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9 **UNITED STATES DISTRICT COURT**
 10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 11 **SAN JOSE DIVISION**

12	EBAY, INC.,	)	Case No. CV 08-04052 JF PVT
)	
13	Plaintiff,	)	DEFENDANTS DIGITAL POINT
		)	SOLUTIONS, INC. AND SHAWN
14	v.	)	HOGAN’S NOTICE OF MOTION AND
		)	MOTION FOR STAY OF PROCEEDINGS;
15	DIGITAL POINT SOLUTIONS, INC., SHAWN	)	MEMORANDUM OF POINTS &
	HOGAN, KESSLER’S FLYING CIRCUS,	)	AUTHORITIES IN SUPPORT THEREOF
16	THUNDERWOOD HOLDINGS, INC., TODD)	
	DUNNING, DUNNING ENTERPRISE, INC.,)	
17	BRIAN DUNNING, BRIANDUNNING.COM,	)	Date: November 20, 2009
	and Does 1-20,	)	Time: 9:00 a.m.
18		)	Dept.: Courtroom 3
)	
19	Defendants.)	
)	
20)	

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 20, 2009 at 9:00 AM, or as soon thereafter as the matter can be heard in Courtroom 3 of the United States District Court for the Northern District of California, located at 280 South 1st Street, San Jose, California 95113, defendants DIGITAL POINT SOLUTIONS, INC. and SHAWN HOGAN will move this Court for an order staying this action pending resolution of the parallel criminal investigation of the United States Attorney's Office for the Northern District of California and the Federal Bureau of Investigation. In the alternative, said Defendants shall move for a stay of all discovery in this action for a period of six months in the interests of justice.

As more fully set forth in the following Memorandum of Points and Authorities, this Motion is made on the grounds that a stay is necessary to protect Mr. Hogan's Fifth Amendment rights in connection with a criminal proceeding arising from the same underlying factual issues that give rise to this action. In addition, the action should be stayed as to defendant Digital Point Solutions, Inc. because Mr. Hogan is the only person that can speak on behalf of the corporation and, as such, defendant Digital Point Solutions, Inc. will be greatly prejudiced by its inability to meaningfully defend itself in this action.

Defendants' motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities set forth below, the accompanying Declarations of Seyamack Kouretchian and Ross M. Campbell, the records and file herein, and upon such other oral and documentary evidence as may be presented at the hearing on this motion.

DATED: October 16, 2009

s/Ross M. Campbell

COAST LAW GROUP, LLP
Attorneys for Defendants, Shawn Hogan
and Digital Point Solutions, Inc.

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26

27

28

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. SUMMARY OF MOTION**

3 Defendants Shawn Hogan and Digital Point Solutions, Inc. (collectively, the DPS Defendants)
4 request that the Court exercise its discretion to stay this action pending resolution of the parallel criminal
5 investigation of the United States Attorney’s Office for the Northern District of California (USAO) and
6 the Federal Bureau of Investigation (FBI). In the alternative, the DPS Defendants request that the Court,
7 at a minimum, stay all discovery in this action for a period of six months to avoid the potential for
8 prejudice in this case. A stay of this action is warranted in the interests of justice, as the scope of the
9 criminal investigation is based on the same “cookie stuffing” allegations at issue in the present action.
10 Further, Assistant United States Attorney Kyle Waldinger has indicated that the USAO intends to seek
11 an indictment for violations of 18 U.S.C. §1343 (for wire fraud) and anticipates that the indictment will
12 be issued after the commencement of the new year.

13 As detailed below, the present circumstances warrant the issuance of a stay. When there are
14 parallel criminal and civil proceedings such as in this case, the defendant faces the difficult choice of
15 asserting his Fifth Amendment rights at the risk of losing a civil trial, or waiving these rights to defend
16 himself in civil proceedings at the risk of incriminating himself. Although not required by the
17 Constitution, the courts have recognized the need to stay civil proceedings under circumstances directly
18 comparable to those at issue here to avoid prejudicing the defendant’s rights. Here, the issuance of a
19 stay is warranted in the interests of justice and should be granted for the following reasons:

20 *One.* The similarity of the issues underlying the civil and criminal actions is regarded as “the
21 most important factor” in determining whether to issue a stay, as the defendant’s Fifth Amendment
22 rights are directly implicated in such cases. Here, as Plaintiff concedes, the government is investigating
23 “whether the fraudulent activities *alleged by eBay in this case* constitute federal crimes.” Indeed,
24 because the Second Amended Complaint (SAC) alleges that Defendants engaged in multiple violations
25 of the predicate act of wire fraud, the underlying factual and legal issues directly overlap. As such, this
26 factor weighs heavily in favor of issuing a stay.

