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JAN 19 2010

Utah Department of Commerce  
Division of Securities

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and David Burns Stayner*

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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:

SECURED LOAN FUND, LLC; SECURED  
LOAN FUND II, LLC; DAVID BURNS  
STAYNER

RESPONDENTS.

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

Docket No. SD-09-0003

Docket No. SD-09-0059

Docket No. SD-09-0004

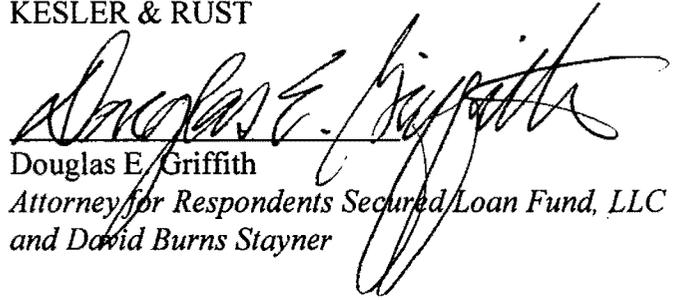
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Respondents Secured Loan Fund, LLC; Secured Loan Fund II, LLC; and David Burns Stayner (collectively "Respondents"), by and through their undersigned attorney, hereby move for a stay of these proceedings until the final resolution of *State v. David Burns Stayner*, Case No. 091702099, a criminal proceeding currently pending before the Second District Court in Davis County. The parallel criminal and civil proceedings represented by that case and this case threaten to undermine and burden the right against self-incrimination provided under the Fifth Amendment to the United States Constitution.

This Motion is accompanied by a supporting legal memorandum. For the reasons stated therein, this Motion should be granted.

**DATED** this 19<sup>th</sup> day of January, 2010.

KESLER & RUST

A handwritten signature in black ink, appearing to read "Douglas E. Griffith", is written over a horizontal line. The signature is fluid and cursive.

Douglas E. Griffith  
*Attorney for Respondents Secured Loan Fund, LLC  
and David Burns Stayner*

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be delivered by the method indicated below a true and correct copy of the foregoing **MOTION TO STAY PENDING RESOLUTION OF CRIMINAL PROCEEDINGS**, postage prepaid, this 19 day of January, 2010, to:

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**BEFORE THE DIVISION OF SECURITIES  
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IN THE MATTER OF:

SECURED LOAN FUND, LLC; SECURED  
LOAN FUND II, LLC; DAVID BURNS  
STAYNER

RESPONDENTS.

**MEMORANDUM IN SUPPORT  
OF MOTION TO STAY PENDING  
RESOLUTION OF CRIMINAL  
PROCEEDINGS**

Docket No. SD-09-0003

Docket No. SD-09-0059

Docket No. SD-09-0004

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Respondents Secured Loan Fund, LLC; Secured Loan Fund II, LLC; and David Burns Stayner (collectively "Respondents"), file this memorandum in support of their Motion for Stay Pending Resolution of Criminal Proceedings ("Motion"). Specifically, Respondents are requesting that this matter be stayed until *State v. David Burns Stayner*, Case No. 091702099, a criminal proceeding currently pending before the Second District Court in Davis County (the "Criminal Matter"), is fully resolved.

## FACTUAL BACKGROUND

The Criminal Matter includes the following counts:

- Count 1 – Securities Fraud, a second degree felony in violation of 61-1-1 UCA
- Count 2 – Communications Fraud, a second degree felony in violation of 76-10-1801 UCA

Although Respondents deny all allegations in the Criminal Matter, a comparison of the allegations in the Criminal Information (attached hereto as Exhibit A) and Affidavit of Probable Cause (attached as Exhibit B) with those in the Order to Show Cause establish beyond question that the two proceedings are based upon the same alleged facts. In both proceedings, the promotion and sale of securities to Utah residents<sup>1</sup> form the basis for the charges against Respondents. *Compare, e.g.,* Affidavit of Probable Cause, Paragraph 11-12 with Amended Order to Show Cause, Paragraph 25.

## DISCUSSION

This motion is based upon the fact that any statements made in the course of this proceeding may be used in the criminal proceedings, thereby impinging on Fifth Amendment rights against self-incrimination ; conversely, if, in an effort to preserve such Fifth Amendment rights, Respondents make no statements in these proceedings, Respondents' defense will be significantly undermined. *United States v. Kordel*, 397 U.S. 1, 7-8 (1970). As shown below, courts have been receptive to granting stays in civil proceedings in an effort to prevent defendants from facing the Hobson's choice that now faces Respondents.

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<sup>1</sup> The Amended Order to Show Cause refers to these individuals by their respective initials, "EC", "GC", "TS", "LS", "LP", "SP", and "TC".

In determining a motion such as this, courts look to: 1) the timeliness of the motion, and 2) the balancing of the plaintiff's interest in proceeding with the matter expeditiously against the impairment of the rights of the defendant by so proceeding, as well as the interest of all other affected parties. *SEC v. Google*, 1997 U.S. Dist Lexis 20878 \*7-8 (D. Conn. April 30, 1997)<sup>2</sup>.

