

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil No. 1:20-cv-1343

\$4,543.79 IN FUNDS SEIZED FROM BANK  
ACCOUNT #153568031006 IN THE NAME  
OF CARLETON P. NELSON AND AMY S.  
NELSON AT U.S. BANK,

\$8,388.54 IN FUNDS SEIZED FROM BANK  
ACCOUNT #1635892407 IN THE NAME  
OF AMY STERNER NELSON AT WELLS  
FARGO,

\$13,559.97 IN FUNDS SEIZED FROM  
BANK ACCOUNT #1361410762 IN THE  
NAME OF E2M PROPERTIES LLC AT  
CAPTIAL ONE BANK,

\$25,343.01 IN FUNDS SEIZED FROM  
BANK ACCOUNT #145947373 IN THE  
NAME OF CARLETON NELSON AT  
CITIBANK,

\$98,358.92 IN FUNDS SEIZED FROM  
BANK ACCOUNT #149656681 IN THE  
NAME OF CARLETON NELSON AT  
CITIBANK,

\$491,780.50 IN FUNDS SEIZED FROM  
ACCOUNT ENDING IN 5810, HELD ON  
BEHALF OF AMY STERNER NELSON  
AND CARLETON P. NELSON, AT  
SIGNATURE BANK,

\$10,567.43 IN FUNDS SEIZED FROM  
BANK ACCOUNT # 104781237441 IN THE  
NAME OF DEVON M. KIRSCHNER AND  
CASEY H. KIRSCHNER AT U.S. BANK,

\$1,217.05 IN FUNDS SEIZED FROM BANK ACCOUNT #320013539278 IN THE NAME OF AMY S. NELSON AND CARLETON PHILLIP NELSON AT AMERICAN EXPRESS NATIONAL BANK,

and

\$4,284.47 IN FUNDS SEIZED FROM BANK ACCOUNT #1518835838 IN THE NAME OF AMY S. NELSON AND CARLETON PHILLIP NELSON AT AMERICAN EXPRESS NATIONAL BANK,

Defendants In Rem.

**MOTION BY THE UNITED STATES, E2M PROPERTIES, AND CASEY KIRSCHNER  
FOR A STAY AND TO CANCEL THE FEBRUARY 17, 2021 INITIAL PRETRIAL  
CONFERENCE**

Come now three of the four parties, the United States of America, E2M Properties, and Casey Kirschner (collectively, “the movants”), two of whom through counsel, and move this Honorable Court for a stay of the above-styled civil forfeiture action pursuant to 18 U.S.C. § 981(g). Further, the government requests, pursuant to 18 U.S.C. § 981(g)(5), to file a declaration in support of this motion by Federal Bureau of Investigation Special Agent Randy Combs ex parte and under seal. Agent Combs’s declaration explains why civil discovery would have an adverse impact on a pending criminal investigation and goes into some sensitive detail. For the reasons explained herein, the movants respectfully request that the Court grant the stay sought. Further, the movants respectfully request the cancellation of the initial pretrial conference set for February 17, 2021, at least until the issue of whether to grant a stay can be resolved.

**PROCEDURAL HISTORY**

On November 9, 2020, the government filed a verified forfeiture complaint seeking the forfeiture of the above-captioned defendants in rem (“defendants”). The complaint alleges that

the defendants represent proceeds from honest-services wire fraud or a conspiracy to commit the same, as well as funds involved in money laundering or unlawful monetary transactions (Document 1). Three parties filed timely claims in this case. Carleton and Amy Nelson filed their claim on December 18, 2020 (Document 9). E2M Properties filed its claim on December 16, 2020 (Document 8). Casey Kirschner filed his claim on December 21, 2020 (Document 11). Mr. Kirschner and the Nelsons assert they are the owners of certain defendants, whereas E2M's claim is based on the account from which its defendant was seized being a corporate account. The Nelsons filed an answer on January 22, 2021 (Document 16). On January 28, 2021, the Court issued a scheduling order (Document 18).

