UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20394

In the Matter of

Paul L. Chancey, Jr., CPA,

Respondent.

UNOPPOSED MOTION TO POSTPONE
BY RESPONDENT PAUL L. CHANCEY, JR.'s

Pursuant to Commission Rule of Practice 161(a) (17 C.F.R. § 201.161(a)), Respondent Paul L. Chancey, Jr. moves to postpone the instant proceeding pending a lift of the stay in the related civil proceeding, *SEC v. MiMedx Grp., Inc.*, No. 1:19-cv-10927 (S.D.N.Y. May 20, 2021), ECF No. 83. Enclosed is a brief in support of this Motion.

The Division of Enforcement has informed the undersigned counsel that the Division does not oppose the proposed postponement.

/s/ Claudius B. Modesti Dated: Aug. 30, 2021

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT PAUL L. CHANCEY, JR.'S UNOPPOSED MOTION TO POSTPONE

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INTRODUCTION

The instant administrative proceeding is closely related to two actions currently pending in federal district court: a criminal prosecution brought by the U.S. Attorney for the Southern District of New York, and a civil action brought by the U.S. Securities and Exchange Commission. The civil action currently is stayed, subject to narrow exceptions, in deference to the criminal prosecution. Because the instant administrative proceeding necessarily will involve discovery into issues and from individuals covered by the civil stay and related to the criminal action, the Commission should postpone the instant proceeding pending a lift of the stay in the civil action. The Division of Enforcement has informed counsel for Chancey that it does not oppose the proposed postponement.

In the instant administrative proceeding, the Division of Enforcement faults Respondent Paul Chancey for not uncovering an alleged side agreement into which the Division claims the audit client, MiMedx Group, Inc., secretly entered. In the parallel criminal prosecution, a federal jury convicted MiMedx's former Chief Operating Officer of violating the federal securities laws by concealing four other side agreements from the company's external auditors. And in the parallel civil action, the Division alleges that the audit client and its former CEO, CFO, and COO violated the federal securities laws by, among other actions, concealing all five of these side agreements from Chancey.

The stay in the civil action prohibits taking discovery from or calling to testify at a hearing several key witnesses, including the audit client's former CEO, CFO, COO, and General Counsel, each of whom played key roles in arranging or concealing the alleged side agreements. Discovery from these witnesses is essential to Chancey's defense in the instant matter. Chancey will be severely prejudiced if he cannot pursue it.

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Taking this discovery in the instant proceeding, however, would mean taking the very discovery that the district court has stayed. Further, it would risk interfering with the ongoing criminal prosecution. Indeed, the Division appears to interpret the stay in the civil action as limiting the Division's ability to produce portions of its investigative file to Chancey, as it has withheld from Chancey documents from those files based in part on the stay.

In the interest of avoiding further prejudice to Chancey, honoring the district court's stay, and not interfering with the criminal prosecution, the Commission should grant Chancey's unopposed motion to postpone the instant proceeding pending a lift of the stay in the civil action.

BACKGROUND

Paul Chancey is an audit partner at the accounting firm Cherry Bekaert LLP, where he has worked for over 25 years. Chancey served as the engagement partner for Cherry Bekaert's 2015 and 2016 audits of MiMedx Group, Inc. As the SEC's Division of Enforcement (the "Division") and the U.S. Attorney for the Southern District of New York (the "USAO") themselves have alleged, MiMedx perpetrated a years-long fraud to inflate its revenue, a key part of which involved deceiving Cherry Bekaert. Sentencing Memorandum at 2, *United States v. Petit*, No. 1:19-cr-850 (hereinafter, "Cr. ECF") (S.D.N.Y. Feb. 16, 2021), ECF No. 145 (Ex. 8) (government alleging that MiMedx executives "orchestrated a brazen scheme to fraudulently inflate … [MiMedx's revenue] and repeatedly lied to and misled the company's internal accountants and outside auditors about their conduct."); Complaint & Jury Demand (hereinafter, "Civ. Compl.") (Ex. 1) ¶ 217, *SEC v. MiMedx Grp., Inc.*, No. 1:19-cv-10927 (hereinafter, "civil matter" or "Civ. ECF") (S.D.N.Y. Nov. 26, 2019), ECF No. 1 (alleging that MiMedx, Petit, Taylor, and Senken each "engaged in deceptive acts … to conceal MiMedx's improper accounting practices from Auditor A."); Order Instituting Public Admin. Cease-and-Desist Proceedings (hereinafter, "OIP") ¶ 23 ("MiMedx management made false representations to [Cherry Bekaert] during each audit").

