UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMODITY FUTURES TRADING COMMISSION, Plaintiff, v. MICHAEL THOMAS NOWAK AND GREGG FRANCIS SMITH, Defendants.	Case No. 1:19-cv-06163 Hon. Robert M. Dow, Jr.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MEMORANDA IN OPPOSITION TO INTERVENOR UNITED STATES' MOTION TO STAY

Plaintiff Commodity Futures Trading Commission (the "Commission") respectfully submits this memorandum in response to the submissions of Defendants Michael Thomas Nowak (ECF Nos. 38-39) and Gregg Francis Smith (ECF Nos. 40-41) in which Defendants oppose the United States' motion for a complete stay of this action and offer two conflicting proposals to stay this action in part. For the reasons set forth herein, both of Defendants' alternative proposals are defective and should be rejected.

The Commission does not oppose the United States' motion for a complete stay of this proceeding during the criminal case against Defendants, *United States v. Smith*, No. 19-cr-00669, which is pending in this District before Judge Edmond E. Chang (the "Criminal Case"). However, the Commission does oppose Defendants' suggestions to partially stay the action on asymmetrical terms that are, for the reasons set forth herein, contrary to applicable rules, unfair

to the Commission and to nonparties, and inconsistent with Defendants' purported desire to avoid unnecessary delay.

Smith's Proposal For Wide-Ranging One-Sided Discovery Should Be Rejected

Smith proposes what is in effect a partial stay of discovery in this action in which Defendants may, by asserting their Fifth Amendment privilege against self-incrimination, defer their responses to any discovery demand until after the conclusion of the Criminal Case. (*See* Smith Mem. at 14-15 (ECF No. 40).) That same proposal was recently made in this District by the defendants in *CFTC v. Vorley*, No. 1:18-cv-00603 (N.D. Ill. filed Jan. 26, 2018), opposed by the Commission, and rightly rejected by Chief Judge Pallmeyer as impractical and inequitable:

> With respect to . . . the notion that there are a bunch of witnesses who might be exercising their Fifth Amendment privilege, if that's true, we are not going to get very far in discovery in this case . . . until the criminal case is over, A.
>
> B, if it's really the case that the two people most likely to exercise their Fifth Amendment rights are the two defendants in this case, which seems the most plausible, then we really are talking about what I would characterize as a one-way stay. And I'm not interested in doing that.

(Meister Decl. Ex. B at 15 (ECF No. 39-3).)

This Court should likewise reject Smith's proposal to allow Defendants to seek unlimited discovery from the Commission while avoiding their reciprocal obligations, as several other district courts have done in granting the United States' motions for complete stays of civil enforcement actions over defendants' objections and alternative proposals for "limited" stays. *See, e.g.*, *SEC v. Coburn*, Civ. No. 19-5820, 2019 WL 6013139, at *4, 6 (D.N.J. Nov. 14, 2019) (noting that "self-incrimination issues may . . . interfer[e] with the fair exchange [of] discovery," and expressing "concern[] that discovery would be largely one-sided"); *SEC v. Giguiere*, No. 18-cv-1530, 2018 WL 9516048, at *3 (C.D. Cal. Oct. 24, 2018) (finding that assertions of "Fifth Amendment rights made by parties and witnesses in this civil case will render civil discovery

complicated, costly, and one-sided"); *SEC v. Shkreli*, No. 15-cv-7175, 2016 WL 1122029, at *5 (E.D.N.Y. Mar. 22, 2016) (rejecting defendant's "application for a 'one-sided' limited stay that 'would permit Defendants to obtain discovery while shielding Defendants from having to provide discovery themselves'")[1]; *SEC v. Nicholas*, 569 F. Supp. 2d 1065, 1070 (C.D. Cal. 2008) (noting that "[t]he specter of parties and witnesses invoking their Fifth Amendment rights would render civil discovery largely one-sided").