As described in more detail in Agent Combs's declaration, the facts giving rise to this forfeiture suit involve an honest-services wire fraud scheme and conspiracy whereby kickbacks were paid by individuals doing business with a company described in the complaint as Company #1. The identity of Company #1 is known to all claimants and is revealed in Agent Combs's declaration. The scheme implicates a number of individuals and businesses and involves several of Company #1's properties located in Northern Virginia. As Agent Combs states in his declaration, the investigation remains ongoing and not all who may be implicated are aware that they are subjects of the investigation. The U.S. Attorney's Office and the FBI are currently investigating the targets and subjects of this investigation. Targets and/or subjects who are aware of their status include Carleton Nelson, Casey Kirschner, and the person referred to as Person #5 in the complaint associated with this case (Document 1). Person #5 is the president of E2M Properties and the complaint alleges that Person #5 laundered fraud proceeds through the defendant E2M account.

From the government's perspective, engaging in civil discovery has the potential to interfere severely in its continued criminal investigation in this case, described in more detail in Agent Combs's declaration. For E2M Properties and Casey Kirschner, those two parties are concerned that engaging in discovery may burden their Fifth Amendment right against self-incrimination.

#### STANDARDS GOVERNING

Whether to stay a pending civil forfeiture action is governed by 18 U.S.C. § 981(g). For the government, "the court shall stay the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case." 18 U.S.C. § 981(g)(1). For claimants, a stay is in order when "the court determines that—(A) the claimant is the subject of a related criminal investigation or case; (B) the claimant has standing to assert a claim in the civil forfeiture proceeding; and (C) continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination in the related investigation or case." 18 U.S.C. § 981(g)(2).

18 U.S.C. § 981(g)(1) "does not require a particularized showing of prejudice or specific harm; rather, all that the Court must determine is whether the civil discovery will interfere with the criminal investigation." United States v. One 2008 Audi R8 Coupe Quattro, 866 F.Supp.2d 1180, 1183 (C.D. Cal. 2011) (further noting that "Court have routinely issued Section 981(g)(1) stays on the basis of the Government's allegations of *likely* prejudice to the criminal proceeding caused by the civil discovery" (emphasis in the original)). Where a related criminal investigation is active and ongoing, and civil discovery would adversely affect the government's ability to carry on with and complete that investigation, a stay is warranted. United States v. 3039.375 Pounds of Copper Coins, No. 1:08-cv-230, 2008 WL 4681779, at \*3 (W.D.N.C. Oct. 21, 2008).

Courts stay civil forfeiture cases when “civil discovery will, in all likelihood, adversely affect the ability for the Government to conduct the related criminal investigation because it will subject the Government's criminal investigation to early and broader civil discovery than would otherwise be possible in the context of the criminal proceeding.” United States v. One Assortment of Seventy-Three Firearms, 352 F.Supp.2d 2, 4 (D.Me. 2005). Accord United States v. \$160,280 in U.S. Currency, 108 F.Supp.3d 324, 326 (D.Md. 2015) (“Where civil discovery would subject the [G]overnment's criminal investigation to ‘early and broader civil discovery than would otherwise be possible in the context of the criminal proceeding,’ a stay should be granted.”) (quoting United States v. All Funds on Deposit in Suntrust Account Number XXXXXXXXXXX8359, 456 F.Supp.2d 64, 65 (D.D.C. 2006)).

As one Court has observed:

The law clearly provides for much more limited discovery in the criminal context than the civil, and for that reason, stays of civil forfeiture actions are routinely granted during the pendency of related criminal proceedings. Indeed, the statute underlying such stays is mandatory; the Court must stay the civil proceeding if it finds that it would interfere with the related criminal matter.

United States v. \$278,780.80 in Funds, No. 11 Civ. 00555, 2012 WL 4747209, at \*3 (S.D.N.Y. Oct. 4, 2012).

