UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	Civ. Case No. 1:16-cv-06848-DLI-VMS ECF Case **Oral Argument Requested** Date of Service: February 3, 2017

DEFENDANTS DANIEL SMALL'S, DAVID LEVY'S, JOSEPH SANFILIPPO'S, AND JEFFREY SHULSE'S PARTIAL OPPOSITION TO APPLICATION OF THE UNITED STATES TO INTERVENE AND TO STAY CIVIL PROCEEDINGS

LEVINE LEE LLP

650 Fifth Avenue
New York, NY 10019
(212) 223-4400

Attorneys for Defendant Daniel Small

WILSON SONSINI GOODRICH & ROSATI
1301 Avenue of the Americas
New York, NY 10019
(212) 999-5800

Attorneys for Defendant David Levy

FORD O'BRIEN LLP

85 Broad Street
New York, NY 10004
(212) 858-0040

Attorneys for Defendant Joseph SanFilippo

SIDLEY AUSTIN LLP

787 Seventh Avenue
New York, NY 10019
(212) 839-5951

Attorneys for Defendant Jeffrey Shulse

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Defendants Daniel Small, David Levy, Joseph SanFilippo and Jeffrey Shulse ("Defendants") respectfully submit this memorandum of law in partial opposition to the Motion of the United States Attorney's Office for the Eastern District of New York (the "Government") for leave to intervene and to stay civil proceedings (the "Civil Action") until the resolution of the parallel criminal action (the "Criminal Action").

PRELIMINARY STATEMENT

The Government's stay request is overbroad. While the Government has a legitimate interest in ensuring that parallel litigation does not compromise the integrity of the Criminal Action, the Government's claim that it would suffer "irreparable prejudice" absent a Court order that precludes only the Defendants from taking ***any*** discovery for an indefinite period of time is simply not supported by the law. Defendants too have a legitimate interest that justifies a partial stay: ensuring that the civil proceeding does not unduly burden the exercise of their Fifth Amendment rights—which the Second Circuit has identified as the primary consideration in evaluating stay motions of this type. Accordingly, the Court should deny the Government's request to stay all of Defendants' discovery rights and instead order a partial stay that is narrowly tailored to allow discovery to move forward to the extent that it does not infringe on the Government's and Defendants' legitimate interests.

The broad stay requested by the Government is an extraordinary remedy. As the moving party, the Government bears a heavy burden of making a specific showing that it is entitled to this relief. Not only has the Government failed to make this showing, it does not even mention the specific circumstances of this case as a justification for the requested stay. Rather, it is the Government's position that this Court should reflexively accept its conclusory assertion that the Criminal Action will be compromised based on the mere fact that Defendants are under Indictment for charges based on the same conduct alleged here. This position is contrary to the

lead Second Circuit case addressing the standards applicable to stay motions. It also has been squarely rejected in a series of recent decisions in this Circuit and elsewhere. These decisions—which the Government neither acknowledges nor addresses—have each denied blanket stays of civil proceedings, including defendant-discovery, where, as here, the Government's main justification for its motion was that civil discovery would threaten the Government's tactical advantage in the parallel criminal case.

The Government further undermines its conclusory assertion that it "will suffer irreparable prejudice if the Civil Defendants are permitted to obtain broad civil discovery" based on its unexplained request that the Court except the Receiver,[1] appointed in this action at the request of the Securities and Exchange Commission ("SEC"), from its proposed stay of discovery. (*See* Gov't Br. at 1, 14.) While Defendants agree that the Government did not and cannot demonstrate that any stay of these proceedings should apply to the Receivership, the Government's acknowledgement of this fact, without elaboration, is incompatible with the claimed consequences that would result if Defendants are allowed access to any civil discovery. It further evidences that the Government's proposed stay is improperly motivated by tactical, rather than substantive, concerns.

