UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. MICHAEL THOMAS NOWAK AND GREGG FRANCIS SMITH, Defendants.	Case No. 19 CV 06163 Honorable Robert M. Dow, Jr.

DEFENDANT SMITH'S OPPOSITION TO INTERVENOR UNITED STATES' MOTION FOR A STAY

Defendant Gregg Smith respectfully submits this brief in opposition to Intervenor United States' ("Government") Motion to Intervene and to Stay this action (ECF Nos. 31-32). Mr. Smith does not oppose the Government's request to intervene for the limited purpose of seeking a stay[1]; however, for the reasons set forth herein, the Government's motion for a stay of this action should be denied.

INTRODUCTION

For the last six years, Mr. Smith has lived under a cloud of suspicion related to his trading. First, in 2013, the Chicago Mercantile Exchange raised questions about his trading practices. More recently, the Commodity Futures Trading Commission ("CFTC") and then the Government initiated investigations and, ultimately, commenced actions against him. All along the way, Mr.

[1] *See S.E.C. v. Holcom*, No. 12-cv-1623, 2013 WL 12073831, at *1 (S.D. Cal. Sept. 6, 2013) (noting that "it would probably not be appropriate for the criminal arm of the United States government to become substantially involved in this civil case" and therefore granting permissive intervention solely "for the limited purposes of seeking a stay in the civil action").

Smith has maintained his innocence and now stands ready and eager to defend himself in Court to clear his name. However, the Government's motion, if granted, would substantially delay his ability to do so. Indeed, the Government seeks a blanket stay of all discovery in this action pending resolution of a complex, multi-defendant criminal case against Mr. Smith and others for which no trial date (or even pre-trial motion schedule) has been set. The Government's motion should be denied.

First, a stay is an extraordinary remedy that is only appropriate in limited circumstances where the movant can demonstrate that it risks suffering substantial prejudice in the absence of a stay. The Government does not even attempt to make such a showing here, nor could it do so.

Second, and in any event, the factors that courts consider when balancing the equities in the face of a motion to stay weigh in favor of denying the stay and allowing discovery to proceed. Specifically, the federal government created the purported problem that it now seeks to be relieved from by filing both actions simultaneously; the public has an interest in the expeditious resolution of civil and criminal matters; the criminal case will be protracted; and this delay will cause substantial prejudice to Mr. Smith.

Rather than stay this action entirely, justice will be served by simply deferring any discovery from parties and witnesses (including the Government's cooperating witnesses) that implicates a valid Fifth Amendment privilege until the conclusion of the criminal action.

Accordingly, and for the reasons set forth in detail below, the Government's motion for a stay should be denied.

RELEVANT BACKGROUND

The Complaint, filed on September 16, 2019, alleges that from 2008 through 2015, Mr. Smith and Michael Nowak ("Defendants") engaged in "spoofing" in violation of 7 U.S.C.

§ 6c(a)(5)(C), market manipulation in violation of 7 U.S.C. § 9(1) and related regulations, and attempted price manipulation in violation of 7 U.S.C. § 13(a)(2) in connection with thousands of trading sequences (the "CFTC Action"). On the same day, a parallel criminal Indictment against Defendants was unsealed, predicated on substantially similar facts as this CFTC Action (No. 19-CR-669 (N.D. Ill.)) (the "Criminal Action"). That same day, the Government and the CFTC held a joint press conference and issued press releases, detailing their allegations against Defendants and noting the assistance and cooperation of the other in investigating and bringing charges against Defendants.[2]

I. THE CRIMINAL ACTION

The original Indictment charged Defendants and a third individual not a party to the CFTC Action with spoofing and attempted market manipulation (similar to the CFTC Action), as well as additional claims for racketeering conspiracy, commodities fraud, bank fraud, wire fraud, and a related conspiracy charge, and specifically identified over 50 at-issue transactions over a period of eight years. Motion 2-3, ECF No. 31 (citing Indictment, *United States v. Smith*, No. 19-cr-669 (N.D. Ill. Aug. 22, 2019), ECF No. 1).

