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

IN THE MATTER OF:)	
)	
CARL ROGER TODD;)	Docket No. SD-06-0089
KENNETH WLATER NORTH;)	Docket No. SD-06-0090
)	
Respondents.)	

**MOTION FOR STAY PENDING
RESOLUTION OF CRIMINAL PROCEEDINGS**

COMES NOW Respondent Carl Todd and moves for a stay of administrative proceedings against him pending the resolution of criminal proceedings.

I. INTRODUCTION

Discussions between counsel for Carl Todd and the Division of Securities have recently disclosed that: (1) Respondent Todd is being actively investigated by law enforcement agencies in one or more jurisdictions within or outside of Utah; and (2) the initiation of criminal proceedings against Todd in one or more of these jurisdictions is imminent. While Todd's participation in the instant matter has been limited thus far to counsel's appearance at a scheduling hearing and the filing of a motion to dismiss on

jurisdictional grounds, it is now apparent that his Fifth Amendment rights will be implicated in any further discovery, motion practice, hearings, or settlement discussions. Further, this is a case where the government is controlling both the civil and criminal prongs of the investigation, heightening the potential for prejudice to Todd through direct or indirect coordination in discovery and other matters. A stay of this proceeding will not prejudice the Division, since upon information and belief it has already substantially prepared its case through an extensive pre-enforcement investigation. It will also be in the best interests of the Division's hearing officer(s), since this matter has not progressed to the point that substantial effort in ruling upon pending motions or in gaining familiarity with the facts of the case would have been wasted. Indeed, counsel for Todd understands that the Division will not oppose this motion.

Finally, the people of Utah will not be prejudiced by a stay. The Division does not allege that Respondent Todd actually sold the alleged securities to any Utah residents, but instead bases its claim in large part on attempted solicitations between Respondent Todd (or another Respondent purportedly acting as his agent) and certain individuals who never gave Todd any funds, including an undercover agent for the Division. Respondent Todd, a Missouri resident, has ceased any attempted solicitation of securities in Utah, and is subject to a Missouri order forbidding him from selling securities.

It is in the public interest for any criminal prosecutions of Todd, which will vindicate its interest in halting and punishing any illegal conduct, to proceed without delay. This will, upon information and belief, occur with the stay of this proceeding. The Division should stay this proceeding and take up the pending Motion to Dismiss, discovery, and other motion practice after resolution of the imminent criminal actions.

II. PROCEDURAL HISTORY

On November 14, 2006, the Division issued an Order to Show Cause against Respondent Todd and Respondent Ken North. The hearing was initially set for December 27, 2006 and was rescheduled to January 16, 2007. Counsel for both Respondents appeared for Respondents at the hearing, at which time a schedule for the proceedings was discussed. The Presiding Officer issued an order on January 22, 2007, setting a schedule for the filing of motions, discovery, and the hearing. Pursuant to that order and in lieu of an Answer, Respondent Todd filed a Motion to Dismiss for Lack of Jurisdiction on February 16, 2007.

After the filing of that Motion, counsel for Respondent Todd and counsel for the Division conferred telephonically and via electronic mail regarding the Motion, the Division's response, and the potential settlement of the matter. During these communications, counsel for the Division indicated that Respondent Todd was under active investigation by one or more law enforcement agencies (including the Utah County Attorney) relating to his alleged conduct in Utah and/or elsewhere. Counsel discussed how this might affect the pending Motion and the Division's prosecution of the case in general. It was agreed that while the parties discussed these issues and while counsel and Respondent Todd conferred, it would not be necessary for the Division to file suggestions in opposition to Todd's Motion to Dismiss (which were otherwise due on March 2, 2007). Counsel for Respondent Todd and the Division conferred again, and the Division agreed not to oppose the instant motion.

III. ARGUMENT

a. The Standard for Evaluating Requests for Stay.

While neither the Utah Uniform Securities Act nor the Administrative Code specify the criteria for evaluating requests to stay state administrative proceedings pending criminal actions, federal courts faced with requests to stay federal civil and administrative proceedings have articulated a multi-point standard. The Division has previously applied this standard in at least one matter. See Matter of Sneed Financial Service, LLC, et al., Nos. SD-06-0015 and SD-02-0016 (Order of May 18, 2006) (citing, inter alia, SEC v. Google, 1997 U.S. Dist. LEXIS 20878 (D. Conn. Apr. 30, 1997)). The federal standard consists of the following factors:

1. The timeliness of the motion;
2. How to balance 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 of the courts;
5. The interests of persons not parties to the civil litigation; and
6. The public interest.