27 /././

28 /././

1 activities alleged by eBay in this case constitute federal crimes.” (Campbell Decl., Ex. 1, p. 4:15-16).
 2 Relevant here, on September 22, 2009, Assistant United States Attorney Kyle Waldinger conveyed the
 3 following information regarding the status of the pending criminal proceedings to defense counsel: (1)
 4 Mr. Hogan is the subject of an ongoing criminal investigation as to whether activities associated with
 5 Plaintiff’s affiliate marketing program constitute wire fraud under 18 U.S.C. §1343; (2) the scope of the
 6 investigation relates to the “cookie stuffing” schemes alleged against the Defendants in this case; (3) Mr.
 7 Waldinger believes that Section 1343 has been violated; (4) the USAO intends to seek an indictment
 8 based on the foregoing; and (5) and it is likely that an indictment will be issued within the early part of
 9 next year. (Kouretchian Decl. ¶2).

10 Given the foregoing circumstances a stay of the civil action is warranted and appropriate.

11 **III. LEGAL STANDARD AND SCOPE OF REVIEW**

12 The Court possesses the inherent power to control its own docket and calendar. *Taylor, Bean &*
 13 *Whitaker Mortg. Corp. v. Triduanum* (C.D.Cal. 2009) 2009 U.S. Dist. LEXIS 60849, 4.

14 A trial court may, with propriety, find it is efficient for its own docket and the fairest
 15 course of the parties to enter a stay of an action before it, pending resolution of
 16 independent proceedings which bear upon the case. This rule . . . does not require that the
 issues in such proceedings are necessarily controlling of the action before it.

17 *Id.* (quoting *Mediterranean Enterprises, Inc. v. Ssangyong Corp.* (9th Cir. 1983) 708 F.2d 1458, 1465.

18 Thus, it is well recognized that a court may, in its discretion, stay civil proceedings when the
 19 interests of justice so require. *Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322, 324.

20 Although not required by the Constitution, a district court may stay civil proceedings or postpone civil
 21 discovery pending the outcome of parallel criminal proceedings. *Fed. Savings & Loan Ins. Corp. v.*
 22 *Molinaro* (9th Cir. 1989) 889 F.2d 899, 902.

23 The decision whether to grant a stay should be made in light of the particular circumstances and
 24 competing interests involved in the case, and should be based on the following factors: (1) the extent to
 25 which the defendant's Fifth Amendment rights are implicated; (2) the interest of the plaintiff in
 26 proceeding with the litigation and the potential prejudice to plaintiff of a delay; (3) the convenience of
 27 the court and the efficient use of judicial resources; (4) the interests of third parties; and (5) the interests
 28 of the public. *Keating, supra*, 45 F.3d at 324-325; *Jones v. Conte* (N.D. Cal. 2005) 2005 U.S. Dist.

1 LEXIS 46962, 2.

2 In evaluating the first factor, the courts further consider the extent to which the issues in the
3 criminal case overlap with those presented in the civil case; the status of the criminal proceeding,
4 including whether the defendant has been indicted; and whether the civil proceedings may expand the
5 scope of criminal discovery beyond the limits of the Federal Rules of Criminal Procedure or otherwise
6 prejudice the case. *Walsh Securities, Inc. v. Cristo Property Management, Ltd.* (D.N.J. 1998) 7 F. Supp.
7 2d 523, 527; *Taylor, supra*, 2009 U.S. Dist. LEXIS 60849 at 6.