Thereafter, between October 16 and 28, 2019, the Government produced over 17 million pages of documents, including statements from cooperating witnesses and numerous other

[2] Cogan Decl. Ex. A, CFTC, *Remarks of Director of Enforcement James McDonald During CFTC-DOJ Press Conference Call* (Sept. 16, 2019), *available at* www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald4; Cogan Decl. Ex. B, CFTC Release No. 8013-19, *available at* https://www.cftc.gov/PressRoom/PressReleases/8013-19 ("The CFTC thanks and acknowledges the assistance of the Fraud Section of the Department of Justice's Criminal Division [and] the Federal Bureau of Investigation . . . ."); Cogan Decl. Ex. C, Government Release No. 19-980, *available at* https://www.justice.gov/opa/pr/current-and-former-precious-metals-traders-charged-multi-year-market-manipulation ("The Commodity Futures Trading Commission's Division of Enforcement provided assistance in this case.").

witnesses, plus an additional 4.3 terabytes of trading and market data that span over eight years. Cogan Decl. ¶ 4.

On November 14, 2019, the Government filed a Superseding Indictment, which added claims against a fourth defendant, additional allegations against Mr. Smith, and three additional purportedly unlawful transactions. Cogan Decl. Ex. E. This was followed on November 19, 2019, by a production of close to 3 million additional pages of documents. Cogan Decl. ¶ 4.

To date, no trial date or even pre-motion schedule has been set.

II. THE CFTC ACTION

The CFTC Action was preceded by a more than 3-year-long investigation, during which time the CFTC gathered and reviewed over 3 million pages of documents[3] and had the opportunity to conduct depositions. Cogan Decl. ¶ 5. Although the CFTC Action and Criminal Action cover similar conduct over a similar time period, the CFTC and Government have identified largely different trades that form the basis of their respective claims, and thus the two actions will have different purported victims, among other things.

On October 31, 2019, the Government filed the pending motion to intervene in the CFTC Action and stay the Action pending resolution of the Criminal Action (the "Motion").

ARGUMENT

I. A STAY IS AN EXTRAORDINARY AND DISFAVORED REMEDY THAT IS ONLY APPROPRIATE IF THE GOVERNMENT MAKES OUT A CLEAR CASE OF HARDSHIP, WHICH IT HAS FAILED TO DO

What the DOJ seeks here—a total stay of civil discovery pending the outcome of a related criminal matter—is an "extraordinary remedy." *Weil v. Markowitz*, 829 F.2d 166, 174 n.17 (D.C.

[3] The CFTC has stated that it is unclear what overlap exists between its contemplated productions and the nearly 20 million pages of documents produced by the Government to date. Cogan Decl. ¶ 5.

Cir. 1987). Such relief is not routinely granted, but rather reserved only for "special circumstances" where "the interests of justice require it." *Chagolla v. City of Chi.*, 529 F. Supp. 2d 941, 945 (N.D. Ill. 2008) (citing *United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970)); *see also Cruz v. City of DePage*, No. 96 C 7170, 1997 WL 370194, at *1 (N.D. Ill. June 27, 1997); Judge Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 209 (1990) (explaining how in a civil case there is a strong presumption in favor of discovery, and the government must overcome that presumption in its request for a stay). Specifically, to be entitled to this extraordinary relief, the Government "must make out a clear case of hardship or inequity in being required to go forward." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936); *see also United States v. 6250 Ledge Rd., Egg Harbor, Wis.*, 943 F.2d 721, 729-30 (7th Cir. 1991) ("[A] stay contemplates 'special circumstances' and the need to avoid 'substantial and irreparable harm.'" (alteration in original) (citation omitted)); *Benevolence Int'l Found., Inc. v. Ashcroft*, 200 F. Supp. 2d 935, 938 (N.D. Ill. 2012) (same); *cf.* Fed. R. Civ. P. 26(c)(1) (requiring a showing of "good cause"). The Court must then balance that hardship with the interests of the parties in the civil action, as well as the public, with the basic goal being to avoid prejudice. *See Salcedo v. City of Chi.*, No. 09-cv-5354, 2010 WL 2721864, at *2 (N.D. Ill. July 8, 2010) (Dow, J.); *United States v. FINRA*, 607 F. Supp. 2d 391, 393 (S.D.N.Y. 2009).

