

DANIEL G. BOGDEN
 United States Attorney
 Nevada State Bar No. 2137
 333 Las Vegas Boulevard South, Suite 5000
 Las Vegas, Nevada 89101
 Telephone: (702) 388-6336
 Facsimile: (702) 388-6787

JEANNETTE F. SWENT
 Special Assistant United States Attorney
 United States Attorney's Office
 185 S. State St. #300
 Salt Lake City, UT 84111
 Telephone: (801) 524-5682
 Facsimile: (801) 325-3340
 Email: jeannette.swent@usdoj.gov

Attorneys for the United States.

**UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA**

FEDERAL TRADE COMMISSION,)
)
 Plaintiff,)
)
 v.)
)
 JEREMY JOHNSON, *et al.*)
)
 Defendants.)
 _____)

Case No. 2:10-cv-02203-RLH-GWF

MOTION TO INTERVENE AND FOR A LIMITED STAY OF DISCOVERY

The United States of America, by and through Daniel G. Bogden, United States Attorney, and Jeannette F. Swent, Special Assistant United States Attorney, respectfully moves this Court for leave to intervene for the sole purpose of seeking an order for a limited stay of discovery in the above-captioned civil action pending completion of a parallel criminal investigation and prosecution in Utah. Specifically, the United States seeks to stay all discovery in this matter *except* any asset-related discovery by the Receiver or the Federal Trade Commission (“FTC”)

1 that might be taken pursuant to section 26 of the Preliminary Injunction entered by the Court on
2 February 10, 2011 (Doc. No. 130). The grounds for intervention and staying discovery are to
3 protect the ongoing criminal investigation and to prevent civil discovery that would adversely
4 affect the ability of the United States to conduct the related criminal investigation and
5 prosecution.

6 This motion is made and is based on the attached Memorandum of Points and
7 Authorities.

8 DATED this 12th day of January 2012.

9 Respectfully submitted,

10 DANIEL G. BOGDEN
11 United States Attorney

12 /s/ Jeannette Swent
13 JEANNETTE F. SWENT
14 Special Assistant United States Attorney
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The United States moves to intervene in this civil case for the sole purpose of asking the Court to order a limited stay of discovery pending completion of criminal proceedings against Jeremy Johnson and iWorks, Inc., in case number 2:11-CR-00501- TS (District of Utah). This action is necessary because defendant Johnson has recently attempted to use discovery tools in this civil case to obtain information to which he is not entitled in the criminal case. As set forth below regarding the proposed stay of discovery, the Court must balance the public's interest in law enforcement against the rights of the civil litigants, giving substantial weight to the public's interest in protecting the United States' criminal investigation and prosecution.

The public interest in protecting sensitive information gathered during the ongoing criminal investigation and prosecution outweighs any prejudice that a stay of discovery might impose on the civil parties. As criminal defendants, Mr. Johnson and iWorks, Inc., are not entitled to take depositions and obtain written discovery, and allowing them to do so in this civil case would interfere with the United States' criminal prosecution. Granting a limited stay of discovery, on the other hand, would protect the prosecution and also conserve judicial resources, because allowing the criminal prosecution to proceed will likely narrow the issues in the civil litigation. The ongoing criminal investigation and prosecution should not be compromised by this civil case. Accordingly, the United States should be allowed to intervene, and the specified discovery in this civil action should be stayed.

II. STATEMENT OF FACTS

A. The FTC's Civil Enforcement Action

The pending criminal investigation of Jeremy Johnson, iWorks, Inc., and related parties stems from the civil enforcement action begun by the Federal Trade Commission in the Fall of 2009. The FTC alleges that Mr. Johnson, iWorks, Inc., and other defendants engaged in a massive Internet-based scam using deceptive marketing tactics. The FTC filed its complaint in

1 December of 2010, and on January 13, 2011 this Court issued a Temporary Restraining Order
2 freezing the assets of Mr. Johnson and corporate defendants in this case. The Court entered a
3 Preliminary Injunction on February 10, 2011, continuing the asset freeze and appointing a
4 Receiver, Robb Evans & Associates, to identify and seize assets of Johnson and iWorks, Inc.
5 Section 26 of the Preliminary Injunction provides for limited discovery by the Receiver and the
6 FTC for the purpose of discovering the nature, location, and status of the assets and business
7 documents of the entities subject to the Receivership. (Doc. No. 130.) The Court ordered a
8 limited stay of discovery for 180 days in the FTC's case (Doc. No. 263), and the parties recently
9 filed a joint status report addressing whether the stay should be extended and, if so, modified
10 (Doc. No. 424). Defendants, including Mr. Johnson, asked the Court to modify and extend the
11 stay for another 180 days. (*Id.* at 1-3.) At a hearing on January 6, 2012, the Court modified and
12 extended the limited stay for another 180 days. (Doc. No. 434.)