See Matter of Sneed at pp.2-3 (citing Google at *7); Reyes v. Freebury, 2004 WL 1737683, No. Civ.A.02-1283-KAJ, (D. Del., July 30, 2004) (citing similar factors in staying civil case pending resolution of criminal proceedings).

While “[a] stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter, [it] is even more appropriate when both actions are brought by the government.” Brock v. Tolkow, 109 F.R.D. 116, 119

(E.D.N.Y. 1985) (staying ERISA action brought by the Department of Labor against fiduciaries pending outcome of Department of Justice pre-indictment investigation and potential criminal proceeding). Stays are granted where criminal investigations are proceeding but indictments have not been handed down. Id.; Kashi v. Gratsos, 790 F.2d 1050, 1057 (2d Cir. 1986). In summary, “[a] court may decide in its discretion to stay civil proceedings when the interests of justice seem to require such action.” Reyes, 2004 WL 1737687 at *5; Kashi, 790 F.2d at 1057 (internal citations omitted).

b. Respondent Todd’s Request for a Stay Should Be Granted.

Each factor of the test weighs in favor of staying this proceeding pending the resolution of the ongoing criminal investigations and—potentially—proceedings.

(1) Timeliness.

Respondent Todd brought this motion upon receiving notice that criminal investigations were continuing in Utah and possibly other jurisdictions. It was brought after only one initial scheduling hearing, before Respondent Todd filed his answer, before discovery, and before motions on the pleadings were fully submitted. In fact, it was brought even before the Division expended time and effort in responding to the Respondent’s Motion to Dismiss and before the Presiding Officer expended effort in reviewing the motion papers. This case is not at an advanced stage, and Respondent’s motion is timely.

(2) Plaintiff’s Interests.

The Division will not be prejudiced by a delay of this proceeding, which counsel understands will be unopposed. First, there is no allegation that members of the public were actually harmed by Respondent’s alleged activities and need the state’s aid to help

recover lost monies; the aim of the administrative action in this instance was primarily preventative, and not to seek a remedy on behalf of specific individuals. And in line with the state's goals in this proceeding, Respondent Todd, a Missouri resident, has already ceased any and all activities in Utah that formed the basis for this enforcement action. He is not defending this proceeding with an eye toward resuming the activities that precipitated the Division's investigation and order to show cause, nor does he intend to solicit or sell securities in Utah. In fact, he is subject to a final order in Missouri forbidding him from the solicitation or sale of securities and from undertaking fraudulent acts in violation of Missouri's Blue Sky law. Thus, there is little or no possibility that a stay will expose Utah residents to violations of the securities laws.

Second, upon information and belief, almost all of the evidence forming the basis of this action has allegedly been preserved in electronic format by the Division in the form of recordings of Respondent(s). Also upon information and belief, there is very little documentary evidence that is in danger of destruction, and almost all of the Division's evidence would be elicited at hearing from either the Division's own investigator, a long-time employee, or the testimony of one or two other Utah residents. All of these documents and witnesses would likely be subject to the criminal proceedings and preserved in the records therein, making the risk of spoliation or loss of memory exceedingly slight. Also, given the fact that so much of the Division's work product in preparation for this case is likely stored in electronic format, and that, upon information and belief, the Division has not yet undertaken the type of extensive trial preparations that would have to be inefficiently mothballed and then resurrected in the distant future, Respondent does not believe the Division will be substantially inconvenienced by a stay.

(3) Defendant's Interests.

Upon information and belief, the actions being investigated by law enforcement agencies are substantially similar, if not identical, to the actions that form the basis for the Division's jurisdiction over Todd. It will therefore be difficult for Todd to file an answer, respond to interrogatories, or testify in this matter without repeatedly invoking his Fifth Amendment privilege. As the Brock court observed:

The propriety of a stay becomes manifest when the public interests are weighed against the protection that a stay will afford the defendants. If the defendants are served with interrogatories in the civil case, they must decide whether to respond or to assert their rights under the fifth amendment. If they choose the former course, they risk providing the government with leads or evidence that may be used against them in the criminal case. If they choose the latter course, they greatly increase the chance that they [will] be found liable [the] civil case for substantial sums of money.