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A. MiMedx's deceit of Cherry Bekaert

MiMedx sells medical products to health care providers. MiMedx Group, Inc., Annual Report (Form 10-K) at 2–4 (Mar. 1, 2017) (Ex. 15) for the Fiscal Year Ending Dec. 31, 2016. As part of its sales strategy, MiMedx entered into agreements to sell its products to distributors, who in turn sold the products to health care providers. *Id.* at 39. The agreements generally called for the distributors to pay for MiMedx products within a specified number of days, and allowed returns only under particular circumstances. *See, e.g.*, OIP ¶ 11 (AvKare); Civ. Compl. ¶ 34 (First Medical); *Id.* ¶ 77 (CPM); *Id.* ¶¶ 118, 126 (Stability Biologics); *Id.* ¶ 92 (SLR). The Division alleges, however, that MiMedx secretly entered into *side* agreements with five such distributors: AvKare, Inc., First Medical, CPM, SLR, and Stability Biologics. OIP ¶ 13; Civ. Compl. ¶¶ 139, 144–47, 166–67 (AvKare); *Id.* ¶¶ 37–38, 49 (First Medical); *Id.* ¶¶ 79–80 (CPM); *Id.* ¶¶ 96–98 (SLR); *Id.* ¶¶ 119, 125 (Stability Biologics). Under the secret side agreements, distributors could pay MiMedx at a date later than the written agreement provided, and could return products for reasons not permitted under the written agreement. *Id.* According to the Division and the USAO, these side agreements rendered MiMedx's recognition of revenue from sales to these distributors improper. *See, e.g.* OIP ¶ 15; Civ. Compl. ¶¶ 3–7. Generally, the government alleges that MiMedx should have recognized revenue when the distributor paid for the product or when the distributor sold the product to the health care provider, not when the product was shipped to the distributor. *Id.*

Critically, the government also alleges that MiMedx management went to great lengths to conceal these side agreements from Cherry Bekaert. MiMedx's deception with respect to AvKare alone was extensive. For example, at Cherry Bekaert's suggestion, MiMedx's management hired a revenue recognition expert purportedly to opine on whether management was recognizing AvKare revenue properly. But management did not disclose to the expert the existence of the side

agreement. Civ. Compl. ¶¶ 245, 247. MiMedx also entered into written agreements with AvKare purporting to extend AvKare's payment period from 45 days to 75 days, even though the side agreement allowed AvKare to pay much later than that. Letter from Deborah Dean to Kim Cosby, Dec. 16, 2013 (CB-00097538) (Ex. 22); Letter from Deborah Dean to Kim Cosby, June 11, 2014 (MMDX_00187135) (Ex. 24). MiMedx further concealed the existence of an internal department whose function was to track when payments were due from AvKare under the side agreement, as opposed to the original agreement. Civ. Compl. ¶¶ 151–55, 240, 273. MiMedx executives signed multiple representation letters to Cherry Bekaert falsely asserting, for instance, that there were no "[s]ide agreements or other arrangements (either written or oral) that have not been disclosed to you, including any related to payment terms with [AvKare] and their Product Distribution Agreement." *Id.* ¶ 252. AvKare and MiMedx even entered into four "amendments" to the distribution agreement, each of which altered the terms of the agreement, but none of which disclosed the side agreement.[1] All of these acts were successful in hiding the existence of the side agreements. For example, the Division itself alleges that had MiMedx disclosed the side agreement with AvKare to the revenue recognition expert, Cherry Bekaert would not have issued an unqualified audit opinion as to MiMedx's 2016 financial statements. *Id.* ¶¶ 250–51.