13 **B. The United States' Criminal Investigation and Indictment**

14 Jeremy Johnson and iWorks, Inc., were initially charged in a complaint filed in the
15 District of Utah on June 10, 2011. Johnson was arrested on June 11, 2011 at the Phoenix airport
16 as he was about to board an airplane bound for Costa Rica. On June 15, 2011 an indictment was
17 filed in the District of Utah charging Johnson and iWorks, Inc., with one count of mail fraud
18 based on their advertising, marketing, distribution, and sale of products on the Internet. Since
19 then the Internal Revenue Service and the U.S. Attorney's Office for the District of Utah have
20 been conducting an extensive criminal investigation for the purpose of superseding the original
21 indictment with a more comprehensive indictment charging Johnson, iWorks, Inc., and others
22 with a widespread pattern of federal criminal violations.

23 **C. Jeremy Johnson's Discovery Activity in this Civil Case**

24 The United States' criminal investigation is expected to continue for some months.
25 Meanwhile, in recent weeks Johnson has propounded discovery in the civil case as follows: (1) a
26 subpoena issued by the District of Utah seeking to take the deposition of IRS Special Agent

1 Jamie Hipwell on December 26, 2011 at Johnson's home in St. George, UT (Agent Hipwell is
2 the Salt Lake City based lead agent investigating federal criminal violations allegedly committed
3 by Johnson and others); (2) a subpoena issued by the District of Utah seeking to take the
4 deposition of Devan Partridge on January 10, 2012 at Johnson's home in St. George (Mr.
5 Partridge is a witness in the federal criminal investigation); (3) two subpoenas issued by the
6 District of Utah to Alexis Partridge and Dallin Partridge seeking documents believed to be
7 evidence in the current federal criminal investigation that is expected to be used in the
8 prosecution of a criminal case; (4) a subpoena issued by the District of Utah to the Davis, Utah
9 County Jail (where Johnson was detained for some months following his arrest in Phoenix)
10 seeking evidence of alleged communications between Johnson and/or the Jail and unnamed
11 representatives of the federal government; (5) a subpoena issued by the Northern District of
12 California to Goggle, Inc. seeking documents believed to be evidence in the federal criminal
13 investigation; (6) a subpoena issued by the District of Columbia to Grants.gov seeking
14 documents believed to be evidence in the federal criminal investigation; (7) a subpoena issued by
15 the District of Massachusetts to Litle & Co. (whose representatives are witnesses in the criminal
16 investigation) seeking documents believed to be evidence in the federal criminal investigation;
17 (8) a subpoena issued by the District of Maryland to Matthew Lesko seeking documents believed
18 to be evidence in the federal criminal investigation; (9) a subpoena issued by the District of Utah
19 to the Utah Consumer Protection Division seeking documents believed to be evidence in the
20 federal criminal investigation; (10) a subpoena issued by the Central District of California to
21 Verify seeking documents believed to be evidence in the federal criminal investigation; (11) a
22 subpoena issued by the Northern District of California to Consumerinfo.com seeking documents
23 believed to be evidence in the federal criminal investigation; (12) a subpoena from the District of
24 Connecticut to Vertrue seeking documents believed to be evidence in the federal criminal
25 investigation; (13) a subpoena issued by the Northern District of California to Visa, Inc. seeking
26 documents believed to be evidence in the federal criminal investigation; (14) a subpoena issued

1 by the District of Connecticut to Webloyalty.com seeking documents believed to be evidence in
 2 the federal criminal investigation; (15) a subpoena issued by the Northern District of California
 3 to Netflix seeking documents believed to be evidence in the federal criminal investigation; and
 4 (16) a subpoena issued by the District of Columbia to Benefits.gov seeking documents believed
 5 to be evidence in the federal criminal investigation.

6 Mr. Johnson and the other defendants in this civil case recently filed a report with this
 7 Court confirming that this civil case and the criminal prosecution arise from the same alleged
 8 conduct, and they asked the Court to continue the current limited stay of discovery for 180 more
 9 days. (Joint Status Report on Limited Stay at 1-3, Doc. No. 424.) They specifically noted that a
 10 continued stay would protect them from civil discovery that might implicate their Fifth
 11 Amendment rights. (*Id.* at 2.) The Court recently modified and extended the limited stay for
 12 another 180 days. (Doc. No. 434.)

13 **III. ARGUMENT - THE UNITED STATES SHOULD BE ALLOWED TO** 14 **INTERVENE**

15 Rule 24 (a)(2) of the Federal Rules of Civil Procedure provides a right of intervention for
 16 an applicant who can demonstrate: (1) an interest in the subject matter of the civil suit; (2) an
 17 impediment to protecting that interest arising from the pending action; and (3) inadequate
 18 protection of that interest by the existing parties to the action. Fed. R. Civ. P. 24(a)(2); *see* 7C
 19 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, & Richard L. Marcus, *Federal Practice*
 20 *and Procedure Civil* § 1908 (3d ed. & 2011 update). Alternatively, intervention may be
 21 permitted by the Court under Rule 24(b) when an applicant's claim or defense "shares with the
 22 main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In the instant case,
 23 intervention by the government is appropriate under both provisions of Rule 24 for the limited
 24 purpose of protecting the criminal action from civil discovery by the same defendants in both
 25 cases.

