UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiffs,	:	ECF Case No. 14-CV-1528
against	:	
STEVEN H. DAVIS, STEPHEN DICARMINE, JOEL SANDERS, FRANCIS CANELLAS, and THOMAS MULLIKIN,	:	
Defendants.	:	

DEFENDANTS STEVEN H. DAVIS AND STEPHEN DICARMINE'S BRIEF IN SUPPORT OF AN APPLICATION FOR A COMPLETE STAY OF THIS ACTION

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INTRODUCTION

This memorandum is submitted on behalf of defendants Steven H. Davis and Stephen DiCarmine in response to the Court's Order entered on April 30, 2014, directing the District Attorney of New York County ("DANY") to submit a brief on the appropriate scope of any stay in this case. The order provides that the other parties, although not directed to submit a brief, also may address the following issues: whether a stay should: (1) focus exclusively on discovery or cover responsive pleadings; (2) cover all aspects of discovery and, if not, what types of discovery may be permissible; and (3) cover all defendants independent of the status of the criminal case.

It is well-settled that a court has the discretionary authority to stay a case if the interests of justice so require. *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir.1986) (citation omitted). In deciding whether to enter a stay, courts in the Southern District of New York typically consider six factors: (1) the extent to which issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in preceding expeditiously weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests and burden on the defendants; (5) the interests of the Courts; and (6) the public interest. *S.E.C. v. Boock*, No. 09 Civ. 8261 (DLC), 2010 WL 2398918, at *1-2 (S.D.N.Y. June 15, 2010) (Cote, J.).[1]

It would be unfair and unduly burdensome for Messrs. Davis and DiCarmine to defend this case while simultaneously defending a criminal case of even greater scope, and we urge the Court to stay this action in its entirety pending the resolution of the parallel criminal case. Granting a stay while the criminal case goes forward would conserve judicial resources and the

[1] We note that in three recent cases brought by the SEC in the Southern District of New York, the Courts have granted a complete stay of the case pending resolutions of parallel criminal cases. In those cases, the defendants were not required to file answers prior to the granting of the stay. Orders from those cases, including an Order in which your Honor continued the complete stay ordered by Judge Crotty in *S.E.C. v. Teeple*, No. 1:13-cv-02010, are attached.

resources of the parties, and would serve the public interest by avoiding duplicative litigation, narrowing disputed issues, and potentially facilitating resolution of this case.

BACKGROUND

On March 6, 2014, at a joint press conference, the Securities and Exchange Commission ("SEC") and the DANY respectively announced the filing of this complaint and also of an indictment against these two defendants, another defendant and another person not charged in this complaint. The SEC and the DANY worked jointly on the investigation that led to this complaint and the indictment. *See* March 31, 2014 Speech of Mary Jo White (SEC investigation was in coordination with DANY).

Perhaps not surprisingly, there is a very substantial overlap between the indictment and this complaint. Count One of the indictment alleges a Penal Law scheme to defraud, a significant component of which is predicated on a Private Placement that Dewey & LeBoeuf ("D&L") engaged in with several insurance company investors in April 2010. Count 105 of the indictment alleges that the defendants violated the securities scheme to defraud subsection in New York's Martin Act based on the same conduct. That same Private Placement is at the core of this civil complaint. Moreover, it appears that 13 of the 15 grand larceny in the first degree counts of the indictment stem from the Private Placement, and many of the falsifying business records counts relate to it.

ARGUMENT

APPLICATION OF THE FACTORS TO THIS SITUATION

The application of the six factors that the courts consider in parallel proceedings such as this strongly argue in favor of staying the entire matter with respect to Messrs. Davis and DiCarmine.

1. The extent to which issues in the criminal case overlap with those presented in the civil case. The Private Placement at the heart of the SEC complaint is a very significant part of

the indictment. The alleged improper accounting adjustments, some of which pre-date the Private Placement Offering by several years, are nonetheless central to the SEC's case because the SEC alleges that the prior years' financial statements incorporated into the Private Placement Memorandum were false as a result of those allegedly improper adjustments. Thus, while the legal theories are distinct, the alleged factual basis for the SEC complaint and for the indictment are substantially the same. "The strongest case for granting a stay is where a party under criminal indictment is required to defend a civil proceeding involving the same matter." *Volmar Distribs., Inc. v. New York Post Co., Inc.*, 152 F.R.D. 36, 39 (S.D.N.Y. 1993) (citations omitted).