In this case, the first fact clearly weights in favor of granting the request for stay. The Motion has been filed in a timely manner. Indeed, it is being filed within the time for Respondents' to file their response to the Amended Order to Show Cause, which was filed on December 22, 2009, and the Notice of Agency Action and prior to the hearing before the Division on the Amended Order to Show Cause.

Turning to the balancing of interests prong, it is clear that delaying this proceeding will not significantly impair the Division's ability to proceed with this matter. First, because actions by the Utah Securities Division and the State of Utah have effectively ended Respondents' involvement with the securities product that is the core of the allegations in both this and the criminal proceedings. Respondents are no longer involved with promoting securities to anyone. Accordingly, there is not concern that Respondents' are making a false statements to the investing public. *Cf.*

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<sup>2</sup> A copy of this Lexis case is included as Exhibit C. Respondents are not aware of any case law from Utah courts addressing the propriety of staying civil and/or administrative proceedings during the pendency of related criminal proceedings. (This is probably because an order granting such a stay is not a final order and therefore is not appealable. In re *J.W.*, 950 P.2d 939, 940 (Utah App. 1997).) Therefore, Respondents rely on federal case law to support their Motion.

*Brock v. Tolkow*, 109 F.R.D. at 120 (noting that denial of a stay is more appropriate where there is “a tangible threat of immediate and serious harm to the public at large”).

Second, the criminal proceedings are aimed at enforcing nearly identical interests and there is no indication that further alleged harm to the public will occur due to a stay of civil proceedings. *SEC v. Google*, 1997 U.S. Dist Lexis 20878 (D. Conn. April 30, 1997). Indeed, the Utah Attorney General’s Office is the office prosecuting both actions. *SEC v. Graystone Nash, Inc.* 25 F.3d 187, 193-194 (3d Cir.1994) (“Courts must bear in mind that when the government is a party in a civil case and also controls the decision as to whether criminal proceedings will be initiated, special consideration must be given to the plight of the party asserting the Fifth Amendment.”) Moreover, in the event the criminal case is decided against Respondents, the civil proceeding will be substantially simplified for the State since the Division would be able to assert collateral estoppel against those convicted.

In contrast, Respondents are now facing these proceedings while being distracted by the pending Criminal Matter. Even were there no Fifth Amendment Issues, the simple inability to focus all efforts on one case severely undermines Respondents’ ability to fully defend this matter. As the Second Circuit held concerning instances where there are parallel criminal and civil proceedings:

More generally, because all parties—those who invoke the Fifth Amendment and those who oppose them—should be afforded every reasonable opportunity to litigate a civil case fully and because exercise of Fifth Amendment rights should not be made unnecessarily costly, courts, upon an appropriate motion, should seek out those ways that further the goal of permitting as much testimony as possible to be presented in the civil litigation, despite the assertion of the privilege. Thus, if there is a timely request

made to the court, the court should explore all possible measures in order to select that means which strikes a fair balance and accommodates both parties.

*United States v. 4003-4005 5<sup>th</sup> Ave.*, 55 F.3d 78, 83-84 (2d Circuit 1995). Similarly, the court in *Brock v. Tolkow*, 109 F.R.D. 116 (E.D.N.Y 1985), held that:

A stay of civil proceedings is most likely to be granted where the civil and criminal actions involve the same subject matter...and is even more appropriate when both actions are brought by the government.

The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits [allowed by the rules governing discovery in criminal cases], expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case. If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it.

*Id.* at 119 (quoting *SEC v. Dresser Indus.*, 628 F.2d 1368, 1375-76 (footnotes omitted by *Brock* court)).

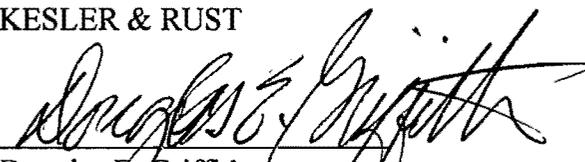
This case falls squarely within the ambit of those in which a stay of the civil proceedings has been granted. It is a case brought based upon the same alleged facts by the same government office as in the criminal proceeding. There is not threatened future harm to the public that will be caused or allowed by a stay. At most, there may be some inconvenience to the Division. Such inconvenience, however, cannot be seriously equated with the burden otherwise being placed by these dual proceedings on the constitutional right against self-incrimination presented.

**CONCLUSION**

Accordingly, for the foregoing reasons, Respondents request that the Motion be granted and that these proceedings be stayed pending the resolution on *State v. David Burns Stayner*, Case No. 091702099.

**DATED** this 19<sup>th</sup> day of January, 2010.

**KESLER & RUST**

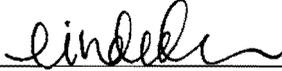


Douglas E. Griffith  
*Attorney for Respondents Secured Loan Fund, LLC  
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