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**BEFORE THE DIVISION OF SECURITIES**  
**OF THE DEPARTMENT OF COMMERCE OF THE STATE OF UTAH**

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IN THE MATTER OF:

**CARL ROGER TODD;**  
KENNETH WALTER NORTH;

Respondents.

**RULING ON REQUEST FOR STAY**

**Docket No. SD-06-0089**  
Docket No. SD-06-0090

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**Background**

Respondent Todd filed a motion dated March 31, 2007 seeking a stay of these administrative proceedings pending resolution of criminal proceedings. The Division has not filed an opposition to Todd's motion and Todd says the Division does not oppose the motion. Todd's motion is based on his understanding that he is being actively investigated by law enforcement agencies and that the initiation of criminal proceedings against Todd is imminent.

Todd's motion is based on concerns that his Fifth Amendment rights will be affected by discovery, motions, hearings, or settlement discussions with the Division. He argues that the prejudice to Todd is heightened because the government is controlling both the administrative and criminal prongs of the case. Todd asserts that a stay would not prejudice the Division nor the public interest and will, in fact, be in the best interests of the hearing officer in the case.

For the reasons described below, Todd's motion is denied. This denial is without prejudice for renewing the motion at a later time in light of the guidance given in this ruling.

**Standard to be Applied**

The United States Supreme Court made it clear in *United States v. Kordel*, 397 U.S. 1 (1970) that there is no violation of due process where a party is faced with the choice of

testifying or invoking the Fifth Amendment. As the court in *Brock v. Tolkow*, 109 F.R.D. 116, 117 (E.D.N.Y. 1985) explained, “[I]t is not unconstitutional to force a litigant to choose between invoking the fifth amendment in a civil case, thus risking a loss there, or answering the questions in the civil context, thus risking subsequent criminal prosecution.” Whether a court decides to stay civil (or administrative) proceedings is within the discretion of the court. *SEC v. Dresser Industries*, 628 F.2d 1368, 1372 (D.C. Cir. 1980) (en banc).

Todd correctly notes that the Division previously has applied the six-point standard articulated in *SEC v. Google*, 1997 U.S. Dist. LEXIS 20878 (D. Conn. Apr. 30, 1997) when addressing this question. See *In The Matter of Sneed Financial Service, LLC*, Docket No’s SD-06-0015 and SD-06-0016 (Ruling on Request for Stay, May 18, 2006). Those standards are:

1. The timeliness of the motion;
2. Balancing the plaintiff’s interest in proceeding expeditiously against possible prejudice to the plaintiff if delayed;
3. The private interests of, and burden on, the defendant;
4. The convenience to the courts;
5. The interests of persons not parties to the civil litigation, and
6. The public interest.

### Analysis

#### Timeliness

These proceedings were initiated on November 14, 2006. To date, there has been a scheduling hearing and a motion by Todd to dismiss the proceedings for lack of jurisdiction. The Division has not yet responded to the dismissal motion. Todd cites this as a factor indicating timeliness, explaining that the Division has not expended time and effort in responding to the

motion and the Presiding Officer has not had to spend time reviewing the Division's response.

While this motion to stay was made over four months after the case was initiated, Todd asserts that it was made promptly after learning of the existence of a criminal investigation. The Presiding Officer finds that the motion is timely.<sup>1</sup>

#### Interests of the Division, Non-Parties, and the Public

Todd asserts that the Division will not be prejudiced by a delay. Unlike private litigation between two parties, this is a governmental enforcement action. The Division is acting in the public interest and seeking to further the welfare of the general public in Utah. Due to their overlapping themes, factors two, five and six will be discussed together.

The Presiding Officer cannot agree that a stay of the administrative proceedings would be without potentially significant deleterious effects on the public. First, the Order to Show Cause in this case alleges that Todd solicited money from a Utah resident in violation of the securities laws. If this turns out to be proven at hearing, it may also mean that Todd violated the law when soliciting funds from Utah residents. Until the Division's allegations are resolved at hearing, permitting this challenged conduct to continue risks permitting further violations to occur.<sup>2</sup>

Second, the Order to Show Cause alleges that Todd's solicitations of a Utah resident were done after Todd had been ordered to cease and desist by the state of Missouri. If this were proven at hearing, it would cast doubt on Todd's assertions that he has ceased all activities in Utah that formed the basis for the Division's action and "is not defending this proceeding with an eye toward resuming the activities." Two other concerns expressed in the *Sneed Financial* Order

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<sup>1</sup> The Presiding Officer notes, however, that Todd's motion to dismiss for lack of personal jurisdiction is a jurisdictional motion. If that motion were granted, Todd's instant request for a stay would be mooted. It seems appropriate, therefore, that the jurisdictional question be resolved before other motions are filed or further proceedings take place in this case. The Division is directed to file either a response to Todd's motion or a request for a stay (joined in by Todd). This should be filed within 30 days of the date of this ruling.

<sup>2</sup> Todd notes that there is no allegation that members of the public were actually harmed by his alleged activities, so the state is not seeking to recover lost monies. He further asserts that he does not intend to solicit in Utah.

also merit mention: inefficiencies to the Division in having prepared its enforcement case, but not being allowed to go forward at this time, and concern about a dissipation of Todd's assets during pendency of a criminal proceeding.