18 U.S.C. § 981(g)(5) provides that the government may make the necessary showings to obtain a stay through presentation of evidence ex parte where doing otherwise may adversely affect an ongoing criminal investigation. United States v. Funds in the Amount of \$1,669,675.00, No. 1:13-cv-21549, 2014 WL 687553, at \*2 (S.D.Fla. Jan. 16, 2014) (that the statute expressly authorizes the submission of ex parte evidence is sufficient reason to overrule claimant’s objection to having to respond to evidence it cannot see); United States v. \$144,001 in U.S. Currency, No. C 09-04182, 2010 WL 1838660, at \*1 (N.D.Cal. May 3, 2010) (the plain

language of § 981(g)(5) permits the government to submit evidence in support of its motion to stay ex parte and under seal even if the claimant objects); United States v. GAF Financial Services, Inc., 335 F.Supp.2d 1371, 1373 n.2 (S.D.Fla. 2004) (same).

From the claimants' side, Courts grant stays of a civil forfeiture case on a claimant's motion where the claimant is a target in a related criminal case and thus runs the risk of civil forfeiture burdening that claimant's Fifth Amendment right against self-incrimination. One Assortment of 73 Firearms, 352 F.Supp.2d at 4. Courts grant stays on a claimant's motion even where there is not a perfect overlap between who is a criminal target or subject and who is a civil claimant. See, e.g., United States v. 249-20 Cambria Avenue, Little Neck, NY, 21 F.Supp.3d 254, 263 (E.D.N.Y. 2014). A stay is appropriate where, "even if there is not an identity of parties in both actions, there is an identity of interests." Id. (internal quotation marks and citing references omitted).

#### ARGUMENT

As explained in the attached declaration of Agent Combs, the FBI is engaged in a long-term investigation of an honest-services wire fraud and money laundering scheme related to commercial land sale contracts in Northern Virginia. No indictment has issued at this point, but the case is actively proceeding in the stage described in Agent Combs's declaration. The government notes that, pursuant to page seven of General Order 2021-01, all grand jury proceedings are suspended through February 28, 2021. Exceptions to General Order 2021-01's proviso are only to be made by the Chief U.S. District Judge and will only be made in "dire circumstances." Further, General Order 2021-01 observes that "while a formal suspension of grand jury proceedings has not recently been in place, **grand juries have not been meeting** in this District since criminal jury trials were suspended in mid-November in light of the materially worsening state of the COVID-19 pandemic in our District" (emphasis in the original order).

The Court's recently issued scheduling order in this case puts the exchange of civil discovery even more imminently on the horizon (Document 18). See United States v. Approximately \$69,577 in U.S. Currency, No. C 09-0674, 2009 WL 1404690, at \*1 (N.D.Cal. May 19, 2009) (cancelling case management conference in light of the Court's issuance of an order staying the civil forfeiture case). Set against this background, the movants seek a stay of this civil forfeiture case for a period of six months and respectfully request the cancellation of the initial pretrial conference set for February 17, 2021, at least until the issue of whether to grant a stay can be resolved.

Given the procedural posture of this case, as described in Agent Combs's declaration, this is an instance where allowing civil discovery to proceed would subject the ongoing criminal investigation to early and broader discovery than would be permitted in the criminal case, to the detriment of the criminal case. United States v. \$845,130 of Funds Associated with Apex Choice Ltd., No. 18-2746, 2020 WL 6581781, at \*2 (D.D.C. Nov. 10, 2020) (granting stay based on broader discovery available in civil cases, the possibility that discovery would expose "sensitive confidential witnesses, and "general disruption to the criminal investigation"); \$160,280 in U.S. Currency, 108 F.Supp.3d at 326 (although state prosecutor in related criminal case has an open-file policy, broader civil discovery in the federal forfeiture case, to include depositions and interrogatories, would provide information from law enforcement not available to the defendant in the state case); United States v. Approximately \$345,762.38 Seized from Nine Financial Accounts, No. 3:09-cv-385, 2009 WL 3230608, at \*2 (W.D.N.C. Oct. 1, 2009) (stay granted because it is "readily apparent" that the broader discovery in a civil case will adversely affect the government's criminal investigation and prosecution); One Assortment of 73 Firearms, 352 F.Supp.2d at 4 (government satisfies its burden by showing civil discovery will subject the



