taking of such witnesses' depositions, would undoubtedly provide information to the defendants not otherwise discoverable in the Criminal Case, and would shed light on the strategies and progress of the ongoing grand jury investigation as well as any resulting prosecution, thus enhancing the defendants' ability to manufacture evidence or tailor testimony, and otherwise severely hamper the government's ability to conduct an orderly investigation and prosecution.

As the government will suffer irreparable prejudice if the Civil Defendants are permitted to obtain broad civil discovery – such as deposition and interrogatory discovery – prior to the conclusion of the criminal proceedings, the requested stay should be granted.

C. A Stay Will Serve the Public Interest in Law Enforcement

It is well-settled that "a trial judge should give substantial weight to [the public interest in law enforcement] in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims or liabilities." Campbell, 307 F.2d at 487; see also In re Ivan F. Boesky Sec. Litig., 128 F.R.D. 47, 48 (S.D.N.Y. 1989). Indeed, one court has observed that "where both civil and criminal proceedings arise out of the same or related transactions, the government is ordinarily entitled to a stay of all discovery in the civil action until disposition of the criminal matter." United States v. One 1964 Cadillac Coupe DeVille, 41 F.R.D. 352, 353 (S.D.N.Y. 1966).

Stays of proceedings and discovery in civil actions reflect a recognition of the vital interests at stake in a criminal prosecution. See, e.g., United States v. Kordel, 397 U.S. 1, 12 n.27

(1970) ("Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action, sometimes at the request of the prosecution"). Stays have been granted to halt civil litigation that threatened to impede criminal investigations which had yet to yield an indictment. For example, stays have been granted to avoid interference in investigations relating to tax fraud, see, e.g., Campbell, 307 F.2d at 480, insider trading, see, e.g., Chestman, 861 F.2d at 50; Downe, 1993 WL 22126, at *1, insurance fraud, see, e.g., Raphael, 744 F. Supp. at 73, bank fraud, see, e.g., Pharaon, 140 F.R.D. at 639, customs violations, see, e.g., R.J.F. Fabrics, Inc. v. United States, 651 F. Supp. 1437 (U.S. Ct. Int'l Trade 1986), and immigration fraud, see, e.g., Souza v. Shiltgen, No. C-95-3997 MHP, 1996 WL 241824, at *1 (N.D. Cal. May 6, 1986).

A stay is especially appropriate here because there is an indictment pending against all seven of the individual defendants in the Civil Case for engaging in the same activities that are the subject of that action. The prosecution in the Criminal Case will therefore vindicate substantially the same public interest underlying the SEC's civil action, namely, preventing corporate securities fraud. See, e.g., Volmar Distrib., Inc. v. N.Y. Post Co., 152 F.R.D. 36, 39 (S.D.N.Y. 1993) (criminal prosecution would serve to advance public interest in preserving integrity of competitive markets); see also Shkreli, 2016 WL 1122029, at *7 (same).

D. The Civil Parties Will Not Be Prejudiced by the Proposed Stay

The SEC, which does not oppose the filing of the requested order, and the Civil Defendants, some of which oppose the filing of the requested order, will save significant resources by allowing the Criminal Case to proceed unencumbered by the burdens of civil proceedings and discovery. As described above, seven of the Civil Defendants have been charged in the Criminal Case. If these defendants are convicted in the Criminal Case, they will in all likelihood not

proceed to trial in the Civil Case. See SEC v. Freeman, 290 F. Supp. 2d 401, 405 (S.D.N.Y. 2003) ("It is settled that a party in a civil case may be precluded from relitigating issues adjudicated in a prior criminal proceeding and that the Government may rely on the collateral estoppel effect of the conviction in support of establishing the defendant's liability in the subsequent civil action").