Here, for the reasons described in more detail below, the Government has failed to demonstrate any prejudice, and the balance of equities weighs heavily against a stay.

A. <u>The Government Will Suffer No Hardship or Prejudice in the Absence of a Stay</u>

The Government's motion does not articulate any reason why both actions proceeding simultaneously would create a hardship or be prejudicial to the Government. There is nothing extraordinary about parallel civil and criminal prosecutions, and in the "absence of *substantial*

prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable." *SEC v. Dresser Indus., Inc.*, 628 F.2d 1375, 1374 (D.C. Cir. 1980) (emphasis added). Courts routinely deny stay applications that fail to make a clear showing of hardship or prejudice. *See, e.g.*, *S.E.C. v. O'Neill*, 98 F. Supp. 3d 219, 221-24 (D. Mass. 2015) (denying government's motion to stay parallel SEC action, finding the government's support unpersuasive); *United States v. All Funds on Deposit*, 767 F. Supp. 36, 42 (E.D.N.Y. 1991) (denying government's motion to stay civil forfeiture action where the government "fail[ed] to point to any specific discovery request or abuse that ha[d] taken place or any other compelling reason why the forfeiture action should be stayed"); *Horn v. Dist. of Columbia*, 210 F.R.D. 13, 16 (D.D.C. 2002) (denying government's motion for a stay, finding that the government failed to make a "clear showing of hardship or inequality").

Further, none of the special circumstances that courts have sometimes found sufficient to justify a stay are present here. Defendants are not claiming that the actions proceeding simultaneously will impair their ability to defend themselves; rather, they oppose a blanket stay of all discovery. *See, e.g.*, *Salcedo*, 2010 WL 2721864, at *1, *cited in* Motion 12. The pendency of the CFTC Action does not threaten to compromise the integrity of the Criminal Action, as the criminal investigation is complete, the charges have been brought, and the Government has already produced most, if not all, discovery. *Compare Bd. of Governors of Fed. Res. Sys. v. Pharaon*, 140 F.R.D. 634, 639-40 (S.D.N.Y. 1991) (granting a limited stay of depositions of witnesses to ensure that the government had the opportunity to lock in relevant grand jury testimony prior to the civil discovery), *with FINRA*, 607 F. Supp. 2d at 393-94 (denying stay where identity of prosecution's witnesses was already revealed to defendants). Nor is this a case where a private plaintiff initiated a civil action to obtain confidential information about an ongoing criminal matter; rather, here, the CFTC (without objection from the Government) initiated the civil action. *See, e.g.*, *Benevolence*,

200 F. Supp. 2d at 940, *cited in* Motion 14 (granting stay where criminal defendant commenced civil suit against government during pendency of related criminal prosecution).

The Government's failure to demonstrate hardship or prejudice is fatal to its motion. For this reason alone, the Motion should be denied.

B. The Balance of Equities Weighs Heavily Against a Stay

Although the Government has failed to articulate any concrete prejudice that would result from both actions proceeding simultaneously and, thus, a balancing of equities is unnecessary, not a single factor that courts consider in determining whether a stay of a parallel civil litigation is appropriate supports the imposition of a blanket stay of civil discovery here. Those factors include: (i) whether the government is a party in both cases; (ii) the effect of granting or denying the stay on the public interest; (iii) the posture of the criminal proceeding; (iv) the burden that any aspect of the civil case may impose on defendants; (v) the interest of the civil plaintiff in proceeding expeditiously and potential prejudice it would suffer from delay; and (vi) whether the civil and criminal matters involve the same subject. *See Chagolla*, 529 F. Supp. 2d at 945.

