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

In the matter of:

DEAN A. HAMILTON,
CRD #5089531

Respondent.

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

Docket No. SD-012-0078

Respondent Dean A. Hamilton ("Hamilton") files this memorandum in support of his motion for stay of pending resolution of criminal proceedings. Specifically, Hamilton is requesting that this matter be stayed until the State of Utah determines whether to proceed with criminal charges against Hamilton arising from substantially the same facts as this administrative proceeding and, if such criminal charges are filed against Hamilton, until those charges are fully and finally resolved. For the following reasons, the motion should be granted:

FACTUAL BACKGROUND

The order to show cause that commenced this administrative proceeding was filed on December 18, 2012. The order to show cause alleged that Hamilton had committed a number of violations of the Utah Securities Act in connection with an alleged Ponzi scheme orchestrated by Dee Allen Randall. The Utah Attorney General's office has informed Hamilton that it has not yet determined whether to pursue criminal charges against Hamilton arising from substantially the same facts as those alleged in the order to show cause, but that such criminal chargers are possible.

**THIS MATTER INVOLVES SUBSTANTIALLY THE SAME FACTS AS
THE CRIMINAL MATTER AND A STAY WILL NOT HARM THE
PUBLIC INTEREST.**

The motion is based upon the fact that any statements Hamilton makes in the course of this proceeding may be used against him in a criminal proceeding, thereby affecting his Fifth Amendment rights against self-incrimination. At the same time, if Hamilton exercises his Fifth Amendment rights and makes no statements in these proceedings, his defense will be significantly undermined. *See, e.g., United States v. Kordel*, 397 U.S. 1, 7-8 (1970). Courts have been receptive to granting stays in civil proceedings under circumstances similar to those here.

In determining a motion such as Hamilton's motion, courts consider: (1) whether the parallel civil and criminal proceedings involve substantially the same facts (*see Koester v. American Republic Invs., Inc.*, 11 F.3d 818, 823 (8th Cir. 1993) ("to warrant a stay, defendant must make a strong showing . . . that the two proceedings are so interrelated that he cannot

protect himself at the civil trial by selectively invoking the Fifth Amendment privilege”); and (2) that a stay is not likely to harm the public interest (*see, e.g., Brock v. Tolkow*, 109 F.R.D. 116, 120 (E.D.N.Y. 1985)).¹

In this case, there is no question that the facts at issue in this administrative and the potential criminal proceeding are substantially similar. Both this administrative proceeding and the potential criminal case arise from Hamilton’s involvement with Dee Allen Randall and the alleged Ponzi scheme Mr. Randall is accused of orchestrating.

It should be noted that the Utah Attorney General’s Office would be the office prosecuting both actions. *See SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 193-94 (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.”)

It is also true that delaying this proceeding will not significantly impair the Division’s ability to proceed with this matter. First, the order to show cause alleges that this matter arises from Hamilton’s work with Dee Allen Randall. To Hamilton’s knowledge, Mr. Randall’s actions have been terminated, and Hamilton has no ongoing relationship with Mr. Randall. There is no allegation that Hamilton is engaging in any ongoing pattern of conduct or in perpetuating any ongoing scheme that puts the public at risk. Under these circumstances, there is no public interest harmed by the granting of a stay. *See Brock v. Tolkow*, 109 F.R.D. at 120

¹ Respondent is relying on federal case law to support the motion because Respondent has been unable to discover 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 likely because an order granting such a stay is not a final order and, therefore, is not appealable. *See In re J.W.*, 950 P.2d 939, 940 (Utah App. 1997)).

(noting that denial of a stay is appropriate when there is “a tangible threat of immediate and serious harm to the public at large”). The court in *Brock* held that:

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

The noncriminal proceedings, 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)).

In one respect, a stay may in fact serve the public interest. Hamilton has engaged in discussions that might result in the resolution of both this administrative and the potential criminal proceedings. The grant of a stay in this administrative proceeding may serve the interest of judicial efficiency, while the potential criminal matter assures that the motion in this matter is not merely for purposes of delay.

CONCLUSION

This case is one in which a stay of the administrative proceedings should be granted. The administrative proceedings are brought based upon the same alleged facts by the same government office as in the potential criminal proceeding, and there is no threatened future harm to the public that will be caused or allowed by a stay.

Accordingly, for the foregoing reasons, Hamilton requests that his motion be granted and that these proceedings be stayed until the State of Utah determines whether to proceed with criminal charges against Hamilton arising from substantially the same facts as this administrative proceeding and, if such criminal charges are filed against Hamilton, until those charges are fully and finally resolved.

DATED this 26th day of April, 2013.

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By: 

KEVIN C. TIMKEN
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR STAY PENDING RESOLUTION OF CRIMINAL PROCEEDINGS** to be delivered, by hand, this 26th day of April, 2013, to the following:

Mr. Dave Hermansen
Director, Enforcement Section
Utah Division of Securities
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Salt Lake City, UT 84114-6760

Mr. Chip Lyons, Analyst
Utah Division of Securities
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