

1 BRANDON TAKAHASHI (SBN 248883)
btakahashi@tallbridgelegal.com
2 **TALLBRIDGE LEGAL, P.C.**
4223 Glencoe Ave, Ste A220,
3 Marina del Rey, CA 90292-5671
Telephone: (323-741-6500

4 ERNEST EDWARD BADWAY (*pro hac vice*)
5 EBadway@FoxRothschild.com
6 **FOX ROTHSCHILD LLP**
101 Park Ave., 17th Floor
New York, NY 10178
7 Telephone: 212-878-7900
Facsimile: 212-692-0940

8 Attorneys for Defendant,
9 DANIEL S. FITZGERALD

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

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14 JANE DOE NOS. 1-10,
15 Plaintiffs,
16 vs.
17 DANIEL S. FITZGERALD,
18 Defendant.

Case No. 2:20-cv-10713-MWF (RAOx)

Honorable Michael W. Fitzgerald

**RESPONSE TO ORDER TO SHOW
CAUSE [DOC. 214]**

Complaint Filed: November 24, 2020

Trial Date: None Set

1 Defendant Daniel S. Fitzgerald (“Fitzgerald”) respectfully submits this
2 opposition to a stay in this matter, pursuant to this Court’s Order to Show Cause. (*See*
3 Doc. 214). A stay is not required or warranted in this case because it would
4 overwhelmingly prejudice Fitzgerald since there is no evidence showing an identity of
5 plaintiffs or facts to hinder any criminal case. Moreover, there is no indication from the
6 United States Attorney’s Office for the Southern District of New York (“Government”)
7 that this matter will be tried anytime soon, thus, delaying Fitzgerald’s opportunity to
8 clear his name from these outlandish and false charges procured by Plaintiffs’ counsel
9 purchase of testimony from these Plaintiffs. Frankly, the Government’s position is
10 somewhat precarious because it seems counter-intuitive that they would want to use
11 such tainted witnesses. Alternatively, to the extent any stay is warranted—it is not—
12 the stay should not include any Plaintiffs unrelated to the criminal case against Nygard.

13 **I. A STAY WOULD OVERWHELMINGLY PREJUDICE DEFENDANT**
14 **FITZGERALD.**

15 No stay is warranted in this action. A stay would overwhelmingly prejudice
16 Fitzgerald, who has already had to live with these false and paid-for allegations against
17 him for nearly two years—as Plaintiffs delayed and amended their pleadings to avoid
18 the discovery process that will reveal the truth about their allegations as well as
19 dismissal of their time-barred claims. This delay has harmed Fitzgerald—he has lost
20 business opportunities and his reputation has been harmed based upon the mere fact of
21 the unsubstantiated allegations proffered by the Plaintiffs. [Doc. 121-4 at ¶ 13].

22 The Government suggests an open-ended, opaque stay of at least several years to
23 accommodate a separate criminal proceeding against a different defendant. Requiring
24 Fitzgerald to endure additional *years* without being able to respond to these false
25 allegations is improper—particularly, where the sole basis for the requested stay is an
26 unrelated criminal proceeding not involving Fitzgerald.

1 Clearly, this Court is not obligated to stay civil proceedings—even when there
2 are related criminal proceedings against a civil defendant specifically. *Keating v. Office*
3 *of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995). That is, a stay is not required
4 even if Fitzgerald was a named, indicted defendant in an ongoing criminal proceeding.
5 In this Circuit, “[t]he rule has emerged that in the absence of substantial prejudice to the
6 rights of the parties involved, such parallel proceedings are unobjectionable.” *Int’l Bus.*
7 *Machines Corp. v. Brown*, 857 F. Supp. 1384, 1387 (C.D. Cal. 1994) (quotations and
8 alternation omitted) (declining to stay civil proceedings despite parallel criminal
9 proceedings).

