UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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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

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

Date of Service: February 13, 2017

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PRELIMINARY STATEMENT

The government respectfully submits this reply memorandum of law in further 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"), and a related, ongoing grand jury investigation.[1] Defendants Uri Landesman and Joseph Mann do not oppose the government's motion to stay the Civil Case (the "Stay Motion"). Defendants Platinum Management (NY) LLC, Platinum Credit Management, L.P., Mark Nordlicht, David Levy, Joseph SanFilippo, Daniel Small and Jeffrey Shulse (collectively, the "Opposing Defendants") oppose the Stay Motion in part, and instead seek a "partial stay" that would permit all discovery in the Civil Case to proceed except "depositions, interrogatories and any testimonial-type activities, including the filing of responsive pleadings, as to any party or witness . . . with a legitimate basis for the invocation of the constitutional privilege against self-incrimination under the Fifth Amendment." Small Br. at 2-3.[2] The Opposing Defendants argue that the government's Stay Motion should be denied because it is "improperly motivated by tactical, rather than substantive concerns." Id. at 2.

To the contrary, the government has demonstrated the appropriateness of a complete stay of the Civil Case until the conclusion of the criminal proceedings and this district's precedent supports such a result. Further, it is the Opposing Defendants' proposal that seeks an

[1] None of the defendants opposes the government's intervention in the Civil Case pursuant to Federal Rule of Civil Procedure 24(a).

[2] The opposition brief filed by defendants Daniel Small, David Levy, Joseph SanFilippo and Jeffrey Shulse, in which defendants Platinum Management (NY) LLC, Platinum Credit Management, L.P. and Mark Nordlicht also join, ECF No. 79, and the supplementary brief filed by Shulse, ECF No. 80, are respectively referred to herein as "Small Br." and "Shulse Br."

unlawful tactical advantage in the Criminal Case by means of asymmetrical discovery favoring the defendants. Under the Opposing Defendants' unwieldy proposal, not only would the defendants obtain evidence that they otherwise would not yet be entitled to receive in the Criminal Case, but also, the government would be forced into extensive litigation to protect the disclosure of evidence that would prejudice the Criminal Case (such as the depositions of key trial witnesses). That process would necessarily reveal the government's witnesses and trial strategy – again, information to which the defendants are not entitled at this juncture in the Criminal Case. The Opposing Defendants, however, would be afforded protections broader even than the Fifth Amendment's; not only would they be shielded from questioning and reciprocal discovery, but also, because their depositions would be stayed, they would not have to assert the Fifth Amendment and suffer the attendant adverse consequences in the Civil Case. Such a one-sided use of civil discovery is clearly contrary to law.

For these reasons and those set forth below, the government's Stay Motion should be granted in full.

ARGUMENT

As set forth in the government's opening memorandum of law, this Court has the inherent authority to stay the Civil Case, see Landis v. N. Am. Co., 299 U.S. 248 (1936), and in determining whether to do so, the Court should balance 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 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). A balancing of those factors here – along with a consideration of the equities, and in particular the need to prevent asymmetrical discovery and witness intimidation – demonstrate that a complete stay is warranted.

I. A Complete Stay Is Warranted, As Recognized by the Prevailing Case Law

In arguing against the requested stay, the Opposing Defendants invoke a "series of recent decisions in this Circuit and elsewhere" that have denied complete stays "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." Small Br. at 1, 2. Despite these conclusory assertions, the government's Stay Motion is not an attempt to secure a tactical advantage in the Criminal Case; rather, the government seeks merely the opportunity for discovery in the Criminal Case to proceed as it normally would in any criminal case, with the appropriate constraints. See, e.g., 18 U.S.C. § 3500; Fed. R. Crim. P. 15(a), 16(a)(1)(E), 16(a)(2).

