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APR 21 2009

Utah Department of Commerce  
Division of Securities

MATTHEW P. JUBE (6414)  
**YOUNG, KESTER & PETRO**  
Attorneys for Defendant, Michael Les Kesler  
75 South 300 West  
Provo, Utah 84601  
Telephone: (801) 379-0700

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

---

IN THE MATTER OF:	)	<b>MOTION FOR A STAY OF</b>
	)	<b>PROCEEDINGS</b>
	)	
INDIAN OIL, INC., and MICHAEL	)	
LES KESLER,	)	<b>Docket N. SD-09-0008</b>
	)	<b>Docket N. SD-09-0009</b>
Respondents.	)	
	)	

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The Respondent, Michael Les Kesler, by and through his attorney, Matthew P. Jube, Esq., of **YOUNG, KESTER & PETRO**, hereby move that the Administrative Law Judge in this matter stay these proceedings until the criminal case initiated against the Respondent has been concluded.

Respondent has discussed this matter with counsel for the State of Utah and understands that the State will not oppose the Respondent's Motion for a Stay.

Respondent has submitted, contemporaneously with the filing of this motion, a memorandum

in support of the motion for a stay.

Dated this 16<sup>th</sup> day of April, 2009.

**YOUNG, KESTER & PETRO**



\_\_\_\_\_  
MATTHEW P. JUBE, ESQ.  
Attorneys for Respondent Michael Kesler

**MAILING CERTIFICATE**

I certify that a copy of the foregoing was mailed, postage prepaid, to the following, on the 17 day of April, 2009.

Administrative Court Clerk  
c/o Pam Radzinski  
Division of Securities  
160 East 300 South, Second Floor  
Box 146760  
SLC, UT 84114-6760

Jeff Buckner, Esq.  
Asst. Attorney General  
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Provo, Utah 84601  
Telephone: (801) 379-0700

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

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IN THE MATTER OF:	)	<b>MEMORANDUM IN SUPPORT</b>
	)	<b>OF RESPONDENT'S MOTION FOR</b>
	)	<b>A STAY OF PROCEEDINGS</b>
INDIAN OIL, INC., and MICHAEL	)	
LES KESLER,	)	<b>Docket N. SD-09-0008</b>
	)	<b>Docket N. SD-09-0009</b>
Respondents.	)	
	)	

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The Respondent, Michael Les Kesler, by and through his attorney, Matthew P. Jube, Esq., of **YOUNG. KESTER & PETRO**, submits the following memorandum in support of the Respondent, Michael Les Kesler's motion for an order staying the proceedings in this matter until such time as the criminal action against the Respondent, that involves the same basic factual allegations is completed.

**STATEMENT OF FACTS**

1. The Order to Show Cause filed by the Utah Department of Commerce, Division of Securities, is premised upon the Respondent's alleged practices and conduct that violated the

provisions of the Utah Uniform Securities Act, Utah Code Annotates 61-1-1 et seq. The State alleges that the Respondent, Kesler, committed securities fraud and engaged in the sale of unregistered securities in connection with the operation of Indian Oil.

2. The Order to Show Cause alleges that from approximately August 2005 through January 2007, Kesler offered and sold the stock of Indian Oil, which is alleged to be a security to at least eight investors and in connection with the sales made false statements and failed to properly disclose known information.

3. At present, the parties are in the process of exchanging information but no further proceedings have been held. The Administrative Law Judge has set this matter for a pre-hearing conference, to be conducted by telephone, on May 4<sup>th</sup>, 2009, at 9:00 a.m.

4. Attached hereto as Exhibit "A," is the criminal Information that the State has filed in the case styled *State v. Michael Les Kesler*, Case No. 091400271 and currently assigned to Judge Lynn Davis. As noted therein, the factual allegations and the substance of the charges are the same as contained in the State's Order to Show Cause in this matter.

5. The discovery furnished by the State in both actions is identical further indicating that the issues in the two matters are substantially the same.

6. Attached hereto as Exhibit "B," is the court docket indicating that the Defendant is set for a Waiver hearing on May 6, 2009.

## **ARGUMENT**

Absent a stay, the Respondent, by the existence of a civil and criminal case that have a common factual basis, is put into the terrible position of having to choose either to fully defend himself in the administrative proceeding (by way of discovery or hearing) or claim his rights under the Fifth Amendment. Any defendant who chooses to invoke the privilege runs the risk that his defense will suffer and that the invocation of the Fifth Amendment rights will be used as the basis for an adverse inference against him or her in this case, *see, e.g., Harris v. City of Chicago*, 266 F.3d 750, 753 (7th Cir. 2001), a practice, which the Respondent understands that the Fifth Amendment does not prohibit. *See Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976).