26 . . .

1 **A. The government has the right to intervene**

2 The Ninth Circuit applies a four-part test to a motion to intervene pursuant to Rule
3 24(a)(2):

4 (1) the motion must be timely; (2) the applicant must claim a “significantly
5 protectable” interest relating to the property or transaction which is the subject of
6 the action; (3) the applicant must be so situated that the disposition of the action
may as a practical matter impair or impede its ability to protect that interest; and
(4) the applicant's interest must be inadequately represented by the parties to the action.

7 *Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173, 1177 (9th Cir. 2011) (*en banc*). The
8 Ninth Circuit follows “practical and equitable considerations and construe[s] the Rule broadly in
9 favor of proposed intervenors.” *Id.* at 1179 (citations and internal quotation marks omitted). In
10 considering an application for intervention, the district court must accept the applicant’s non-
11 conclusory allegations as true. *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810,
12 819–20 (2001). This “liberal policy” favoring intervention “serves both efficient resolution of
13 issues and broadened access to the courts.” *Wilderness Soc.*, 630 F.3d at 1179 (citation omitted).
14 The United States meets each of the four cited criteria and is entitled to intervene as a matter of
15 right.

16 **1. The government’s motion to intervene is timely.**

17 The United States seeks to intervene in this case while a limited stay of discovery is in
18 effect and within days of learning of various subpoenas served by defendant Jeremy Johnson. As
19 Mr. Johnson recently stated to the Court, he and other defendants “are just now beginning
20 discovery in this [civil] case.” (Joint Status Report on Limited Stay at 3, Doc. No. 424.) Thus,
21 the United States’ motion to intervene and request a stay of discovery is timely.

22 **2. The government has a “significantly protectable” interest in the property**
23 ***or transaction which is the subject of the action.***

24 The Ninth Circuit has held that the “interest” test is generally satisfied if “the interest is
25 protectable under some law, and . . . there is a relationship between the legally protected interest
26 and the claims at issue.” *Wilderness Soc.*, 630 F.3d at 1179 (citation omitted). The government’s

1 interest in prosecuting the criminal defendants is protectable under the statute cited in the
 2 indictment, 18 U.S.C. § 1341 (mail fraud), and other statutes that may be added in a superseding
 3 indictment. The ongoing criminal investigation and this civil suit involve the same facts
 4 regarding defendants' Internet-based marketing and sales; thus, the United States has an interest
 5 in the subject matter of this suit. More specifically, the government has a "discernible interest in
 6 intervening in order to prevent discovery in the civil case from being used to circumvent the
 7 more limited scope of discovery in the criminal matter." *SEC v. Chestman*, 861 F.2d 49, 50 (2d
 8 Cir. 1988) (affirming the District Court's decision to allow intervention by the government under
 9 either Rule 24(a) or (b)).

10 **3. *Disposition of this action may as a practical matter impair or impede the***
 11 ***United States' ability to protect its interest.***

12 The government is entitled to intervene in this action for the purpose of protecting against
 13 the premature discovery of information that is the subject of the criminal investigation of the
 14 defendants and is likely to be used during their criminal trial. Unless the Court orders the
 15 proposed limited stay, discovery in the civil suit will impair the government's ability to protect
 16 its prosecutorial and investigative interests. As a result of the filing of the civil action, defendant
 17 Johnson is already attempting to benefit from discovery in the context of the civil case that he
 18 would be prohibited from receiving under the Federal Rules of Criminal Procedure. The
 19 potential prejudice to the United States' interests is addressed further in section IV.B., *infra*.

20 **4. *No current party to this action adequately represents the United States'***
 21 ***interest.***

22 If civil discovery were to proceed here, the government's investigative and prosecutorial
 23 interests would be directly harmed. No current party to the civil case can protect these interests.
 24 The defendants, many of whom are targets of the government's ongoing criminal investigation,
 25 cannot adequately protect these governmental interests. Neither can the FTC adequately
 26 represent these interests, because its statutory authority is limited to enforcement of laws in the

1 civil context. Under similar circumstances in *Securities and Exchange Commission v. Downe*,
 2 1993 WL 22126 (S.D.N.Y. 1993), the court noted that “even though the SEC is involved in this
 3 action, the United States Attorney may have an interest in this litigation which is qualitatively
 4 different from the SEC’s interest. Moreover, the United States Attorney is better equipped to
 5 explain its need for intervention in the instant case due to a parallel criminal investigation, rather
 6 than using the SEC as a conduit for such arguments.” *Id.* at 12. For the foregoing reasons, the
 7 government requests that it be granted intervention as a matter of right in the above-captioned
 8 case for the sole purpose of obtaining the limited stay of discovery.