1. That the Government Initiated Both Actions Weighs Against a Stay

Courts routinely deny motions to stay a civil proceeding pending resolution of a parallel criminal prosecution where, as here, "it is the Government that has created the conflict between the civil and criminal cases by simultaneously filing those actions." *United States v. Gieger Transfer Serv., Inc.*, 174 F.R.D. 382, 385 (S.D. Miss. 1997); *see also E.E.O.C. v. Global Horizons, Inc.*, No. CV 11-00257, 2012 WL 874868, at *5 (D. Haw. Mar. 13, 2012) ("[A]lthough 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."); Pollack, 129 F.R.D. at 205

(stating that a "factor which almost inevitably results in a denial of a motion for a stay is where the movant intentionally creates the impediment which he seeks to erect as a shield.").[4]

Here, the CFTC chose to sue Mr. Smith on the same day he was arrested and his Indictment was unsealed. The Government and CFTC then held a joint press conference and issued press releases thanking each other for the assistance they each apparently provided the other. As other courts have explained, it is inappropriate and "strange[]" that the Government, "having closely coordinated with [another government agency] in bringing simultaneous civil and criminal actions . . . should then wish to be relieved of the consequences that will flow if the two actions proceed simultaneously." *S.E.C. v. Saad*, 229 F.R.D. 90, 91 (S.D.N.Y. 2005) (denying motion to stay civil action).[5] Accordingly, this factor weighs heavily against a stay.

2. It is in the Public Interest for the CFTC Action to Proceed Expeditiously

There are two interests of the public that are potentially relevant here: (i) civil litigation proceeding expeditiously; and (ii) the criminal process proceeding untainted by civil litigation. *See Chagolla*, 529 F. Supp. 2d at 946-47. The Government argues that the latter interest outweighs

[4] *See also, e.g.*, *F.T.C. v. Johnson*, No. 10-cv-2203, 2013 WL 3155311, at *3 (D. Nev. June 19, 2013) (denying government's motion where "it was the government's decision—not Defendants'—to bring both [cases] simultaneously"); *S.E.C. v. Cioffi*, No. 08-CV-2457, 2008 WL 4693320, at * 1 (E.D.N.Y. Oct. 23, 2008) (denying government's motion, stating that "[c]ourts are 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. Sandifur*, No. C05-1631, 2006 WL 3692611, at *3 (W.D. Wash. Dec. 11, 2006) (denying government's motion because "the United States worked directly with the SEC and voluntarily chose to institute both civil and criminal actions at the same time"); *S.E.C. v. Fraser*, No. CV-09-443, 2009 WL 1531854, at *3 (D. Ariz. June 1, 2009) (collecting cases).

[5] While some courts in assessing this factor consider whether the parallel proceedings would give *the government* the opportunity to use civil discovery to circumvent limitations on criminal discovery, as the cases cited by the Government show, this is only applicable when defendants are seeking the stay. *See, e.g.*, *Chagolla*, 529 F. Supp. 2d at 946 (analyzing government's ability to abuse criminal discovery limitations on motion for stay filed by defendants); *Salcedo*, 2010 WL 2721864, at *2 (same).

the former because Defendants may be "permitted to use the civil discovery process to circumvent the limitations under the Federal Rules of Criminal Procedure." Motion 13. But Defendants' ability to seek discovery in a civil case does not, without concrete allegations of abuse, justify a stay of civil discovery. *See All Funds*, 767 F. Supp. at 42; *see also, e.g.*, *S.E.C. v. Kanodia*, 153 F. Supp. 3d 478, 482 (D. Mass. 2015) ("Although it is true that civil discovery might reveal aspects of the government's criminal case, or potentially result in inconsistent witness statements . . . these are the risks that the government and the SEC run when they elect to pursue parallel investigations and prosecutions.").