The Opposing Defendants' briefs make clear, by contrast, that their requested "partial" stay would in fact provide them with a tactical advantage. They would be able to use the limited stay as a sword in the Criminal Case by, inter alia, obtaining a preview of the names of the government's trial witnesses and their anticipated trial testimony via depositions, and as a shield in the Civil Case, by avoiding depositions, interrogatories, other discovery requests and even answering the SEC's complaint. The defendants should not be granted that improper windfall, and the government should be spared the undue prejudice that it inevitably would sustain in the criminal proceedings as a result of such a targeted and asymmetrical civil discovery process.[3]

[3] The Opposing Defendants dismiss the harm that their requested "partial" stay would cause the government's ongoing grand jury investigation, and instead baselessly suggest

Moreover, the factors guiding the Court's inquiry strongly counsel in favor of granting a complete stay of the Civil Case.[4] Specifically, a complete stay is warranted because of: (1) the significant overlap between the parallel criminal and civil proceedings; (2) the fact that a criminal indictment already has been returned against all seven individual defendants for engaging in the same activities that are the subject of the Civil Case; (3) the public's interest in the "effective prosecution of those who violate the securities laws," and more specifically, in preventing corporate securities fraud, which will be served by the criminal proceedings, see, e.g., Volmar Distrib., Inc. v. N.Y. Post Co., 152 F.R.D. 36, 39 (S.D.N.Y. 1993); see also SEC v. Shkreli, No. 15 CV 7175 (KAM), 2016 WL 1122029, at *7 (E.D.N.Y. Mar. 22, 2016); (4) the Court's interest in judicial economy and in safeguarding 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 Civil Case beyond the scope permitted in the Criminal Case would lead to

impropriety in that investigation. See Small Br. at 10. The government's criminal investigation was conducted in parallel with the SEC's civil investigation, as is typical in federal securities and investment adviser fraud cases. Further, it is patent that, if the defendants were to interview or depose witnesses as part of discovery in the Civil Case, the defendants very easily could impede the government's ongoing criminal investigation by, for example, asking witnesses about their contact with and statements to the government in that investigation and whether they have been subpoenaed to testify in the grand jury, and chilling their cooperation with the government.

[4] The Opposing Defendants mischaracterize the government's requested exception relating to the Receivership as inconsistent with its arguments for a complete stay, see Small Br. at 2, 12, while conceding that the requested exception is appropriate, id. at 12 ("Defendants do not suggest that any stay of these proceedings should apply to the Receiver."). The government has requested that the stay not apply to the work of the Receiver not for strategic reasons but rather to further the goal of recovering the maximum amount possible for the victims of the charged Platinum schemes. Counsel for defendants Nordlicht and Levy at the January 12, 2017 status conference in the Criminal Case stated, in sum and substance, that at least their clients share the same goal. Moreover, the respective incentives of the Receiver and the defendants, who are defending against charges in both the Civil and Criminal Cases, unquestionably differ and, as such, the Receiver does not present the same concerns as the defendants.

"perjury and manufactured evidence" and the "revelation of the identity of prospective witnesses," SEC v. One or More Unknown Purchasers of Securities of Global Indus., Ltd., No. 11 Civ. 6500 (RA), 2012 WL 5505738, at *3-*6 (S.D.N.Y. Nov. 9, 2012); and (5) the likelihood that a complete stay would streamline discovery for the SEC and any defendants who remain in the Civil Case after the conclusion of the criminal proceedings.[5] Rather than reckon with these justifications for a complete stay, the Opposing Defendants simply repeat their "tactical advantage" refrain.

Further to the government's foregoing concerns, an important reason for a complete stay of the Civil Case is the need to limit the potential for witness intimidation and tampering with evidence. See, e.g., Global Indus., Ltd., 2012 WL 5505738 at *5-*6; Nakash v. U.S. Dep't of Justice, 708 F. Supp. 1354, 1366 (S.D.N.Y. 1988); Campbell v. Eastland, 307 F.2d 478, 487 n.12 (5th Cir. 1962). Courts have found that the mere potential for such corruption of a criminal case counsels in favor of a complete stay even when there is no evidence that the parties to the civil case might engage in improper activities. See, e.g., SEC v. Nicholas, 569 F. Supp. 2d 1065, 1072 & n.8 (C.D. Cal. 2008) (potential for witness or evidence tampering weighed in favor of stay of parallel SEC proceeding, even absent suggestion that "Defendants seek civil discovery for an illegal or unethical purpose"). Such potential unquestionably exists here. As the government recognized at the January 12, 2017 status conference in the Criminal Case, during colloquy about the importance of preventing the defendants from communicating with each other and investors in Platinum's funds as a condition of their pretrial release, there are ongoing witness

[5] The Opposing Defendants dismiss the benefit of streamlining discovery and argue that the stay "would result in an unnecessarily lengthy delay in the completion of [the civil] proceedings." Small Br. at 14 n.6. This argument strains credulity because, even under the Opposing Defendants' proposal, the defendants' depositions and other discovery, their answer to the SEC's complaint and trial would be deferred until after the end of criminal proceedings.

intimidation concerns in this case because, inter alia, many victims of the charged Platinum scheme and most of the defendants are members of or are tied to the same small community. A complete stay of discovery is thus necessary in order to protect the integrity of the Criminal Case and the ongoing grand jury investigation.