As noted above, Defendants recognize that the Government has an interest in the present litigation and do not oppose its request to intervene. Indeed, it is abundantly clear that the Government has been jointly investigating this case with the SEC from day one. Defendants also recognize that a partial stay designed to account for both the Government's and Defendants' legitimate interests is warranted. Defendants thus respectfully submit that the Court should stay

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[1] Capitalized terms used herein but not defined shall have the meaning ascribed to them in the Government's Memorandum of Law in Support of Application to Intervene and to Stay Civil Proceedings ("Gov't Br.").

depositions, interrogatories and any testimonial-type activities, including the filing of responsive pleadings, as to any party or witness, including Government cooperators, with a legitimate basis for the invocation of the constitutional privilege against self-incrimination under the Fifth Amendment. While such a narrowly-tailored stay should alleviate most (if not all) of the Government's legitimate concerns, Defendants recognize that the Government, or any party, should be permitted to object to specific discovery requests and, barring agreement, seek to extend the stay to those requests upon a specific showing of undue prejudice. Such a partial stay would allow nearly all the documentary discovery to proceed and allow the parties to start deposition discovery during the pendency of the Criminal Action. It would also limit the prejudice to Defendants while safeguarding any legitimate interests that the Government has in delaying discovery in this case.

ARGUMENT

I. THE GOVERNMENT'S MOTION FOR A BLANKET STAY OF THE PROCEEDINGS SHOULD BE DENIED.

The purpose of staying parallel civil proceedings originated from a concern that allowing discovery in the civil litigation "would unduly burden a defendant's exercise of his rights under the Fifth Amendment." *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 97 (2d Cir. 2012) ("*Louis Vuitton*"). The government, however, has converted these stays into a vehicle for preserving its tactical advantage in its criminal proceedings without regard for the defendants' constitutional rights. The Government acknowledged as much to Defendants, stating that it is standard practice for it to apply for blanket stays of parallel proceedings filed by its investigative partners.

The Government's motion here is no different. The Government offers no evidence in support of its conclusory assertion that it would be prejudiced if Defendants are permitted, as is

their right, to take discovery in this matter. Other than the fact that Defendants are under indictment, the Government does not reference any facts specific to this case in support of its request for a stay. In other words, the Government's position is that it is automatically entitled to a stay of parallel civil litigation whenever it, in its discretion, determines that such relief is necessary following the return of an indictment. Given that stays are disfavored and it is the Government who bears the burden on this motion, the Government must do more than file a stock brief in the expectation that the Court will rubber stamp its request for a stay. Because the Government has offered little support for its motion, the Court should reject the Government's request to stay all of Defendants' discovery rights and instead order a partial stay that is narrowly-tailored to allow discovery to go forward to the extent that it does not implicate the Government's or Defendants' legitimate interests.

A. The Government's Desire to Preserve Its Tactical Advantage Is Insufficient to Support a Blanket Stay of the Proceedings.

The Government has not met its burden to establish its need for the requested stay in this matter. *See Louis Vuitton*, 676 F.3d at 97 ("The person seeking a stay 'bears the burden of establishing its need.'") (citing *Clinton v. Jones*, 520 U.S. 681, 708 (1997)). A stay of civil proceedings is an "extraordinary remedy." *Id.* at 98 (citation omitted). As such, the Court's "starting point" should be that "discovery and other proceedings in a civil action brought by the Securities and Exchange Commission ought to proceed in the normal course, notwithstanding the happenstance that some discovery also relates to a parallel criminal matter." *S.E.C. v. Saad*, 384 F. Supp. 2d 692, 693 ("*Saad II*") (S.D.N.Y. 2005). The Court should also be "justifiably skeptical of blanket claims of prejudice by the government where—as here—the government is responsible for the simultaneous proceedings in the first place." *S.E.C. v. Cioffi*, No. 08-CV-2457 (FB) (VVP), 2008 WL 4693320, at *1 (E.D.N.Y. Oct. 23, 2008).