As the cases relied on by the Government illustrate, such abuse may exist where, for example, a criminal defendant commences civil litigation against the Government for the purpose of obtaining discovery for use in the civil case. *See, e.g.*, *Campbell v. Eastland*, 307 F.2d 478, 488 (D.C. Cir. 1962), *cited in* Motion 14; *Benevolence*, 200 F. Supp. 2d at 941, *cited in* Motion 14; *Grubbs v. Irey*, No 06-cv-1714, 2008 WL 906246, at *3-4 (E.D. Cal. Mar. 31, 2008), *cited in* Motion 13. Here, on the other hand, the availability of civil discovery is a consequence of the Government's and CFTC's decision to bring parallel criminal and civil charges, not an attempt by Defendants to abuse criminal discovery rules. "Had the Government thought this was a serious problem, it could have easily avoided it by waiting until after the criminal matter was resolved to institute civil proceedings." *Sandifur*, 2006 WL 3692611, at *3.

Further, the types of abuse that the narrower criminal discovery rules are designed to prevent are witness intimidation, the solicitation of perjured testimony, and manufactured evidence, *see FINRA*, 607 F. Supp. 2d at 393; in other words, independently unlawful conduct. The Government has not raised any of these concerns in its motion, nor could it, as there is absolutely no support for such an accusation against Defendants and "mere conclusory allegations

of *potential* abuse or simply the *opportunity* by the claimant to improperly exploit civil discovery. . . will not avail on a motion for a stay." *All Funds*, 767 F. Supp. at 42 (omission in original) (internal quotation marks and citation omitted).

Rather, the Government's concern boils down to the contention that discovery in the CFTC Action could give Defendants an "unfair advantage." Motion 13-14. However, this purported advantage, when it is merely the consequence of the Government's and CFTC's decision to file charges simultaneously, is not "abuse" of civil discovery and thus does not justify a blanket stay. *See S.E.C. v. Oakford Corp.*, 181 F.R.D. 269, 272-73 (S.D.N.Y. 1998) ("[T]o the extent that the defendants' discovery requests simply result in the happenstance that in defending themselves against the serious civil charges that another government agency has chosen to file against them they obtain certain ordinary discovery that will also be helpful to helpful in the defense of their criminal case, there is no cognizable harm to the government in providing such discovery beyond its desire to maintain a tactical advantage.").

Accordingly, the only interest of the public relevant here is the interest that "both matters are brought to a conclusion in an expeditious manner." *Johnson*, 2013 WL 3155311, at *4; *see also Digital Equip. Corp. v. Currie Enters.*, 142 F.R.D. 8, 14 (D. Mass. 1991); Cogan Decl. Ex. F, CFTC Letter in Opp. to Request for Stay, *CFTC v. Hartshorn*, No. 16-cv-9802, ECF No. 51, at *2 (S.D.N.Y. Apr. 11, 2019) (in which the CFTC argued that a stay "would be prejudicial to the Commission and not in the public interest because it would indefinitely delay discovery"). And this interest weighs against a stay.

3. The Posture of the Criminal Action Weighs Against a Stay

The posture of the Criminal Action—post-indictment with no trial date on the horizon—also weighs against a stay.

First, Courts are more willing to grant a request for a stay by the government (as opposed to a request by a defendant) pre-indictment[6] to prevent discovery in the civil action from influencing grand jury testimony and thereby threatening to compromise the integrity of the criminal investigation. *See, e.g.*, *Bd. of Governors*, 140 F.R.D. at 639-40. Here, in contrast, the Government has already secured a Superseding Indictment against Defendants. While "[c]ivil discovery might reveal aspects of the government's case or result in inconsistent statements if witnesses are questioned more than once, . . . exposing the government's case or testing witness recollections will not fundamentally compromise an ongoing investigation or prosecution" in light of the fact that the grand jury investigation is over. *O'Neill*, 98 F. Supp. 3d at 222.