As also noted in the *Sneed Financial* ruling, the public interest includes efforts by the Division to protect future purchasers of investments, promote confidence in the integrity of the markets, deter other sellers of investments from engaging in similar conduct, demark the types of conduct that are covered by the securities laws so that case law is established, and account to the public, media, and elected officials on how the public resources devoted to enforcement of the securities laws are being utilized. Granting a stay might impede all these public interests.

Finally, it should be noted that, unlike the case in *Sneed Financial*, criminal proceedings have not yet been brought against Todd, much less criminal proceedings by the State of Utah. Todd asks that the administrative proceedings be stayed out of concern that criminal charges might be filed at a later time. He cites *Brock v. Tolkow*, 109 F.R.D. 116 (E.D.N.Y. 1985), which stayed an ERISA action by the U.S. Department of Labor after grand jury subpoenas were served,<sup>3</sup> and *Kashi v. Gratsos*, 790 F.2d 1050 (2<sup>nd</sup> Cir. 1986), where a stay was granted in a private action based on a defendant being subject to a grand jury investigation.

The Presiding Officer acknowledges that administrative or civil cases might be stayed due to the *potential* of criminal proceedings, not just the *pendency* of criminal charges. Nevertheless, both cases emphasized that the decision to stay a civil action is discretionary, based on the interests of justice. The *Brock* opinion went so far as to quote language from *Kordel* that: "It would stultify enforcement of federal law to require a government agency . . . to defer civil proceedings pending the ultimate outcome of a criminal trial." 397 U.S. at 11. Since Todd is accused of engaging in conduct with Utah residents despite the existence of an

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<sup>3</sup> The court also noted there was no allegation of a risk of ongoing harm by granting a stay of proceedings.

outstanding cease and desist order from another state, delaying resolution of the Division's action to determine whether a cease and desist order should be entered by this State may not be in the public interest.

Todd's motion failed to mention or discuss a securities enforcement case much more on point. In *Gellis v. Casey*, 338 F.Supp 651 (S.D.N.Y. 1972), Gellis was the subject of SEC administrative proceedings. During the administrative proceeding he learned that the transactions at issue in the administrative proceedings had been called to the attention of the U.S. Attorney for possible presentation to the grand jury. *Id.* at 652. He moved to have the SEC proceedings stayed. When the hearing officer refused, he sought an injunction from the district court. The district court refused, saying 1) his motion was premature as no criminal prosecution had yet been brought and 2) this was not a case where the government had brought the civil action solely to obtain information for a criminal prosecution<sup>4</sup> and the SEC had been careful to observe fairness standards by warning plaintiff of possible criminal prosecution. *Id.*

For the same reasons, the Presiding Officer is not persuaded that Todd has made a sufficient showing that a stay should be granted.

#### **Ruling on the Motion for a Stay**

The presiding officer finds that a stay of all administrative proceedings against Respondent Todd is not justified at this point. Nevertheless, I acknowledge Todd's claim of concern about being able defend himself in the administrative action when such efforts might be used in some future criminal action. Therefore, I will reconsider a motion to stay if it addresses the concerns identified above and otherwise strikes a better balance between the interests of the Division (and the public) and Respondent Todd. This balance may include:

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<sup>4</sup> Todd has made no allegation that the Division's instant proceeding was brought in bad faith or solely to obtain evidence for a criminal prosecution.

1. Whether criminal charges are in fact filed against Todd. In that event, an important consideration will be whether the criminal charges are filed by prosecutors in Utah or elsewhere. There is more concern about the exchange of information between the Division and a prosecutor in Utah than with a federal prosecutor or a prosecutor in another state.
2. Implementation of interim preventative measures providing assurances that Respondent will not sell this investment, or others like it, to Utah residents or from Utah to residents of other states during the pendency of the administrative and criminal cases.
3. Addressing whether the delay in the administrative proceeding will result in a dissipation of assets of Respondents. If so, a future motion should indicate whether any ameliorative steps will be taken to preserve assets in the event of an adverse ruling in the administrative case.
4. Whether a stay should be limited in time, to avoid creating an incentive for Respondent Todd to seek to delay the criminal proceedings, in the hopes of further delaying the administrative proceedings.
5. Permitting the administrative case to proceed, short of testimony that would raise Fifth Amendment concerns. There may be many preliminary steps that could be taken to move the administrative case forward that do not implicate Todd's Fifth Amendment interests. These may include the exchange of any hearing documents or witness lists and providing a written answer to the Order to Show Cause. I will leave it to Respondents and counsel for the Division to determine whether they can agree on what preparatory actions can still proceed

It will be left to Respondent Todd to determine whether and when to re-file a motion for stay of proceedings against him. If there is a re-filing of the motion, an agreement with the Division on the conditions of the stay would assist the presiding officer in evaluating the reasonableness of the balance between the interests of the parties. If not, the presiding officer will make the determination.

IT IS SO ORDERED.

Dated this 24<sup>th</sup> day of April, 2007.

  
WAYNE KLEIN  
Director, Presiding Officer



### CERTIFICATE OF SERVICE

The undersigned certifies that on the 24<sup>th</sup> day of April, 2007 copies of the foregoing

Ruling on Request for Stay were served on the parties as follows:

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