8 **IV. ARGUMENT**

9 **A. Extent to which Mr. Hogan's Fifth Amendment Rights are Implicated**

10 **1. Similarity of the Issues**

11 When there are simultaneous criminal and civil proceedings, the defendant faces the difficult
12 choice of asserting his Fifth Amendment rights at the risk of losing a civil trial, or waiving these rights to
13 defend himself in civil proceedings at the risk of incriminating himself. *Walsh Securities, supra*, 7 F.
14 Supp. 2d at 528. As such, the courts have recognized that the interests of justice may warrant the
15 issuance of a stay in such circumstances. This is particularly true to the extent the factual allegations at
16 issue in the civil action overlap with the subject matter of the criminal investigation. Indeed, because the
17 defendant's Fifth Amendment rights are directly implicated in such cases, the similarity of the issues
18 underlying the civil and criminal actions is regarded as "the most important factor" in determining
19 whether or not to grant a stay. *Chao v. Fleming* (W.D. Mich. 2007) 498 F. Supp. 2d 1034, 1039; *Walsh*
20 *Securities, supra*, 7 F. Supp. 2d at 527.

21 In this case, it is undisputed that the allegations of the SAC directly overlap with the subject
22 matter of the pending criminal investigation. Indeed, Plaintiff itself has emphasized this point
23 throughout the course of this litigation. For instance, in opposing the DPS Defendants' initial Motion to
24 Dismiss, Plaintiff asserted the following:

25 [Defendants'] schemes involved the improper placement of data known as "cookies" on
26 the computers of potential eBay users so that eBay would be tricked into paying
27 commissions to Defendants when no commissions were owed. And it is those schemes
28 that caused the Federal Bureau of Investigation to raid named Defendants Shawn Hogan
and Brian Dunning in June 2007 and to seize their computers.

1 (Campbell Decl., Ex. 2, p. 1:4-8; emphasis added).

2 Further, in Plaintiff's section of the parties' Joint Case Management Statement, Plaintiff states
3 that the alleged cookie-stuffing scheme ceased "when the FBI seized Defendants' computer equipment
4 in June 2007 as part of an investigation into whether the fraudulent activities alleged by eBay in this case
5 constitute federal crimes." (Campbell Decl., Ex. 1, p. 4:13-16; emphasis added). Thus, as Plaintiff
6 concedes, the subject of the pending criminal investigation not only overlaps with Plaintiff's allegations
7 in this case, it is directly predicated on those allegations. Moreover, the foregoing has been confirmed
8 by Assistant U.S. Attorney Kyle Waldinger. As noted above, Mr. Waldinger recently indicated that the
9 USAO is actively investigating whether the alleged cookie stuffing schemes associated with Plaintiff's
10 affiliate marketing program constitute wire fraud under 18 U.S.C. §1343. (Kouretchian Decl. ¶2). The
11 same contentions are at issue in the present action, as Plaintiff's RICO claim is likewise predicated on
12 alleged violations of Section 1343. (SAC ¶50).

13 Because the civil and criminal proceedings are based on the same factual and legal issues, there
14 can be no question that Mr. Hogan's Fifth Amendment rights are implicated in this case. As such, this
15 factor weighs heavily in favor of granting the stay. *See Jones v. Conte* (N.D. Cal. 2005) 2005 U.S. Dist.
16 LEXIS 46962, 3 (factor weighed in favor of stay because civil defamation action and criminal
17 proceeding both arose from defendant's alleged involvement in distribution of performance-enhancing
18 drugs); *Continental Insurance Co. v. Cota* (N.D. Cal. 2008) WL 4298372, 2 (stay particularly
19 appropriate where civil action and criminal action spring from "same nucleus of facts"), *Medina v.*
20 *Argent Mortg. Co.* (N.D. Cal 2006) 2006 U.S. Dist. LEXIS 30582, (defendants' Fifth Amendment rights
21 "clearly implicated" where civil and criminal proceedings based on same alleged abusive lending
22 practices); *Chao, supra*, 498 F. Supp. 2d at (stay issued in context of civil and criminal ERISA
23 violations because "substantive factual and legal issues would be almost identical.").