Brock, 109 F.R.D. at 120. While this dilemma does not offend the Constitution, "it certainly undercuts the protections of [the fifth amendment and due process], and a Court can exercise its discretion to enable a defendant to avoid this unpalatable choice when to do so would not seriously hamper the public interest." Id.

Finally, the presence of the ongoing criminal investigations of Todd has made it difficult for both the Division and Respondent Todd to engage in full and frank discussions regarding (1) the factual basis for the Division's jurisdiction; and (2) a pre-hearing resolution of the matter that is amenable to both Respondent and the people of Utah. No interest is served by retarding the flow of information and communication between the parties in this proceeding. This increases their reliance upon the

adjudicatory apparatus of the Division without yielding any corresponding benefit to the public. This factor weighs strongly in favor of staying the proceeding.

(4) Convenience to the Division (as Adjudicator)

Staying a civil matter while it is still in its infancy actually preserves, rather than wastes, adjudicatory resources. See Reyes, 2004 WL 1737683 at *5. This is because “staying the case will eliminate the need to wrestle with how to balance Fifth Amendment rights” and how to open access to evidence in a way that does not taint either this proceeding or the criminal proceeding. Id. Once the criminal proceedings have been resolved and concluded, the Division will be able to conveniently take up this matter and adjudicate it from beginning to end without constantly dealing with the Fifth Amendment issue. This factor weighs in favor of a stay.

(5) Interests of Non-Parties and (6) the Public Interest.

As discussed above, the non-parties who have a stake in this proceeding are not individuals who purchased investments from Todd (there were none), but instead, Utah residents. In other words, this enforcement action was not brought to facilitate recovery of lost funds or the value of diminished investments, but to protect Utah residents from future illegal conduct by Respondents or others.¹ For two reasons, the interest of non-parties (i.e., all Utah residents, or the public interest) will be served by a stay. First, there is little or no risk that Utah residents will be harmed by Respondent Todd during the period of the stay. Todd has taken no position indicating that he believes he should be

¹ Accordingly, the same analysis applies to factor (5) and factor (6), and they are treated together for the sake of brevity.

able to continue to solicit Utah residents to purchase the types of investments at issue here. In fact, he is neither making such solicitations, nor does he ever intend to. Additionally, the Respondent is a Missouri resident who is subject to a final Missouri order forbidding him from soliciting or selling securities or making any fraudulent statements or omissions illegal under the state Blue Sky laws.

Second, the criminal investigation and proceedings will vindicate the same interest in prevention that would be vindicated were the instant proceeding to continue to fruition. See Brock, 109 F.R.D. at 121 (in granting a stay, noting that “a criminal prosecution serves to enforce those same interests [enforced in a civil case]”). Additionally, a stay “would benefit the public by allowing the criminal prosecution... to proceed expeditiously and allow the Plaintiffs in this case the opportunity for a full and fair trial... after the conclusion of the proceedings.” Reyes, 2004 WL 1737683 at *6. Thus, the Utah public will be well-served by an order staying this proceeding pending the outcome of parallel criminal investigations.

IV. CONCLUSION

Each of the factors weighs in favor of a stay. Every party involved, including the Respondent, the Division (in both its capacity as a party and as an adjudicator), and the public at large, will gain by allowing the parallel criminal investigations and proceedings to run their course before again taking up the instant proceeding. Therefore, Respondents respectfully move that the Presiding Officer issue an order staying this case until resolution of all criminal investigations and proceedings against Todd relating to “bank trading programs,” “prime bank schemes,” or other investments upon which the Division bases its jurisdiction in the Order to Show Cause. Additionally, Respondents

respectfully recommend that upon the lifting of the stay, the Presiding Officer convene a scheduling conference. At the conference, Respondent may state whether, based on the facts then available to him through the prosecution of the criminal proceedings, he will withdraw or supplement his Motion to Dismiss. The parties can then confer on dates for additional briefing (if necessary), discovery and hearing on the merits.

Dated: March 31, 2007

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2007, a copy of this brief was served by U.S. Mail and e-mail on each of the following parties:

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