The Division and the USAO likewise allege that MiMedx concealed from Cherry Bekaert its side agreements with the other four distributors. For instance, one day after a MiMedx employee raised concerns to management about the company's revenue recognition practices with respect to Stability Biologics, former CEO Pete Petit and former COO Bill Taylor asked Stability to enter into what the government calls a "sham" distribution agreement to conceal the side agreement. Cr.

[1] Ex. 10 (First Amendment to Product Distribution Agreement); Ex. 11 (Second Amendment to Product Distribution Agreement); Ex. 12 (Third Amendment to Product Distribution Agreement); Ex. 13 (Fourth Amendment to Product Distribution Agreement).

ECF No. 145 at 26, 32. When Cherry Bekaert asked another distributor, First Medical, to confirm the balance of its year-end payable to MiMedx, Taylor instructed First Medical to return Cherry Bekaert's audit confirmation without disclosing that First Medical and MiMedx had a side agreement. Cr. ECF No. 151 (Ex. 9) at 15. When another distributor, CPM, wanted to make an exchange of product (pursuant to the side agreement, but in violation of the written agreement), Taylor orchestrated the timing of the product exchange to conceal it from Cherry Bekaert. Cr. ECF No. 145 at 32. To conceal that SLR could not pay for its purchases in the time allowed under its distribution agreement, Petit arranged to loan his own money to SLR to make the payment. *Id.* at 7–8; Cr. ECF No. 151 at 9.

The details and extent of MiMedx and others' deceit of Cherry Bekaert will form a critical part of Chancey's defense in the instant proceeding.

B. The government initiates three actions in response to MiMedx's deception of Cherry Bekaert.

The federal government has brought three actions in response to MiMedx's fraud and the related deception of Cherry Bekaert.

First, in November 2019, the USAO brought a criminal action against Petit and Taylor. Cr. ECF No. 1 (Ex. 6) at 1, 41. In November 2020, a jury convicted Taylor of conspiracy to mislead MiMedx's outside auditors, to commit securities fraud, and to make false filings with the SEC; and convicted Petit of securities fraud. Cr. ECF No. 121 (Ex. 7). Petit and Taylor appealed their convictions to the U.S. Court of Appeals for the Second Circuit. *United States v. Petit*, No. 21-559 (2d Cir. 2021). Those appeals are pending and will be fully briefed in November 2021.[2]

[2] Petit and Taylor have filed their opening briefs, and the government's brief is due October 21, 2021. *Id.* at ECF No. 99 (Ex. 4). The reply briefs will be due on November 12, 2021. L.R. 31.2(a)(2).

Second, the U.S. Securities and Exchange Commission (the "Commission" or "SEC") filed a civil suit against MiMedx, Petit, Taylor, and former CFO Michael Senken. Civ. Compl. The civil complaint alleges the defendants lied to MiMedx's outside auditors in violation of federal securities laws and committed other forms of securities fraud. Civ. Compl. ¶¶ 217, 315–17. MiMedx settled with the SEC in December 2019. Civ. ECF No. 18 (Ex. 2). Petit, Taylor, and Senken remain defendants.

The third action is the instant administrative proceeding. The Division alleges that Chancey violated audit standards by failing to uncover the secret side agreement between MiMedx and AvKare. OIP ¶¶ 35, 42.[3] The OIP concedes that "MiMedx management made false representations to [Cherry Bekaert] during each audit" by "denying that MiMedx had a side arrangement with [AvKare]." *Id.* at ¶ 23. The Division makes no allegation that Chancey colluded with MiMedx management or otherwise knew about the side agreement.