24 2. Potential for Prejudice

25 A stay is further appropriate to the extent civil proceedings may expand the scope of criminal
26 discovery beyond the limits of the Federal Rules of Criminal Procedure, expose defense strategies to the
27 prosecuting authorities, or otherwise prejudice the case. *Taylor, Bean & Whitaker Mortg. Corp. v.*
28 *Triduanum* (C.D.Cal. 2009) 2009 U.S. Dist. LEXIS 60849, 4. "The risk that civil discovery will be used

1 to circumvent criminal discovery limitations becomes much greater where the same facts are at issue.”
2 *Javier H. v. Garcia-Botello* (W.D.N.Y. 2003), 218 F.R.D. 72, 74.

3 Here, these concerns are particularly relevant, as any information or testimony procured during
4 the discovery process will be directly relevant to the criminal investigation. Moreover, because the
5 authorities are investigating “whether the fraudulent activities alleged by eBay in this case constitute
6 federal crimes” (Campbell Decl. Ex. 1, p. 4:13-16), it cannot reasonably be disputed that Plaintiff has
7 assisted with the investigation in the past. Nor can there be any question that Plaintiff has a direct
8 interest in furthering prosecutions related to its Affiliate Marketing Program or that Plaintiff is likely to
9 play at least some role in the development of the prosecution’s case through trial. A stay is warranted in
10 this case to ensure that civil discovery will not be used to circumvent the discovery limitations that
11 would otherwise apply in the criminal proceeding.

12 3. Status of Parallel Criminal Proceedings

13 This factor considers the status of the criminal proceeding, including whether the defendant has
14 been indicted. *Walsh Securities, supra*, 7 F. Supp. 2d at 527. In general, the courts are more inclined to
15 issue a stay once an indictment has been returned. *See SEC v. Schroeder* (N.D. Cal. 2008) 2008 U.S.
16 Dist. LEXIS 6527, 4-5. Courts have concluded that the case for staying civil proceedings is far weaker
17 when no indictment has been returned and no Fifth Amendment Privilege is threatened. *Id.*

18 Here, as detailed above, Mr. Hogan’s Fifth Amendment rights are *directly implicated*. Moreover,
19 “[t]he fact that an indictment has not yet been returned - while it may be a factor counseling against a
20 stay of civil proceedings- does not make consideration of the stay motion any less appropriate.” *Brock v.*
21 *Tolkow* (E.D.N.Y. 1985) 109 F.R.D. 116, 119, fn. 2; *United States v. \$557,933.89 in U.S. Funds*
22 (E.D.N.Y. 1998) 1998 U.S. Dist. LEXIS 22252, 13. For instance, the issuance of a pre-indictment stay
23 is warranted where, as here, the government is conducting an active parallel investigation based on the
24 same allegations set forth in the civil complaint. *Walsh Securities, supra*, 7 F. Supp. 2d at 527.

25 In addition, “[a] pre-indictment stay is particularly appropriate where both the civil and criminal
26 charges arise from the same remedial statute such that the criminal investigation is likely to vindicate the
27 same public interest as would the civil suit.” *Par Pharm. Sec. Litig.* (S.D.N.Y. 1990) 133 F.R.D. 12, 14
28 (denying stay where criminal investigations involved misconduct before Food and Drug Administration

1 while civil action involved federal securities laws); *see also Brock, supra*, 109 F.R.D. at 118, 120 (stay
 2 granted where both proceedings involved ERISA violations). Here, as noted above, the civil and
 3 criminal proceedings arise from the same nucleus of alleged facts and are both predicated on alleged
 4 violations of 18 U.S.C. §1343. As such, this factor weighs in favor of a stay notwithstanding the pre-
 5 indictment status of the criminal proceedings.