The Opposing Defendants' arguments against a complete stay are unavailing. In support of their position, they rely most heavily on two cases from the Southern District issued by Judge Jed Rakoff – Saad (reported as SEC v. Saad, 229 F.R.D. 90 (S.D.N.Y. July 23, 2005) ("Saad I") and SEC v. Saad, 384 F. Supp. 2d 692 (S.D.N.Y. 2005) ("Saad II")) and SEC v. Gupta, No. 11 Civ. 7566 (JSR), 2011 WL 5977579, at *1 (S.D.N.Y. Nov. 30, 2011)) – and two District of Massachusetts decisions – SEC v. Kanodia, 153 F. Supp. 3d 478, 483-84 (D. Mass. 2015), and SEC v. O'Neill, 98 F. Supp. 3d 219, 221-23 (D. Mass. 2015). See Small Br. at 4-7, 14-16. As is plain from their provenance, these decisions are not controlling here, and the Opposing Defendants cannot wish away this district's enduring recognition of the appropriateness of a complete stay in circumstances such as those presented here.

In recent years, courts in the Eastern District of New York routinely have granted complete stays of Civil Cases where parallel criminal cases had proceeded past indictment. In many of these cases, the defendants either affirmatively sought, or otherwise did not object to, complete stays of civil discovery, as defendants Landesman and Mann have done in this case. See, e.g., SEC v. St. Julien, No. 16 CV 2193 (BMC) (May 26, 2016 Order) (complete stay granted where all defendants either consented or took no position); SEC v. Arias, No. 12 CV 2937, 2012 WL 4849151, at *1 (E.D.N.Y. Sept. 14, 2012) (same); SEC v. Mulholland, No. 15 CV 3668 (ILG) (ECF No. 12) (complete stay granted where defendant took no position); SEC v. Bandfield, No. 14 CV 5271 (ILG) (same); SEC v. Kueber, No. 15 CV 4479 (ILG) (ECF No. 11) (complete stay

granted where defendants consented); SEC v. Discala, No. 14 CV 4346 (ENV) (ECF No. 15) (same). Last year, a court in this district granted a complete stay even over both defendants' objection under circumstances nearly identical to those presented here. Shkreli, 2016 WL 1122029, at *7; see id. (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 citing cases).

The recent decision in Shkreli is particularly apposite here. In that case, the court concluded that a balancing of the relevant factors "overwhelmingly favor[ed] a stay" where: (1) there was a "substantial overlap of the issues" in the criminal and civil cases; (2) both defendants already had been indicted in the criminal case; (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-*7. As in Shkreli, here, there is a "substantial overlap of the issues" in the criminal and civil matters, the individual defendants already have been indicted, 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.

Tellingly, the Opposing Defendants' attempt to distinguish Shkreli is a non-starter. They argue that, because the Shkreli court linked the overlapping issues factor to a concern about the defendants' "self-incrimination," the court's reasoning does not apply to this case, where that factor has been implicated only with respect to "the government's right to maintain its tactical advantage." Small Br. at 9-10. Irrespective of the Opposing Defendants' puzzling argument, this factor weighs in favor of a complete stay here just as strongly as it did in Shkreli. The Opposing Defendants concede that their Fifth Amendment right against self-incrimination is

implicated and needs protection, and urge as much in seeking their proposed "partial" stay. Further, in Shkreli, not only were the individual defendants' Fifth Amendment rights similarly implicated, but also they had objected to a complete stay and proposed an alternative "limited" stay that was substantively identical to the Opposing Defendants' requested stay. See Shkreli, 2016 WL 1122029, at *6. Nevertheless, the court gave the overlapping issues factor the substantial weight it deserved, rejected the defendants' proposal for a limited stay and granted a complete stay. The same result is appropriate here.