C. The district court stays discovery in the civil matter.

On March 9, 2020, at the request of Petit, Taylor, Senken, the USAO, and the Division, the court in the civil matter stayed most discovery in that matter.[4]

The stay prohibits all discovery, subject to narrow exceptions. It allows only: 1) certain discovery *from the Division*, Civ. ECF No. 83 ¶¶ A(2)–(4); and 2) document subpoenas *except* as to the defendants, witnesses who testified in the criminal trial, and four additional individuals (Rick Creese (Cherry Bekaert's Engagement Quality Reviewer for the 2015 and 2016 MiMedx audits), Lexi Haden (MiMedx's former General Counsel), Mark Brooks (owner of CPM) and Jerry

[3] For purposes of this Motion, Chancey assumes as true the Division's allegation that MiMedx entered into side agreements with AvKare, First Medical, SLR, CPM, and Stability Biologics. Chancey reserves the right to challenge these allegations later in this litigation.

[4] Civ. ECF No. 64. On June 29, 2021, the court altered the stay, narrowing it only slightly, if at all. Civ. ECF No. 83 (Ex. 5).

Morrison (CEO of SLR)). *Id.* ¶ A(1). The stay also prohibits the production of communications between the Division and counsel for MiMedx, and communications among, and documents received from, law enforcement agencies. *Id.* ¶ A(3). No discovery of any kind may be taken from defendants Petit, Taylor, and Senken. *Id.* ¶ B. And the stay prohibits all discovery as to any party in the form of depositions, interrogatories, and requests for admission. *Id.*[5]

LEGAL STANDARDS

In deciding whether to postpone a proceeding, the Commission considers five factors:

> (i) The length of the proceeding to date; (ii) The number of postponements, adjournments or extensions already granted; (iii) The stage of the proceedings at the time of the request; (iii) The impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission; and (iv) Any other such matters as justice may require.

17 C.F.R. § 201.161(b)(1). Requests for postponement are disfavored, unless the requesting party "makes a strong showing that the denial of the request or motion would substantially prejudice their case." *Id.*

In addition, "[t]he Commission has made it clear that administrative proceedings should not interfere with parallel criminal proceedings." *Paul A. Flynn*, Admin. Proc. File No. 3-11390, at 2 (ALJ Mar. 5, 2004) (order); *Hunter Adams*, Admin. Proc. File No. 3-10624, 2–3 (ALJ Nov. 27, 2001) (stay order); *see also Michael J. Rothmeier*, Admin. Proc. File No. 3-10007, 2000 SEC LEXIS 1060, at *12 (ALJ May 25, 2000) (stay order) (The Commission has "repeatedly recognized that civil or administrative proceedings may be stayed pending resolution of parallel criminal proceedings where justice requires.").

[5] A prior stay in the civil matter likewise prohibited all discovery from Petit, Taylor, and Senken, but allowed certain discovery into AvKare-related issues. Civ. ECF No. 64 ¶¶ b, d, f. The public record in the civil matter does not indicate whether the parties took such discovery.

ARGUMENT

I. Chancey will be severely prejudiced if he cannot take the discovery that is stayed in the civil matter.

The stay in the civil matter prohibits taking discovery and/or testimony from several witnesses who are essential to Chancey's defenses in the instant proceeding. Chancey will be severely prejudiced if he is not allowed to take discovery from these witnesses, or to call them to testify at a hearing.

A. Petit, Taylor, and Senken

Pete Petit, Bill Taylor, and Michael Senken served as the CEO, COO, and CFO, respectively, of MiMedx. Each made what the Division itself alleges were material misrepresentations and/or omissions to Chancey during the audits in question. Civ. Compl. ¶ 270. Indeed, the Division has sued each of them for deceiving Cherry Bekaert. *Id.* ¶¶ 315–17. With respect to the AvKare relationship alone, Petit, Taylor, and Senken are crucial fact witnesses. Petit and Taylor entered into the side agreement with AvKare, *Id.* ¶¶ 2, 144–48, and Petit "personally managed almost all interactions with [AvKare]'s principals." *Id.* ¶ 135. The need for this discovery from ex-MiMedx management is compounded by the fact that Bobby Lindsey, the only AvKare party to the alleged side agreement and primary AvKare negotiator with MiMedx, has passed away.[6] Petit and Senken also each signed management representation letters falsely representing to Cherry Bekaert that MiMedx had no undisclosed side agreements, including with AvKare. *See, e.g.*, Civ. Compl. ¶ 252. All three defendants failed to disclose the side agreement to MiMedx's Audit Committee, including its outside counsel, during two Audit Committee investigations into MiMedx's revenue recognition practices. *Id.* ¶¶ 221–24, 238–39, 241. When Mark Andersen,

