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-6163 Honorable Robert M. Dow, Jr.

UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO INTERVENE AND TO STAY

A complete stay of this case is supported by the prevailing case law and warranted given the circumstances.[1] As discussed below, the defendants' arguments in opposition to a stay have no merit. Furthermore, their proposed alternatives to a complete stay would unfairly allow them to obtain discovery from the CFTC and third parties far beyond what they would be entitled to in the related criminal case, while at the same time shielding them from having to produce any discovery, respond to

[1] Neither defendant opposes the government's request to intervene in this case for the limited purpose of seeking a stay. For the reasons set forth in its Brief in Support of the Motion of the United States to Intervene and to Stay (Dkt. No. 31) ("Motion"), the United States has satisfied the requirements to intervene both permissively and as of right under Federal Rule of Civil Procedure 24(a) and (b). (*See* Motion at 7-10.) The United States, therefore, should be allowed to intervene in this case without the limitation proposed by the defendants. *See S.E.C. v. Nicholas*, 569 F. Supp. 2d 1065, 1068 (C.D. Cal. 2008) ("[N]umerous courts have allowed the United States government to intervene in a civil case for the purpose of moving to stay discovery and other proceedings until the resolution of a related criminal case.") (collecting cases).

pleadings, answer interrogatories, or sit for depositions if they believed those actions would touch on their Fifth Amendment rights. The Court thus should reject the defendants' proposals as transparent attempts to obtain one-sided discovery without having to actually assert their Fifth Amendment rights against self-incrimination and incur the resulting adverse effects in this civil case.

DISCUSSION

I. The Defendants' Proposed Alternatives to a Complete Stay Would Result in Asymmetric Discovery Meant to Provide the Defendants with a Tactical Advantage in the Related Criminal Case

In their opposition briefs, the defendants seek a lop-sided stay of discovery permitting them to deploy the full array of civil discovery tools, while also avoiding any obligation on their part to produce documents, respond to pleadings, answer interrogatories, or be deposed. The defendants take different positions on the United States Department of Justice's ("DOJ") requested stay with Defendant Smith opposing the stay completely with a "slight modification" (Opposition to Intervenor United States' Motion for a Stay ("Smith Opp.") at 14), and Defendant Nowak agreeing there should be a stay except for document discovery (Opposition to United States' Motion to Intervene and to Stay ("Nowak Opp.") at 1). The Court should reject both proposals because, under either, the defendants could obtain civil discovery from others while being afforded protections broader even than those provided by the Fifth Amendment insofar as the defendants would not be required to provide discovery or submit to questioning. Their rationale is plain: they could enjoy the benefits of discovery without having to assert their Fifth Amendment rights and suffer the

attendant adverse consequences in this civil action. The Court should reject that self-serving, one-sided approach and instead stay this case completely pending the outcome of the parallel criminal prosecution in *United States v. Smith,* Case No. 19 CR 669 (N.D. Ill.) (Chang, J.).

Smith's Proposal. Smith opposes any stay and proposes "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." (Smith Opp. at 2; *see id.* at 14.) Under Smith's proposal, any party or witnesses "who receives a subpoena, deposition notice, or other discovery request, in response to which he / she wishes to invoke a valid Fifth Amendment right," will be permitted "to notify all parties to this Action of this wish (the 'Fifth Amendment Notification') through his or her counsel." (*Id.* at 14-15.) Such notification would adjourn the deadline to respond "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." (*Id.*) This proposal, however, would allow the defendants to avoid responding to discovery, while not actually asserting their Fifth Amendment rights (only providing notice to other parties of their intent to do so).

If there were any doubt, Nowak's position on Smith's proposal lays bare the motivation and confirms its goals. Nowak does not object to Smith's proposal, but makes clear 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 not to be a witness against himself." (Nowak Opp. at 3 n.3.) In other cases, proposals similar to Smith's have been rejected by courts. *See, e.g.*, *S.E.C v. Platinum Mgmt. (NY) LLC*, No. 16-CV-6848, 2017 WL 2915365, at *5 (S.D.N.Y. July 7, 2017) (rejecting defendants' proposal and concluding their "arguments have no merit, given the potential impact on the Individual Defendants' Fifth Amendment rights," noting that "[e]ven a narrowly tailored discovery protocol, that includes testimonial types of evidence, could include potentially incriminating documents or emails.").[2] Smith's plan also would serve to benefit only the defendants and ensure judicial resources will be required to address challenges to whether a party or witness has a "valid" Fifth Amendment right in order to postpone responding to discovery and other related requests. *See id.* at *6 ("In proposing a partial stay that would bar any 'testimonial-type activities' that broadly might implicate the Government's or defendants' legitimate interests, it is certain that judicial resources would be required to resolve civil discovery disputes in determining what types of discovery would implicate the Government's or defendants' interests. A stay of the civil action would avoid a duplication of efforts and a waste of judicial time and resources."). Given the

