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Utah Department of Commerce
Division of Securities

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

IN THE MATTER OF:

DAVID BARTHOLOMEW,

Respondent.

**MOTION FOR STAY PENDING
RESOLUTION OF RELATED
CRIMINAL CASE**

Docket No. SD-11-0049

Respondent David Bartholomew ("Bartholomew"), through his undersigned counsel, hereby moves for a stay of these proceedings until the final resolution of the related criminal case, *Utah v. David G. Bartholomew*, Case No. 111904456, which is currently pending before the Utah Third Judicial District Court, in Salt Lake County ("Related Criminal Case"). The Related Criminal Case is founded upon the same investigation and claims. Proceeding on this civil case before the Related Criminal Case has been resolved impinges upon Mr. Bartholomew's

right against being a witness against himself provided by the Fifth Amendment to the United States Constitution. This problem is remedied by staying this civil proceeding until the Related Criminal Case has been resolved.

Counsel for the Utah Division of Securities (the "Division"), Mr. Jeff Buckner, as told the undersigned counsel that the Division does not oppose this request for a stay, and that a similar stay request has been sought by co-respondents Jon Pugmire and James Mooring.

Background

1. The Criminal Information (charging document) in the Related Criminal Case was filed in the Utah Third District Court on June 15, 2011. Messrs. Kenneth E. North, John P. Laing, Jon R. Pugmire and James B. Mooring are named as co-defendants in that Criminal Information, although each defendant has been assigned a separate Criminal Case Number. Those are the same persons who are named as co-respondents in the instant civil case before the Division.

2. Four of the 22 counts in the Criminal Information in the Related Criminal Case involve Mr. Bartholomew, and they all relate to Mr. Bartholomew's alleged involvement with alleged 2006 securities purchases by Tamara Bernson and Sharon Lloyd (Counts 10 and 13). Those same transactions are the ones that are at issue in the instant civil case against Mr. Bartholomew. (See June 28, 2011 Order to Show Cause ("OSC"): Fourth Cause of Action and Seventh Cause of Action).

3. Similarly, Count 21 of the Criminal Information against Mr. Bartholomew alleged sale of securities by an unlicensed agent under UCA § 61-1-3, which mirrors the Tenth Cause of Action in the OSC.

Argument

Similar to the argument made in the memorandum in support of co-respondent James Mooring's Motion for Stay, 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 Mr. Bartholomew's Fifth Amendment rights against self-incrimination. Conversely, if, in an effort to preserve such Fifth Amendment rights, Mr. Bartholomew makes no statements in these proceedings, Bartholomew's 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 Mr. Bartholomew.

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).

Bartholomew has satisfied the first factor. This Request for stay has been filed in a timely manner: it is being filed within the time for Bartholomew to file his response to the Order to Show Cause and prior to the first hearing before the Division on the Order to Show Cause, which is scheduled for August 3, 2011.

As to the second factor, balancing of interests, delaying this proceeding will not significantly impair the Division's ability to proceed with this matter. First, Mr. Bartholomew has not had a securities license since 2006 and is not currently involved with promoting or selling securities to anyone. *Cf. 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 this 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 that is 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.")

Finally, a timely stay request pending the resolution of the criminal case strikes a fair balance to both parties, as explained by the Second Circuit:

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 5th 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.

Conclusion

Based on the foregoing, Mr. Bartholomew's Motion for Stay Pending Resolution of Related Criminal Case should be granted. A proposed order staying proceedings is submitted herewith for the Division's consideration.

DATED: August 1, 2011

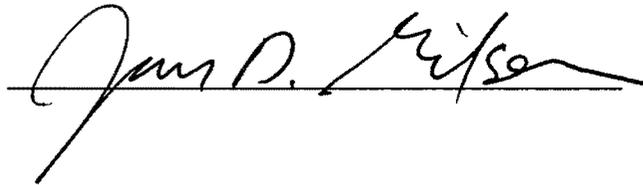
CALLISTER NEBEKER & McCULLOUGH

By: 
James D. Gilson
Attorneys for David Bartholomew

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing **MOTION FOR STAY PENDING
RESOLUTION OF RELATED CRIMINAL CASE** was mailed, first class postage prepaid,
this 15th day of August, 2011, on the following:

Jeff Buckner
Assistant Attorney General
Utah Division of Securities
160 East 300 South, 5th Floor
Salt Lake City, UT 84114-0872

A handwritten signature in black ink, appearing to read "James D. Wilson", is written over a horizontal line.