criminal investigation “to early and broader civil discovery than would otherwise be possible in the context of the criminal proceeding”). This is especially true given the stage of the criminal proceedings described in Agent Combs’s declaration.

Producing discovery will divulge the identities of witnesses, opening them up to attempts at witness tampering made by the targets/subjects themselves without the knowledge of their attorneys. See, e.g., Funds in the Amount of \$1,669,675.00, 2014 WL 687553, at \*3 (that the government would have to identify the witnesses in its criminal case and expose their testimony is itself reason to grant a stay). See also United States v. Approximately \$6,658.92 in U.S. Currency Seized from Wells Fargo Bank Account No. 8328019032, No. 1:13-cv-1674, 2015 WL 7750619, at \*2 (E.D.Cal. Dec. 2, 2015) (granting stay to prevent criminal defendant from using civil discovery to obtain documents and testimony of witnesses in criminal case); United States v. VIN: WP1AD2A26DLA72280, No. 2:13-cv-636, 2014 WL 289379, at \*2 (M.D.Fla. Jan. 27, 2014) (stay granted because discovery of the identities of the witnesses in the civil case by the criminal defendant would jeopardize the criminal investigation); United States v. All Funds on Deposit in Business Marketing Account, 319 F.Supp.2d 290, 294 (E.D.N.Y. 2004) (once the Court is satisfied that routine civil discovery would compromise the identities of confidential informants, stay of the civil case is mandatory under section 981(g)). As described in Agent Combs’s declaration, the United States has obtained evidence during the investigation of at least one instance of an individual who successfully eliminated evidence by contacting a potential witness or subject. . Having to divulge the identity of witnesses will also discourage those witnesses from continuing to provide information to agents as the investigation continues. Further, discovery will reveal the identities of subjects of the investigation who do not appear to know that they are subjects, which would significantly damage the government’s criminal



investigation. Any one of these factors, standing alone, would justify a stay. \$845,130 of Funds Associated with Apex Choice Ltd., 2020 WL 6581781, at \*2 (“Adversity [justifying a stay] can be found when the discovery process would burden law enforcement officials who are otherwise conducting a contemporaneous criminal investigation or would lead to the disclosure of confidential information, the government's criminal strategy, or otherwise undiscoverable evidence in the criminal process.”) (internal quotation marks and citing references omitted).

For the moving claimants, proceeding with discovery would expose them to discovery, to include written discovery and depositions, that they would not have to produce in a criminal case and which would burden their Fifth Amendment right against self-incrimination. As stated above, Casey Kirschner is well aware that he is a target in the criminal investigation, hence the appointment of the Public Defender to represent him with respect to that ongoing investigation. Though Carleton Nelson does not join this motion to stay, his Fifth Amendment exposure stands in the same posture as Kirschner's. While it is true that E2M Properties is a company that does not have a Fifth Amendment right against self-incrimination, the president of E2M Properties is Person #5, another individual who is aware that his conduct falls within the purview of this investigation. United States v. \$2,000,000 in U.S. Currency, No. 6:12-cv-1279, 2013 WL 5462320, at \*2 (M.D.Fla. Oct. 2, 2013) (corporate claimant has no Fifth Amendment right against self-incrimination). Person #5 is aware that the government alleges that he used a corporate account to launder fraud proceeds related to this case. Thus, as to E2M Properties and Person #5, it may be true that there is not a perfect identity between the parties, but there certainly is an identity of interests, warranting a stay. 249-20 Cambria Avenue, Little Neck, NY, 21 F.Supp.3d at 263. See also Approximately \$69,577 in U.S. Currency, 2009 WL 1404690, at \*3 (government is entitled to stay if providing discovery to defendant's family members in the