[2] In *Platinum Management*, the defendants "proposed 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." 2017 WL 2915365, at *5. The defendants had claimed they would be prejudiced by a stay because it would allow the SEC to continue investigating its case while barring them from obtaining exculpatory evidence, and further argued that the government has not met its burden of showing either undue prejudice or actual harm that would result if the civil action were to proceed without the stay. *Id.*

lop-sided benefit to the defendants, and waste of judicial resources, Smith's plan should be rejected.

Nowak's Proposal. While Nowak does not oppose Smith's proposal, he also proposes a more limited plan that would "stay this action except for document discovery, including third-party discovery, which should proceed." (Nowak Opp. at 1; *see id.* at 3 (stating the Court "should permit document discovery to proceed while otherwise staying this action.").) Nowak claims such a stay "would protect the criminal process as well as the defendants' rights, but also vindicate the defendants' interests in proceeding as expeditiously as possible to resolve the CFTC Case." (*Id.* at 2.) Although more limited than Smith's plan, Nowak's proposal would still allow the defendants to avail themselves of the civil document discovery rules while avoiding the need to assert their Fifth Amendment rights against self-incrimination in response to interrogatories and deposition requests.

To support his position, Nowak points to *Commodity Futures Trading Commission v. Vorley*, No. 18-CV-603 (N.D. Ill.) (Pallmeyer, C.J.), which he claims is a "similarly situated" case that was stayed pending the resolution of a parallel criminal case, but allowed document discovery to proceed. (Nowak Opp. at 3, 12-13.) In the *Vorley* case, however, at the time of motion to stay, one co-defendant had not yet made his initial appearance in the case (even though the criminal case had been pending for five months) and there was no trial date on horizon. In addition, the court in *Vorley* was clear that:

> [I]f 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.

(Cogan Declaration (Dkt. No. 39), Exhibit B at 15). While the court in *Vorley* ultimately permitted document discovery to proceed—although it did so *sua sponte* and seemingly in conflict with its interest in avoiding the "one-way stay"—the facts in this case show why *Vorley* is not applicable here. The criminal case involving the defendants is on a clearer path to a resolution: all four defendants have appeared, a briefing schedule has been set, and a trial date will be set at the next status hearing. *See infra* at 12. Further, Nowak's citation to *Vorley* still fails to explain why this Court should allow the defendants to obtain document discovery from the CFTC and third parties, while themselves not being "required to take any actions—such as responding to pleadings, answering interrogatories, or being deposed—that implicate his Fifth Amendment right not to be a witness against himself." (Nowak Opp. at 3 n.3.)

Nowak also claims that the DOJ's request for a stay is an attempt to "maintain a tactical advantage" and prevent the defendants from obtaining information. (Nowak Opp. at 9.) To the contrary, the government has provided the defendants with voluminous discovery in the criminal case, including trade data, millions of pages of documents, and reports of witness statements.[3] (*See* Smith Opp. at 4.) It is

[3] Complying with the criminal discovery rules does not mean the DOJ is trying to prejudice the defendants' criminal case. *See Nicholas*, 569 F. Supp. 2d at 1072 n.8 ("[T]he Court recognizes that the criminal discovery rules were crafted with an eye toward fairness for all concerned—the defendant, the prosecution, and the public. The Court rejects any implication that leaving Defendants with only criminal discovery mechanisms somehow prejudices their defense.").

the defendants, in fact, who openly seek the improper advantage in the criminal case by attempting to avail themselves of the broad civil discovery rules—unavailable to the DOJ—to gather information ahead of their criminal trial. Nowak's proposal, therefore, should be rejected.