[6] *See* Transcript of Deposition of Steve C. Shirley at 35–37, *In the Matter of MiMedx Grp., Inc.*, File No. D-03679-A (May 30, 2018) (Ex. 18); Email from Bill Taylor to Bobby Lindsey, Mar. 8, 2013 (SEC-AVKARE-E-0000001) (Ex. 20).

MiMedx's Controller, began questioning MiMedx's revenue recognition practices for AvKare, Petit, Taylor, and Senken reassigned Andersen from Controller to Vice President of Finance, so that he would not be in a position to interact with Cherry Bekaert. *Id.* ¶ 226; Transcript of Criminal Trial at 253, *United States v. Petit*, No. 1:19-cr-850 (S.D.N.Y. Oct. 26, 2020–Nov. 20, 2020) (hereinafter, "Cr. Tr.") (Ex. 17). And all three defendants lied to a revenue recognition expert MiMedx retained (at Cherry Bekaert's recommendation) to advise on the proper accounting treatment of AvKare sales. Civ. Compl. ¶¶ 241–48. Indeed, the Division itself alleges that if not for this last misrepresentation, Cherry Bekaert would not have issued an unqualified opinion on MiMedx's 2016 financial statements. *Id.* ¶¶ 249–51. Yet under the stay in the civil matter, no discovery can be taken from Petit, Taylor, or Senken, and they cannot be called to testify at a hearing, because they are all defendants in the civil matter. Civ. ECF No. 83 ¶ B.

B. Other MiMedx personnel

Chancey will need discovery from Mark Andersen in the form of documents and a deposition. Andersen is a critical fact witness. His email in 2016 questioning the revenue recognition for AvKare is the primary basis for the Division's claim that Cherry Bekaert's 2015 audit failed to meet applicable audit standards. OIP ¶¶ 26–31. Andersen is also the subject of at least three key factual disputes: 1) whether, in a meeting with MiMedx's Audit Committee, Andersen recanted his allegations; 2) what, if any, information Andersen possessed supporting the concerns expressed in his email; and 3) whether Andersen declined to sign the management representation letter for the 2015 audit. But under the stay in the civil matter, no discovery can be taken from Andersen, because he testified during the criminal trial. ECF No. 83 ¶ A(1).

Likewise, Chancey will need discovery from Lexi Haden, the former MiMedx General Counsel. When MiMedx's Audit Committee posed questions to AvKare about its relationship with MiMedx, Haden and others encouraged AvKare to alter its answers to reflect only the terms of the

original AvKare agreement with MiMedx without disclosing the alleged side agreement. Email from Larry Childs to David Ghegan, Feb. 8, 2017 (AvKARE_Subpoena Response_0007256) (Ex. 21). Yet the stay in the civil matter names Haden specifically, and prohibits taking any discovery from her. Civ. ECF No. 83 ¶¶ A(1), B.

Chancey will need to depose or call to testify Deborah Dean, former Executive Vice President at MiMedx. The Division alleges that Taylor instructed Dean to "provide incomplete and misleading information to … [MiMedx's] Audit Committee" regarding MiMedx's practices with respect to AvKare. Civ. Compl. ¶ 240. Dean also arranged for AvKare to enter into two agreements purporting to extend AvKare's payment terms from 45 days to 75 days.[7] These agreements further concealed the terms of the pre-existing side agreement, which did not require AvKare to pay MiMedx until much later. Civ. Compl. ¶ 144. Dean also oversaw an internal MiMedx department whose function was to track when payments were due from AvKare under the side agreement, as opposed to the original agreement. Civ. Compl. ¶¶ 151–55, 273. Yet under the stay in the civil matter, Chancey cannot take testimony from Dean. Civ. ECF 83 ¶ B.