In making its argument, the Government fails to cite an entire line of recent district court decisions, in this Circuit and others, that have rejected the position that it advances here: that "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." (Gov't Br. at 2); *see, e.g.*, *United States v. Fin. Indus. Regulatory Auth. (FINRA)*, 607 F. Supp. 2d 391, 394 (E.D.N.Y. 2009) (rejecting the government's argument that a stay of discovery was warranted to preserve its tactical advantage in the criminal proceeding); *Cioffi*, 2008 WL 4693320, at *1-2 (denying the Government's request for a blanket stay in order to prevent defendants from obtaining civil discovery); *see also e.g.*, *S.E.C. v. Kanodia*, 153 F. Supp. 3d 478, 483-84 (D. Mass. 2015) (rejecting government's "tactical" request to stay discovery because of its "concern[] about having to reveal discovery … earlier than it might otherwise have to"); *S.E.C. v. O'Neill*, 98 F. Supp. 3d 219, 221-23 (D. Mass. 2015) (rejecting government's motion to stay discovery in order to protect "a tactical advantage."); *S.E.C. v. Mazzo*, No. 12-1327-DOC, 2013 WL 812503, at *2 (C.D. Cal. Feb. 25, 2013) (denying request for broad stay without particularized showing on a discovery-specific basis); *S.E.C. v. Gupta*, No. 11-Civ.-7566 (JSR), 2011 WL 5977579, at *1 (S.D.N.Y. Nov. 30, 2011) (stating the standard rule is that discovery in an SEC action should proceed even where some of the discovery pertains to a pending criminal matter); *S.E.C. v. Chakrapani*, No. 09-Civ.-325 (RJS), 2010 WL 2605819, at *7-8, *11 (S.D.N.Y. June 29, 2010) (rejecting the government's assertion that it would be prejudiced by the application of the Federal Rules of Civil Procedure in a parallel civil action); *S.E.C. v. Fraser*, No. 09-Civ.-0443 (PHX), 2009 WL 1531854, at *3-4 (D. Ariz. June 1, 2009) ("[T]he vast majority of cases hold that such a stay is improper absent a specific showing of prejudice that cannot be remedied by anything other than

a complete stay of the civil proceedings."); *S.E.C. v. Sandifur*, No. C05-1631C, 2006 WL 3692611, at *2 (W.D. Wash. Dec. 11, 2006) ("Although courts have been receptive to Government stay requests in civil cases brought by parties other than the Government, results in recent years have been markedly different when the Government itself brings a civil lawsuit simultaneous with a criminal proceeding."); *S.E.C. v. Saad,* 229 F.R.D. 90, 92 (S.D.N.Y. 2005) ("*Saad I*") (dismissing the government's argument that defendant was receiving a "special advantage" by pursuing discovery in a parallel SEC civil action); *Saad II*, 384 F. Supp. 2d at 693 (recognizing the standard rule that discovery in an SEC action "ought to proceed in the normal course, notwithstanding the happenstance that some of the discovery also relates to the criminal matter").[2]

These cases demonstrate that the Government's desire to maintain its tactical advantage does not provide a sufficient justification to prevent Defendants from taking any discovery pending resolution of the Criminal Action. As one district court recently stated:

> [I]n this case, the government is largely concerned about having to reveal discovery earlier than it might otherwise have to do. ***This is a strategic and tactical consideration that has little to do with the public interest or the interests of the defendants.*** If the government and the SEC choose to bring parallel civil and criminal cases close in time to each other, then each entity must be prepared to go ahead with its case on a usual schedule. The SEC and the government cannot pursue a strategy that allows them to take advantage of the benefits of dual prosecutions, but then complain when the defendants, too, find ways to benefit from the otherwise very burdensome task of having to defend on two fronts at the same time. Further, the evidence supporting an indicted criminal case ought to be able to survive scrutiny, and ***the government should not be so invested in withholding information until disclosure is required—after all, the goal is a just resolution in both the civil and criminal cases, and there is no doubt that***

[2] *See also, e.g.*, *S.E.C. v. Oakford Corp*., 181 F.R.D. 269, 272-73 (S.D.N.Y. 1998) (rejecting the argument that there is any harm to the government where a defendant's discovery requests in defending itself against another government agency happen to also be helpful in the criminal case).