Smith attempts to paint his one-sided proposal as symmetrical because "the Government's cooperating witnesses" could, in theory, also seek to avoid their discovery obligations by asserting their Fifth Amendment rights. (Smith Mem. at 14.) As Chief Judge Pallmeyer noted in *Vorley*, if that is true, then "we are not going to get very far in discovery," *supra* p. 2, under the terms of the limited stay Smith proposes. *See, e.g., SEC v. Platinum Mgmt. (NY) LLC*, No. 16-cv-6848, 2017 WL 2915365, at *5 (E.D.N.Y. July 7, 2017) (rejecting defendants' request for "a narrowly tailored stay that would bar depositions, interrogatories, or 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 self-incrimination under the Fifth Amendment," and granting the United States' motion for a complete stay).

In any event, Smith's suggestion of symmetry is groundless. As Smith well knows, the Commission's cooperating witnesses have already pled guilty and allocuted to the criminal

[1] In *Shkreli*, defendant Evan Greebel opposed the United States' motion for a complete stay and proposed "that document discovery and depositions of individuals who invoke their Fifth Amendment rights against self-incrimination should be stayed" and "document discovery and depositions of other individuals shall proceed on the condition that [United States] counsel be allowed to attend and participate in such depositions if they wish." Evan Greebel's Opp. to Gov't's Mot. for Complete Stay and Appl. for Limited Stay at 1, *Shkreli*, No. 15-cv-7175 (E.D.N.Y. Feb. 11, 2016), ECF No. 23 (attached as Ex. A to Decl. of David C. Newman).

conduct that the United States alleges they committed with Defendants,[2] agreed to the Commission's findings that they engaged in illegal conduct, and promised to "testify completely and truthfully at depositions" as part of their cooperation with the Commission.[3] There is therefore no reasonable basis to believe that any cooperating witnesses would seek to invoke their Fifth Amendment rights against self-incrimination in response to a discovery demand from Defendants, and Smith presents no information to the contrary. Indeed, the only witness who has indicated an intention to assert his Fifth Amendment rights is Smith's co-defendant Nowak, who states that he does not object to Smith's proposed partial stay "on the condition that he not be required to take any actions—such as responding to pleadings, answering interrogatories, or being deposed—that implicate his Fifth Amendment right" (Nowak Mem. at 3 n.3 (ECF No. 38)). Nowak's position underscores the reality that Smith's proposed partial stay would be dramatically one-sided and inequitable, with Defendants able to extract wide-ranging discovery from the Commission and nonparties while refusing even to answer the Complaint or respond to interrogatories and facing no consequence of a potential adverse inference being drawn from such refusal.

Lastly, to the extent that Smith's opposition to the United States' motion relies upon the Commission's prior opposition to a stay motion in a recent matter (Smith Mem. at 10), such reliance is misplaced. In that matter, the Commission opposed a defendant's motion to stay the civil action against him where *there was no pending criminal case* against the defendant (who represented that he had merely received a grand jury target letter), and so the delay sought was

[2] *See, e.g.*, Plea Agreement, *United States v. Edmonds*, No. 3:18-cr-00239 (D. Conn. Oct. 9, 2018), ECF No. 7 (attached as Ex. B to Newman Decl.); Superseding Indictment ¶ 19, *United States v. Smith*, No. 19-cr-00669 (N.D. Ill. Nov. 14, 2019), ECF No. 52 (Cogan Decl. Ex. E (ECF No. 41-5)).

[3] *E.g.*, *In re Edmonds*, CFTC Dkt. No. 19-16, 2019 WL 3425040, at *1, 6 (July 25, 2019) (consent order).

truly "indefinite" and prejudicial to the Commission. CFTC Letter at *1-2, *CFTC v. Hartshorn*, No. 16-cv-9802, ECF No. 51 (S.D.N.Y. Apr. 11, 2019) (Cogan Decl. Ex. F (ECF No. 41-6)). Here, by contrast, Defendants have been indicted and are entitled to assert their rights to a speedy trial, and so the Commission's lack of opposition to the stay sought by the United States is fully consistent with its position in *Hartshorn*. (*See* Meister Decl. Ex. B at 15 (Chief Judge Pallmeyer noting that "if Mr. Vorley's speedy trial rights are violated, he is in every position to say he wants his trial in 70 days[, a]nd if the government is not ready, that's their problem").)[4]

Nowak's Request To Obtain Document Discovery Without Answering the Complaint and Providing Mandatory Initial Disclosures Should Be Rejected

Nowak requests a partial stay of discovery that is at odds with Smith's request but is similarly defective. His proposal—that the Court should "permit document discovery to proceed while otherwise staying this action" (Nowak Mem. at 3)—is contrary to applicable rules, prejudicial to the Commission, and ill-suited to further Defendants' purported goals of expediently litigating this matter.