C. Cherry Bekaert

Under the stay in the civil matter, Chancey would be unable to call to testify two witnesses from the audit team: Matthew Urbizo (manager on the 2015 MiMedx audit) and Rick Creese (Engagement Quality Reviewer on the 2015 and 2016 audits). Civ. ECF No. 83 ¶¶ A(1), (B). During the criminal trial, Urbizo testified at length about MiMedx's deception of Cherry Bekaert. Cr. Tr. at 1720–1960. Urbizo also drafted a memo explaining why MiMedx's revenue recognition

[7] Transcript of Deposition of Kimberly Diane Cosby at 58–29, 146–47, *In the Matter of MiMedx Grp., Inc.*, File No. D-03679-A (May 31, 2018) ("Cosby Tr.") (Ex. 19); Letter from Deborah Dean to Kim Cosby, Dec. 16, 2013 (CB-00097538); Letter from Deborah Dean to Kim Cosby, June 11, 2014 (MMDX_00187135) (Ex. 24).

treatment for AvKare sales was proper. Cr. Tr. 1787–88, 1835–36. And Rick Creese was involved in numerous discussions with MiMedx management concerning AvKare revenue recognition issues. Yet the stay in the civil matter would prohibit any discovery from Urbizo (who testified in the criminal trial) and Creese (whom the stay order specifically names). Civ. ECF No. 83 ¶ A(1).

D. Division's communications with certain third parties, including law enforcement

The stay in the civil matter prohibits the Division from producing its communications with MiMedx counsel, MiMedx's audit committee, and law enforcement agencies, including the USAO. Indeed, the Division has withheld these documents from Chancey in the instant matter, citing the stay in the civil matter as a basis for doing so.[8] Chancey is entitled to these materials in the instant matter, as they all form part of the Division's investigative file, and all may contain evidence relevant to Chancey's defense, including material exculpatory evidence.

E. Other Distributors

Because the Division alleged in the civil matter that MiMedx entered into secret side agreements with four distributors in addition to AvKare, Chancey may need to inquire of Petit and Taylor about the acts the Division alleges the executives took to conceal these other side agreements from Cherry Bekaert. *See, e.g.*, Civ. Compl. ¶¶ 266, 269 (alleging that Petit and Taylor misrepresented to Cherry Bekaert that First Medical, CPM, and Stability had fixed payment terms and limited rights of return, when in fact the side agreements provided otherwise); *Id.* ¶¶ 110–12, 269(d) (alleging that Petit arranged to make a secret loan to SLR in order to conceal from Cherry

[8] Div. of Enf't's Withheld Doc. List for July 21, 2021 Prod. to Paul L. Chancey, Jr., CPA, entry no. 6 (Ex. 28). In addition, entry no. 5 stated that the Division would withhold a separate category of documents based on the stay in the Civil Matter. Despite this assertion, the Division included these documents in its July 21, 2021 production to Chancey. After counsel for Chancey notified the Division of the discrepancy, the Division asked that counsel refrain from reviewing these documents until further notice. *See* Decl. of Claudius B. Modesti in Support of Mot. to Postpone ¶ 9; Ex. 29.

Bekaert that SLR was paying MiMedx per the terms of the side agreement rather than the written agreement). Likewise, the 2016 email from Mark Andersen that forms a key part of the Division's case against Chancey also expressed concerns about First Medical, SLR, and Stability. Thus, Chancey will need to take discovery into Andersen's concerns, and MiMedx's response to those concerns, with respect to those distributors. But the stay in the civil matter prohibits any discovery from Petit and Taylor. Civ. ECF No. 83 ¶¶ A(1), B.