6 Indeed, a number of courts have issued pre-indictment stays under circumstances directly
 7 comparable to those at issue in this case. *See Brock, supra*, 109 F.R.D. at 120, fn. 2, 121. (stay of all
 8 civil discovery pending outcome of criminal RICO investigation); *Walsh Securities, supra*, 7 F. Supp. 2d
 9 529, (partial stay of discovery based on U.S. Attorney's Office investigation of whether civil RICO
 10 allegations amount to criminal conduct); *Kashi v. Gratsos* (2nd Cir. 1986) 790 F.2d 1050, 1057 (trial
 11 court properly exercised discretion in staying civil trial until U.S. Attorney declined to prosecute); *Chao*,
 12 *supra*, 498 F. Supp. 2d at 1039 (issuing 3-month pre-indictment stay of entire action); *United States v.*
 13 *\$557,933.89, More or Less in U.S. Funds* (E.D.N.Y. 1998) 1998 U.S. Dist. LEXIS 22252, 10-13 (issuing
 14 16-month pre-indictment stay of all discovery where information sought to be extracted presented
 15 realistic threat of incrimination); *Am. Motorists Ins. Co. v. Bridger Pub. Sch. Dist. # 2* (D. Mont. 2007)
 16 2007 U.S. Dist. LEXIS 30140, 8-10 (granting pre-indictment stay of discovery based on active parallel
 17 criminal investigation conducted by United States); *Shell Offshore v. Courtney* (E.D. La. 2006) 2006
 18 U.S. Dist. LEXIS 49973, 2-4 (one-year pre-indictment stay of discovery in civil RICO action appropriate
 19 based on pending grand jury investigation); *United States v. Certain Real Property & Premises*
 20 (E.D.N.Y. 1989) 751 F. Supp. 1060, 1062 (pre-indictment stay appropriate where possibility that
 21 defendant might be forced to incriminate herself was neither "fanciful" nor "imaginary").

22 4. Stay as to Digital Point Solutions, Inc.

23 Although corporate defendants cannot invoke the protections of the Fifth Amendment, a stay is
 24 appropriate as to such defendants where "the individual defendants are the persons most knowledgeable
 25 and the persons whom the corporation would designate to testify on its behalf." *Medina v. Argent*
 26 *Mortg. Co.* (N.D. Cal 2006) 2006 U.S. Dist. LEXIS 30582, 6. Indeed, where the Fifth Amendment
 27 rights of the corporation's officers and directors are implicated, the corporation "is likely to be greatly
 28 prejudiced in its ability to meaningfully defend itself in the civil matter." *Taylor, supra*, 2009 U.S. Dist.

1 LEXIS 60849 at 8. Further, courts have held that a stay as to all parties is preferred over a partial stay, as
2 it avoids the duplication of effort and waste of resources during the discovery process. *Volmar Distributions*
3 *v. New York Post Co.* (S.D.N.Y. 1993) 152 F.R.D. 36, 39, 41.

4 The foregoing concerns apply in this case, as Mr. Hogan is the sole shareholder, officer and
5 director of defendant Digital Point Solutions, Inc., and is the person whom the corporation would
6 designate to testify on its behalf. Because Mr. Hogan's Fifth Amendment rights are directly implicated
7 as set forth above, a complete stay as to both DPS Defendants is warranted and appropriate. Further, the
8 stay will reduce litigation costs and avoid burdening the Court with time-consuming discovery motions.
9 For instance, as reflected in the motions to compel currently pending before Judge Trumbull, a number
10 of Fifth Amendment discovery disputes have arisen with respect to the individual Defendant's right to
11 assert the privilege and the countervailing rules relating to collective entities. Because the issuance of a
12 stay will avoid burdening the Court with resolving these issues, a stay as to all Defendants is warranted.

13 **B. Plaintiff's Interests and Potential Prejudice**

14 Where the plaintiff itself delays in pursuing its claims, it undermines any subsequent claims of
15 prejudice resulting from the issuance of a stay. *Medina v. Argent Mortg. Co.* (N.D. Cal 2006) 2006 U.S.
16 Dist. LEXIS 30582, 8. Further, where the plaintiff has not shown any prejudice other than delay in
17 pursuing its suit, the plaintiff fails to establish a sufficient basis for denying the stay. *Reyes v. Freebery*
18 (Del. 2004) 2004 U.S. Dist. LEXIS 15018, 15. Although the stay may inconvenience the plaintiff, under
19 settled authority, protection of the defendant's Fifth Amendment rights is "the more important
20 consideration." *Brock, supra*, 109 F.R.D. 116, 121; *Volmar Distributions v. New York Post Co.* (S.D.N.Y.
21 1993) 152 F.R.D. 36. In addition, the consideration of prejudice to the plaintiff supports a stay where
22 "the plaintiff does not continue to suffer losses and does not dispute that it filed a criminal complaint . .
23 ." *Shell Offshore, Inc. v. Courtney* (E.D. La 2006) 2006 U.S. Dist. LEXIS 49973, 4.