9 **B. Alternatively, the government should be permitted to intervene**

10 If the Court concludes that the government does not have a right to intervene in this case,
 11 the government requests that the Court exercise its sound discretion to permit it to intervene
 12 under Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure. *See SEC v. Chestman*, 861 F.2d
 13 49, 50 (2d Cir. 1988) (affirming the District Court’s decision to allow intervention by the
 14 government under Rule 24(b) “in order to prevent discovery in the civil case from being used to
 15 circumvent the more limited scope of discovery in the criminal matter”); *In re Sealed Case*, 856
 16 F.2d 268, 271 (D.C. Cir. 1988) (Department of Justice granted permissive intervention in private
 17 civil case to seek protection of privileged law enforcement materials).

18 Rule 24(b)(1)(B) grants the Court discretion to permit intervention to an applicant who:
 19 (1) makes a timely motion; and (2) has a claim or defense that shares with the main action a
 20 common question of law or fact. Rule 24(b)(3) requires the Court to “consider whether the
 21 intervention will not unduly delay or prejudice the adjudication of the original parties’ rights.”
 22 FED R. CIV. P. 24(b)(1)(B) and (b)(3). *See* 7C Charles Alan Wright, Arthur R. Miller, Mary Kay
 23 Kane, & Richard L. Marcus, *Federal Practice and Procedure Civil* § 1911 (3d ed. & 2011
 24 update); *Bureerong v. Uvawas*, 167 F.R.D. 83, 86 (C.D. Cal. 1996) (granting United States’
 25 motion to intervene in civil case based on parallel criminal proceedings).

26 As set forth earlier, this motion is filed before full-blown discovery has begun in this civil

1 case, while a limited stay of discovery is in effect, and within days of service of subpoenas
2 seeking discovery by defendants. Thus, the motion is timely filed.

3 Mr. Johnson acknowledges that the criminal prosecution arises out of the same alleged
4 conduct at issue in the civil case. (Joint Status Report on Limited Stay at 2, Doc. No. 424.)
5 Specifically, both cases raise issues regarding Mr. Johnson's use of the Internet to advertise,
6 market, distribute, and sell products. The FTC's Complaint alleges that Defendants engaged in
7 unfair or deceptive acts or practices in or affecting commerce in violation of the FTC Act, 15
8 U.S.C. § 45(a), and also violated the Electronic Fund Transfer Act, 15 U.S.C. § 1693o(c).
9 (Complaint ¶¶ 1, 11 (Doc. No. 1).) The Indictment states that "hundreds of thousands of
10 consumers" fell victim to the criminal defendants' and their co-conspirators' fraudulent
11 representations and omissions on the Internet. (*See* Indictment at 5, copy attached as Exhibit A.)

12 Permitting the United States to intervene in this case – a decision that is separate and
13 apart from the decision whether to stay discovery – will not "unduly delay or prejudice
14 adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The United States seeks to
15 intervene for the sole purpose of seeking a limited stay of discovery. If intervention is permitted,
16 the Court will either grant or deny the motion for limited stay. In either case, the intervention
17 itself will not cause undue delay or prejudice to the current parties.

18 In similar circumstances, other courts generally "have allowed the government to
19 intervene in civil actions -- especially when the government wishes to do so for the limited
20 purpose of moving to stay discovery." *Twenty First Century Corp. v. LaBianca*, 801 F. Supp.
21 1007 (E.D.N.Y. 1992); *see Bureerong v. Urawas*, 167 F.R.D. 83, 86 (C.D.Cal. 1996) ("It is well
22 established that the United States Attorney may intervene in a federal civil action to seek a stay
23 of discovery when there is a parallel criminal proceeding, which is anticipated or already
24 underway that involves common questions of law or fact" (citations omitted)); *see SEC v.*
25 *Downe*, 1993 WL 22126 at 10 (S.D.N.Y. Jan. 26, 1993); *Kaiser v. Stewart*, Civ. A. 96-6643,
26 1997 WL 66186 (E.D. Pa. Feb. 6, 1997) (granting intervention); *Thornhill v. Otto Candies, Inc.*,

1 Civ. A. No. 94-1479, 1994 WL 382655 (E.D. La. July 19, 1994) (granting intervention under
 2 Rule 24). In short, the government has a strong interest in maintaining the integrity of the
 3 criminal process, which will be subverted unless the Court allows intervention in the present
 4 action.

5 Under the controlling standards, the government has a right to limited intervention under
 6 Rule 24(a)(2) or, in the alternative, to permissive intervention under Rule 24(b)(1)(B).

