

1 Bruce L. Simon (State Bar No. 096241)
PEARSON, SIMON, SOTER, WARSHAW & PENNY, LLP
2 44 Montgomery Street, Suite 1200
San Francisco, CA 94104
3 Telephone: 415-433-9000
Facsimile: 415-433-9008
4

5 Richard M. Heimann (State Bar No. 063607)
Joseph R. Saveri (State Bar No. 130064)
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
6 275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
7 Telephone: (415) 956-1000
Facsimile: (415) 956-1008
8

9 *Interim Co-Lead Counsel for the Direct Purchaser Plaintiffs*

10 Francis O. Scarpulla (State Bar No. 41059)
ZELLE HOFMANN VOELBEL MASON & GETTE LLP
11 44 Montgomery Street, Suite 3400
San Francisco, CA 94104
12 Telephone: (415) 693-0700
Facsimile: (415) 693-0770
13

14 Joseph M. Alioto (State Bar No. 42680)
ALIOTO LAW FIRM
555 California Street, Suite 3160
15 San Francisco, CA 94104
Telephone: (415) 434-8900
16 Facsimile: (415) 434-9200

17 *Interim Co-Lead Counsel for the Indirect Purchaser Plaintiffs*

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)

20
21 IN RE TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION

Master File No. M 07-1827 SI
MDL No. 1827

22
23 This Document Relates To:
24 ALL ACTIONS

**DIRECT PURCHASER PLAINTIFFS'
AND INDIRECT PURCHASER
PLAINTIFFS' JOINT OPPOSITION
TO THE UNITED STATES' MOTION
TO STAY DISCOVERY**

25
26 Date: September 19, 2007
Time: 2:00 p.m.
27 Court: Hon. Susan Illston

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF FACTS	3
A. Status Of Proceedings And Discovery	3
B. Relevant Other Proceedings	5
III. ARGUMENT	6
A. The Government’s Requested Stay Would Be Unprecedented.	6
B. The Government’s Proposed Stay Does Not Satisfy The <i>Molinaro</i> Test.	11
1. Plaintiffs Will Suffer Substantial Prejudice.	12
2. Burden On Defendants	15
3. The Proposed Blanket Stay Would Inconvenience The Court And Require The Unnecessary Expenditure of Judicial Resources	17
4. Refusal To Permit The Blanket Stay Will Not Implicate The Interests Of Nonparties	18
5. The Public’s Interest In The Pending Civil And Criminal Cases Weighs Against A Blanket Stay	19
a. The Public’s Interest In The Vigorous Enforcement Of The Antitrust Laws Through Civil Litigation Is Commensurate With Its Interest In Criminal Enforcement	19
b. The Government’s Interest In Ensuring Grand Jury Information Remains Secret Does Not Justify The Stay It Seeks	21
IV. CONCLUSION	25

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

American Society of Mechanical Engineers v. Hydrolevel, Inc.,
456 U.S. 556 (1982)..... 20

Arnold Pontiac-GMC, Inc. v. General Motors Corp.,
786 F.2d 564 (3d Cir. 1986)..... 14

Barry Farm Resident Council, Inc. v. United States Dep't of the Navy,
Nos. 96-01450, 96-01700, 1997 WL 118412 (D.D.C. Feb. 18, 1997) 7

Bell Atlantic Corp. v. Twombly,
127 S. Ct. 1955 (2007)..... 6, 12

Bellis v. United States,
417 U.S. 85 (1974)..... 16

Blue Cross and Blue Shield of Alabama v. Unity Outpatient Surgery Center,
490 F.3d 718 (9th Cir. 1997)..... 11, 12, 13, 14

Board of Governors of Federal Reserve System v. Pharaon,
140 F.R.D. 634 (S.D.N.Y. 1991) 9, 10, 18

Braswell v. United States,
487 U.S. 99 (1988)..... 16

Bureerong v. Uvawas,
167 F.R.D. 83 (C.D. Cal. 1996) 9, 18

Campbell v. Eastland,
307 F.2d 478 (5th Cir. 1962)..... 9

Citibank, N.A. v. Hakim,
No. 92-CIV 6233, 1993 WL 481335 (S.D.N.Y. Nov. 18, 1993)..... 13

Douglas v. United States,
Nos. 03-04518, 04-05357, 2006 WL 2038375 (N.D. Cal. July 17, 2006)..... 11

Embligh Motors Corp. v. General Motors Corp.,
340 U.S. 558 (1951)..... 14

Favaloro v. S/S Golden Gate,
687 F. Supp. 475 (N.D. Cal. 1987) 17, 18

First Merchant's Enters. v. Shannon,
No. 88-CIV 8254, 1989 WL 25214 (S.D.N.Y. March 16, 1989) 9, 18

Founding Church of Scientology of Washington, D.C. v. Kelley,
77 F.R.D. 378 (D.D.C. 1981)..... 9

Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.,
87 F.R.D. 53 (D. Pa. 1980) 13

Howard v. Gutterman,
3 B.R. 393 (S.D.N.Y. 1980)..... 13

Illinois v. General Paving Co.,
590 F.2d 680 (7th Cir. 1979)..... 14

In re Dynamic Random Access Memory (DRAM) Antitrust Litigation,
M-02-cv-1486-PJH (N.D. Cal.) passim

TABLE OF AUTHORITIES

(continued)

	<u>Page</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
	20
	6
	8, 12, 15, 20
	7, 16, 17, 21
	passim
	7, 16
	22
	7
	19
	7
	9, 13
	14
	9
	19
	7, 13
	15
	20
	9
	19
	8, 15
	20

TABLE OF AUTHORITIES

(continued)

		<u>Page</u>
1		
2		
3	<i>United States v. Banco Cafetero International,</i>	
4	107 F.R.D. 361 (S.D.N.Y. 1985)	7
5	<i>United States v. Dynavac, Inc.,</i>	
6	6 F.3d 1407 (9th Cir. 1993).....	22
7	<i>United States v. Gieger Transfer Serv., Inc.,</i>	
8	174 F.R.D. 382 (S.D. Miss. 1997); <i>accord Horn v. District of Columbia,</i>	
9	210 F.R.D. 13 (D.D.C. 2002).....	8
10	<i>United States v. Hubbell,</i>	
11	530 U.S. 27 (2000).....	16
12	<i>United States v. Lot 5,</i>	
13	23 F.3d 359 (11th Cir. 1994).....	7
14	<i>United States v. Private Sanitation Indus. Assoc. of Nassau/Sulfolk, Inc.,</i>	
15	811 F. Supp. 802 (E.D.N.Y. 1992)	17
16	<i>Zenith Radio Corporation v. Hazeltine Research, Inc.,</i>	
17	395 U.S. 100 (1969).....	19

STATUTES

	15 U.S.C. § 16(a)	14
--	-------------------------	----

RULES

	Federal Rule of Civil Procedure 1.....	17
	Federal Rules of Criminal Procedure 6(e)	6, 20, 21

OTHER AUTHORITIES

	Bloch, R. [2006, February] <i>How To Respond To A Criminal Antitrust Investigation: A Practical Approach In Today's Enforcement Environment.</i> American Bar Association, Section of Antitrust Law, International Cartel Conference), p. 20 (noting under subtitle, " <i>Sharing Information And Resources Among Joint Defense Counsel Can Be Essential To Adequate Defense Preparation</i> ")	23
	Kowal, S.M. [2002, January], <i>Limitations To The Protection Afforded By A Joint Defense Agreement.</i> American Bar Association, Section of Antitrust Law, International Forum, International Cartel Workshop.....	23, 24
	Siffert, J. S. (2002, February). <i>Role of Joint Defense Agreements in Defending Antitrust Investigations.</i> American Bar Association, Section of Antitrust Law, International Forum, International Cartel Workshop.....	23

25
26
27
28

1 **I. INTRODUCTION**

2 The Direct Purchaser Plaintiffs and Indirect Purchaser Plaintiffs (collectively,
3 “Plaintiffs”) respectfully submit this joint memorandum in opposition to the motion of the United
4 States Department of Justice for a stay of discovery.

5 The Government is asking for an unprecedented blanket stay, which effectively
6 puts the civil case on hold indefinitely, or for years in the future, at the least. The stay sought is
7 not in the interests of justice. It is contrary to how other judges in this District have handled
8 similar issues in similar cases. In several other cases in this District, including *In re Dynamic*
9 *Random Access Memory (DRAM) Antitrust Litigation*¹ and *In re Static Random Access Memory*
10 *(SRAM) Antitrust Litigation*,² the civil litigation has co-existed with and progressed alongside the
11 criminal investigation, even in the face of indictments and guilty pleas. Indeed, in *DRAM* and
12 *SRAM*, the *only* antitrust cases cited in the Government’s brief, the plaintiffs in the civil litigation
13 were able to protect the interests of the class, and the Government was able to achieve its goals as
14 well. Based on that track record, Plaintiffs here have proposed a similar compromise to the
15 Government, but the Government has not yet agreed. The Government has not argued and cannot
16 argue that it will be prejudiced here by the approach it adopted previously. As the Government
17 has failed to show why the Court should provide the unprecedented sweeping stay it seeks, such a
18 request should be denied on its face. This result will be consistent with a long line of cases
19 disfavoring such a blanket stay.

20 Moreover, the requested stay fails the test articulated by the Ninth Circuit in
21 *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 903 (9th Cir. 1989). The Federal
22 antitrust laws recognize long standing policies of the salutary purposes of private enforcement,
23 and while Plaintiffs intend to coordinate with the Government to prevent undue interference with
24 its investigation, the Government should not be allowed to stop the civil case dead in its tracks for
25 years. Among other things, the Government’s proposed stay will impair Plaintiffs’ ability to

26 ¹ The civil case is captioned *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*,
27 M-02-cv-1486-PJH (N.D. Cal.) (“*DRAM*”).

28 ² The civil case is captioned *In re Static Random Access Memory (SRAM) Antitrust Litigation*, C-
M-07-cv-01819-CW (N.D. Cal.) (“*SRAM*”).

1 depose witnesses before they become unavailable or their memories fade, and before key
2 documents are inadvertently lost or destroyed. It will also prevent Plaintiffs from discovering the
3 identities of as-yet unnamed defendants in time to add appropriate claims within the applicable
4 statute of limitations, and assessing the fairness and adequacy of any settlement. Even Rule 26
5 disclosures, which are designed to enable the parties to evaluate the case at an early stage, to
6 enhance settlement opportunities, and to address issues regarding document locations, identity,
7 and storage, will be foreclosed. Further, the stay will unfairly confine Plaintiffs' prosecution of
8 their claims to the pace of the DOJ investigation, and the extent of the resources the Government
9 commits to it, while leaving Defendants, armed with information not available to Plaintiffs, free
10 to pursue dismissal motions and challenge personal jurisdiction. *See* [Proposed] Order On The
11 United States's Motion To Stay.

12 Finally, if the real problem for the Government³ is the fact that one Defendant's
13 production of the documents produced to the Grand Jury might allow other Defendants to obtain
14 what the Government plans to use to investigate the conspiracy, then the Court may enter an order
15 that protects that interest without resorting to the indiscriminate stay the Government seeks here.
16 For example, Plaintiffs have proposed, and the Government has rejected, a procedure limiting
17 production of materials from a Defendant to Plaintiff, and not to other Defendants. Plaintiffs ask
18 the Court to enter an order instituting similar proceedings here. Moreover, the Government's
19 concern may be entirely misplaced because Defendants have refused to disclose whether they
20 have already shared this information with one another. It is more likely than not that information
21 has already been shared amongst Defendants, and thus alleviating one of the Government's
22 principle concerns.

23 The fact is, the DOJ's investigation and Plaintiffs' concurrent investigation of
24 Defendants are complementary, not antagonistic. Appropriately executed, discovery in both
25 cases can progress expeditiously and efficiently without one proceeding threatening the other.
26 Accordingly, Plaintiffs respectfully request that the Court deny the United States' proposed stay
27

28 ³ The Government has submitted certain materials *in camera* to which Plaintiffs are not privy.

1 on discovery, or in the alternative enter a modified stay. *See* [Proposed] Order On The United
2 States's Motion To Stay. This modified stay is consistent with orders entered in other analogous
3 cases, which have been more than sufficient to protect the Government's interests while not
4 unduly prejudicing plaintiffs in the parallel civil cases.

5 **II. STATEMENT OF FACTS**

6 **A. Status Of Proceedings And Discovery**

7 This multidistrict litigation involves an alleged conspiracy to set prices in the
8 market for thin film transistor-liquid crystal displays (TFT-LCD). The case is in its initial stages.
9 The case was recently transferred to this District by the Judicial Panel on Multidistrict Litigation.
10 No Defendant has responded to any Complaint. Discovery has not yet begun.

11 On July 20, 2007, prior to the Court's initial status conference in this matter, the
12 Government applied for a stay of discovery. *See* Government's Brief filed 7/20/07. Specifically,
13 the Government requested a blanket stay of all discovery for a period of twelve months, lifted
14 only after the Government submits a "progress report," to be followed by staged discovery, with
15 document discovery proceeding first. *Id.* at 1. In the Government's view, depositions will not
16 begin, at the earliest, for two years.

17 To date, Plaintiffs have not propounded discovery. Declaration of Bruce Simon in
18 Opposition to the United States' Motion to Stay Discovery ("Simon Decl."), ¶ 22. Plaintiffs have
19 met and conferred with the Government and made a proposal in an effort to reach an agreement,
20 consistent with prior experience in analogous cases, which would protect the legitimate interests
21 of the parties. Simon Decl., ¶¶ 6, 7, 10, 11, 14-20. Plaintiffs' proposal is carefully crafted to
22 avoid seeking information regarding the proceedings before the Grand Jury, or to otherwise
23 intrude on the criminal proceedings. The key features of the proposal would permit the following
24 discovery:

- 25 1. Plaintiffs' production of documents regarding the consolidated
26 complaint and regarding Plaintiffs' purchases of TFT-LCDs.
- 27 2. Defendants' and Plaintiffs' production of material regarding
28 Defendants' sales and Defendants' distribution channels.

- 1 3. Mandatory disclosures and other procedures under Rules 16 and
2 26.
- 3 4. Third parties' production of documents.
- 4 5. Discovery with respect to any jurisdictional issues Defendants
5 raise.
- 6 6. Interrogatories to identify knowledgeable persons and to
7 identify the storage location, retention, destruction or identity of
8 corporate records.
- 9 7. Defendants' production of Grand Jury subpoenas, documents
10 regarding the scope of the subpoenas and documents provided
11 to the Grand Jury or Government or any other Defendant.

12 Simon Decl., ¶ 11; *see* Plaintiffs' August 15, 2007 Letter to Niall Lynch, Simon Decl., Exh. F.
13 ("Plaintiffs' Proposal"). All other discovery would be stayed. *Id.* This includes any depositions
14 of the parties and would preclude third party depositions from touching on matters related to the
15 Grand Jury proceedings. This limited stay proposal would expire automatically on May 1, 2008.
16 *Id.*

17 The Government accepted a portion of the proposal, but indicated that all their
18 concessions were premised upon a global, complete agreement. Simon Decl., ¶ 14. Thus,
19 Plaintiffs and the Government have been unable to reach agreement by the time this Opposition
20 was due.

21 Plaintiffs also have met and conferred with Defendants, seeking an agreement to
22 permit certain types or areas of discovery to proceed. Simon Decl., ¶ 11. Defendants currently
23 take the extreme position that no discovery should take place and agree with the scope of the stay
24 requested by the Government. Simon Decl., ¶ 21. At the same time, Defendants indicate they
25 intend to attack Plaintiffs' pleadings and to argue Plaintiffs' claims should be dismissed on the
26 grounds they fail to plead sufficient facts to state a cause of action against them. Simon Decl.,
27 ¶ 12. Defendants have indicated they may also move to dismiss on jurisdictional grounds, but
28 currently they will not agree to allow discovery on jurisdictional issues. Simon Decl., ¶ 12, 22.

Significantly, Defendants have refused to disclose whether they have shared any of
the materials Plaintiffs seek with each other in order to prepare their case. Simon Decl., ¶ 13.
Defendants also have refused to disclose whether they have entered into a judgment sharing, joint

1 defense or other agreement which they assert would shield any such discoverable information.

2 Simon Decl., ¶ 13.

3 **B. Relevant Other Proceedings**

4 In this District, there are a number of parallel criminal and civil proceedings in
5 similar price-fixing cases where a blanket stay was not issued. These cases include investigations
6 involving *DRAM* and *SRAM*.⁴ In stark contrast to the stay the Government requests here, the stay
7 in *DRAM* specifically provides for the production of all documents Defendants turned over to the
8 Grand Jury in that case, as well as all other relevant documents. *Id.* at Exh. A at 3:1-4 (“[E]ach
9 Defendant shall produce to the other Parties for inspection and copying all documents theretofore
10 produced by such Defendant to that Grand Jury in compliance with the subpoenas issued by the
11 grand jury[.]”). Interrogatories were also permitted with respect to statistical data concerning
12 *DRAM* sales and purchases, and the identity of relevant products and distribution channels. *Id.* at
13 3:16-22. Plaintiffs were also permitted to take third-party depositions of defendants’ customers
14 and suppliers, so long as they asked no questions about the Grand Jury proceeding itself or the
15 witness’s Grand Jury testimony. *Id.* at 4:4-9. The Government was permitted to delay the
16 depositions of certain specific witnesses of its choosing until later in the discovery process, and
17 the parties proceeded with other depositions first. Simon Decl. ¶ 3, Exh. B. Finally, in the event
18 any Defendant contested personal jurisdiction, the *DRAM* Order permitted all discovery related to
19 that issue. Simon Decl., Exh. A at 4:22-5:6. Significantly, the Order was successful in permitting
20 the civil litigation to proceed without impeding the criminal proceedings. Following the initial
21 stay, 129 depositions were taken. After the depositions, the direct purchasers settled their claims,
22 and that part of the case is now resolved. Simon Decl. ¶ 3.

23 In *SRAM*, the Government applied for a stay which is far less indiscriminate and
24 sweeping than the one it has applied for here. *See* Motion By United States For Stay Of All
25 Deposition And Interrogatory Pending Resolution Of Criminal Grand Jury Investigation, filed

26 _____
27 ⁴ Plaintiffs request judicial notice of the April 16, 2003 Stipulation and Order Limiting the Scope
28 of Discovery and the July 8, 2005 Stipulated Protective Order Limiting Certain Discovery in *In re*
Dynamic Random Access Memory (DRAM) Antitrust Litigation, M-02-cv-1486-PJH (N.D. Cal.)
 (“*DRAM*”). Copies are attached to the Declaration of Bruce Simon as Exhibits A, B.

1 5/31/07, *In re Static Random Access Memory (SRAM) Antitrust Litigation*, M-07-cv-01819-CW
 2 (N.D. Cal.) Subsequently, as in *DRAM*, following negotiations the parties and the Government
 3 reached an agreement on a procedure permitting unrestricted document discovery from the outset,
 4 along with discovery by Defendants in connection with class certification, except as to issues
 5 relating to co-defendants that might touch on merits. See Simon Decl., Exh. C (Stipulation and
 6 Order To Stay All Deposition And Interrogatory Discovery, filed June 12, 2007, *In re Static*
 7 *Random Access Memory Antitrust Litig.*, M-07-cv-01819-CW (the “SRAM Order”)) at 2:19-22.⁵
 8 Judge Wilken also has ordered that the records given by Defendants to the Antitrust Division be
 9 produced to Plaintiffs’ counsel as well. Simon Decl., Exh. D (Supplemental Case Management
 10 Order No. 1, SRAM, filed June 21, 2007, at 2:7-18 (“Defendants shall produce to Plaintiffs all
 11 documents they have produced to the Department of Justice by June 15, 2007.”).⁶

12 **III. ARGUMENT**

13 **A. The Government’s Requested Stay Would Be Unprecedented.**

14 The Government’s request for a blanket and lengthy stay is extraordinary and
 15 inappropriate. The Court should exercise its discretion and either deny the stay outright, or adopt
 16 the Plaintiffs’ compromise position. In and of itself, the mere presence of criminal proceedings
 17 provides the Government with no right to a stay, particularly a blanket stay of all discovery.

18 ⁵ Plaintiffs request judicial notice of the June 12, 2007 Stipulation and Order to Stay All
 19 Deposition and Interrogatory Discovery, and the Supplemental Case Management Order No. 1
 20 entered on June 21, 2007 in *In re Static Random Access Memory (SRAM) Antitrust Litigation*,
 C-M-07-cv-01819-CW (N.D. Cal.) (“SRAM”). Copies of these orders are attached to the
 Declaration of Bruce Simon as Exhibits C and D.

21 ⁶ More recently, in *Graphics Cards*, the Government did not even apply for a complete stay at the
 22 outset. In *In re Graphics Processing Units Antitrust Litig.*, C 06-cv-07417 WHA (N.D. Cal.), the
 23 government expressly indicated to the Court that it neither favored nor opposed a stay, despite its
 24 pending investigation. See Simon Decl., Exh. E (Pretrial Order No. 4: Order Granting
 25 Defendants’ Motion To Stay Discovery And Disclosures (“*Graphics Order*”), filed July 24, 2007
 26 at 2:27-3:2. Judge Alsup concluded that the “Antitrust Division appears to believe discovery in
 27 this action can coexist with its grand jury investigation,” and that therefore the defendants’
 28 contention that such discovery would somehow derail the government’s efforts was meritless. *Id.*
 at 4:1-5. Judge Alsup also concluded that a blanket stay of all discovery was not warranted either
 under Fed. R. Crim Proc. 6(e) or the Supreme Court’s recent decision in *Bell Atlantic Corp. v.*
Twombly, 127 S. Ct. 1955 (2007). *Graphics Order* at 2:9-11, 6:22-7:6. To the extent Judge
 Alsup did impose a stay in *Graphics*, it was only until resolution of motions to dismiss, based on
 concerns regarding the scheduling of briefs and discovery. *Id.* at 7:8-8:21. No such concerns
 have been raised here. Plaintiffs request judicial notice of this *Graphics Order*.

1 “[T]he Constitution does not ordinarily require a stay of civil proceedings pending the outcome of
2 criminal proceedings.” *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995);
3 *Securities & Exchange Comm’n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir.), *cert. denied*,
4 449 U.S. 993 (1980). A criminal investigation alone rarely provides a legitimate basis for staying
5 civil proceedings prior to an indictment, as the argument for “staying civil proceedings is ‘a far
6 weaker one’ when ‘[n]o indictment has been returned’” *Federal Sav. & Loan Ins. Corp. v.*
7 *Molinaro*, 889 F.2d 899, 903 (9th Cir. 1989) (quoting *Dresser Indus.*, 628 F.2d at 1376); *see also*
8 *In re Scrap Metal Antitrust Litigation*, No. 02-0844, 2002 WL 31988168, at * 2 (N.D. Ohio
9 Nov. 7, 2002) (“[R]equests for pre-indictment delays are often, but not always, denied.”). In
10 truth, civil litigation and criminal investigations should proceed concurrently, even after an
11 indictment, “[i]n the absence of substantial prejudice to the rights of the parties involved,
12 [simultaneous] parallel [civil and criminal] proceedings are unobjectionable under our
13 jurisprudence.” *Keating*, 45 F.3d at 324 (quoting *Dresser*, 628 F.2d at 1374); *see also Barry*
14 *Farm Resident Council, Inc. v. United States Dep’t of the Navy*, Nos. 96-01450, 96-01700, 1997
15 WL 118412, at *3 (D.D.C. Feb. 18, 1997) (quoting *United States v. Lot 5*, 23 F.3d 359, 364 (11th
16 Cir. 1994) (“[B]lanket assertion of the privilege [against self-incrimination] is an inadequate basis
17 for the issuance of a stay.”).

18 Blanket, indefinite or lengthy stays of civil cases are routinely rejected as
19 unacceptable, unnecessary, and contrary to the law. *See Landis v. North American*, 299 U.S. 248,
20 257 (1936) (“The stay is immoderate and hence unlawful unless so framed in its inception that its
21 force will be spent within reasonable limits[.]”); *McKnight v. Blanchard*, 667 F.2d 477, 479 (5th
22 Cir. 1982) (“[S]tay orders will be reversed when they are found to be immoderate or of an
23 indefinite duration.”); *Scrap Metal*, 2002 WL 31988168, at *6 (rejecting Government’s proposed
24 stay of eight months with right to request further stay “if it believes additional time is necessary”
25 as “essentially indefinite in nature,” and noting “indefinite stays are discouraged”); *United*
26 *States v. Banco Cafetero International*, 107 F.R.D. 361, 366 (S.D.N.Y. 1985) (rejecting stay of
27 indefinite scope and duration). Indeed, a court may abuse its discretion if it grants “a stay of
28 indefinite duration in the absence of a pressing need.” *Landis*, 299 U.S. at 254-55. Therefore,

1 there is a strong presumption in favor of civil discovery, and the Government must overcome that
2 presumption in its request for a stay. *United States v. Gieger Transfer Serv., Inc.*, 174 F.R.D.
3 382, 385 (S.D. Miss. 1997); *accord Horn v. District of Columbia*, 210 F.R.D. 13, 15 (D.D.C.
4 2002).

5 Stays such as the one the Government requests here are considered indefinite for
6 all practical purposes. *See Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 175 F. Supp. 2d 573, 579
7 (S.D.N.Y. 2001) (treating request for stay of depositions for six months as indefinite pending
8 resolution of ongoing Grand Jury investigation because “the argument for a further stay [six
9 months later] will be at least as potent as it is now”); *In re Plastics Additives Antitrust Litigation*,
10 No. 03-2038, 2004 WL 2743591, at *5 (E.D. Pa. Nov. 29, 2004) (“defendants implicitly ask this
11 court to stay merits-based discovery until the outcome of ongoing grand jury proceedings [where]
12 stay request states ‘If, however, the grand jury has not concluded by the time the class
13 certification motion has been decided, the Court can re-evaluate at that time whether to permit
14 merits discovery to go forward and with what limitations’”). The Government asks the Court to
15 stay proceedings for a year— far longer than any of the precedents the Government cites. The
16 stay does not terminate. Instead, discovery will only be allowed to begin following further
17 proceedings to determine a schedule, following a “progress report” by the Government “on the
18 status of its investigation.” Government Brief at 2, 9. Moreover, “the government expects that at
19 the end of the stay it would move the Court to enter a staged discovery schedule, with document
20 discovery proceeding first, followed by full discovery after a reasonable period of time.”
21 Government Brief at 2.⁷ Because the stay requested is the functional equivalent of “indefinite,” it
22 should be rejected out of hand.

23
24
25 ⁷ As confirmed in subsequent conversations with one of the Interim Co-Leads for the Indirect
26 Purchaser Plaintiffs, the stay is intended to prevent depositions for at least two years. Simon
27 Decl., ¶ 9. For the first year, the Government’s stay would allow no merits discovery, including
28 Rule 26 disclosures and production of documents. In the second year, document discovery would
be permitted. Depositions and further discovery would take place thereafter. *Id.* The
Government anticipates that the burden of lifting the stay would be on Plaintiffs, rather than
placing the burden on the Government to extend the stay, as it should be.

1 Remarkably, even the cases the Government relies on stand for the proposition that
2 the Court should not enter orders staying civil proceedings that are not narrowly tailored and not
3 limited to short, finite time periods. For example, in *McSurely v. McClellan*, 426 F.2d 664 (D.C.
4 Cir. 1970), the court vacated a stay of discovery noting that “we have no indication that the
5 District Court considered the possibility of more narrowly framed protective orders.” The other
6 cases the Government cites each involved stays of very limited duration that were crafted
7 specifically to protect particular identified documents or witnesses. *See Osband v. Woodford*,
8 290 F.3d 1036, 1042-43 (9th Cir. 2002) (district court did not commit clear error by granting
9 protective order that prevents prosecution from using attorney-client privileged documents
10 discovered in habeas proceeding in subsequent retrial of criminal case); *Campbell v. Eastland*,
11 307 F.2d 478, 487 (5th Cir. 1962) (involving only discovery of reports of agents that investigated
12 plaintiffs for tax fraud); *Souza v. Schiltgen*, No. 95-3997, 1996 WL 241824 (N.D. Cal. May 6,
13 1996) (involving a stay of 90 days where subject of criminal investigation files a civil suit against
14 the Government agency conducting investigation and seeks discovery); *Bureerong v. Uvawas*,
15 167 F.R.D. 83, 87 (C.D. Cal. 1996) (seeking a stay of only three or four months during the trial of
16 parallel criminal case); *First Merchant’s Enters. v. Shannon*, No. 88-CIV 8254, 1989 WL 25214
17 (S.D.N.Y. March 16, 1989) (seeking stay of discovery from a single, non-party witness); *Board of*
18 *Governors of Federal Reserve System v. Pharaon*, 140 F.R.D. 634 (S.D.N.Y. 1991) (criticizing
19 against blanket stays); *Founding Church of Scientology of Washington, D.C. v. Kelley*, 77 F.R.D.
20 378, 381 (D.D.C. 1981) (staying interrogatories where civil plaintiffs propounded them to only
21 two of nine defendants, and those two were responsible for the ongoing Grand Jury investigation,
22 circumstances indicating the discovery was a ploy to obtain information about the criminal
23 investigation).

24 Further, in *Pharaon*, the Court noted that “a court must hesitate before granting a
25 blanket stay of discovery in a civil proceeding, based on conclusory allegations of prejudice and
26 on the mere possibility that a non-party witness may be called to testify before the Grand Jury.”
27 140 F.R.D. at 639-40. The *Pharaon* Court granted a stay because the Government did not request
28 “a stay of infinite scope and duration, but rather has represented that the Grand Jury will have

1 decided whether or not to indict Pharaon” within six weeks of the court’s decision. *Id.* at 640.

2 Indeed, even if the Government had made such a representation here, and it has not, any stay
3 should be narrowly tailored to fit the disclosed Grand Jury schedule.

4 Moreover, the stay the Government seeks here is also inconsistent with the stays it
5 has recently sought in this District in similar circumstances. In *DRAM*, there is also parallel civil
6 and criminal litigation, and the Government and the private litigants agreed to a limited stay.

7 Simon Decl. ¶ 3, Exhs. A-B. That stay provided that no depositions would be taken for a year.

8 During that period, Defendants produced the material they turned over to the Government and the
9 Grand Jury. *Id.*, Exh. B at 2:21-28. Plaintiffs also were permitted to conduct discovery regarding

10 issues relating to jurisdictional challenges raised by certain defendants as well as to obtain certain
11 basic information from Defendants regarding the organization and structure of their marketing
12 and sales. While Plaintiffs did face certain difficulties and delays as a result, Plaintiffs were able
13 to devote their resources to developing their case to minimize the deleterious effects of the stay.

14 When the stay expired after a few months, Plaintiffs were immediately able to proceed with
15 depositions and conclude preparation of their case because documents had already been produced,
16 reviewed, put into a database, and segregated by proposed deponents. If documents had not been
17 produced early in the case, the delay would have been much longer. It should therefore come as
18 no surprise that as a result *DRAM* was resolved with the direct purchasers within five years of the
19 MDL transfer to Judge Hamilton. (Plaintiffs herein would seek an even shorter time to complete
20 resolution of this case, but there is no chance of that happening if the requested stay is granted.)

21 Indeed, based on the favorable *DRAM* experience, a similar agreement was reached in *SRAM*.

22 Simon Decl., Exhs. C-D. Under the agreement, the Defendants will produce the materials they
23 turned over to the Government and the Grand Jury. *Id.*

24 Here, unfortunately, while Plaintiffs have agreed to meet the Government more
25 than half way, the Government has refused. Consistent with *DRAM* and *SRAM*, Plaintiffs have
26 offered to stay all discovery until May 31, 2008, except for certain categories of materials. *See*
27 Simon Decl., ¶ 11. Although the Government has not agreed to this proposal, Plaintiffs request
28 that the Court consider it as an alternative to prevent the Government from irreparably

1 prejudicing the victims of Defendants' price-fixing conspiracy. *See* [Proposed] Order On The
2 United States's Motion To Stay.

3 **B. The Government's Proposed Stay Does Not Satisfy The *Molinaro* Test.**

4 The Government asks this Court to apply the factors the Ninth Circuit set forth to
5 evaluate requests for tailored stays. *Molinaro, supra*, 889 F.2d at 902-903. *Molinaro* does not
6 apply. Because the blanket stay sought by the Government here is so broad, limitless, and
7 indiscriminate, the Court should reject it out of hand. However, even under *Molinaro*, the Court
8 should reject the Government's proposed stay.

9 Under *Molinaro*, the propriety of a tailored stay request should be analyzed under
10 the following factors:

11 (1) the interest of the plaintiffs in proceeding expeditiously with
12 this litigation or any particular aspect of it, and the potential
13 prejudice to plaintiffs of a delay; (2) the burden which any
14 particular aspect of the proceedings may impose on defendants; (3)
15 the convenience of the court in the management of its cases, and the
efficient use of judicial resources; (4) the interests of persons not
parties to the civil litigation; and (5) the interest of the public in the
pending civil and criminal litigation.

16 889 F.2d at 902-03; *see also Blue Cross and Blue Shield of Alabama v. Unity Outpatient Surgery*
17 *Center*, 490 F.3d 718, 724 (9th Cir. 1997) (remanding district court decision to stay civil
18 litigation pending criminal investigation for discussion and holding that "[w]e cannot review the
19 district court's exercise of its discretion in weighing these factors unless we know that it has done
20 so and why it reached its result").

21 By design, *Molinaro* is to be applied to narrow requests for stays, as the interests
22 may balance in favor of a stay with respect to one aspect of discovery and against a stay with
23 respect to another. Variations in the subject matter, the state of the proceedings, the type of
24 discovery sought, and the party from whom it is sought are relevant to the balance.
25 Consequently, courts in this circuit approach requests for stays of discovery by requiring stays be
26 limited to specific efforts to take discovery and be justified by the immediate problems that such
27 discovery might cause. For example, *Douglas v. United States*, Nos. 03-04518, 04-05357, 2006
28 WL 2038375, at *6 (N.D. Cal. July 17, 2006), applied the *Molinaro* factors to the Government's

1 request to stay depositions in two related civil cases with a parallel criminal proceeding. The
2 Court recognized the Government's interest but required the Government to address its concerns
3 on a "deposition-by-deposition basis." *Id.* Although the Government's, the court's, and the
4 public's interests were the same in both cases, the Court granted the stay with respect to one
5 plaintiff's civil case, but not to the other. *Id.* (granting stay in one case, because "the Douglases
6 do not have a strong interest [and] the Government does have a strong interest in a stay," but not
7 the other, because "[a]lthough three of the five factors weigh in favor of the Government's
8 motion, the heavy burden on Jones that would result is too substantial to warrant a stay at this
9 time"). *See also Blue Cross*, 490 F.3d at 725 ("district court should consider, *inter alia*, the
10 distinctions between the corporate defendants and the individual defendants, and the distinctions
11 between the defendants that have been indicted and those that have not").

12 **1. Plaintiffs Will Suffer Substantial Prejudice.**

13 Plaintiffs will be substantially and unjustifiably prejudiced if the Court enters the
14 stay the Government requests.

15 The proposed stay will force Plaintiffs to oppose potentially dispositive motions
16 without the benefit of the same information that Defendants and the Government already have.
17 Some Defendants have stated they intend to file motions to dismiss on the grounds that Plaintiffs
18 fail to plead sufficient facts to state a cause of action against them. Simon Decl., ¶ 12. A blanket
19 stay in discovery will prevent Plaintiffs from uncovering facts which could be incorporated into
20 an amended Complaint to address any issues the Defendants may raise in such motions.
21 Similarly, Defendants have indicated they may file jurisdictional motions while at the same time
22 will refuse to provide information relevant to such motions. The Government's proposal will tie
23 Plaintiffs' hands and could prevent the Court from deciding motions absent a full record and
24 without having all the information relevant to such determinations.

25 The Government gives the interests of Plaintiffs short shrift, claiming merely that
26 the "temporary curb on discovery" they seek will not affect Plaintiffs. The Government is wrong.
27 A stay of discovery "will prejudice plaintiffs by preventing the expeditious resolution of the
28 lawsuit." *Plastics Additives*, *supra*, at *6. A stay of a year before any documents will be

1 produced is prejudicial. Discovery is the only method through which a plaintiffs can assess the
 2 merits of their case and begin to develop a strategy for litigation. *Golden Quality Ice Cream*
 3 *Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (D. Pa. 1980). If a stay is entered here,
 4 time will work against Plaintiffs. Important records and documents, including emails, may be lost
 5 or destroyed. Key witnesses are unlikely to be available to plaintiffs in the future; witnesses'
 6 memories are likely to fade; and others may relocate outside the jurisdiction of the Court or to
 7 unknown locations. As the Court knows, some executives of certain Defendants have already
 8 changed their status such that Plaintiffs brought a motion to be able to obtain their testimony as
 9 party witnesses. As the Ninth Circuit noted in *Blue Cross*, a stay of eighteen months has been
 10 considered "sufficient to place the plaintiffs effectively out of court." 490 F.3d at 724. The
 11 passage of time also may result in the running of the statute of limitations on claims against as yet
 12 unnamed additional defendants. Therefore, as one court explained:

13 Grand Jury investigations take time, as do criminal prosecutions. If
 14 [the Department of] Justice moves too slowly the statute of
 15 limitations may run, witnesses may die or move away, memories
 16 may fade, or enforcement resources may be diverted. . . . Thus we
 17 should not block parallel investigations . . . in the absence of
 "special circumstances" in which the nature of the proceedings
 demonstrably prejudices substantial rights of the investigated party
 or of the government.

18 *Dresser*, 628 F.2d at 1377; accord *McSurely v. McClellan*, 426 F.2d 664, 672 (D.C. Cir. 1970)
 19 ("In light of the fact that one of the functions of discovery is to preserve testimony while
 20 recollection is relatively fresh, an indefinite stay of their taking should not be entered unless no
 21 alternative is available."); *Howard v. Gutterman*, 3 B.R. 393, 395 (S.D.N.Y. 1980) (if the courts
 22 had to stay any civil proceeding due to possible criminal prosecution, such a result would "wreak
 23 havoc with court dockets and the rightful claims of plaintiffs"); *Citibank, N.A. v. Hakim*, No. 92-
 24 CIV 6233, 1993 WL 481335, at *2 (S.D.N.Y. Nov. 18, 1993) (commenting that "it is unrealistic
 25 to postpone indefinitely the pending action until criminal charges are brought or the statute of
 26 limitations has run for all crimes conceivably committed").

27 We agree with the majority position that lengthy and indefinite stays place a
 28 plaintiff effectively out of court. Such an indefinite delay amounts to a
 refusal to proceed to a deposition on the merits. *Discon, Inc. v. NYNEX*

1 *Corp.*, 4 F.3d 130, 134 (2d Cir. 1993). Even if litigation may eventually
2 resume, such stays create a “danger of denying justice by delay.” *American*
3 *Manufacturers Mutual Insurance Co. v. Edward D. Stone, Jr. & Assocs.*,
4 743 F.2d 1519, 1524 (11th Cir. 1984). Delay “inherently increases the risk
5 that witnesses’ memories will fade and evidence will become stale.”
6 *Pagtalunana v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002).

7 *Blue Cross*, 490 F.3d at 724. Here, as in *Blue Cross*, the stay requested is “both indefinite and
8 expected to be lengthy.” *Id.*

9 The Government suggests that this prejudice, caused by over a year's delay, will be
10 outweighed because “[i]f the government is able to secure guilty pleas or convictions against
11 defendants, this will immeasurably aid the plaintiffs in their ability to secure civil relief”
12 Government Brief at 4. In other words, the Government assumes that its criminal investigation is
13 more likely to benefit the civil Plaintiffs here than Plaintiffs’ discovery in these civil proceedings
14 will benefit the Government in its criminal investigation. In fact, it is just as likely, if not more
15 so, that discovery will unearth evidence of significant benefit to the Government.

16 Even if the Government’s cases are to prove successful, the benefits to the
17 Plaintiffs are elusive. Furthermore, none of the Defendants in this proceeding have been indicted
18 and no trials are set. While guilty pleas or verdicts (none of which appear to be imminent) are
19 *prima facie* evidence against Defendants here, such guilty pleas or verdicts are of questionable
20 preclusive effect. *See* 15 U.S.C. § 16(a) (“final judgment or decree . . . shall be *prima facie*
21 evidence against such defendant”). *See, e.g., Emblich Motors Corp. v. General Motors*
22 *Corp.*, 340 U.S. 558, 567-69 (1951); *New York v. Julius Nasso Corp.*, 202 F.3d 82 (2d Cir. 2000);
23 *Illinois v. General Paving Co.*, 590 F.2d 680 (7th Cir. 1979). Defendants can be expected to
24 concede no such effect. The Government also ignores the fact that discovery in this case will be
25 much broader than discovery in the criminal case. Discovery here will include discovery of the
26 facts sufficient to demonstrate the full nature of the conspiracy, each of the participants (which
27 will likely not be limited to the Defendants named to date), issues regarding class certification,
28 antitrust injury and damages. *Compare Arnold Pontiac-GMC, Inc. v. General Motors Corp.*,
786 F.2d 564, 572 (3d Cir. 1986) (holding that a civil action under the Sherman Act requires “that
the plaintiffs were injured as a proximate result of that conspiracy”); *with Shaw v. U.S.*, 371 F.

1 Supp. 2d 265, 272 (E.D.N.Y. 2005) (holding, "a relevant market and antitrust injury are not
2 required elements to prove a criminal violation of Section 1 of the Sherman Act").

3 At the end of the day, the Government's speculation as to the benefits that might
4 accrue under its stay is insufficient. As the court held in *Plastics Additives Antitrust Litig.*:

5 While the initiation and resolution of the California grand jury
6 proceedings against defendants may narrow the scope of this
7 litigation, this possibility is too remote to be considered at this
8 stage. Furthermore, staying discovery on this rationale would result
9 in an indefinite stay, as there is no way to predict when grand jury
10 proceedings will end, whether an indictment will be delivered, and
whether criminal proceedings will ensue. *See In re Residential
Doors Antitrust Litigation*, 900 F. Supp. 749, 756 (E.D. Pa. 1995)
(rejecting argument that discovery can be stayed without prejudice
to plaintiffs until completion of government's criminal investigation
of unspecified others at unknown future date).

11 *Plastics Additives* at *6. As noted in *Sterling Nat'l Bank*, 175 F. Supp. 2d at 575, "it would be
12 perverse if plaintiffs who claim to be the victims of criminal activity were to receive slower
13 justice than other plaintiffs because the behavior they allege is sufficiently egregious to have
14 attracted the attention of the criminal authorities." In short, the harm to Plaintiffs if the
15 Government's stay is granted will be substantial, and will create the "perverse" result of allowing
16 Defendants to hamper Plaintiffs' ability to receive justice by virtue of the fact that Defendants'
17 conduct was egregious enough to warrant criminal prosecution.

18 **2. Burden On Defendants**

19 Remarkably, the Government attempts to justify the stay based on deference
20 towards the Defendants, the targets of its criminal investigation. The Government has it
21 backwards. The issue is not whether the stay would benefit the Defendants. The issue is whether
22 denying the stay would result in any undue burden on Defendants. *See Molinaro*, 889 F.2d at
23 903.

24 Here, rejecting the stay will not cause undue burden to the Defendants. In fact, the
25 discovery Plaintiffs propose will create little additional burden beyond what Defendants have
26 already faced in the criminal proceedings. The materials Plaintiffs seek are largely those the
27 Defendants already produced to the Government or the Grand Jury. The burden of producing
28 them again to the Plaintiffs is minimal at best. The production of any additional materials, such

1 as information regarding sales and distribution channels or materials regarding jurisdictional
2 discovery, has been achieved by agreement in prior cases, including *DRAM* and *SRAM*.
3 Mandatory disclosures under Rule 26 and interrogatories identifying knowledgeable persons and
4 identifying the storage, location, retention, destruction or identity of corporate records would
5 result in little marginal burden. Third parties' production of documents should cause no burden
6 to Defendants at all. Finally, in order to further minimize the burden on Defendants, Plaintiffs
7 have specifically agreed not to pursue depositions during this initial period of discovery.

8 On the other hand, the Government asserts that Defendants will benefit from a
9 discovery stay, because "successful criminal charges may well refine the civil case's focus,
10 potentially reducing the cost to defendants of discovery in this matter." Government Brief at 4.
11 This argument is entirely speculative. It also misses the point. Plaintiffs are entitled to develop
12 their own theory of the case and litigation strategy. At this juncture, Plaintiffs do not seek to
13 expand discovery significantly beyond that of the criminal proceedings. To the extent Plaintiffs
14 seek any additional discovery, it is minimal and will not impede the Government.

15 The Government also incorrectly asserts that a stay of discovery "will protect
16 employees of Defendants from having to unnecessarily assert their Fifth Amendment privilege
17 against self-incrimination during civil depositions." Generally, Defendants in the civil cases are
18 businesses, and such entities cannot refuse to provide information under the Fifth Amendment.
19 *See Braswell v. United States*, 487 U.S. 99, 108 (1988); *Bellis v. United States*, 417 U.S. 85, 89-
20 90 (1974). In addition, the Fifth Amendment does not permit anyone or any entity from refusing
21 to produce documents. *United States v. Hubbell*, 530 U.S. 27, 35-36 (2000). Even with respect
22 to individuals, there is "no absolute right not to be faced to choose between testifying in a civil
23 matter and asserting his Fifth Amendment privilege." *Keating v. Office of Thrift Supervision*,
24 45 F.3d 322, 326 (9th Cir. 1995). Consistent with these well-established precedents, courts have
25 rejected the very argument the Government makes. *See Scrap Metal, supra*, at *6 (rejecting
26 argument on ground that "prejudice only exists . . . if the court ultimately allows the trier of fact
27 to draw this inference."). Furthermore, remedies less drastic than wholesale stays of litigation are
28 available to protect Defendants' Fifth Amendment rights. *See Favaloro v. S/S Golden Gate*, 687

1 F. Supp. 475, 482 (N.D. Cal. 1987) (denying stay where no indictments are filed and protective
2 orders are available to protect Fifth Amendment rights).

3 **3. The Proposed Blanket Stay Would Inconvenience The Court And**
4 **Require The Unnecessary Expenditure of Judicial Resources**

5 A stay will slow down the litigation, if not stop it in its tracks and ultimately delay
6 resolution. That will inconvenience the Court and require the unnecessary expenditure of judicial
7 resources.

8 The Court has an interest in ensuring the “just, speedy, and inexpensive
9 determination of every action.” *See* Fed. R. Civ. Pro. 1; *see also* *Molinaro*, 889 F.2d at 903
10 (refusal to say affirmed based on court’s interest in clearing docket.); *Scrap Metal, supra*, at *7
11 (“The Court has an obligation to move its docket, and not to let cases languish before it.”); *United*
12 *States v. Private Sanitation Indus. Assoc. of Nassau/Sulfolk, Inc.*, 811 F. Supp. 802, 808
13 (E.D.N.Y. 1992) (“Convenience of the courts is best served when motions to stay proceedings are
14 discouraged.”). While contravening these basic interests, the stay will result in unnecessary
15 expenditure of judicial resources. Some Defendants have indicated they intend to pursue motions
16 to dismiss on the grounds that Plaintiffs have failed to allege facts sufficient to state a cause of
17 action against them.⁸ *Simon Decl.*, ¶ 12. Such a motion will be wholly unnecessary, baseless,
18 and misguided if the discovery sought will provide material that demonstrates Defendants’
19 involvement in the price fixing conspiracy alleged here.

20 The Government then asserts that “allowing the criminal case to proceed
21 unhindered” by the civil case weighs in favor of a blanket stay, because “the matter will be
22 brought to a quicker resolution” if the criminal case resolves questions of liability against the
23 Defendants. Government Brief at 5. This argument is spurious because there is no evidence that
24 criminal proceedings expedite resolution for civil cases. Moreover, the document discovery will
25

26 _____
27 ⁸ Plaintiffs believe the complaints to date are more than sufficient to state a cause of action
28 against Defendants. While Plaintiffs have been denied access to the Government’s *in camera*
submissions, Plaintiffs can only assume they provide further factual support for Plaintiffs’ claims
as well.

1 impose little, if any, burden since Defendants have already produced the documents in the
2 criminal proceeding.

3 The Government's reliance on *Bureerong v. Uvawas, supra*, is misplaced. In
4 *Bureerong*, unlike here, there was an indictment. In addition, at the time the stay was requested, a
5 six-week trial was set to begin the next month. Here, there is no time period for resolving the
6 criminal proceedings. Also, in *Bureerong*, the stay was of limited duration. "The stay [was]
7 likely to last only three to four months." *Id.* at 87. Here, while there is no end in sight to the
8 criminal proceedings, the Government seeks a stay of indefinite duration. Furthermore in
9 *Bureerong*, the Plaintiffs did not object to the requested stay. *Id.* at 85. In the present case,
10 Plaintiffs oppose the stay.

11 **4. Refusal To Permit The Blanket Stay Will Not Implicate The Interests**
12 **Of Nonparties**

13 The Government acknowledges that there is "no significant nonparty interest at
14 issue." Government Brief at 5. Nonetheless, it argues that the interests of Defendants'
15 employees support the stay, because they may be called to testify in both the Grand Jury
16 proceedings and civil depositions. Of course, Defendants' employees are hardly innocent
17 bystanders or strangers to the proceedings. Moreover, the discovery Plaintiffs seek – documents
18 turned over to the Government or Grand Jury – do not implicate the interests of Defendants'
19 employees. To the extent that the depositions might be taken – and Plaintiffs have agreed to
20 foreclose them for the time being – they can be protected on a deposition-by-deposition basis, as
21 the Court deems necessary. *See Favaloro*, 687 F. Supp. at 482. Indeed, that is exactly how the
22 courts addressed this issue in the very cases cited by the Government. *See First Merchant's*
23 *Enters*, 1989 WL 25214 (staying the deposition of a single nonparty witness); *Pharaon*, 140
24 F.R.D. at 639-40 (same). Indeed, *Pharaon* explicitly refused the very type of blanket stay sought
25 here, "based on conclusory allegations of prejudice and on the mere possibility that a non-party
26 witness may be called to testify before the Grand Jury." *Id.*

1 5. **The Public's Interest In The Pending Civil And Criminal Cases**
2 **Weighs Against A Blanket Stay**

3 a. **The Public's Interest In The Vigorous Enforcement Of The**
4 **Antitrust Laws Through Civil Litigation Is Commensurate**
5 **With Its Interest In Criminal Enforcement**

6 Particularly in an antitrust case, the public interest is best served by a speedy
7 resolution of the civil proceedings. The quickest and surest way to resolve the civil proceedings
8 is to permit the parties to take discovery and prepare their case for trial. On the other hand, the
9 surest way to prevent resolution is by staying the case as the Government requests.

10 The public has a particular interest in the enforcement of the antitrust laws. For
11 generations it has been clear that civil litigation is integral to enforcement of the antitrust laws
12 and should not take a back seat to criminal proceedings. *See Standard Sanitary Mfg. Co. v.*
13 *United States*, 226 U.S. 20, 51-52 (1912) (“An imperative rule that the civil suit must await the
14 trial of the criminal action might result in injustice or take from the [Sherman Act] a great deal of
15 its power.”). The Supreme Court has recognized “that prompt investigation of both civil and
16 criminal claims can be necessary to the public interest.” *Zenith Radio Corporation v. Hazeltine*
17 *Research, Inc.*, 395 U.S. 100, 130-31 (1969) (the Supreme Court has long recognized the
18 importance of private antitrust actions as part of the Congressional scheme to further “the high
19 purpose of enforcing the antitrust laws.”); *see also Reiter v. Sonotone Corporation*, 442 U.S. 330,
20 344 (1979) (“Congress created the treble-damages remedy of [the Sherman Act] precisely for the
21 purpose of encouraging private challenges to antitrust violations.” (emphasis in original));
22 *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1955) (noting “the public interest in
23 vigilant enforcement of the antitrust laws through the . . . private treble-damage action.”). The
24 public interest in cases like this is very strong.

25 The public's interest in vigorously enforcing national anti-trust laws
26 through the expeditious resolution of a private antitrust litigation is
27 particularly great. *See Golden Quality Ice Cream*, 87 F.R.D. at 58;
28 *In re Residential Doors*, 900 F.Supp. at 756. This interest is even
greater when the nature of the litigation is a class action lawsuit,
filed on behalf of nationwide consumers of a particular product
over the course of more than a decade. Furthermore, the public also
has a significant interest in ensuring the flow of the Court's judicial

1 docket so that justice may be administered to the instant litigants, as
2 well as all other litigants before this Court, in a timely fashion.

3 *Plastics Additives, supra*, at *8. On the basis of this public interest, the civil litigation should not
4 be stayed. See *American Society of Mechanical Engineers v. Hydrolevel, Inc.*, 456 U.S. 556, 572-
5 73 n.10 (1982) (“These private suits provide a significant supplement to the limited resources
6 available to the Department of Justice for enforcing the antitrust laws and deterring violations.”).

7 The Government appears to rest its claim on the public interest in preventing
8 Defendants from obtaining information to which they would not be entitled under Rule 6(e) or
9 other provisions of the Federal Rules of Criminal Procedure. This concern is misplaced.
10 Plaintiffs do not seek information regarding the Grand Jury proceedings themselves. They only
11 seek material in Defendants’ possession. While Plaintiffs could obtain such information as part
12 of broader discovery on the merits, they do not intend to do so at this juncture. Instead, they seek
13 to initiate narrow discovery which, among other things, will minimize intrusion into the
14 Government’s investigation. See Plaintiffs’ Proposal to Government (Simon Decl., Exh. F (Letter
15 to Niall Lynch)).

16 Even if sought directly from the Government, Rule 6(e) would not prevent
17 disclosure of documents provided to the Grand Jury. Books and records do not become matters
18 “occurring before the Grand Jury” merely because they were subpoenaed or reviewed by the
19 Grand Jury. See *Sisk v. Commissioner*, 791 F.2d 58 (6th Cir. 1986); *United States v. Anderson*,
20 778 F.2d 602, 605 (10th Cir. 1985); *In re Grand Jury Investigation*, 630 F.2d 996, 1000 (3d Cir.
21 1980), *cert. denied*, 449 U.S. 1081 (1981). Defendants are free to disclose this information in
22 their possession.

23 Significantly, it is likely that Defendants have already exchanged this information
24 amongst themselves, and have used it to prepare their defenses, including formulating strategies
25 to oppose the civil litigation. It is therefore hard to understand how the stay could circumvent the
26 rules of criminal discovery when Defendants already have provided each other with the
27 information resulting in the odd situation that only the civil Plaintiffs are denied access. In
28 addition, Plaintiffs have specifically offered to receive the production of materials with the

1 condition that they not be shared with anyone beyond Plaintiffs’ Counsel, thus completely
2 preventing any undesired sharing of the information with other Defendants. *See* Plaintiffs’
3 Proposal, ¶ 7.