> ***confidence in an outcome is highest where the evidence is known and can be tested***.

O'Neill, 98 F. Supp. 3d at 223-24 (emphasis added).

These same principles should result in the denial of the Government's motion here where the driving force behind the Government's motion for a stay is the preservation of its tactical advantage in the Criminal Action. (Gov't Br. at 12 (arguing that "[a] stay of 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.").) As will be shown below, the Government has not met its burden of establishing undue prejudice to the Criminal Action in the absence of a stay, and the mere loss of the Government's tactical advantage does not trump Defendants' right to pursue discovery in the Civil Action.

B. The Government Has Not Met Its Burden to Establish Undue Prejudice.

To prevail on a motion to stay the proceedings, the moving party must establish "undue prejudice" or "interference with [] constitutional rights." *Louis Vuitton*, 676 F.3d at 97 ("'[A]bsent a showing of undue prejudice upon defendant or his constitutional rights, there is no reason why a plaintiff should be delayed in its efforts to diligently proceed to sustain its claim.'") (alteration in original) (quoting *Hicks v. City of N.Y.*, 268 F. Supp. 2d 238, 241 (E.D.N.Y. 2003)). In determining whether the movant had made this showing, the Second Circuit in *Louis Vuitton* approved a district court's evaluation of the following 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 case, including whether the defendants have been indicted; 3) the private interests of the plaintiff[] in proceeding expeditiously weighed against the prejudice to plaintiff[] caused by the delay; 4) the private interests of and burden on defendants; 5) the interests of the court; and 6) the public interest.

Id. at 99 (citation omitted); *accord S.E.C. v. One or More Unknown Purchasers of Sec. of Global Indus., Ltd.*, No. 11-Civ.-6500 (RA), 2012 WL 5505738, at *2 (S.D.N.Y. Nov. 9, 2012) ("*Global Industries*") (analyzing the identical factors and noting that "[b]alancing these factors is a case-by-case determination, with the basic goal being to avoid prejudice"). The Second Circuit cautioned, however, that these factors "do no more than act as rough guide for the district court as it exercises its discretion" and that a district court's decision "ultimately requires and must rest upon a particularized inquiry into the circumstances of, and the competing interests in, the case." *Louis Vuitton*, 676 F.3d at 99 (internal quotations omitted).

The Government has not met its burden because it has failed to make a specific showing of undue prejudice if this action proceeds. It has not identified any actual harm that would result without the stay. Nor does it support its conclusory assertion of prejudice with any evidence–submitted *in camera* or otherwise–or any reference to the specific facts of this case. Conversely, Defendants face significant prejudice if they are not permitted to take any discovery in this action for an indefinite, likely prolonged, period until resolution of the Criminal Action. In addition, the remaining equities do not support the issuance of a blanket stay of proceedings, including all of Defendants' discovery rights.

1. The Government's Stay Request Would Apply to All Discovery Without a Showing of Any Prejudice on Its Part.

As noted above, the Government cites no facts specific to this case in support of its requested stay. Rather, the Government relies on the mere fact that Defendants are under indictment as justification for its request. (*See* Gov't Br. at 11-14.) The Second Circuit, however, indicated in *Louis Vuitton* that the fact that the defendants are under an indictment based on the same subject matter, does not, standing alone, constitute a sufficient basis for granting a full stay of discovery in parallel civil litigation. *Louis Vuitton*, 676 F.3d at 101-02 &

n.17 ("District courts have not, however, treated the fact that an indictment of the defendants has been handed up at the time of their making a motion for a stay of the civil proceedings as requiring that the stay be entered.").