24 Here, no threat of continuing harm exists, as Plaintiff itself has alleged that the cookie stuffing
25 schemes ceased in June 2007 (SAC ¶¶ 48, 57). Further, the record indicates that Plaintiff will not suffer
26 any prejudice as a result of a stay. For instance, even though Plaintiff alleges that it conducted numerous
27 investigations in June 2007 and became aware of the details of the alleged scheme as of that date (SAC
28 ¶¶ 52-57), Plaintiff chose not to file suit for well over a year, until August 2008. "While it is certainly

1 plausible that valid reasons supported such a delay, it undercuts plaintiff's entitlement to complain about
2 a roughly similar delay." *Medina, supra*, 2006 U.S. Dist. LEXIS 30582 at 8 (plaintiff's four-month
3 delay in serving complaint undermined subsequent claims of prejudice). Moreover, any inconvenience
4 resulting from the stay does not overcome the paramount concern of protecting the defendant's
5 constitutional rights. *Continental Insurance Co. v. Cota* (N.D. Cal. 2008) WL 4298372, 3; *see also*
6 *Brock, supra*, 109 F.R.D. at 121 (protection of the Fifth Amendment right is "the more important
7 consideration"). As such, this factor weighs in favor of granting the stay.

8 **C. Interests of the Court and Judicial Economy**

9 This consideration "examines the interests of courts in docket management and the expeditious
10 resolution of cases." *Chao, supra*, 498 F. Supp. 2d at 1040. The courts have a particular interest "in
11 resolving individual cases efficiently." *Walsh Securities, supra*, 7 F. Supp. 2d at 528. In considering
12 these factors, courts have found that staying the civil case "makes efficient use of judicial resources by
13 'insuring that common issues of fact will be resolved and subsequent civil discovery will proceed
14 unobstructed by concerns regarding self-incrimination.'" *Jones, supra*, 2005 U.S. Dist. LEXIS 46962 at
15 2 (quoting *Javier H. v. Garcia-Botello* (W.D.N.Y. 2003), 218 F.R.D. 72, 75); *Taylor, supra*, 2009 U.S.
16 Dist. LEXIS 60849 at 10. As discussed below, both of these considerations weigh in favor of granting
17 the stay.

18 **1. Potential for Resolution of Common Issues**

19 The interests of judicial economy weigh in favor of granting the stay, as resolution of the
20 criminal proceedings may narrow the issues for trial in the civil action. *See Chao, supra*, 498 F.Supp. 2d
21 at 1040 (concluding "that scarce judicial resources in this district at this time would be best used by
22 staying this case in favor of the criminal case, which may ultimately reduce or eliminate the need for
23 discovery or result in a settlement of this case if Defendants are convicted."). Here, as noted above, the
24 underlying factual and legal issues significantly overlap, particularly with respect to the alleged wire
25 fraud violations under 18 U.S.C. §1343. As such, there is a greater likelihood that the issuance of a stay
26 will promote judicial economy. For instance, with respect to issues that are necessarily decided in prior
27 criminal actions, "[c]ollateral estoppel is available to plaintiffs in civil racketeering litigation." *In re*
28

1 *Lewisville Properties, Inc.* (5th Cir. 1988) 849 F.2d 946, 949.¹

2 **2. Avoiding Unnecessary Law and Motion Practice**

3 This factor also weighs in favor of granting Defendants' motion. Without an appropriate stay,
4 Defendants will be forced to continue to assert their Fifth Amendment rights, which will "burden the
5 Magistrate Judge and this Court with deciding a constant stream of privilege issues." *Walsh Securities,*
6 *supra*, 7 F.Supp. 2d at 528. Disputes over the scope of the privilege consume the courts' resources with
7 unnecessary discovery litigation and law and motion practice. "In contrast, if the civil actions are stayed
8 until the conclusion of the criminal proceedings, then these rulings will no longer be necessary." *In re*
9 *Adelphia Communs. Secs. Litig* (E.D. Pa. 2003) 2003 U.S. Dist. LEXIS 9736, at 15.