7 **IV. ARGUMENT - THIS COURT SHOULD ORDER A LIMITED STAY OF**
 8 **DISCOVERY IN THIS CIVIL ACTION TO PROTECT THE ABILITY OF THE**
 9 **UNITED STATES TO PROSECUTE THE RELATED CRIMINAL CASE.**

10 **A. The Court has authority to stay discovery in this civil case**

11 This Court has the discretionary authority to stay discovery in this civil proceeding. A
 12 court's authority to grant a stay derives from the power of every court "to control the disposition
 13 of the causes on its docket with economy of time and effort for itself, for counsel, and for the
 14 litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see Rohan v. Woodford*, 334 F.3d
 15 803, 817 (9th Cir. 2003) ("District courts have inherent authority to stay proceedings before
 16 them. . .") (citation omitted); *Stern v. United States*, 563 F. Supp. 484, 489 (D. Nev. 1983)
 17 ("Every court has the inherent power to stay causes on its docket with a view to avoiding
 18 duplicative litigation, inconsistent results, and waste of time and effort by itself, the litigants and
 19 counsel.") (citations omitted). Moreover, a court may stay civil proceedings "when the interests
 20 of justice seem[] to require such action." *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375, (D.C.
 21 Cir. 1980) (quoting *United States v. Kordel*, 397 U.S. 1, 12 n. 27 (1970)); *see also Kashi v.*
Gratsos, 790 F.2d 1050, 1057 (2d Cir. 1986).

22 Before granting a stay of civil proceedings in the face of parallel criminal proceedings, a
 23 court should consider the particular circumstances and competing interests involved in the case,
 24 including the extent to which a defendant's Fifth Amendment rights are implicated. *Keating v.*
 25 *Office of Thrift Supervision*, 45 F.3d 322, 324-25 (9th Cir. 1995) (citation omitted). In addition,
 26 the court should generally consider:

(1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) 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.

Id. (citation omitted).

The United States has moved for a limited stay of civil discovery to protect its ongoing criminal investigation and prosecution. The Court has the authority to grant such a limited stay after considering any competing interests of the parties and the interests of justice.

B. The competing interests in this case favor ordering a limited stay of discovery to allow the criminal investigation and prosecution to proceed

Defendant Jeremy Johnson has sent 16 subpoenas in this civil case to date, demonstrating his intent to seek civil discovery that is not available to him or proper under the Federal Rules of Criminal Procedure. Federal criminal law provides certain time frames for discovery by defendants and establishes strict limitations on material that criminal defendants may obtain prior to trial. *See, e.g.*, Fed. R. Crim. P. 16 and 26.2 and 18 U.S.C. § 3500. Rule 26.2 and Section 3500 state that the prosecution is not required to provide a criminal defendant with a witness's statements until after the witness has testified on direct examination at trial. Further, the court may not compel the government to disclose statements of a witness before this time. 18 U.S.C. § 3500(a); *United States v. Rewald*, 889 F.2d 836, 866-67 (9th Cir. 1989). In addition, federal criminal practice allows a witness full choice over whether to speak with any of the parties or their representatives prior to testifying in a criminal case. This basic protection, however, is unavailable to the same witness in a civil case. A defendant's use of the civil discovery process to secure key witness statements that would certainly then be used in his criminal case would permit precisely what the foregoing cases are intended to prevent – the subversion of the criminal discovery limits by civil means.

Noting that the scope of discovery in criminal cases is narrower than in civil cases,

1 various courts have approved the stay of civil proceedings to avoid exploitation of civil discovery
2 to the detriment of a related criminal investigation. In *United States v. Mellon Bank, N.A.*, 545
3 F.2d 869 (3rd Cir. 1976), a civil litigant asserted his Fifth Amendment privilege against self-
4 incrimination during the discovery process as he simultaneously sought government production
5 of documents that pertained to an ongoing criminal case against him. The Third Circuit upheld a
6 stay of the civil action upon a finding that the mere similarity of issues between the civil and
7 criminal cases opened the door for a civil party to abuse civil discovery in order to gain an
8 advantage in his criminal case:

9 It was clearly within the power of the district court to balance competing interests
10 and decide that judicial economy would best be served by a stay of civil
11 proceedings. The court found, and [the taxpayer] does not contend otherwise, that
12 the civil matter before it and the criminal case in New York involved substantial
13 matters of the same nature. Hence, it might well have been that resolution of the
14 criminal case would moot, clarify, or otherwise affect various contentions in the
15 civil case. Furthermore, the similarity of the issues left open the possibility that
16 [the taxpayer] might improperly exploit civil discovery for the advancement of his
17 criminal case.