10 Thus, this Court, in deciding if to stay civil proceedings in light of parallel
11 criminal proceedings, considers the following six factors: (1) the extent the defendant's
12 Fifth Amendment rights are implicated; (2) the plaintiff's interests in proceeding
13 expeditiously and potential prejudice resulting from a delay; (3) judicial efficiency; (4)
14 the interests of nonparties; and (5) the public's interests in the pending civil and criminal
15 litigation. *Keating*, 45 F.3d at 324–25.¹

16 Nearly all of these factors do not support a stay in the normal course. Initially,
17 there is no evidence that Fitzgerald has, or will, invoke his Fifth Amendment rights.²
18 Further, while Plaintiffs have not asserted their interests, Fitzgerald is a
19 counterclaimant, and certainly has a strong interest in proceeding expeditiously and
20 clearing his name from the pall that has been cast by these baseless and paid for
21 allegations. Fitzgerald also has an interest in defending these already-aged claims while
22 evidence is still potentially available. *See, e.g., Abante Rooter & Plumbing Inc. v.*

23 ¹ *Keating* (and other similar Ninth Circuit cases cited herein) are progeny of the *Landis* case
24 specifically referenced by the Court. [Doc. 114 at p. 2 (citing *Landis v. North American Co.*, 299 U.S.
25 248, 254 (1936). Fitzgerald has focused his analysis of the relevant factors on the more recent and
detailed Ninth Circuit cases interpreting the import of *Landis*.

26 ² Even if this were an issue, it would be of very little import. While an adverse interest could be drawn
27 from assertion of a Fifth Amendment defense in a civil action, “this consequence alone does not
28 compel a stay pending the outcome of a related criminal case.” *ESG Cap. Partners LP v. Stratos*, 22
F. Supp. 3d 1042, 1046 (C.D. Cal. 2014) (citing *Keating*, 45 F.3d at 326).

1 *Nationwide Mut. Ins. Co.*, No. 17-CV-03328-EMC, 2018 WL 573576, at *3 (N.D. Cal.
2 Jan. 26, 2018) (denying stay, in part, based on possibility that “witness memories may
3 fade” and possible “diminished access to material witnesses”).

4 Similarly, there is little to no benefit in judicial efficiency because the criminal
5 proceeding supposedly being used by the Government to support its request for a stay,
6 does not involve Fitzgerald, and there is no scheduled trial date or even a calendar for
7 eventual proceedings in the matter. Therefore, there is nothing from that case to
8 circumvent the issues in this case or minimize the evidentiary hearings or eventual trial
9 in this action. Additionally, there is no evidence that the rights or interests of nonparties
10 will be affected by continuing this case.

11 Finally, the public interest is unaffected by this case proceeding. The criminal
12 action against Nygard can proceed, at some uncertain point in the future. Nothing will
13 be precluded by Fitzgerald’s defense of these claims, based on the limited allegations
14 against him specifically. To be sure, there may be witnesses that could testify in both
15 actions, but the evidence relevant to Fitzgerald’s defense will not preclude the
16 Government’s ability to interview witnesses and collect evidence—in fact, it may assist
17 the criminal case by establishing sworn testimony of any shared witnesses. Thus, a stay
18 is not warranted under the traditional analysis.

19 Nonetheless, a stay is still unnecessary even if this Court were not to use the
20 above analysis. That is, this is not the normal course where a stay is considered because
21 the civil defendant is the same as the criminal defendant. Fitzgerald is not a criminal
22 defendant; has not been indicted; and has not even been referenced in related criminal
23 proceedings.

24 Further, courts in this district require more than just the “say so” of the applicant
25 for a stay—the applicant must also (1) make a clear showing, by direct or indirect proof,
26 that the issues in the civil action are “related” as well as “substantially similar” to the
27 issues in the criminal investigation; (2) make a clear showing of hardship or inequality
28 if required to go forward with the civil case while the criminal investigation is pending;

1 and (3) establish that the duration of the requested stay is not unreasonable.” *Klein v.*
2 *City of Beverly Hills*, No. CV 13-110-JFW (VBKX), 2013 WL 12470381, at *1 (C.D.
3 Cal. Apr. 19, 2013). The Government has made no such showing. Rather, the
4 Government’s position is solely based on the unsupported, unverified allegations of the
5 Plaintiffs and the statements of Plaintiffs’ counsel in this case. (Doc. 210 at p. 2 of 9
6 (citing Fourth Amended Complaint allegations and statements of counsel). There is no
7 objective evidence or analysis of a specific hardship. Nor is there a showing that an
8 open-ended stay of indeterminate length is reasonable.