While the Government has cited several cases that have granted the type of stay requested here, most of these cases pre-date the Second Circuit's decision in *Louis Vuitton* by years.[3] The few cases that the Government cites that were decided in the past few years are not only contrary to *Louis Vuitton* and the great weight of recent authority (*see supra* § I.A.), they are also distinguishable from the present case or inapposite. For example, while the Government relies on the Southern District's decision in *Global Industries* (*see* Gov't Br. at 9, 10, 11), that court actually rejected the argument that the Government relies on here, stating that: "[t]he Court is not convinced that a civil defendant's access to, and use of, civil discovery to gain unavailable insight into a criminal proceeding, without more provides compelling support for a discovery stay." *Global Indus.*, 2012 WL 5505738, at *5. There, the Court instead relied on the government's proffer demonstrating "specific and serious risks of prejudice to the Criminal Case," which the Government has not provided here. *Id.* at *6. The Government's reliance on this Court's decision in *S.E.C. v. Shkreli*, No. 15-Civ.-7175 (KAM) (RML), 2016 WL 1122029 (E.D.N.Y. Mar. 22, 2016), is similarly misplaced. (*See* Gov't Br. at 10, 12 (quoting *Shkreli*, 2016 WL 1122029, at *7).) As the Government notes, the Court identified the "'substantial overlap of issues' in the criminal and civil matters" as "particularly significant" to its conclusion. *Shkreli*, 2012 WL 1122029, at *4. But the reason for the significance was a concern for the

[3] *See, e.g., S.E.C. v. Beacon Hill Asset Mgmt. LLC.,* No. 02-Civ.-8855, 2003 WL 554618 (S.D.N.Y. Feb. 27, 2003); *Bridgeport Harbour Place I, LLC v. Ganim*, 269 F. Supp. 2d 6 (D. Conn. 2002) (where Defendant also moved to stay the civil proceedings); *S.E.C. v. Downe*, No. 92-Civ.-4092, 1993 WL 22126 (S.D.N.Y. Jan. 26, 1993).

defendants' constitutional rights, as opposed to the government's right to maintain its tactical advantage. *Id.* The Court stated: "Where there is overlap, there is a greater concern about self-incrimination. By contrast, if 'there is no overlap, ***there would be no danger of self-incrimination and accordingly no need for a stay***.'" *Id.* (emphasis added) (quoting *Trustees of Plumbers & Pipefitters Nat. Pension Fund v. Transworld Mech., Inc.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995)). Given that the Government's requested stay of proceedings here is not required to safeguard Defendants' constitutional rights, *Shkreli*'s analysis does not support the granting of such extreme relief. Rather, the narrowly-tailored stay that Defendants propose below is all that is necessary to fully address and protect the Defendants' Fifth Amendment rights.

Moreover, the Government offers no support for its conclusory assertion that it will suffer "irreparable prejudice" because civil discovery would "shed light on the strategies and progress of the ongoing grand jury investigation as well as any resulting prosecution." (*See* Gov't Br. at 14.) Far from supporting the requested relief, the Government's assertion raises serious questions about whether the Government abided the strict grand jury secrecy requirements of Federal Rule of Criminal Procedure 6(e). These requirements, *inter alia*, prohibit the Government from sharing grand jury materials with the SEC. *Id*. Thus, it is difficult to understand why the Government believes that Defendants' access to non-grand jury related documentary discovery, including third-party document discovery and the notes of witness-interviews, would shed light on its grand jury investigation. In any event, the Government offers no explanation for why a full stay of Defendants' discovery is necessary to protect its grand jury investigation. Rather, as this Court has previously found, this particular concern does not justify a request for a blanket stay of Defendants' discovery, but is better addressed on a case-by-case

basis through Government and other party objections to specific discovery requests. *Cioffi*, 2008 WL 4693320, at *2 ("The far more sensible approach is to allow discovery to go forward, but to allow the U.S. Attorney to object to particular requests.").