14 *Mellon Bank, N.A.*, 545 F.2d at 872-73 (citations and quotes omitted). See *McSurely v.*
15 *McClelland*, 426 F.2d 664, 671-72 (D.C. Cir. 1985) (“civil discovery may not be used to subvert
16 limitations on discovery in criminal cases, by either the government or by private parties”);
17 *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962) (stating that a litigant should not be
18 allowed to make use of liberal discovery procedures applicable to civil suits “as a dodge to avoid
19 the restrictions on criminal discovery.”); *Larouche Campaign v. F.B.I.*, 106 F.R.D. 500, 501
20 (D.C. Mass. 1985) (granting stay of civil discovery until the Grand Jury failed to return an
21 indictment or until the conclusion of presentation of evidence at trial in parallel criminal
22 proceeding); *White v. Mapco Gas Products, Inc.*, 116 F.R.D. 498, 503 (E.D. Ark. 1987) (granting
23 stay of civil discovery to avoid possibility that civil litigants might “circumvent the more
24 restrictive rules of criminal discovery to obtain information they would not otherwise be entitled
25 to for use in a criminal suit”). In a more extreme case, the Eleventh Circuit affirmed a district
26 court’s decision to enjoin criminal defendants from bringing a civil suit against potential

witnesses at their criminal trial where the court found evidence that civil discovery would be used to help prepare the criminal defense and, quite possibly, to harass potential witnesses and affect their testimony in the criminal trial. *United States v. Tison*, 780 F.2d 1569, 1573 (11th Cir. 1986) (affirming injunction pursuant to 18 U.S.C.A. § 1514(b)).

1. *The proposed limited stay will not prejudice the FTC or unduly burden Defendants in the civil case.*

If the Court permits intervention and orders a limited stay of discovery, this will not prejudice the FTC or unduly burden Defendants. In fact, the parties to this case will benefit from staying the specified civil discovery while allowing the criminal investigation and prosecution to proceed. The FTC will benefit from the stay because the resolution of the criminal case will likely reduce the scope of discovery and simplify, if not wholly eliminate, many issues in the civil case. Moreover, Mr. Johnson and the other defendants recently asked the Court to continue its limited stay of discovery in the civil case, and the Court modified and extended the limited stay for another 180 days. (*See* Joint Status Report on Limited Stay at 1-3 (Doc. No. 424); Doc. 434.)

Further, staying discovery will relieve Defendants of the necessity of concurrently defending a civil lawsuit and a criminal action and, thus, diverting resources that may be necessary for the defense of the criminal case. *See White v. Mapco Gas Products Inc.*, 116 F.R.D. 498, 501-3 (E.D. Ark. 1987). Documents relating to the conduct alleged in the indictment will be made available to the defense during the course of the criminal proceeding pursuant to Rule 16 of the Federal Rules of Criminal Procedure. Witness statements and impeachment material will be provided no later than the time of the criminal trial. Thus, the criminal targets will be provided with most, if not all, of the materials that would be made available to them through civil discovery, other than the civil depositions of material witnesses.

As Mr. Johnson has stated to the Court in support of extending the limited stay of discovery, proceeding with discovery would force Defendants to choose whether to testify in the

1 civil case or assert their Fifth Amendment rights against self-incrimination. (Joint Status Report
2 on Limited Stay at 2, Doc. No. 424.) The proposed limited stay of discovery will protect
3 Defendants' rights under the Fifth Amendment.

4 While Mr. Johnson may argue that keeping the receivership in place is an undue burden,
5 the assets in the receivership are being preserved and are earning interest where possible. Courts
6 have stayed civil proceedings to allow criminal investigations to run their course in similar
7 situations where significant assets were at stake. *See Mellon Bank*, 545 F.2d at 873 (upholding
8 stay of civil proceedings despite effect of denying fugitive defendant access to safe deposit box);
9 *Bd. of Governors of the Fed. Reserve Sys. v. Pharaon*, 140 F.R.D. 634, 640-41 (S.D.N.Y. 1991)
10 (ordering stay of depositions despite effect of continuing freeze of fugitive defendant's assets).
11 Moreover, as set forth below, the potential harm to the government and public interest far
12 outweighs concerns about the receivership estate.

13 **2. The proposed limited stay will serve judicial efficiency and economy.**

14 Judicial economy will also be served by the potential resolution of some of the disputed
15 issues in this civil action. A prior criminal conviction will operate as an estoppel in a subsequent
16 civil proceeding as to those issues that were determined in the criminal matter. *See, e.g., Emich*
17 *Motors Corp. v. Gen. Motors Corp.*, 340 U.S. 558, 568-69 (1951). Should the investigation
18 result in criminal convictions of the defendants (whether by trial or plea agreement) for mail
19 fraud or other crimes, such convictions might facilitate resolution of this civil proceeding
20 regarding Jeremy Johnson and iWorks, Inc. In any event, resolution of the criminal proceedings
21 may "moot, clarify, or otherwise affect" various aspects of the civil case. *Mellon Bank, N.A.*, 545
22 F.2d at 872-73 (upholding stay of civil action while criminal case proceeded). Accordingly,
23 ordering a limited stay of civil discovery while allowing the criminal case at issue to proceed to
24 trial or other resolution may conserve scarce judicial resources and reduce time and expenses for
25 the civil litigation.

26 . . .