Moreover, even the cases upon which the Opposing Defendants rely do not support the so-called "partial" stay for which they advocate. E.g., Small Br. at 15; Shulse Br. at 1, 2. In many of the cases they cite, courts that initially declined to grant a complete stay thereafter stayed discovery when it became clear the defendant would invoke his or her Fifth Amendment rights and not participate in the very discovery process he or she sought to use affirmatively, or where the witnesses the defendant sought to depose would assert their Fifth Amendment rights and/or testify for the government at a related criminal trial. For example, in SEC v. Chakrapani, Nos. 09 CV 325 (RJS), 09 CV 1043 (RJS), 2010 WL 2605819, at *11 (S.D.N.Y. June 29, 2010), the court invited the government to renew its stay motion if the defendant or a witness invoked the Fifth Amendment because, then, "the balance of interests could turn in favor of a discovery stay pending completion of [the] criminal trial." One week later, the court ordered the parties to appear regarding a deposition notice served on a cooperating witness likely to invoke the Fifth Amendment and the "[d]efendant's refusal to participate in discovery," Chakrapani, July 6, 2010 Order, ECF No. 125, and the court thereafter endorsed a discovery schedule postponing all depositions until after "the conclusion of the trial in the criminal case," id., Aug. 4, 2010 Order, ECF No. 131. Other courts have taken a similar approach. See SEC v. Cioffi, No. 08 CV 2457

(FB) (VVP) (ECF Nos. 19, 38 & 40) (denying stay initially, then staying all depositions after defendants advised SEC they would assert the Fifth Amendment); SEC v. Adondakis, No. 12 Civ. 409 (HB), 2012 WL 10817377, at *1 (S.D.N.Y. May 21, 2012) (same).

Similarly, here, the Opposing Defendants have signaled that the defendants will assert their Fifth Amendment rights if noticed for depositions or served with interrogatories. See Small Br. at 2-3; see id. at 1, 15. For the same reason, it is expected that the defendants will seek to defer filing an answer to the SEC's complaint and will assert the act of production privilege in response to requests for documents. As a result of the defendants' Fifth Amendment considerations, it is clear that no civil trial will take place in advance of the criminal trial. Accordingly, the only reason the Opposing Defendants are seeking discovery in the Civil Case is to obtain material to assist in the criminal trial, including by procuring witness statements now, far in advance of any criminal trial, which they can use to tailor their defenses.[6]

A complete stay is thus warranted in light of the specific circumstances of this case.

II. The Prejudice Concerns Set Forth by the Opposing Defendants Are Overstated

Finally, the Opposing Defendants' complaints of prejudice are overstated. See, e.g., Small Br. at 13-14; Shulse Br. at 2. First, in compliance with its criminal discovery obligations, the government will timely produce to the defendants all materials it has received from the SEC pursuant to a sharing order that are discoverable under Federal Rule of Criminal Procedure 16. Such materials, along with documents from sources other than the SEC that the government

[6] The Opposing Defendants' proposal would unduly burden the parties and the Court, requiring the government to potentially litigate countless discovery requests and the Court to construe and repeatedly apply the "legitimate basis for [invoking]" the Fifth Amendment standard. Small Br. at 3. The government would be forced to distinguish among and potentially signal the status of witnesses, further prejudicing the government and compromising witness security.

has produced and will continue to produce, will allow the defendants to prepare for the Civil Case while the Criminal Case is ongoing.[7] Accordingly, the Opposing Defendants' argument that a complete stay will deprive them of access to documentary discovery in the Civil Case is meritless.

Second, the Opposing Defendants' claim that a complete stay will uniquely harm their reputations is misdirection. Small Br. at 13; Shulse Br. 2. As discussed above, given the defendants' Fifth Amendment considerations, the Civil Case will not be resolved while the Criminal Case is ongoing, and the Opposing Defendants cannot plausibly claim that they are suffering greater reputational harm from the civil charges than from the criminal indictment.

CONCLUSION

The government respectfully requests that the Stay Motion be granted in its entirety.

Dated: Brooklyn, New York
February 13, 2017

Respectfully submitted,

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[7] Defendant Jeffrey Shulse has drawn a false dichotomy between discovery relating to (1) the broader fraudulent scheme, with which he is not charged, and (2) the Black Elk Bond scheme. Shulse Br. at 2. Rather, as is suggested by allegations in the SEC's complaint and the indictment – including that Platinum's signature fund's Black Elk investment was its largest asset – and the overlap in charged defendants, the discovery is inextricably intertwined.