9 *To be clear, the Government’s position is that a civil defendant can be denied*
10 *the opportunity to defend himself without a shred of evidence supporting the claimed*
11 *interference in a criminal investigation, no matter how remote or disconnected from*
12 *the civil case, for an indefinite period of time.* That is not the standard, and does not
13 comply with basic constitutional principles or the appropriate use of this Court’s
14 discretion. The Court should deny the requested stay on this basis alone.

15 **II. THE TVPRA DOES NOT REQUIRE A STAY IN THESE** 16 **CIRCUMSTANCES.**

17 As this Court has already found, the “statutory” stay provision in § 1595 is no
18 basis to enter a stay in this case. The TVPRA provides that “[a]ny civil action filed
19 under subsection (a) shall be stayed during the pendency of any criminal action arising
20 out of the same occurrence in which the claimant is the victim.” 18 U.S.C. § 1595(b)(1).
21 Subsection (a), in turn, provides for a civil action by a “victim” against the
22 “perpetrator.” Thus, the most straightforward reading of the statute is that the “criminal
23 action arising out of the same occurrence” must include the relevant criminal
24 defendant—not a separate, unindicted party.

25 The purpose of the stay is to allow the Government to investigate and prosecute
26 the criminal defendant and “not help defendants delay civil actions.” *Tianming Wang v.*
27 *Gold Mantis Constr. Decoration (CNMI), LLC*, No. 1:18-CV-0030, 2020 WL 5983939,
28 at *2 (D. N. Mar. I. Oct. 9, 2020); accord *Plaintiff A v. Schair*, 744 F.3d 1247, 1254

1 (11th Cir. 2014). However, the defendant relevant to the statute—Nygard—cannot
2 delay the civil action by a stay in this case. Thus, there is no benefit to Nygard if these
3 proceedings are delayed.

4 Fitzgerald—who is not a criminal defendant—does not want to delay the civil
5 action and will not benefit from such delay. Rather, he wants to finish this action and
6 clear his name. The ongoing litigation has harmed him personally and professionally.
7 The Government’s request to stay this case for years would only exacerbate that harm,
8 as well as make his defense more difficult by allowing evidence to slowly wither—
9 particularly where evidence will be reliant on witness testimony and memories.

10 Moreover, the language and the purpose of the TVPRA do not apply here. In one
11 of the few cases in this District analyzing the TVPRA stay provision, the Court
12 concluded that “the statute focuses on the identity of the claimant-victim and the
13 conduct at issue in the civil and criminal actions.” *Doe v. Mindgeek USA Inc.*, No.
14 SACV2100338CJCADSX, 2021 WL 6618628, at *3 (C.D. Cal. Dec. 28, 2021).
15 However, there is no evidence of an identity of “claimant/victims” or the “conduct at
16 issue” here. There is simply no record to serve as basis to conclude the “victims”
17 relevant to the Government’s indictment are the same as this case. The Government
18 certainly does not provide any evidence of such—rather, the Government merely relies
19 on the allegations of the civil complaint and statements of Plaintiffs’ counsel to establish
20 the relevant identity of parties and occurrences. (*See* Doc. 210 at p. 2 of 9 (citing Fourth
21 Amended Complaint allegations and statements of counsel). That is not *evidence*. The
22 Government has simply adopted Plaintiffs’ allegations and asserted legal conclusions.
23 That cannot be the unaccountable standard to allow a stay of proceedings to Fitzgerald’s
24 detriment.