The Government also fails to offer any evidence to support its conclusory assertion that allowing Defendants to engage in discovery would "enhance[] the defendants' ability to manufacture evidence, and otherwise severely hamper the government's ability to conduct an orderly investigation and prosecution." (*See* Gov't Br. at 14.) The mere recitation of these concerns is insufficient to meet the Government's burden. As its own cases suggest, the Government, at the very least, must make a proffer that demonstrates "specific and serious risks of prejudice to the Criminal Case sufficient to justify a stay of discovery of the Civil Case." *See Global Indus.*, 2012 WL 5505738, at *5-6; *see also Oakford Corp.*, 181 F.R.D. at 272 ("To the extent that [discovery] demands threaten the integrity of the criminal case in the sense of potential witness tampering … informant exposure … or the like, they are … subject to being narrowed or quashed upon an appropriate showing [by] the United States Attorney."). As the Government has made no showing to support its claim of prejudice, the Government has not met its burden.

The Government's claim of undue prejudice also fails because, to the extent there is any prejudice (which has not been shown), it is of the Government's own making. There is no dispute here that the Government and SEC jointly investigated this case. In addition to coordinating the unsealing of the indictment in the Criminal Action and the Complaint in this case on the same day, each entity acknowledged the joint investigation in simultaneously issued press releases. The United States Attorney "thanked the Securities and Exchange Commission ... for their significant cooperation and assistance during the investigation." (*See* Dec. 19, 2016

Government Press Release.)[4] The SEC similarly stated that it "appreciate[d] the assistance of the U.S Attorney's Office for the Eastern District of New York." (*See* Dec. 19, 2016 SEC Press Release.)[5] Given the joint investigation and the Government's awareness that the SEC would be filing this case at the same time it filed the Criminal Action, the Government should not be permitted to complain of being prejudiced by Defendants' right to defend themselves. *See Saad I*, 229 F.R.D. at 91 ("[I]t is stranger still that the U.S. Attorney's Office, having closely coordinated with the SEC in bringing simultaneous civil and criminal actions against some hapless defendant, should then wish to be relieved of the consequences that will flow if the two actions proceed simultaneously.").

Nor does the Government explain why at least some discovery cannot proceed, given that it asks the Court to exempt the Receivership, and its ancillary litigation, from its requested stay. To be clear, Defendants do not suggest that any stay of these proceedings should apply to the Receiver. But if the Government was actually concerned, as it represents, that any civil discovery would "shed light on the strategies and progress of an ongoing grand jury investigation" (Gov't Br. at 14), there is no basis for distinguishing Defendants from the Receiver because the grand jury secrecy rules apply equally to both. Specifically, where the Receiver proposes, with the aid of counsel, to "conduct, defend, or otherwise participate in any investigation" and discovery in this case, as well as to commence and pursue any other litigation it deems necessary. (App. for Order Approving Retention of Cooley LLP *Nunc Pro Tunc* to the Appointment Date, ¶¶16(a-k) [ECF. No. 65].) Thus, the Government's acknowledgement that

[4] The Government's press release is accessible at: https://www.justice.gov/usao-edny/pr/platinum-partners-founder-and-chief-investment-officer-among-five-indicted-1-billion (last visited Feb. 2, 2017).

[5] The SEC's press release is accessible at: https://www.sec.gov/news/pressrelease/2016-267.html (last visited Feb. 2, 2017).

none of the Receiver's work will compromise any of its legitimate interests further undermines its unsupported claim of prejudice that would follow from any Defendant-initiated discovery.