1 **3. *The proposed limited stay will serve interests of the United States,***
2 ***potential witnesses, and the public.***

3 The interests of justice generally weigh in favor of a stay of parallel civil proceedings due
4 to the variety of ways in which the civil proceeding may impede a criminal investigation. *Dresser*
5 *Indus.*, 628 F.2d at 1375; *Bureerong v. Urawas*, 167 F.R.D. 83, 86 (C.D.Cal. 1996) (“the
6 interests of the Government in protecting its criminal investigation are clearly the paramount
7 concern” where stay of civil discovery is sought pending conclusion of criminal trial); *United*
8 *States v. One 1964 Cadillac Coupe DeVille*, 41 F.R.D. 352, 353 (S.D.N.Y. 1966) (“where both
9 civil and criminal proceedings arise out of the same or related transactions the government is
10 ordinarily entitled to a stay of all discovery in the civil case until disposition of the criminal
11 matter”). Indeed, courts have long recognized the wisdom of staying civil actions or civil
12 discovery pending the resolution of related criminal proceedings to avoid the conflict inherent in
13 concurrent proceedings concerning the same underlying facts and issues. *See United States v.*
14 *United States Currency*, 626 F.2d 11, 17 (6th Cir. 1980); *Wehling v. Columbia Broad. Sys.*, 608
15 F.2d 1084, 1089 (5th Cir. 1979). As the Supreme Court observed in *Landis*, private litigants
16 must recognize that “the individual may be required to submit to delay not immoderate in extent
17 and not oppressive in its consequences if the public welfare or convenience are to be promoted.”
18 *Landis*, 299 U.S. at 256. Any interest the parties might have in moving forward with this matter,
19 including through civil discovery, should not trump the government’s interest in preserving
20 evidence or developing facts in a parallel criminal investigation of some of the same defendants.
21 In reversing a district court’s denial of a stay in a civil proceeding, the Fifth Circuit has stated:

22 There is a clear-cut distinction between private interests in civil litigation and the
23 public interest in a criminal prosecution, between a civil trial and a criminal trial,
24 and between the Federal Rules of Civil Procedure and the Federal Rules of Criminal
25 Procedure. . . The very fact that there is a clear distinction between civil and
26 criminal actions requires a government policy determination of priority: which case
would be tried first. *Administrative policy gives priority to the public interest in law*
enforcement. This seems so necessary and wise that a trial judge ... should give
substantial weight to it in balancing the policy against the right of a civil litigant to
a reasonably prompt determination of his civil claims or liabilities.

1 *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962) (emphasis added). As a concurring
 2 author noted in *Campbell*, “The criminal aspect of the matters could not be ignored [because] the
 3 end result [of allowing discovery] was tantamount to allowing discovery under Federal Rules of
 4 Civil Procedure in a criminal proceeding, something we are powerless, as was the trial court, to
 5 authorize.” 307 F.2d at 492-493.

6 The interest of the government and the public in law enforcement will be prejudiced
 7 irreparably if civil discovery proceeds in this case without limitation. Critical evidence might be
 8 disclosed to the criminal targets prematurely, and such disclosure might impair the government’s
 9 ability to work with cooperating witnesses and, thus, to investigate and prosecute the criminal
 10 case. Moreover, the criminal targets might assert their Fifth Amendment rights against self-
 11 incrimination and refuse to provide sworn interrogatory responses to the FTC in this case while
 12 the criminal investigation proceeds. Indeed, Mr. Johnson and his co-defendants have asked the
 13 Court to continue the limited stay in the civil case based in part on their Fifth Amendment rights.
 14 (Joint Status Report on Limited Stay at 2, Doc. No. 424.) Various courts have held that the
 15 government’s and the public’s interest in enforcement of the criminal laws outweigh a civil
 16 defendant’s desire to proceed with discovery in a parallel civil matter. *See Campbell*, 307 F.2d at
 17 487 (“Administrative policy gives priority to the public interest in law enforcement.”);
 18 *Bureerong v. Uvawas*, 167 F.R.D. at 87 (“the Government’s interest in the unhindered
 19 disposition of the extremely complex criminal case looms large over the opposing Defendants’
 20 concerns. A stay of discovery will protect the integrity of the Government’s investigation and
 21 ensure that the Defendants will not use the civil discovery processes to obtain discovery that is
 22 not authorized in a criminal case.” (internal quotation marks and citation omitted)); *In re Ivan F.*
 23 *Boesky Securities Litig.*, 128 F.R.D. 47, 49 (S.D.N.Y. 1989) (“[T]he *public interest* in the
 24 criminal case is entitled to precedence over the civil litigant.” (emphasis in original)).

25 . . .

26 . . .

1 **V. CONCLUSION**

2 The United States seeks a limited stay of discovery in this civil proceeding to allow it to
3 complete its ongoing criminal investigation and prosecution related to this civil case. The
4 parallel cases have witnesses, facts, and legal issues in common. Allowing all civil discovery to
5 continue could force witnesses to testify in civil depositions to which criminal defendants are not
6 entitled, and prematurely disclose to the criminal defendants sensitive details of the criminal
7 prosecution, thereby frustrating and inhibiting the orderly completion of the criminal process.
8 Such disclosure would substantially prejudice the United States' law enforcement efforts.