25 To the contrary, the fact that none of the details of any of the alleged
26 dates/instances in the Fourth Amended Complaint appear in the indictment of Nygard,
27 and the fact Fitzgerald is not indicted or even referenced in the Nygard indictment, is
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1 actually evidence there is not an identity of factual circumstances. If the Government
2 has evidence otherwise, it did not provide it in the filing requesting a stay.

3 In short, the Government’s mere invocation of the words “criminal proceedings”
4 cannot be sufficient to delay Fitzgerald’s ability to clear his name of these baseless
5 claims. At a minimum, there must be a baseline evidentiary threshold to warrant the
6 requested stay, establishing the identity of “victims” and the same “occurrences”
7 involved in the criminal proceeding. *See Tianming Wang v. Gold Mantis Constr.*
8 *Decoration (CNMI), LLC*, No. 1:18-CV-0030, 2020 WL 5983939, at *2 (D. N. Mar. I.
9 Oct. 9, 2020) (noting lack of evidence to support request for stay); *Cortez-Romero v.*
10 *Marin J Corp.*, No. 2:20-CV-14058, 2020 WL 3162979, at *1 (S.D. Fla. June 11, 2020)
11 (“The Court agrees with Plaintiffs that Defendants have presented insufficient evidence
12 of the subject of the criminal investigation to justify staying this case under §
13 1595(b)(1), which would be an indeterminate, potentially lengthy, stay.”). Simply
14 stated, the Government has not provided evidence to cross that threshold, and, thus, this
15 Court has no other option but to deny the requested stay.

16 **III. THE REQUESTED STAY, IF GRANTED AT ALL, MUST BE NARROW.**

17 Finally, the Court must consider if a stay—one is not warranted at all—should be
18 as broad as the Government requests. The Government seeks to stay this entire case as
19 to all Plaintiffs, despite acknowledging not all of these Plaintiffs are part of any alleged
20 trafficking enterprise involving Nygard. (Doc. 210 at p. 6 of 9). The purported rationale
21 is these Plaintiffs are alleged to have attended parties at Nygard’s house (*id.*)—
22 therefore, that fact alone is somehow critical to the Government’s case to stay the civil
23 proceedings.

24 That position is simply indefensible. There is no basis to stay proceedings
25 having no connection to the criminal case against Nygard. This is not a class action, nor
26 are these “joint” claims. Rather, these are disparate Plaintiffs alleging entirely separate
27 circumstances, that Plaintiffs’ counsel cobbled together in a pleading as a matter of
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1 convenience and efficiency. However, there is no determination these claims are
2 related, or that there is any crossover in the evidence vis-à-vis each Plaintiff.

3 As to Jane Doe Nos. 5, 6, and 10, at least, there is simply no parallel criminal
4 proceeding (against Nygard, Fitzgerald, or anyone else) warranting a stay under 18
5 U.S.C. § 1595. These Plaintiffs bring claims against a civil defendant, with no
6 established connection to any criminal defendant. The fact Plaintiffs’ counsel has shoe-
7 horned them into an action with other Plaintiffs is simply not enough to deprive
8 Fitzgerald of his ability to timely defend against these claims. Therefore, to the extent
9 any stay is entered at all—none should be—the stay should not include any Jane Does
10 not shown, by actual evidence, to be alleged victims in a parallel criminal proceeding.

11 **CONCLUSION**

12 For the foregoing reasons and for additional reasons to be discussed at any
13 hearing on this issue, Defendant Fitzgerald respectfully opposes a stay of this action or,
14 alternatively, requests the Court deny any stay with respect to any Jane Doe plaintiffs
15 not demonstratively shown to be victims in a parallel criminal proceeding.

16 .
17 Respectfully submitted,

18 Dated: November 10, 2022

FOX ROTHSCHILD LLP

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20 By: /s/ Ernest Edward Badway
21 Ernest Edward Badway

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23 *Attorneys for Defendant*
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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2022, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I caused the foregoing document or paper to be mailed via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 10, 2022.

By: /s/ Ernest Edward Badway
Ernest Edward Badway