Second, the Criminal Action is likely to face significant delays before the charges reach final disposition, given, among other things, the nearly 20 million pages and 4.3 terabytes of trading data produced by the Government to date that Mr. Smith and the other defendants will have to review before trial and the fact that the charged conduct spans eight years and purports to cover thousands of trading sequences. *See, e.g.*, Cogan Decl. Ex. E, Superseding Indictment ¶ 26(a)-(e). Further complicating the Criminal Action here, the Government has alleged novel theories of criminal liability, including most notably the use of RICO to prosecute trading activity, which will be the subject of pre-trial motion practice in the Criminal Action. Courts are reluctant to impose such an open-ended stay without even an estimate by the Government of its contemplated length. *See Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983) ("[B]efore granting a stay pending the resolution of another case, the court must carefully consider the time reasonably

[6] The filing of criminal charges against a defendant weighs in favor of a stay generally when the defendant (as opposed to the government) is seeking the stay, because, *inter alia*, before charges are filed, there is no genuine threat of criminal prosecution and, thus, the risk of self-incrimination is only speculative. *See, e.g.*, *U.S. ex rel. Shank v. Lewis Enters., Inc.*, No. 04-cv-4105, 2006 WL 1064072, at *3 (S.D. Ill. Apr. 21, 2006).

expected for resolution of the 'other case,' in light of the principle that stay orders will be reversed when they are found to be immoderate or of an indefinite duration."); *cf. Bureerong v. Uvawas*,167 F.R.D. 83, 87 (C.D. Cal. 1996) (granting Government's request for a stay that was "likely to last only three to four months," over opposition of just two of the more than twenty defendants).

4. Defendants Will Suffer Substantial Prejudice if Civil Discovery is Stayed

A protracted stay of this CFTC Action pending resolution of the Criminal Action will result in substantial prejudice to Mr. Smith, which weighs heavily against a stay.

First, the CFTC's accusations of intentional wrongdoing are serious, and courts recognize that when a defendant's "reputation and credibility have been called into question, he deserves a timely opportunity to clear his name." *S.E.C v. Jones*, No. 04 Civ. 4385, 2005 WL 2837462, at *2 (S.D.N.Y. Oct. 28, 2005) (denying government's motion to stay because "the pendency of this [SEC enforcement action] continues to cloud his future career and personal life"); *see also Fraser*, 2009 WL 1531854, at *3 (noting a defendant's "strong interest in being able to defend [himself] against the SEC's allegations as quickly as possible"). Discovery in the CFTC Action will inevitably be protracted: the CFTC has indicated that it has more than 3 million pages of documents that Mr. Smith will need to review, and there are numerous alleged victims and other witnesses from whom discovery needs to be sought. Mr. Smith should be given the opportunity to take this discovery now, and not be forced to wait until an as-yet-unscheduled criminal trial is finished before even being permitted to start the process.

Second, the events that form the basis of the CFTC's Complaint began more than ten years ago. The CFTC had the opportunity to conduct a lengthy and extensive investigation before filing suit. Now that the CFTC Action has been filed, Mr. Smith should be afforded the opportunity to review the evidence collected by the CFTC and take affirmative discovery. If Mr. Smith is not

permitted to obtain whatever evidence now exists, including evidence in the possession of third parties which is more likely to be lost or destroyed, he may not be able to defend himself adequately against the CFTC's charges. *See Connecticut ex rel. Blumenthal v. BPS Petroleum Distribs., Inc.*, No. 3:91-CV-00173, 1991 WL 177657, at *2 (D. Conn. July 16, 1991) (denying requested stay because "[s]tays in proceedings may result in prejudice . . . because witnesses relocate, memories fade, and persons allegedly aggrieved are unable to seek vindication or redress for indefinite periods of time on end" (internal quotation marks and citation omitted)).

Third, the proposed stay would effectively be one-sided. The CFTC had the benefit of a more than three-year investigation which enabled it to serve subpoenas, collect and review over 3 million pages of documents from third parties, and take depositions. During this same period, Mr. Smith was entitled to no discovery. The CFTC already has the tactical advantage of pre-action discovery; the Court should not permit it to have the additional advantage of indefinite extra time to analyze the discovery it has taken to date and to continue to refine and strengthen its case.

5. The CFTC Has No Legitimate Interest in Favor of a Stay

The CFTC does not oppose the Government's request for a stay, likely because, as the Government speculates, a criminal conviction could result in efficiencies for the CFTC based on principles of estoppel. Motion 14-15. But this argument has been rejected: "the Court will not in any way abridge [a defendant]'s procedural rights simply to preserve [CFTC] resources or allow the [CFTC] to defer its case so as to more efficiently capitalize on a successful criminal prosecution." *O'Neill*, 98 F. Supp. 3d at 223; *see also Kanodia*, 153 F. Supp. 3d at 483 (same); *cf. S.E.C. v. Oakland Corp.*, 181 F.R.D. 269, 273 (S.D.N.Y. 1998) ("To use the federal courts as a forum for filing serious civil accusations that one has no intention of pursuing until a parallel criminal case is completed is a misuse of the processes of these courts."). Regardless, Mr. Smith

maintains his innocence and expects to be acquitted at trial. *See Nowaczyk v. Matingas*, 146 F.R.D. 169, 175 (N.D. Ill. 1993) (rejecting a similar argument on the grounds that "discovery is broader and the standard of proof less stringent in a civil case than in a criminal proceeding[;] [t]herefore, an acquittal in a parallel criminal proceeding does not rule out a finding of liability in a civil suit").

Accordingly, the interests of the CFTC do not support the imposition of a stay here.

6. The Similarities Between the Cases Do Not, Without More, Support a Stay

Finally, while the Government is correct that there is overlap between the conduct alleged in the Criminal and Civil Actions, the mere existence of parallel civil and criminal proceedings, without more, does not warrant the extraordinary remedy of a stay. *Cf. Dresser*, 628 F.2d at 1374 ("The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings . . . . In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.").

II. DISCOVERY IN THE CFTC ACTION SHOULD PROCEED IN THE ORDINARY COURSE WITH A LIMITED MODIFICATION

As the Government has failed to establish its entitlement to the extraordinary remedy of a blanket stay of the CFTC Action, discovery should proceed in the ordinary course with one slight modification, which courts have made under the circumstances to avoid compromising anyone's Fifth Amendment rights: discovery from parties and witnesses (including the Government's cooperating witnesses) that implicates a valid Fifth Amendment privilege should be deferred until the conclusion of the Criminal Action. *See, e.g.*, *O'Neill*, 98 F. Supp. 3d at 223; *Kanodia*, 153 F. Supp. 3d at 483; *Saad*, 229 F.R.D. at 91; *S.E.C. v. Saad*, 384 F. Supp. 2d 692, 693-94 (S.D.N.Y. 2005). Such a deferral can be accomplished by an order from this Court that (1) allows any party or witness who receives a subpoena, deposition notice, or other discovery request, in response to

which he / she wishes to invoke a valid Fifth Amendment right, to notify all parties to this Action of this wish (the "Fifth Amendment Notification") through his or her counsel; and (2) adjourns, upon providing the Fifth Amendment Notification, the deadline(s) for responding to the subpoena, deposition notice, or other discovery request until after the completion of the Criminal Action or further Order of this Court in the event the Court determines that the Fifth Amendment Notification does not pertain to a valid Fifth Amendment right by that particular party or witness.

Such a modification will allow the vast majority of the substantial fact discovery in this action to proceed in parallel with the Criminal Action, leaving only a relatively small amount of discovery to be completed after the conclusion of that trial.

CONCLUSION

For the reasons set forth above, the Court should deny the Government's Motion to stay.

Dated: November 27, 2019

Respectfully submitted,

KOBRE & KIM LLP

By: /s/ Jonathan D. Cogan

Jonathan D. Cogan
Sean S. Buckley
Leanne A. Bortner
111 West Jackson Blvd, 17th Floor
Chicago, IL 60604
(312) 429-5100
jonathan.cogan@kobrekim.com
sean.buckley@kobrekim.com
leanne.bortner@kobrekim.com

Counsel for Defendant Gregg Smith

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will provide notice of the filing to counsel for the government.

By: /s/ Jonathan D. Cogan
Jonathan D. Cogan