civil case would provide defendant with earlier and broader discovery than he could obtain in his criminal case). Further, the government having to propound written discovery and conduct depositions of these claimant targets would necessarily expose the government's strategy for a criminal trial, another reason to stay the civil case. United States v. \$247,052.54, No. C-05-4798, 2007 WL 2009799, \*2 (N.D.Cal. Jul. 6, 2007) (stay must be granted even if it is the government, not claimant, that is seeking the discovery that will impact the criminal case; government's need to depose witnesses will expose them to cross examination, exposing the government's strategy for trial).

Outside of E2M Properties, both Nelson and Kirschner are targets who are aware of their status as such. The facts and circumstances set forth in the forfeiture complaint also serve as the factual basis of the criminal investigation. As noted both above and in Agent Combs's declaration, the offenses forming the basis for forfeiture are the very offenses being examined by the FBI in the criminal investigation. \$845,130 of Funds Associated with Apex Choice Ltd., 2020 WL 6581781, at \*1 (for purposes of a stay, "actions are clearly related where a criminal investigation and a civil forfeiture action have common facts, similar alleged violations and some common parties") (internal quotation marks and citing references omitted). See also \$278,780.80 in Funds, 2012 WL 4747209, at \*3 (granting a stay despite a pending extradition request that may delay the criminal case because the complete overlap, focusing particularly on the factual overlap, between civil and criminal cases means that civil discovery is certain to adversely impact the criminal case). This forfeiture action is therefore related to an ongoing criminal investigation as contemplated by 18 U.S.C. § 981(g)(4).

Finally, the Court must find that Kirschner and E2M Properties have standing to participate in the civil forfeiture action in order to grant their motion to stay. 18 U.S.C. §


981(g)(2)(B). Of note, the Court need not make the standing determination with respect to the claimants in order to grant the government's motion to stay. Compare 18 U.S.C. § 981(g)(1) with 18 U.S.C. § 981(g)(2)(B). Moreover, Courts considering a claimant's motion to stay view the standing issue as a low bar at this stage of the proceedings. See, e.g., United States v. \$410,000.00 in U.S. Currency, No. 07-0598, 2007 WL 4557647, at \*5 n.4 (D.N.J. Dec. 21, 2007) (§ 981(g)(7) expressly provides that a determination that a claimant has standing for purposes of seeking a stay does not preclude the government from objecting to claimant's standing "at a later juncture in the proceeding"). The movants respectfully submit that the facts set forth in this motion establish sufficient standing for claimants Kirschner and E2M Properties to make this motion to stay.

#### CONCLUSION

Given the factual basis set forth in Agent Combs's declaration and the legal arguments presented above, the government respectfully submits that engaging in civil discovery will prove detrimental to the government's ongoing criminal investigation, thereby triggering 18 U.S.C. § 981(g)(1)'s mandatory stay provision. Likewise, claimants E2M Properties and Casey Kirschner submit that they have standing to participate in this case and that civil discovery will impinge on the Fifth Amendment rights of Mr. Kirschner, as well as Person #5, the president of E2M Properties. Therefore, the movants seek a stay of this civil forfeiture case for a period of six months and respectfully request the cancellation of the initial pretrial conference set for February 17, 2021, at least until the issue of whether to grant a stay can be resolved. The movants do not seek a hearing on this motion and agree that the issue may be decided on the pleadings.



CASEY KIRSCHNER  
CLAIMANT

  
\_\_\_\_\_  
Casey Kirschner, Pro Se

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 3<sup>rd</sup> day of February 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of the filing (NEF) to all counsel of record. I have also mailed a true copy of this motion to the following:

Casey Kirschner  
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By: /s/ Kevin Hudson  
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