Similarly, Chancey may need to take discovery from other members of MiMedx management regarding these four distributors. Michael Carlton, former Vice President of Sales at MiMedx, testified in the criminal trial that Taylor instructed him to ask First Medical to return Cherry Bekaert's audit confirmation without disclosing First Medical's side agreement with MiMedx, in order to hide the side agreement from Cherry Bekaert. Cr. ECF No. 151 at 15. This testimony is relevant to Chancey's defenses with respect to AvKare. Without fail, every year that Cherry Bekaert audited MiMedx, AvKare returned confirmation responses to Cherry Bekaert without disclosing that AvKare had a side agreement with MiMedx.[9] Notably, the OIP does not allege that AvKare disclosed its secret side agreement either in any of its confirmation responses or otherwise to Cherry Bekaert. Evidence that MiMedx colluded with a distributor not to disclose a side agreement to Cherry Bekaert is, therefore, highly probative. But because he testified in the criminal trial, the stay in the civil matter prohibits any discovery from Carlton. Civ. ECF No. 83 ¶¶ A(1), B. Chancey may need to depose or call to testify another MiMedx executive, Brent Miller.

[9] Letter from Kim Cosby to Lindsey Blackburn, Feb. 14, 2017 (AvKARE_Subpoena Response_0000137) (Ex. 27); Letter from Clint King to Sara-Alison Powell, Jan. 27, 2016 (AvKARE_Subpoena Response_0000128) (Ex. 26); Letter from Rosie Wallace to Sara-Alison Massey, Jan. 21, 2015 (AvKARE_Subpoena Response_0000123) (Ex. 25); Letter from Rosie Wallace to Allison Laubacher, Feb. 5, 2014 (AvKARE_Subpoena Response_0000115) (Ex. 23); Letter from Rosie Wallace to Cherry Bekaert LLP, Feb. 5, 2013 (CB-00077967) (Ex. 30).

Miller arranged to return products to CPM, in keeping with the side agreement but in contravention of the written agreement. Taylor directed Miller to spread the returns over time "in a manner designed to avoid detection by MiMedx's outside auditors." Cr. ECF No. 145 at 6. Miller even wrote in an email, "We have auditors here in the end of July looking at the books. No more emails on this." *Id.*; Cr. ECF No. 151 at 12–14. The stay in the civil matter, however, prohibits deposing Miller or calling him to testify. ECF No. 83 ¶ B.

If Chancey is unable to obtain the discovery outlined above, it will severely prejudice Chancey's defense. The prejudice would be particularly harmful in this case because the Division interviewed or took testimony from many of these witnesses during its investigation, including Kim Cosby, Pete Petit, and Deborah Dean, and likely interviewed many more. Denying Chancey the opportunity to obtain his own discovery for these witnesses would give the Division an unfair advantage in the administrative proceeding.

II. Chancey's efforts to obtain this essential discovery would contravene the stay in the civil matter.

The discovery outlined above, including the documents the Division has withheld from Chancey pursuant to the stay in the civil matter, is essential to Chancey's defense in the instant matter. But allowing Chancey to take this discovery would mean explicitly authorizing the very discovery that the court in the civil matter has stayed. Principles of comity suggest that the Commission should not contravene the order of the district court by allowing this discovery to proceed.

Further, permitting this discovery would risk the defendants in the criminal case obtaining access to documents and testimony that otherwise would not be available to them under the constraints of criminal discovery. Unless the Commission postpones this proceeding, Chancey intends to obtain discovery from both of the criminal defendants, including deposing each of them

using discovery from sources such as Andersen and Haden, among others. As a result, the criminal defendants will have access to discovery that otherwise would not be available to them through the criminal prosecution. As the USAO argued in requesting the stay in the civil matter, this would "risk prejudice to the Government in the Criminal Case." Civ. ECF No. 52 at 7 (Ex. 3). *See also SEC v. Beacon Hill Asset Mgmt. LLC*, No. 02-cv-8855 (LAK), 2003 WL 554618, at *1 (S.D.N.Y. Feb. 27, 2003) (In considering whether to stay an action that overlaps with a criminal proceeding, the "principal concern with respect to prejudicing the government's criminal investigation is that its targets might abuse civil discovery to circumvent limitations on discovery in criminal cases.").