However, the case law contemplates special circumstances and the need to avoid substantial and irreparable prejudice. A court may, however, stay parallel civil litigation in these circumstances if the interests of justice require it. *See United States v. Kordel*, 397 U.S. 1, 12 n. 27, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970). Determination of whether to grant a stay due to parallel criminal litigation involves balancing the interests of the plaintiff, the defendants, and the public. The factors considered include the following non-exclusive list: whether the civil and criminal matters involve the same subject; whether the governmental entity that has initiated the criminal case or investigation is also a party in the civil case; the posture of the criminal proceeding; the effect of granting or denying a stay on the public interest; the interest of the civil-case plaintiff in proceeding expeditiously, and the potential prejudice the plaintiff may suffer from a delay; and the burden that

any particular aspect of the civil case may impose on defendants if a stay is denied. *See, e.g., Cruz v. County of DuPage*, No. 96 C 7170, 1997 U.S. Dist. LEXIS 9220, 1997 WL 370194, at \*2 (N.D. Ill. June 27, 1997) (citing cases).

As applied to the facts of this case, Respondent submits that he is entitled to a stay of proceedings.

1. **Same or Similar Subject Matter.** There is no question that the civil and criminal cases are in fact identical. The prosecutions, both administrative and criminal rely on the same statute. The discovery that the State has produced in both cases is identical and the ultimate issues to be determined by the fact finder are the same.

2. **Initiation of the Cases.** Again, the State of Utah and its various law enforcement arms investigated and proceeded with the initiation and prosecution of both the administrative case and the criminal matter.

3. **Posture of the Criminal Matter.** The pending criminal matter, as shown by the court docket is at an early stage.

4. **Effect of a Stay on the Public Interest.** The Respondent recognizes that the public has an interest in the prompt disposition of civil litigation. A stay quite obviously will impair that interest. On the other hand, the public has an interest in ensuring that the criminal process can proceed untainted by civil litigation. *See, e.g., Jones v. City of Indianapolis*, 216 F.R.D. 440, 452 (S.D. Ind. 2003). The possibility that the orderly progress of the criminal cases and investigations --

particularly those involving the exact same incidents at issue in the present case -- will be hindered by issues that could arise from ongoing civil discovery is significant enough to be worthy of consideration.

5. **Plaintiff's Interest in Proceeding Expeditiously.** As just discussed, entry of a stay will impose a delay on this action. The State certainly has an interest worthy of protection, but again, when compared with the risks imposed in the criminal prosecution coupled with the fact that the State of Utah is the moving party in both actions, it is submitted that this factor wains, when compared to the prejudice likely to be suffered by the Respondent.

6. **Burden on the Respondent.** Any individual respondent who is forced to respond to discovery will be faced with the choice of whether to claim or waive the privilege against self-incrimination. As the Courts have suggested, the likelihood is substantial that a respondent will claim the privilege and thereby face the risk that the State, in the administrative proceeding, will use the privilege invocation to help prove the defendant's liability. Though the law allows this, the question of whether it is fair does not yield the same answer in every case. It is submitted that it is not at all rare for a person faced with criminal charges or a pending investigation to invoke the privilege even though he may have done nothing wrong, out of an abundance of caution prompted by a careful criminal defense lawyer. Though a person who claims the privilege in such circumstances and then has it used against him in a parallel civil case ordinarily is given the chance to explain his invocation of the privilege, the finer points of risk-aversion as it relates to criminal

defense practice easily can be lost on lay jurors. A civil defendant in this situation who is effectively backed into a corner in which he has no viable choice but to claim the privilege is forced to face a significant risk of unfair prejudice that may be virtually impossible to remedy. This is, in the decisions discussing the issue, a significant factor weighing in favor of a stay.

It is respectfully submitted that the factors established by the Courts considering the issue weigh, in their entirety, in favor of granting a stay.

#### **CONCLUSION**

Respondent respectfully submits that he has established the requirements established by the courts to obtain a stay of these administrative proceedings until the criminal matter is concluded.

Dated this 16 day of April, 2009.

**YOUNG, KESTER & PETRO**



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MATTHEW P. JUBE, ESQ.  
Attorneys for Respondent Michael Kesler

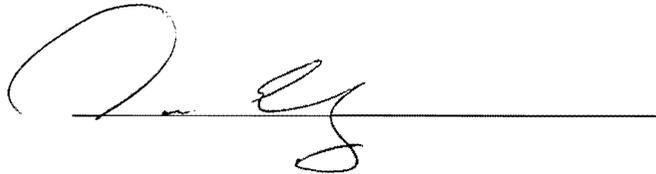
**MAILING CERTIFICATE**

I certify that a copy of the foregoing was mailed, postage prepaid, to the following, on the

47 day of April, 2009.

Administrative Court Clerk  
c/o Pam Radzinski  
Division of Securities  
160 East 300 South, Second Floor  
Box 146760  
SLC, UT 84114-6760

Jeff Buckner, Esq.  
Asst. Attorney General  
160 East 300 South, Fifth Floor  
Box 140872  
SLC, UT 84114-0872

A handwritten signature in black ink, appearing to read "Jeff Buckner", is written over a horizontal line. The signature is stylized and cursive.