9 The United States respectfully requests that the Court (1) grant its motion to intervene for
10 the sole purpose of seeking an order to stay discovery in this civil action to avoid adversely
11 affecting the ongoing criminal investigation and prosecution; and (2) grant its motion for a
12 limited stay of civil discovery pending completion of the parallel criminal investigation and
13 prosecution in Utah. Specifically, the United States requests that the Court stay all discovery in
14 this matter *except* any asset-related discovery by the Receiver or the Federal Trade Commission
15 ("FTC") that might be taken pursuant to section 26 of the Preliminary Injunction entered by the
16 Court on February 10, 2011 (Doc. No. 130).

17 DATED this 12th day of January 2012.

18 Respectfully submitted,

19 DANIEL G. BOGDEN
20 United States Attorney

21 /s/ Jeannette F. Swent
22 JEANNETTE F. SWENT
23 Special Assistant United States Attorney
24
25
26

PROOF OF SERVICE

I, Jeannette F. Swent, SAUSA, certify that the following individuals were served with the **MOTION TO INTERVENE AND FOR A LIMITED STAY OF DISCOVERY** on this date by the below identified method of service:

Electronic Case Filing:

Reza Sina, Esq.
Sina Law Group
801 S. Figueroa Street, 12th Floor
Los Angeles, California 90017

Attorney for defendant Scott Leavitt

Alan D. Boyack, Esq.
Boyack & Boyack
205 East Tabernacle, Suite 2
St. George, Utah 84770

Attorney for defendants Terrason Spinks and Jet Processing

Michael P. Studebaker, Esq.
Studebaker Law Office, LLC
2550 Washington Blvd., Suite 331
Ogden, Utah 84401

Attorney for defendants Duane Fielding, Anthon Holdings Corp., and Network Agenda, LLC

Gary Owen Caris, Esq.
Lesley Anne Hawes, Esq.
McKenna Long & Aldridge LLP
300 South Grand Avenue, 14th Floor
Los Angeles, California 90071

Attorneys for the Receiver

Jeremy D. Johnson
529 South Woods View Circle
St. George, Utah 84770

individually and as an officer for and on behalf of I Works, Inc.; Cloud Nine, Inc.; CPA Upsell, Inc.; Elite Debit, Inc.; Internet Economy, Inc.; Market Funding Solutions, Inc.; and Success Marketing, Inc.

U.S. Mail:

Loyd Johnston
2988 Kings Court Lane
Washington, Utah 84780

individually and as an officer for and on behalf of Blue Streak Processing, Inc.; Cold Bay Media Inc.; eBusiness Success, Inc.; eCom Success, Inc.; Money Harvest, Inc.; Monroe Processing, Inc.; Net Commerce, Inc.; Premier Performance, Inc.; Pro Internet Services, Inc.; Revive Marketing, Inc.; Summit Processing, Inc.; and Business First, Inc.

Andy Johnson
3641 Vista View Circle
Santa Clara, Utah 84765

individually and as an officer for and on behalf of Funding Success, Inc.; Hooper Processing, Inc.; and Internet Fitness, Inc.

Scott Muir
618 Draper Heights Ways
Draper, Utah 84020

individually and as an officer for and on behalf of Big Bucks Pro, Inc.; Blue Net Progress, Inc.; Bolt Marketing, Inc.; Business Loan Success, Inc.; Mist Marketing, Inc.; C.S. Processing, Inc.; G.G.L. Rewards, Inc.; Optimum Assistance, Inc.; Net Discounts, Inc.; Highlight Marketing, Inc.; Razor Processing, Inc.; and Simcor Marketing, Inc.

Bryce Payne
2399 East Bella Rosa Circle.
St. George, Utah 84790

individually and as an officer fir and on behalf of I Works, Inc.; and JRB Media, Inc.

Kevin Pilon
1975 East 1060 North
St. George, Utah 84770

individually and as an officer for and on behalf of Bottom Dollar, Inc.; Bumble Marketing, Inc.; Costnet Discount, Inc.; Cutting Edge Processing, Inc.; eBusiness First, Inc.; Excess Net Success, Inc.; Fiscal Fidelity, Inc.; Fitness Processing, Inc.; G.G. Processing, Inc.; Internet Business Source, Inc.; Net Business Success, Inc.; Net Fit Trents, Inc.; Power Processing, Inc.; Rebate Deals, Inc.; The Net Success, Inc.; xCel Processing, Inc.

Ryan Riddle
446 East 1410 South
Washington, Utah 84780

individually and as an officer for and on behalf of I Works, Inc.; and Diamond J. Media

DATED this 12th day of January 2012.

/s/ Jeannette F. Swent
JEANNETTE F. SWENT
Special Assistant United States Attorney