Defendants Nordlicht, Levy, Small, Landesman, Mann, SanFilippo and Shulse are also likely to choose to assert their Fifth Amendment rights against self-incrimination in the Civil Case. As detailed above, it would be unfair to permit them to obtain discovery while not requiring that they provide the same. A stay would also likely streamline discovery for the SEC and any defendants who remain in the Civil Case after the conclusion of the criminal proceedings. See Twenty First Century Corp., 801 F. Supp. at 1011 (noting that civil discovery due to pending criminal action "may streamline later civil discovery since the transcripts from the criminal case will be available to the civil parties."). The SEC and the Civil Defendants will therefore benefit from, as opposed to be prejudiced by, a stay of proceedings and discovery in the Civil Case.

E. The Court Will Not Be Inconvenienced If It Stays Proceedings in the Civil Case

The Court will not be inconvenienced as a result of the stay. To the contrary, as stated above, should the Criminal Case result in convictions, it could greatly streamline the Civil Case. A stay of civil proceedings is also likely to narrow or eliminate factual issues in the civil litigation. See, e.g., In re Grand Jury Proceedings, 995 F.2d 1013, 1018 n.11 (11th Cir. 1993) ("Although stays delay civil proceedings, they may prove useful as the criminal process may determine and narrow the remaining civil issues."); United States v. Mellon Bank, 545 F.2d 869, 873 (3d Cir. 1976) (affirming a stay of discovery and stating: "[I]t might well have been that resolution of the criminal case would moot, clarify, or otherwise affect various contentions in the civil case."); Brock v. Tolkow, 109 F.R.D. 116, 119-20 (E.D.N.Y. 1985) (in granting a stay, noting

that "the resolution of the criminal case might reduce the scope of discovery in the civil case or otherwise simplify the issues."). Such narrowing of the issues in the Civil Case will save the Court's time and resources when the civil proceedings' stay is lifted at the conclusion of the criminal proceedings.

CONCLUSION

In sum, the interests of the public, the government, the parties, and the Court strongly weigh in favor of granting the instant motion for a stay. In the interest of permitting the government to complete its prosecution in the Criminal Case and the ongoing criminal investigation, the government respectfully requests that its motion for a stay of civil proceedings in the Civil Case be granted, with the sole exception that the stay not apply to the Receiver or to any work performed or matters related to the Receivership or any future expansion of the Receivership.

Dated: Brooklyn, New York
January 23, 2017

Respectfully submitted,

ROBERT L. CAPERS
United States Attorney
Eastern District of New York

__/s/ Alicyn L. Cooley____
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Cc: Clerk of the Court (DLI)
All Counsel (By ECF)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

16 CV 6848 (DLI)

- against -

PLATINUM MANAGEMENT (NY) LLC,
PLATINUM CREDIT MANAGEMENT, L.P.,
MARK NORDLICHT,
DAVID LEVY,
DANIEL SMALL,
URI LANDESMAN,
JOSEPH MANN,
JOSEPH SANFILIPPO and
JEFFREY SHULSE,

Defendants.

- X

ORDER

1. The Court, having reviewed the Government's Notice of Motion to Intervene and to Stay Civil Proceedings in the above-captioned case (the "Civil Case") submitted pursuant to Rule 24 of the Federal Rules of Civil Procedure, and the Government's Memorandum of Law in Support of its Motion to Intervene and to Stay Civil Proceedings, HEREBY ORDERS THAT:

2. Pending resolution of the criminal matter captioned United States v. Mark Nordlicht et al., 16 CR 640 (DLI), by verdict, pretrial disposition, or until otherwise allowed by the Court, the Civil Case proceedings are stayed and the Securities and Exchange Commission, Platinum Management (NY) LLC, Platinum Credit Management, L.P., Mark Nordlicht,

David Levy, Daniel Small, Uri Landesman, Joseph Mann, Joseph SanFilippo and Jeffrey Shulse will not seek discovery in the Civil Case from one another or from third parties. This Order does not apply to the Receiver or to any work performed or matters related to the Receivership or any future expansion of the Receivership.

IT IS SO ORDERED.

Dated: Brooklyn, New York
_____, 2017

_____
THE HON. DORA LIZETTE IRIZARRY
CHIEF UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK