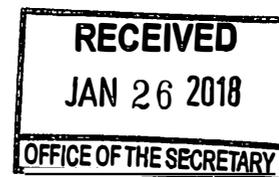


**UNITED STATES OF AMERICA**  
**Before The**  
**SECURITIES AND EXCHANGE COMMISSION**



**ADMINISTRATIVE PROCEEDING**  
**File No. 3-18346**

---

**In the Matter of**

**CYNTHIA HOLDER, CPA,**  
**JEFFREY WADA, CPA,**  
**DAVID MIDDENDORF, CPA,**  
**THOMAS WHITTLE, CPA,**  
**DAVID BRITT, CPA,**

**UNITED STATES DEPARTMENT OF**  
**JUSTICE'S MOTION TO INTERVENE**  
**AND STAY ADMINISTRATIVE**  
**PROCEEDINGS**

**Respondents.**

---

**INTRODUCTION**

Pursuant to 210(c)(3) of the United States Securities and Exchange Commission ("Commission") Rules of Practice, Geoffrey S. Berman, United States Attorney for the Southern District of New York (the "United States Attorney"), makes this Application to Intervene in the above-captioned proceeding and makes this motion for an Order staying the above-captioned proceeding pending the resolution of a parallel criminal action being pursued by the United States Attorney for the Southern District of New York.

As grounds for this application, the United States Attorney submits the following information:

1. The Securities and Exchange Commission instituted the subject administrative proceeding under an Order Instituting Proceedings ("OIP") on January 22, 2018. A hearing has been scheduled for February 26, 2018.
2. In the OIP, the Securities and Exchange Commission has alleged that,

from in or about April 2015 through in or about February 2017, Cynthia Holder, Jeffrey Wada, David Middendorf, Thomas Whittle, and David Britt (the “Respondents”) participated in a scheme to obtain, disseminate, and use confidential information concerning which KPMG audits the Public Company Accounting Oversight Board (the “PCAOB”) would be reviewing so that KPMG could improve its performance in PCAOB inspections.

3. On or about January 22, 2018, a multi-count Indictment returned by a federal grand jury sitting in the Southern District of New York was unsealed. The Indictment charges the Respondents with criminal offenses relating to the fraudulent scheme set forth above. The United States Attorney submits that the OIP and the criminal case share common allegations and questions of law and fact. Indeed, the OIP and the criminal case focus on precisely the same conduct, and many of the same witnesses, documents and other evidence will be germane to both proceedings.

4. Therefore, continuation and disposition of the administrative proceeding will substantially prejudice the criminal prosecution and hinder the enforcement of the securities laws at issue. *See, e.g., In the Matter of Crucible Capital Group, Inc., et al.*, Order Granting Application to Intervene and Motion to Stay, Admin.Proc.File No. 3-16008 (Aug. 20, 2014); *In the Matter of L&L Energy Inc., et al.*, Order Staying Proceeding, Admin.Proc.File No. 3-15815 (Apr. 3, 2014); *In the Matter of Michael J Rothmeier, et al.*, Stay Order, Admin.Proc.File No. 3-10007 (May 25, 2000) (citing *In the Matter of A. S. Goldman & Co.*, Order Postponing Proceedings at p.6, Admin.Proc.File No. 3-9933 (Sept. 1, 1999) (“Federal courts and the Commission have repeatedly recognized that civil or administrative proceedings may be stayed pending resolution of parallel criminal proceedings where justice requires.”). Should a stay be denied, certain individuals will be

called as witnesses in both the administrative hearing and subsequent criminal proceedings. The administrative hearing will thus give the Respondents a preview of certain witnesses' testimony to which they would otherwise not be entitled in the criminal proceeding, and will result in the creation of multiple statements for the same witnesses. Because there is such significant overlap between this administrative proceeding and the criminal case, the prejudice to the United States Attorney is manifest.

5. The Enforcement Staff of the Commission has informed the undersigned that it does not object to the entry of a stay in the administrative proceeding. The undersigned has sought consent for the stay from all of the Respondents but has not yet received a response.

WHEREFORE, the United States Attorney seeks leave to intervene in the administrative proceeding for the limited purpose of bringing this motion for an order staying the administrative proceeding, and it further moves for an order staying the administrative proceeding.

Dated: January 26, 2018  
New York, New York

Respectfully submitted,

GEOFFREY S. BERMAN  
United States Attorney

By:

  
Amanda Kramer/Rebecca Mermelstein/  
Jessica Greenwood  
Assistant United States Attorneys  
(212) 637-2478/2360/1090

**UNITED STATES OF AMERICA**  
**Before The**  
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-18346**

---

**In the Matter of**

**CYNTHIA HOLDER, CPA,**  
**JEFFREY WADA, CPA,**  
**DAVID MIDDENDORF, CPA,**  
**THOMAS WHITTLE, CPA,**  
**DAVID BRITT, CPA,**

**Respondents.**

---

**UNITED STATES DEPARTMENT OF  
JUSTICE'S MEMORANDUM OF LAW  
IN SUPPORT OF MOTION TO STAY  
ADMINISTRATIVE PROCEEDINGS**

**PRELIMINARY STATEMENT**

The United States of America submits this Memorandum of Law in support of its Application to Intervene in this Administrative Proceeding before the Securities and Exchange Commission and in support of its Application to Intervene and Motion For An Order Staying this Administrative Proceeding pursuant to 210(c)(3) of the United States Securities and Exchange Commission ("Commission") Rules of Practice. The United States respectfully requests this Court to stay this proceeding against Respondents Cynthia Holder, Jeffrey Wada, David Middendorf, Thomas Whittle, and David Britt (the "Respondents") pending the outcome of a parallel criminal proceeding.

The administrative proceeding should be stayed because it focuses on precisely the same conduct that is the subject of the criminal case. Both involve allegations that, from in or about April 2015 through in or about February 2017, the Respondents participated in a scheme to obtain, disseminate, and use confidential information concerning

which KPMG audits the Public Company Accounting Oversight Board (the “PCAOB”) would be reviewing so that KPMG could improve its performance in PCAOB inspections. *See In the Matter of Michael J. Rothmeier, et al.*, Admin.Proc.File No. 3-10007, May 25, 2000 (granting a stay where criminal and administrative proceedings related to same allegations); *In the Matter of Hunter Adams, et al.*, Admin.Proc.File No. 3-10624, November 27, 2001 (same).

**A STAY OF THE ADMINISTRATIVE PROCEEDING  
IS NECESSARY AND APPROPRIATE IN THE PUBLIC INTEREST**

Protection of the public through the earnest and vigorous enforcement of its criminal laws is an important public policy. To further this goal, “[f]ederal courts and the Commission have repeatedly recognized that civil or administrative proceedings may be stayed pending resolution of parallel criminal proceedings where justice requires.” *In the Matter of A.S. Goldman & Co.*, Order Postponing at p.6, Admin.Proc.File 3-9933 (September 1, 1999) (Commission overruling law judge denial of stay).

Rule 210(c)(3) of the Rules of Practice for the Securities and Exchange Commission recognizes that staying a Commission administrative proceeding until the conclusion of a parallel criminal proceeding is often in the public interest. Under Rule 210(c)(3), the Administrative Law Judge may grant leave for representatives of the United States Attorney’s Office to participate in a Commission administrative proceeding for the purpose of seeking a stay of the proceeding during the pendency of a criminal investigation or prosecution arising out of the same or similar facts at issue in the administrative proceeding. *See* Rule 210(c)(3) (“Upon a showing that [] a stay is in the public interest or for the protection of investors, the motion for stay shall be favored.”).

A. Prejudice to the Criminal Prosecution if a Stay Is Denied

Whether to issue a stay is a matter for the sound discretion of the court. *See SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980). If permitting a civil proceeding to go forward would interfere or jeopardize a criminal investigation or prosecution, the law is clear that the proceeding should be stayed. *See Kashi v. Gatsos*, 790 F.2d 1050 (2d Cir. 1996); *Dresser Indus., Inc.*, 628 F.2d at 1375; *Nakash v. United States Department of Justice*, 708 Supp. 1354, 1366 (S.D.N.Y. 1988) (if parallel proceedings not stayed, risk that disclosure may lead to perjury and manufactured evidence, revelation of identity of witnesses and possible intimidation, and unfair advantage to criminal defendants). “The Commission has made it clear that administrative proceedings should not interfere with parallel criminal proceedings,” *see In the Matter of Paul A. Flynn*, Admin.Proc.File No. 3-11390, March 4, 2004, and “Administrative Law Judges routinely grant such stays.” *In the Matter of Hunter Adams, et al.*, Admin.Proc.File No. 3-10624, November 27, 2001.

Here, a hearing in the administrative proceeding has been scheduled for February 26, 2018. Were the administrative proceeding not stayed, the Division of Enforcement would call as witnesses at that hearing many of the same individuals who are prospective trial witnesses in the criminal proceeding. Although the Division of Enforcement has already interviewed several potential witnesses, a hearing will afford the Respondents an opportunity to cross-examine them, thus giving the Respondents an additional preview of potential testimony in the criminal case. Moreover, there may be additional witnesses that the Division of Enforcement has not interviewed but who may be called to testify at such a hearing, thus giving the Respondents an opportunity to obtain

statements to which they would not otherwise be entitled in the criminal matter. The creation of potential impeachment material through taking multiple sworn statements of the same witnesses has previously been recognized as a grounds for a stay. *See In the Matter of Kolar*, Admin.Proc.File No. 3-9570 (Oct. 28, 1999) (noting United States Attorney's concern that multiple proceedings could prejudice criminal case by creating multiple sworn testimonies of witnesses). In sum, this above-referenced testimony, particularly where the United States is not a party, may jeopardize the criminal investigation.

B. Respondent Will Not Be Prejudiced By a Stay

The Division of Enforcement does not oppose the United States' motion for a stay of the administrative proceeding, and there is no indication that a stay will prejudice the Respondents. *See In the Matter of A.S. Goldman & Co.*, Admin.Proc.File No. 3-9933 at p.6 (Commission ordered a stay of the administrative proceeding pending resolution of the criminal case, noting "there has been no showing that the Respondents will be prejudiced in the administrative case by a stay"). The United States has sought consent for the stay from the Respondents, but has not yet received a response. While the criminal case has only recently been charged, Rule 210(c)(3) does not anticipate or require a determination that the parallel criminal proceeding will be completed within a fixed time period. Neither the enacting release for Rule 210(c) nor the Rule itself imposes a particular time limitation on the duration of the stay. The Commission's omission of such a limitation was recognition that criminal cases cannot be expected to run on a fixed schedule.

C. Additional Reasons to Grant the Requested Stay

Given the higher standard of proof in a criminal case, the disposition of the criminal case prior to a resolution of the administrative proceeding will promote judicial

economy. Should the Respondents be convicted in the criminal case, it is unlikely that they will demand a hearing in the administrative proceeding. Conversely, even should one of the Respondents lose the administrative proceeding, such Respondent is still likely to contest the criminal case. Thus, judicial, government, and Respondents' resources will likely be saved should the criminal matter be resolved prior to the administrative proceeding. *See, e.g., In the Matter of Crucible Capital Group, Inc., et al.*, Order Granting Application to Intervene and Motion to Stay, Admin.Proc.File No. 3-16008 (Aug. 20, 2014); *In the Matter of L&L Energy Inc., et al.*, Order Staying Proceeding, Admin.Proc.File No. 3-15815 (Apr. 3, 2014); *In the Matter of Michael J Rothmeier, et al.*, Stay Order, Admin.Proc.File No. 3-10007 (May 25, 2000) (citing *In the Matter of A. S. Goldmen & Co.*, Order Postponing Proceedings at p.6, Admin.Proc.File No. 3-9933 (Sept. 1, 1999) ("Federal courts and the Commission have repeatedly recognized that civil or administrative proceedings may be stayed pending resolution of parallel criminal proceedings where justice requires.")).

Moreover, should the administrative proceeding go forward, one or more of the Respondents are likely to exercise his or her Fifth Amendment right against self-incrimination, resulting in an adverse inference. Neither Respondents' interests nor that of the public are served thereby.

### CONCLUSION

Accordingly, due to the substantial legal, practical and policy reasons outlined above, the public interest would best be served by staying this administrative proceeding pending prosecution of the parallel criminal case. Should the request for a stay be granted, the United States Attorney's Office will file periodic status reports as required. *See In the Matter of Paul A. Flynn*, Admin.Proc.File No. 3-11390, March 4, 2004; *In the Matter of*

*Michael J. Rothmeier, et al.*, Admin.Proc.File No. 3-10007, May 25, 2000.

WHEREFORE, the United States seeks leave to intervene and an order staying this administrative proceeding pending the disposition of the criminal prosecution being conducted by the United States Attorney for the Southern District of New York.

Dated: January 26, 2018  
New York, New York

Respectfully submitted,

GEOFFREY S. BERMAN  
United States Attorney

By:

  
Amanda Kramer/Rebecca Mermelstein/  
Jessica Greenwood  
Assistant United States Attorneys  
(212) 637-2478/2360/1090

**UNITED STATES OF AMERICA  
Before The  
SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING  
File No. 3-18346**

---

**In the Matter of**

**CYNTHIA HOLDER, CPA,  
JEFFREY WADA, CPA,  
DAVID MIDDENDORF, CPA,  
THOMAS WHITTLE, CPA,  
DAVID BRITT, CPA,**

**Respondents.**

---

**CERTIFICATE OF SERVICE**

I, Amanda Kramer, certify that on the 26<sup>th</sup> day of January, 2018, I caused true and correct copies of the United States Department of Justice's Application to Intervene and Motion to Stay Administrative Proceedings, and Memorandum of Law in Support of Motion to Stay Administrative Proceedings, dated January 26, 2018, to be filed and served on the following by FedEx, unless otherwise stated below:

Brent Fields, Secretary  
Office of the Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-2557

Melissa Armstrong  
Ian Rupell  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-2557

The Honorable Cameron Elliot  
Administrative Law Judge  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-2557

Greg Bruch  
Bruch Hanna  
1099 New York Ave., NW, Ste. 500  
Washington, DC 20001  
*Counsel for David Middendorf in criminal case*

Nelson Boxer  
Amy Lester  
Petrillo Klein & Boxer LLP  
655 Third Avenue, 22nd Floor  
New York, NY 10017  
*Counsel for David Middendorf in criminal case*

James Bicks  
James Glasser  
Wiggin & Dana  
Two Stamford Plaza  
281 Tresser Boulevard  
Stamford, CT 06901  
*Counsel for Thomas Whittle in criminal  
Case*

Rob Stern  
Melinda Haag  
Orrick  
1152 15th Street, N.W.  
Washington, DC 20005-1706  
*Counsel for David Britt in criminal case*

Norman Bloch  
Thompson Hine  
335 Madison Avenue, 12th Floor  
New York, New York 10017-4611  
*Counsel for Cynthia Holder in criminal  
case*

Stephen R. Cook  
Brown Rudnick  
2211 Michelson Drive, 7th Floor  
Irvine, CA 92612  
*Counsel for Jeffrey Wada in criminal case*



---

Amanda Kramer/Rebecca Mermelstein/  
Jessica Greenwood  
Assistant United States Attorneys  
(212) 637-2478/2360/1090