Both the Federal Rules of Civil Procedure ("FRCP") and this Court's Mandatory Initial Disclosure Pilot program ("MIDP") predicate the commencement of discovery, including document discovery, on a defendant serving FRCP 12 responses to a complaint as well as

[4] With regard to Smith's comments about in the potential volume of document discovery in this matter and its overlap with discovery in the Criminal Case (Smith Mem. at 4, 12), the Commission briefly notes that the discoverable materials in the Commission's relevant investigative database are anticipated to be substantially duplicative of documents obtained by the United States (and presumably produced to Defendants) in the Criminal Case. (In any event, Smith's counsel informed the Commission on December 12, 2019, that Smith would be serving the Commission with a document subpoena in the Criminal Case—reflecting that Smith has the means to seek to obtain documents uniquely in the Commission's possession, if any, notwithstanding any order that this Court may issue staying this matter.) In addition, the fact that the *examples* of the "thousands of Spoof Orders and Layered Spoof Orders" allegedly entered by Defendants (Compl. ¶ 48 (ECF No. 1)) identified in the Commission's Complaint differ from the *examples* of the "thousands of trading sequences" identified by the United States as part of Defendants' alleged racketeering conspiracy (Superseding Indictment ¶ 26(a), *United States v. Smith* (Cogan Decl. Ex. E (ECF No. 41-5))) does not support an inference that the two matters are based on "largely different trades" (Smith Mem. at 4) that would require substantially different discovery as to victims.

mandatory initial disclosures. For MIDP cases such as this one, initial disclosures are not due until defendants serve a FRCP 12(a) answer (not merely a FRCP 12(b) motion to dismiss).[5] Then, only after serving mandatory initial discovery responses—which are due 30 days after service of the answer—may parties initiate any further discovery.[6]

The rules for the normal timing of discovery reflect that civil discovery is meant to be two-sided. Without Defendants' FRCP 12 responses to the Complaint and mandatory initial disclosures, the Commission will be unfairly prejudiced in identifying what issues are in dispute and what defenses will be asserted. As a result, the Commission would be hampered in assessing what material is properly discoverable under FRCP 26 and in contesting any improper document demands. (The same would also be true for nonparty recipients of Defendants' FRCP 45 subpoenas.) The Commission would likewise be prejudiced in effectively determining what documents to seek from Defendants and what nonparties to subpoena for documents—to say nothing of the head start that Defendants would have in formulating interrogatories and requests to admit and planning for other discovery that would be stayed pending the resolution of the Criminal Case under Nowak's proposal. In short, it would be inequitable for Defendants to obtain discovery from the Commission without first satisfying their FRCP 12 and MIDP obligations to give the Commission notice of their defenses. *See, e.g.*, *Genentech, Inc. v. JHL Biotech, Inc.*, No. C 18-06582, 2019 WL 1045911, at *26 (N.D. Cal. Mar. 5, 2019) (granting

[5] *See* Amended Standing Order Regarding Mandatory Initial Discovery Pilot Project ¶ A.4, https://www.ilnd.uscourts.gov/_assets/_documents/MIDP%20Standing%20Order%20Dec0118.pdf ("MIDP Order"). The Court reiterated this requirement in December 2018 when it revised the MIDP to incorporate FRCP 12(a)(4) in MIDP cases, stating that "the MIDP response period will not be triggered . . . while a motion is pending under Rule 12(b)(6) or any other provision of Rule 12" *unless* an answer has also been served. MIDP Changes Effective 12-1-18, https://www.ilnd.uscourts.gov/_assets/_documents/MIDP%20Changes%20Effective%2012-1-18.pdf.

[6] *See* MIDP Order ¶¶ A.1.a, A.4.

indicted defendants' motion for partial stay of civil case, including stay of answer, but disallowing them from obtaining discovery from plaintiff during stay).

Nowak's request for a complete stay except for document discovery—that is, relief from his obligations to file a FRCP 12(a) answer, to assert FRCP 12(b) defenses (if any), and to provide mandatory initial discovery responses prior to obtaining documents from the Commission and nonparties—belies his asserted concern for an "expeditious resolution" (Nowak Mem. at 6) of this action. Nowak asserts that "responding to pleadings" would "implicate his Fifth Amendment right not to be a witness against himself" (Nowak Mem. at 3 n.3), but he does not indicate whether he intends to move to dismiss the Complaint under FRCP 12(b), or explain why, if he plans to do so, filing such a motion (which might take a long time for the parties to brief and for the Court to decide, and could narrow the scope of discovery and otherwise speed the ultimate resolution of this action) should be deferred until after the resolution of the Criminal Case. Nor does Nowak explain why he cannot serve mandatory initial discovery responses prior to making any document discovery demands. The fact that Nowak proposes to defer these steps of litigation suggests that his true motive is not to reach a speedy conclusion to this action but instead to gain a tactical advantage over the Commission.

The sole authority Nowak cites for the partial stay he seeks is *Vorley*, in which Chief Judge Pallmeyer issued a complete stay except for document discovery.[7] In that case, the only two options that were briefed and argued to the Court were a complete stay (sought by the

[7] Nowak also cites a decision of this Court to support his argument that courts sometimes seek to avoid forcing a defendant to choose between making statements in a civil case that could be used against him in a criminal case, or invoking his Fifth Amendment rights and potentially suffering an adverse inference from such invocation. (*See* Nowak Mem. at 6.) Notably, in that case, in which this Court granted defendants' motion for a stay of a private civil action, the proper remedy for the Fifth Amendment adverse inference concerns was a complete four-month stay of the case as to moving defendants—not a one-sided partial stay such as those sought here by Defendants. *See Hare v. Custable*, No. 07-cv-3742, 2008 WL 1995062, at *4 (N.D. Ill. May 6, 2008).

United States and unopposed by the Commission) and a one-sided partial stay "deferring" the depositions of any witnesses who would assert their Fifth Amendment right against self-incrimination (proposed by the defendants and opposed by the Commission, as Smith proposes and the Commission opposes here). During a conference, Chief Judge Pallmeyer initially ruled in favor of the United States, but after defense counsel asked the Court to reconsider, stating that his client still opposed the stay even if defendants' depositions would not be deferred, the Court ruled that the parties "could go forward with document discovery on both sides" and *sua sponte* ordered a complete stay of the case except for document discovery. (Meister Decl. Ex. B at 15-16, 18.) At no point in the briefing or argument did any party propose that the Court might stay defendants' deadline to respond to the complaint but not stay discovery, and defendants' FRCP 12 obligations were not mentioned by the Court or by any participant at the conference. If this Court were inclined to accept Nowak's proposal to emulate the partial stay ordered in *Vorley*, the Commission respectfully submits that all parties should first be required to meet their antecedent FRCP and MIDP obligations before initiating document discovery, thus ensuring a fair and reciprocal discovery process.

Conclusion

For the foregoing reasons, the Commission does not object to the United States' motion for a complete stay of this case, and respectfully asks that the Court deny Smith and Nowak's respective applications for partial stays. The Commission requests—in the event that the Court is inclined to order a partial stay as proposed by Nowak rather than to grant or deny the United States' motion in its entirety—that any such stay should not impact the parties' obligations under FRCP 12 and the MIDP, thereby ensuring symmetry and fairness to all parties as well as to nonparties from whom discovery may be sought.

Dated: December 13, 2019

Respectfully submitted,

PLAINTIFF COMMODITY FUTURES TRADING COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2019, I caused a copy of the foregoing PLAINTIFF'S RESPONSE TO DEFENDANTS' MEMORANDA IN OPPOSITION TO INTERVENOR UNITED STATES' MOTION TO STAY to be filed with the Clerk of the Court through the CM/ECF system, which will provide notice of the filing to all counsel of record.

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