2. The Stay Requested by the Government Would Result in Significant Prejudice to Defendants.

The Court should reject the Government's conclusory assertion that Defendants will not be prejudiced by a full stay of their discovery rights. (Gov't Br. at 16.) Defendants have an acute interest in defending themselves in this proceeding, especially given the public manner in which both the Government and SEC touted the filing of the Criminal and Civil Actions. *See S.E.C. v. Jones*, No. 04-Civ.-4385 (RWS), 2005 WL 2837462, at *2 (S.D.N.Y. Oct. 28, 2005) (recognizing that where a defendant's "reputation and credibility have been called into question" "he deserves a timely opportunity to clear his name"). Despite the Government's assertions that the criminal proceedings are all that matter, the fact remains that "the defendants are not just facing a criminal indictment; they are also facing a very serious SEC civil action, and they are thus fully entitled to the timely discovery that federal law grants them in defending such an action." *Saad I*, 229 F.R.D. at 92.

Moreover, the Government's claim that Defendants will suffer no prejudice is without merit given that it requested an indefinite stay that will likely persist for years. Defendants have a legitimate concern that the requested delay will make discovery in this already complex matter even more difficult. As time passes, there is a greater risk that relevant documents may be lost or destroyed, or witnesses will become unavailable or their memories will have faded. *See, e.g.*, *Trustees of Plumbers*, 886 F. Supp. at 1140 (stating that parties to the civil case "have a legitimate interest in the expeditious resolution of their case and their argument that they could face prejudice from a stay through a loss of evidence is well-taken."). These concerns are particularly severe here given that the SEC Complaint is premised on alleged conduct dating

back to 2012. (*See e.g.,* Compl. ¶¶ 3, 44, 50, 58, 76, 188, 191, 194, 197.) Thus, the prejudice to Defendants further supports crafting a narrowly-tailored stay designed to permit some discovery without infringing on the Government's legitimate concerns–not a blanket stay of Defendants' discovery rights designed solely to preserve the Government's tactical advantage.[6]

3. The Other Equities Do Not Support the Requested Stay.

The Government suggests that the Court too will benefit from a blanket stay of proceedings, which will likely leave this case on the Court's docket for years. It argues that the Criminal Case "could greatly streamline" and "narrow[] the issues in the Civil Case." (Gov't Br. at 16.) However, "[t]he Court has an interest in the efficient resolution of the Civil Case." *Global Indus.*, 2012 WL 5505738, at *4-5. It is unclear how indefinitely staying an action on the Court's docket is a benefit. This Court presides over both the Civil and Criminal Actions and will be aware of the dual discovery processes, including, of course, any issues that might arise. Allowing discovery to proceed serves the Court's interest in the fair and efficient administration of justice while still being able to adjudicate any actual discovery concerns that arise. *See e.g., United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.,* 811 F. Supp. 802, 808 (E.D.N.Y. 1992).

In addition, the Government has failed to demonstrate that a full stay is in the public's interest. As one court recently stated, the Government's "concern[] about having to reveal discovery or expose its witnesses to questioning earlier than it might otherwise have to do . . . is

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[6] The Government also argues that there is no prejudice because the requested stay will "likely streamline discovery." (*See* Gov't Br. 15-16.) But this argument assumes that it will prevail in the Criminal Action. However, if the Government is wrong, the requested stay would result in an unnecessarily lengthy delay in the completion of these proceedings and would prejudice Defendants for the reasons set forth above.

a strategic and tactical consideration that has ***little to do with the public interest or the interests of the defendants***." *Kanodia*, 153 F. Supp. 3d at 483 (emphasis added).

Given the absence of any actual prejudice to the Government, the significant prejudice to Defendants and that the equities do not support the requested blanket stay, the Court should deny the relief requested by the Government in favor of the narrowly-tailored stay proposed by Defendants.

II. A PARTIAL STAY SHOULD BE NARROWLY TAILORED TO DISCOVERY THAT DOES NOT IMPLICATE A PARTY'S OR WITNESS'S FIFTH AMENDMENT RIGHTS.