The appropriate course, therefore, is to postpone the instant proceeding pending a lift of the stay in the civil matter.

III. The remaining Rule 161 factors likewise favor a postponement.

The instant proceeding has only just begun; the Division served the OIP on July 21, 2021 and there have been no postponements or adjournments so far. Therefore, the first three factors of Rule 161(b)(1) all favor a postponement. 17 C.F.R. § 201.161(b)(1) (hearing officer considers "(i) The length of the proceeding to date; (ii) The number of postponements, adjournments or extensions already granted; (iii) The stage of the proceedings at the time of the request").

The stay in the civil matter does allow some discovery *from* the Division. In the instant matter, the Division has begun producing documents to Chancey, a process that would not violate the stay in the civil matter. That discovery is substantial. So far, the Division has produced more than 350,000 documents. As a practical matter, this means that granting this Motion to Postpone will not halt the instant matter altogether. Chancey and his counsel will use the postponement period to review the SEC's investigative file, which will allow discovery to proceed more efficiently once the stay in the civil matter is lifted.

The fourth factor, "[t]he impact of the request on the hearing officer's ability to complete the proceeding in the time specified by the Commission" 17 C.F.R. § 201.161(b)(1)(iv)), should be given little weight in the Commission's analysis. The problematic discovery issues Chancey highlights above all were reasonably foreseeable to the Division. The Division supported the stay in the civil action, but subsequently chose to recommend that the Commission commence this proceeding in spite of the broad stay. Given the differences in the civil and administrative discovery schedules, it would be fundamentally unfair for the Commission to force Chancey to litigate without access to essential evidence.

The final factor, "[a]ny other such matters as justice may require", favors a postponement. 17 C.F.R. § 201.161(b)(1)(v). First, a postponement would pose no harm to the public interest because Chancey has not, and will not, participate in the audit of or otherwise perform work for a public company pending the outcome of the instant proceeding. Second, the alleged conduct is already quite dated. The audits in question were completed in early 2016 and 2017. The SEC began questioning MiMedx's revenue recognition for AvKare as early as January of 2017. SEC Comment Letter to MiMedx at 6474, Jan. 25, 2017 (Ex. 14). And MiMedx announced in June of 2018 that it would restate its financial statements. MiMedx Form 8-K dated June 6, 2018 (Ex. 16). The OIP was not filed until July 13, 2021. Given this significant passage of time, there can be no substantial argument that postponing this proceeding poses any threat to investors. *Johnson v. SEC*, 87 F.3d 484, 490 n.9 (D.C. Cir. 1996) ("If the SEC really viewed [respondent] as a clear and present danger to the public, it is inexplicable why it waited *more than five years* to begin the proceedings to suspend her.").

CONCLUSION

For the foregoing reasons, the Commission should grant Chancey's unopposed motion to postpone the instant proceedings pending a lift of the stay in the civil matter.

Respectfully submitted,

/s/ Claudius Modesti Dated: Aug. 30, 2021

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Certification of Compliance with Length Limit

In accordance with Rule 154(c) (17 C.F.R. § 201.154(c)), I hereby certify that the foregoing motion and brief complies with the length limitations set forth in Rule 154(c). That Rule limits briefs in support of non-dispositive motions to 7,000 words. According to the word counter in Microsoft Word, the foregoing motion and brief (excluding the table of contents and table of authorities) contains 5,193 words.

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Certificate of Service

In accordance with Rules of Practice 150 and 151 (17 C.F.R. §§ 201.150, .151) I certify that on August 30, 2021 a copy of Respondent Paul L. Chancey, Jr.'s Unopposed Motion to Postpone and the accompanying brief, declaration, and exhibits was filed on the eFAP system and served on the following counsel through the methods indicated below.

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