II. The Relevant Factors Weigh in Favor of a Complete Stay of this Civil Action Pending the Resolution of the Parallel Criminal Case, Even Over Defendants' Objections

Notwithstanding the defendants' arguments to the contrary, a stay through the resolution of the criminal case is warranted given the substantial overlap of the issues in the two actions; the post-indictment status of the criminal case; the CFTC's lack of opposition to the DOJ's proposed stay; the Court's interest in the efficient resolution of the two proceedings; and the strong public interest in vindication of the criminal law all weigh in favor of a stay of the CFTC's civil action.[4] *See S.E.C. v. Shkreli*, No. 15-CV-7175, 2016 WL 1122029, at *7 (E.D.N.Y. Mar. 22, 2016) ("[N]umerous courts both in this circuit and others . . . have granted complete stays of [civil] actions during the pendency of parallel criminal proceedings, even over a defendant's objection.") (collecting cases); *see also United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970) ("Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to

[4] The defendants attempt to re-cast the relevant metric for determining whether a stay is appropriate using a "substantial prejudice" standard. (*See* Smith Opp. at 2, 4-5.) Courts have been clear, however, that deciding whether a stay is appropriate "requires balancing the competing interest of plaintiffs, defendants, and the public" and that a court "may stay a civil proceeding pending resolution of criminal proceedings when the interests of justice require it." *Salcedo v. City of Chicago*, No. 09-CV-5354, 2010 WL 2721864, at *2 (N.D. Ill. July 8, 2010).

require such action, sometimes at the request of the prosecution, sometimes at the request of the defense.") (citations omitted). As discussed below, the defendants misapply the relevant factors and ignore relevant case law in making their arguments against a complete stay in this case.

Whether the government is a party in both cases[5]*:* The defendants claim a stay is not warranted because "the federal government created the purported problem that it now seeks to be relieved from by filing both actions simultaneously." (Smith Opp. at 2; *see also id.* at 7-8; Nowak Opp. at 8-9.) The fact that these cases were filed closely in time, however, has no bearing on the issue of whether a stay is appropriate. *See infra* at 11-12. In addition, the defendants misstate the issue that courts in this District analyze when the government is involved in both the civil and criminal cases, namely, the government's potential use of civil discovery to obtain evidence for the criminal case. *See Salcedo v. City of Chicago*, No. 09-CV-5354, 2010 WL 2721864, at *2 (N.D. Ill. July 8, 2010); *Chagolla v. City of Chicago*, 529 F. Supp. 2d 941, 946 (N.D. Ill. 2008).[6] No party claims that this is an issue in this civil action. Further, the

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[5] To facilitate the consideration of the DOJ's responses in this Reply Memorandum to the defendants' arguments in their briefs, this Memorandum addresses the various factors in the order set forth in Smith's opposition papers, which differs from the order in the DOJ's initial motion and the prevailing case law. *See, e.g., Chagolla*, 529 F. Supp. 2d at 945-47. To the extent Nowak's opposition appeared to address any one factor, Nowak's arguments are included in the discussion of that factor, as relevant.

[6] Despite defendant Smith's statement that this factor is "only applicable when defendants are seeking a stay" (Smith Opp. at 8 n.5), courts consider whether the government would use civil discovery to circumvent criminal discovery even when a defendant has moved for the stay. *See Cruz v. Cnty. of DuPage*, No. 96-CV-7170, 1997 WL 370194, at *3 (N.D. Ill. June 27, 1997).

defendants also overlook the related concern that arises when examining this issue—which is particularly acute in this case given the defendants' proposed alternatives to a complete stay of this action—that "the pendency of parallel criminal and civil matters poses the related risk of giving persons who have been accused criminally . . . the ability to use the civil discovery process to ferret out the particulars of the prosecuting authorities' case against them, an opportunity they would not have if no civil case were pending." *Chagolla*, 529 F. Supp. 2d at *946.

Effect of a stay on the public interest: The defendants assert that the "only interest of the public relevant here" is the public's "interest in the expeditious resolution of civil and criminal matters." (Smith Opp. at 2, 10; *see also* Nowak Opp. at 11-12.) The defendants call the idea "speculative" that the defendants' civil discovery would adversely affect the criminal proceeding, claiming their use of the civil discovery rules "does not pose a risk of cognizable prejudice of harm to the government" (Nowak Opp. at 2, 6), and asserting that "concrete allegations of abuse" are necessary in order to justify a stay (Smith Opp. at 9).