4 In a similar case, *Scrap Metal, supra*, the Government sought an eight-month stay
5 of only depositions and interrogatories, and not the production of documents. In *Scrap Metal*, as
6 here, the Government sought a stay based on the Government’s concern that criminal defendants
7 might use civil discovery to circumvent the criminal discovery rules. The court denied the
8 request:

9 The Government also has expressed concerns that Defendants could
10 use the civil discovery procedures to obtain information regarding
11 the Government’s criminal investigations to which they would not
12 otherwise be entitled, though it did not explain the precise nature of
13 its concern in this regard. . . .

14 The Court believes, however, that it can take measures other than
15 imposing a complete stay of discovery that would minimize the
16 Government’s concerns while, at the same time, allowing discovery
17 to proceed. . . .

18 [T]he public interest is best served by allowing these proceedings to
19 continue. The Supreme Court has recognized there is a
20 ‘longstanding policy of encouraging vigorous private enforcement
21 of the antitrust laws.’ *Illinois Brick Co. v. Illinois*, 431 U.S. 720,
22 745 (1977). . . . Here, Plaintiffs alleged a long-standing and
23 widespread conspiracy to fix prices in the scrap metal market. The
24 public interest is best served by allowing Plaintiffs to pursue these
25 claims.

26 *Scrap Metal*, at *7-*8. The same logic applies, with even greater force, here.

27 **b. The Government’s Interest In Ensuring Grand Jury**
28 **Information Remains Secret Does Not Justify The Stay It Seeks.**

29 The Government argues that its own interest—“a compelling interest in ensuring
30 that grand jury information is kept secret”—weighs in the public’s interest in favor of a stay.
31 Federal Rule of Criminal Procedure 6(e) is not compromised by discovery in civil proceedings.
32 As noted above, the law is clear on this point. “[I]f a document is sought for its own sake rather
33 than to learn what took place before the grand jury, and if its disclosure will not compromise the
34 integrity of the grand jury process, Rule 6(e) does not prohibit its release . . . disclosure of
35 business records independently generated and sought for legitimate purposes would not seriously

1 compromise the secrecy of the grand jury's deliberations." *United States v. Dynavac, Inc.*, 6 F.3d
2 1407, 1411-12 (9th Cir. 1993); *see also Kersting v. United States*, 206 F.3d 817, 821 (9th Cir.
3 2000) ("The only exception to *Dynavac* is if the material reveals a secret aspect of the grand
4 jury's workings.").

5 In addition, measures – other than a complete stay of discovery – are available to
6 assuage the Government's concerns while still allowing discovery to proceed. Document
7 requests and interrogatories can avoid seeking information about the actual proceedings before
8 the Grand Jury or specific aspects of the DOJ investigation, and focus on documents relevant to
9 the specific allegations in the civil proceeding. Plaintiffs can ask deposition questions that avoid
10 specific reference to the investigation or the Grand Jury proceeding. Interrogatory responses will
11 not be filed with the Court and can be limited to "attorneys' eyes-only" review pending
12 completion of the criminal proceeding. With these safeguards, the civil case could continue to
13 move forward expeditiously to resolution.

14 Furthermore, the notion that Defendants would employ civil discovery to develop
15 a full factual record of their own crimes and conspiracies makes no sense. Indeed, if the
16 Defendants were as intent on finding out what the DOJ and their co-Defendants were doing, as
17 the DOJ now claims, Defendants would be opposing this motion, when instead they are joining it.

18 Moreover, for anyone experienced in these cases, the obvious import of the
19 Government's concern is that the Government wants to use Grand Jury testimony and documents
20 with witnesses without permitting a preview. The need for surprise is not a compelling reason to
21 put the civil case on ice. First, as proposed by the direct purchaser plaintiffs, the documents could
22 be produced by Defendants to Plaintiffs only, and for attorneys' eyes only. Second, if the
23 Government has testimony, it can use that as effectively as the documents.

24 Most importantly, it is more likely than not that Defendants have already shared
25 this information. It is customary, and in fact recommended practice, for defendants to enter into a
26 joint defense agreement as soon as a Government investigation commences. Experienced defense
27 firms have publicly advocated the need for cooperation amongst defendants in a case such as this.
28 One of the claimed advantages of a joint defense agreement is the sharing of confidential

1 information that is cloaked with the attorney client privilege. This strategy is intended to put civil
 2 plaintiffs in an inescapable bind. Not only is the Government protecting Defendants by
 3 preventing production of relevant information, Plaintiffs have no explicit way to attack the
 4 premise of the Government's motion because of a purported privilege that is not even theirs to
 5 assert. Defendants ordinarily use joint defense agreements to share information among
 6 themselves, including material provided to the Grand Jury or government investigators. *See*
 7 Simon Decl., Exh. G (Bloch, R. [2006, February] *How To Respond To A Criminal Antitrust*
 8 *Investigation: A Practical Approach In Today's Enforcement Environment*. American Bar
 9 Association, Section of Antitrust Law, International Cartel Conference), p. 20 (noting under
 10 subtitle, "*Sharing Information And Resources Among Joint Defense Counsel Can Be Essential To*
 11 *Adequate Defense Preparation*" that "[s]haring information allows counsel to assess the strength
 12 and substance of the government's case at an early stage, and enables counsel to monitor and
 13 evaluate the government's case as it develops"); Simon Decl. Exh. H (Kowal, S.M. [2002,
 14 January], *Limitations To The Protection Afforded By A Joint Defense Agreement*. American Bar
 15 Association, Section of Antitrust Law, International Forum, International Cartel Workshop) (one
 16 of the benefits of a joint defense agreement is that "Such an agreement among the attorneys
 17 representing the parties involved in the investigation will facilitate communication and the
 18 exchange of information that will be important to the decisions that must be made by each of the
 19 parties.")⁹

21 ⁹ Attached to this same article is a form Joint Defense Agreement which amongst other salient
 22 points states:

- 23 1. The Defense Group agrees that their respective Clients share a mutuality of interest
 24 in a common defense in connection with the Government Investigations.
- 25 2. The undersigned believe that communications among the Defense Group are matters
 26 of common interest and concern essential to the effective representation of our respective
 27 clients.

28 *Id.* In another article written for the same program by John S. Siffert of Lankler Siffert & Wohl
 LLP, the benefit of early cooperation and sharing of information is described: "This article
 underscores why it is important at the first signs of trouble to put in place a team of lawyers to
 represent each divergent interest who also can communicate with each other consistent with their
 respective client's interests pursuant to a joint defense agreement." (Siffert, J. S. (2002,
 February). *Role of Joint Defense Agreements in Defending Antitrust Investigations*. American
 Bar Association, Section of Antitrust Law, International Forum, International Cartel Workshop.)

1 The Government is uniquely situated to protect the “secrecy” interest it uses
2 without seeking a stay. The Government can confirm whether the information has already been
3 shared.

4 Similarly, the prosecutors might ask the corporate representatives to
5 disclose whether they have entered into a joint defense agreement. Disclosure of the existence of the agreement, by itself, may violate
6 the terms of the agreement. Thus, the company could confront the dilemma of either refusing to answer questions posed by the
7 government, and exhibiting a lack of cooperation, or engaging in a clear violation of the terms of the joint defense agreement.

8 *Limitations To The Protection, supra*, at 4. Rather than rely on the speculative concern that civil
9 discovery might tip off the targets of its investigation, the Government should first determine the
10 exact nature of what has been shared by defendants. Of course, the Defendants could also advise
11 the Court *in camera* of the nature of their agreement and what information has been shared. The
12 point at this juncture should be to determine exactly what has been kept confidential and what has
13 not.

14 The Government has shown no concrete, credible prejudice to its criminal
15 investigation from the denial of a stay, as *Dresser* requires. Rather than deprive the victims of
16 this alleged antitrust conspiracy of the information which obviously shows that it occurred, and
17 put them through the waste of opposing misguided motions to dismiss, when there is evidence
18 already produced by defendants that would easily overcome that motion, the Government should
19 at least permit documents produced to the Grand Jury to be produced to Plaintiffs.

20 //

21 //

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the filing of this document has been obtained from Bruce L. Simon, Francis O. Scarpulla, and Joseph M. Alioto.