While the Government has failed to meet its burden to justify a blanket stay of civil proceedings, excepting only those proceedings involving the Receiver, Defendants agree that a partial stay is warranted in this case. As discussed above, the principal concern in evaluating a stay request is "the extent to which continuing the civil proceeding would unduly burden a defendant's exercise of his rights under the Fifth Amendment." *Louis Vuitton*, 676 F.3d at 97. Thus, Defendants respectfully submit that the Court should stay depositions, interrogatories and any testimonial-type activities, including the filing of responsive pleadings as to parties or witnesses with a legitimate basis for the invocation of the privilege against self-incrimination under the Fifth Amendment. Such a stay would mitigate any prejudice to the Government, as well as Defendants, and has been employed in numerous cases. *See, e.g.*, *Kanodia*, 153 F. Supp. 3d at 483 (staying depositions of the defendant and witness to avoid prejudice to their Fifth Amendment rights); *O'Neill*, 98 F. Supp. 3d at 225 (denying the Government's stay "with the exception of a deposition of [the defendant] which is stayed until further Court Order" and permitting the Government to "object to particular discovery requests, which the Court will deal with on a case-by-case basis."); *Gupta*, 2011 WL 5977579, at *1 (making a determination that seven specific depositions should proceed where the government had not raised any concerns

about their testimony and they had already testified previously on the same subject matter); *Saad II*, 384 F. Supp. 2d at 693-94 (granting a stay of six depositions "because of the likelihood that, prior to the conclusion of the criminal case, all six of these persons would invoke the Fifth Amendment privilege against self-incrimination and refuse to testify substantively in the instant case, thus rendering the taking of their depositions prior to the conclusion of criminal case of little substantive value"). While such a narrowly-tailored stay should alleviate most (if not all) of the Government's legitimate concerns, Defendants also note that the Government, as well as the parties, should be permitted to object to specific requests and, barring agreement, to apply to extend the stay to those requests upon a specific showing of undue prejudice.

Defendants' proposed stay would promote judicial efficiency by allowing nearly all documentary discovery to proceed and permit the parties to start certain deposition discovery during the pendency of the Criminal Action. It thus would also limit the prejudice to Defendants while safeguarding any legitimate interests that the Government has in delaying the proceedings in this case.

CONCLUSION

For the foregoing reasons, the Government's request for a blanket stay of the proceedings, including Defendants' discovery rights, should be denied and the Court should order a partial stay of the proceedings as requested by the Defendants above.

February 3, 2017

Respectfully Submitted,

By: /s/ Michael Sommer
Michael Sommer
Morris J. Fodeman

WILSON SONSINI GOODRICH & ROSATI
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
(212) 999-5800
Msommer@wsgr.com
mfodeman@wsgr.com
Attorneys for Defendant David Levy

By: /s/ Seth L. Levine
Seth L. Levine
Scott B. Klugman
David J. Lizmi

LEVINE LEE LLP
650 Fifth Avenue, 13th Floor
New York, New York 10019
(212) 223-4400
slevine@levinelee.com
sklugman@levinelee.com
dlizmi@levinelee.com
Attorneys for Defendant Daniel Small

By: /s/ Adam C. Ford
Adam C. Ford
Kevin O'Brien

FORD O'BRIEN LLP
85 Broad Street, 28th Floor
New York, New York 10004
(212) 858-0040
aford@fordobrien.com
kobrien@fordobrien.com
Attorneys for Defendant Joseph SanFilippo

By: /s/ David M. Rody
David M. Rody
Barry W. Rashkover
Michael D. Mann
Sonia Marquez

SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
(212) 839-5951
drody@sidley.com
mdmann@sidley.com
Attorneys for Defendant Jeffrey Shulse

CERTIFICATE OF SERVICE

I, Seth L. Levine, hereby certify that on February 3, 2017, a copy of Defendants' Partial Opposition to Motion of the United States in Support of Application to Intervene and to Stay Civil Proceedings was served via ECF on the following persons:

Winston M. Paes
Alicyn L. Cooley
Lauren H. Elbert
Sarah M. Evans
Assistant U.S. Attorneys
United States Attorney's Office
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201

Dated: February 3, 2017

/s/ Seth L. Levine
Seth L. Levine