In making these arguments, however, the defendants ignore that courts have clearly recognized the public's "interest in ensuring that a criminal investigation can proceed untainted by civil litigation and this interest weighs in favor of a stay." *Salcedo*, 2010 WL 2721864, at *3; *see Chagolla*, 529 F. Supp. 2d at 947 (noting the public "has an interest in ensuring that the criminal process can proceed untainted by civil litigation"). When granting a stay for such reasons, courts do not consider whether "abuse" has occurred, but rather focus on the fact that vast civil discovery

would allow a defendant to obtain materials he otherwise would not receive in a criminal case, not because of any nefarious act by the government but simply because of the more limited nature of criminal discovery. *See S.E.C. v. Gordon*, No. 09-CV-0061, 2009 WL 2252119, at *5 (N.D. Okla. July 28, 2009) (stating that "many courts have granted stays to prevent a criminal defendant from obtaining otherwise unavailable information" and rejecting the argument that "taking advantage of broader civil discovery mechanisms is not a legitimate reason to grant a stay"). Even where there is *no* evidence that a defendant may engage in improper activity, courts have found that the mere potential for a negative effect on a criminal case weighs in favor of a stay. *See Nicholas*, 569 F. Supp. 2d at 1072 & n.8 (identifying the potential for witness or evidence tampering as a factor weighing in favor of staying a parallel SEC proceeding and noting "the Court does not suggest that the Defendants seek civil discovery for an illegal or unethical purpose"); *see also Shkreli*, 2016 WL 1122029, at *7 (concluding that "the public's interest in the effective enforcement of the criminal law is the paramount public concern" and that "the pending criminal prosecution serves to advance those same interests") (quotation omitted).

In addition, the defendants assert that the DOJ could have avoided the issues identified in its request for a stay if the DOJ and CFTC had not brought simultaneous cases and the CFTC had simply waited for the criminal case to resolve before filing its civil action. (Smith Opp. at 9-10; *see also* Nowak Opp. at 7-8 (arguing a stay is not warranted because the DOJ is "responsible for the simultaneous proceedings").) This argument ignores obvious statute-of-limitations issues as well as the fact that the

DOJ and CFTC are separate government bodies with different mandates to pursue when investigating violations of the criminal and civil laws, respectively. The CFTC has a statutory mandate to enforce the commodities laws and cannot simply forgo or delay bringing a civil enforcement action because a related criminal proceeding may also arise. *See Shkreli*, 2011 WL 1122029, at *7 n.6 ("The court finds no fault in the SEC's commencement of the civil action at or around the time the criminal indictment was unsealed, given the SEC's independent mandate to enforce the securities laws and the needs to commence an action before expiration of the statute of limitations."); *Nicholas*, 569 F. Supp. 2d at 1071 ("Upon discovering securities violations, it is the duty of the SEC to bring civil enforcement actions and seek injunctive relief to prevent continuing violations. Should the SEC forego civil enforcement proceedings in deference to criminal prosecution, numerous violations would become time-barred during the pendency of the criminal case."); *see also Kordel*, 397 U.S. at 11 ("It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.").

Posture of the criminal proceeding: The parallel criminal case has a pre-trial motion briefing schedule[7] and is moving forward towards a trial date, so a stay of this

[7] All legal challenges to the Superseding Indictment that are not dependent on discovery must be filed by February 28, 2020, and any other Federal Rule of Criminal Procedure 12 or 16 pre-trial motions must be filed by April 24, 2020. (*See* Exs. A and B to Sullivan Decl.)

civil action will not be for an undefined, indefinite period of time. On December 5, 2019, Judge Chang held an arraignment on the superseding indictment and status hearing in the criminal case, during which he set the schedule for pre-trial motions and stated that he expects to set a trial date at the next status hearing on March 3, 2020. *See* Order, *United States v. Smith*, 19 CR 669, Dkt. Nos. 68 (Smith) & 69 (Nowak) (N.D. Ill. Dec. 5, 2019) ("At the next status hearing, the Court will set a trial date so that a time block is set aside; the parties shall confer on possible trial dates.") (Exs. A and B to the Sullivan Decl.).