2. The status of the case, including whether the defendants have been indicted. The defendants have been indicted as part of a coordinated investigation by the DANY and the SEC. Justice Robert Stolz has repeatedly said that he intends to start the criminal trial in January 2015. "Courts have noted that a civil stay is most appropriate when the defendant has already been indicted…." *S.E.C. v. One or More Unknown Purchasers of Secs. of Global Indus., Ltd.*, No. 11 Civ. 6500 (RA), 2012 WL 5505738, at *3 (S.D.N.Y. Nov. 9, 2012).

3. The private interests of the plaintiffs in preceding expeditiously weighed against the prejudice to plaintiffs caused by the delay. The plaintiff has consented to a complete stay of the action, which demonstrates its willingness to forego a resolution of the civil case until after the criminal case is resolved, thereby evincing its perception that its interests will not be prejudiced by that delay. See *S.E.C. v. One or More Unknown Purchasers of Secs. of Global Indus., Ltd.*, 2012 WL 5505738 at *3, *citing SEC v. Syndicated Food Serv. Int'l*, 04 Civ. 1303 (E.D.N.Y. Aug. 26, 2004) ("[A] stay of discovery would not prejudice the plaintiffs in the civil case, as evidenced by the fact that the SEC does not oppose the USAO's motion.").

4. The private interests and burden on the defendants. Proceeding with the SEC action would severely burden the defendants in several ways. First, because of the pendency of the criminal case, proceeding here might very well force them to assert their Fifth Amendment

rights with respect to answering the complaint and at depositions, something they likely would not otherwise do. As the Court noted in *Volmar Distribs.*, 152 F.R.D. at 39 ("denying a stay might undermine a defendant's Fifth Amendment privilege against self-incrimination" and "[p]roceeding with discovery would force these defendants into the uncomfortable position of having to choose between waiving their Fifth Amendment privilege or effectively forfeiting the civil suit.") (citation omitted). *See also S.E.C. v. Boock*, 2010 WL 2398918 at *2 ("In the absence of a stay, an adverse inference may very well be drawn against the defendants in this civil action if the pendency of the criminal prosecution prompts them to invoke their Fifth Amendment privilege.").

Second, proceeding with even limited discovery in the SEC action would be a severe drain on the defendants' limited resources. DANY estimates that the prosecution case at the criminal trial will last four to six months. Justice Stolz has advised the parties to expect the trial to commence in January 2015. Preparing for a criminal trial of this magnitude and complexity - which will involve analyzing millions of documents and accounting records - is a massive undertaking. Messrs. Davis and DiCarmine cannot reasonably defend the criminal charges they face and simultaneously participate in discovery and defend this civil action. If the defendants were required to proceed with even limited discovery in the SEC action, they would be forced to incur expenses and devote resources to defend the SEC action to the detriment of their defense in the criminal case. In short, forcing the defendants to proceed on two fronts would be terribly unfair to them.

5. The interests of the Courts. Where criminal cases are resolved prior to the disposition of the parallel SEC actions, the criminal case resolution often dictates the SEC resolution or at minimum informs it. "Moreover, a stay in the action will streamline later civil discovery since the transcripts from the criminal case will be available to the civil parties." *Morris v. American Fed'n of State, Cnty. and Mun. Emps.*, No. 99 Civ. 5125 (SWK), 2001 WL

123886 at *2 (S.D.N.Y. Feb. 9, 2001). Thus, it makes little sense for two courts to expend limited judicial resources covering the same ground, especially when the parties are prepared to proceed *seriatim*.

6. The public interest. The public interest is best served when defendants facing Draconian penalties[2] in serious criminal cases are treated fairly. That overriding interest is best served by the Court staying this action against these two defendants.

Any partial stay would be very unfair to these two defendants. If they are compelled to answer or to be deposed, they will be placed in an untenable, prejudicial position *vis-a-vis* their Fifth Amendment rights. That would be particularly unfair to them since DANY and the SEC acted in tandem to bring the cases simultaneously based largely on the same conduct.

CONCLUSION

For the foregoing reasons, the Defendants request that this action be completely stayed.

Dated: New York, New York
May 30, 2014

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[2] The indictment includes fifteen counts of Grand Larceny in the First Degree, a class B felony punishable by a term of imprisonment of up to 25 years. N.Y. Penal Law §§70.00(2)(b) and 155.42.