10 Here, the foregoing concerns are directly at issue, as Plaintiff recently filed three privilege-related
11 motions (including two motions to compel pending before Judge Trumbull and the motion to strike
12 pending before the Court). All three motions are largely predicated on Defendants' assertion of the Fifth
13 Amendment privilege and the extent to which those protections apply. Similar disputes are likely to
14 arise as to the scope of the privilege in future rounds of discovery and when Defendants are deposed.
15 Because the issuance of a stay will likely avoid unnecessary law and motion practice, this factor also
16 weighs in favor of a stay.

17 **D. Interests of Third Parties and the Public**

18 While the public has an interest in the resolution of civil disputes, parallel criminal proceedings
19 generally serve to protect and advance those same interests. *Brock, supra*, 109 F.R.D. 116, 121; *Chao,*
20 *supra*, 498 F.Supp. 2d at 1040. Further, the courts have recognized that "the public interest will be
21 furthered by a stay because 'the public's interest in the integrity of the criminal case is entitled to
22 precedence over the civil litigant.'" *Jones, supra*, 2005 U.S. Dist. LEXIS 46962 at 2 (quoting *Javier H.*
23 *v. Garcia-Botello* (W.D.N.Y. 2003), 218 F.R.D. 72, 75); *see also Taylor, supra*, 2009 U.S. Dist. LEXIS
24 60849 at 10. And as the courts have explained, these principles equally apply in the context of a pending
25

26
27 ¹ "The doctrine depends on three elements: 1) the issue at stake must be identical to the one
28 involved in the prior litigation; 2) the issue must have been actually litigated in the prior litigation; and
3) the determination of the issue in the prior litigation must have been a critical and necessary part of the
judgment in that earlier action." *Id.*

1 criminal investigation:

2 [A] stay in this case would benefit the public by allowing the government to conduct a
3 complete, unimpeded investigation into potentially criminal activity. In this case, there is
4 no tangible harm to the public from these alleged frauds that could not be remedied by the
criminal investigation. Therefore, the public interest weighs in favor of a stay.

5 *Walsh, supra*, 7 F. Supp. 2d at 529; *see also Shell, supra*, 2006 U.S. Dist. LEXIS 49973 at 4.

6 Notably, courts have denied stays where the civil case, brought by a government agency, was
7 intended to protect the public by halting continuing harms such as the distribution of mislabeled drugs or
8 the dissemination of misleading investment information. *Walsh, supra*, 7 F. Supp. 2d at 529 (citing
9 *United States v. Kordel* (1970) 397 U.S. 1, 11, and *SEC v. Dresser Indus.* (D.C. Cir. 1980) 628 F.2d
10 1368, 1377, respectively). However, no such concerns are at issue here, as Plaintiff itself contends that
11 the alleged scheme ceased in June 2007 (SAC ¶48) and in any event, the harms alleged in the SAC do
12 not meet the foregoing criteria. *See United States v. Certain Real Property & Premises* (E.D.N.Y. 1989)
13 751 F. Supp. 1060, 1062 (this case “is not comparable in public importance to a civil enforcement action
14 brought by a federal regulatory agency entrusted with the protection of consumers, investors, or other
15 broad segments of the population, whose welfare could be jeopardized by deferral of the action.”).

16 Because a stay will promote the integrity of the pending criminal investigation, the interests of
17 the public, and any relevant third parties, this factor also weighs in favor of granting the motion.

18 **V. CONCLUSION**

19 For the foregoing reasons, the DPS Defendants respectfully request that the Court stay this action
20 pending resolution of the parallel criminal investigation. In the alternative, the DPS Defendants request
21 that the Court stay all discovery in this action for a period of six months.

22 DATED: October 16, 2009

23 s/Ross M. Campbell
24 COAST LAW GROUP, LLP
25 Attorneys for Defendants, Shawn Hogan
26 and Digital Point Solutions, Inc.