The burden imposed on defendants if a stay is denied: The defendants claim that "the criminal case will be protracted" and any "delay will cause substantial prejudice" to the defendants, saying they need to move forward and defend this civil action because the "CFTC's accusation of intentional wrongdoing are serious." (Smith Opp. at 2, 12; *see also* Nowak Opp. at 2 (claiming a stay would prejudice Nowak by "substantially delaying the time-consuming process of discovery in the CFTC Case, which in turn will further prolong and delay a resolution of this action."); *see also id.* at 10-11.) This civil action, however, will not be resolved prior to the conclusion of the criminal case—as evident from Smith and Nowak's proposed alternatives to a complete stay discussed above—and the defendants cannot seriously claim that they suffer greater reputational harm from the civil claims in this case than from the racketeering, conspiracy, and other felony charges in the criminal case. *See Platinum Mgmt.*, 2017 WL 2915365, at *6 (finding "claim that a complete stay will cause harm to [defendants'] reputation is unconvincing and disingenuous at best" because it was

"implausible that the opposing defendants will suffer greater reputational harm from civil charges than from a criminal indictment"). Courts addressing similar arguments have found that allowing the parallel civil proceedings to move forward would distract the government, defendants, and the court from the related criminal proceedings, which are of "greater relative importance." *Nicholas*, 569 F. Supp. 2d at 1073; *see id.* ("[T]he foremost concern of the Court is for the parties to devote their time, energy and resources towards preparing for the criminal trial"); *Gordon*, 2009 WL 2252119, at *5 (commenting that the defendant "might stand to benefit from proceeding with the criminal case first" in order to avoid implicating his Fifth Amendment rights and the "distraction of defending himself in a civil action while facing serious criminal charges").

The defendants also argue that a delay in discovery will delay the resolution of this civil action and "will harm the defendants, who have an interest in confronting the serious allegations against them and clearing their names as soon as is reasonably possible." (Nowak Opp. at 6; *see also id.* at 12; Smith Opp. at 12-13). In the criminal case, however, the defendants already have over 19.9 million pages of discovery as well as dozens of interview reports (*see* Exs. A & B to Sullivan Decl.; Cogan Decl. ¶ 4), which will certainly be of use in this civil action when any stay is lifted. *See Shkreli*, 2016 WL 1122029, at *6 (noting the court's "strong interest in the efficient resolution of the both the criminal and civil cases" and that "evidence gathered and presented during the criminal prosecution can be used in the civil action").

Civil plaintiff's interest in proceeding expeditiously: The defendants oppose the stay, in part, because they reject the notion that any efficiencies will accrue to this civil action through the resolution of the criminal case, claiming "this argument has been rejected." (Smith Opp. at 13.) The defendants simply dismiss the obvious efficiencies to the Court and the parties that would arise from resolving issues in the criminal case first, which would subsequently narrow or eliminate issues in this civil action. *See Gordon*, 2009 WL 2252119, at *5 ("A stay of the civil case pending the outcome of the criminal proceeding would avoid a duplication of efforts and a waste of judicial time and resources."). For example, even considering defendant Smith's assertion that he "expects to be acquitted at trial" (Smith Opp. at 14), he fails to acknowledge that such an acquittal may lead to a quick resolution of this civil case without the need to expend significant resources by the parties or the Court. *See* Joint Motion for 60-Day Stay, *Commodity Futures Trading Commission v. Andre Flotron*, Civil Action No. 18-158, Dkt. No. 29 (D. Conn. July 20, 2018) (stating that the parties had "reached an agreement in principle that would resolve all of the Commission's claims against the Defendant and conclude this litigation in its entirety" less than three months after Flotron's acquittal of criminal charges arising from similar underlying conduct as alleged here) (Ex. C to the Sullivan Decl.).

Same subject matter: The defendants concede (as they must) that the subject matter of this civil action overlaps substantially with the criminal case. This, along with the other factors discussed above, weighs in favor of a complete stay. *See*

Chagolla, 529 F. Supp. 2d at 946 ("The close relationship between the civil and criminal matters weighs in favor of a stay.").

CONCLUSION

For the foregoing reasons, the Motion of the United States to Intervene and to Stay this civil action through the conclusion of the parallel criminal prosecution against Nowak and Smith in *United States v. Smith et al.*, Case No. 19 CR 669 (N.D. Ill.) should be granted.

Respectfully submitted,

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Dated: December 13, 2019

CERTIFICATE OF SERVICE

I, Matthew F. Sullivan, hereby certify that on December 13, 2019, I caused the foregoing United States' Reply Memorandum in Support of Its Motion to Intervene and to Stay to be electronically filed with the Clerk of Court by using the Court's electronic filing system, which will automatically send a notice of electronic filing to the plaintiff and the defendants' representatives who have entered an appearance in this case.

/s/*Matthew F. Sullivan*
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