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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

NATIONAL NOTE OF UTAH, LC, a Utah
Limited Liability Company and WAYNE
LaMAR PALMER, an individual,

Defendants.

MOTION TO STAY PROCEEDINGS

Case No. 2:12-cv-00591-BSJ

The Honorable Bruce S. Jenkins

Mr. Palmer, by and through counsel, Robert K. Hunt, hereby moves this Court to stay the on-going civil proceedings based on the prejudice that Mr. Palmer will suffer. This prejudice significantly outweighs any prejudice that plaintiff might suffer since, at this stage, that prejudice would be minimal.

In presenting this Motion, Mr. Palmer proffers the following: On or about June 25, 2012, The S.E.C. filed its complaint and began the present action. On or about January 14, 2013, the United States Attorney's office contacted the Utah Federal Public Defender and requested that an attorney be appointed to represent Mr. Palmer in a pending and, as represented, inevitable

criminal proceeding. It was represented at that time that a criminal investigation was ongoing and would continue to develop and expand as the months went on. In the early part of 2013, Assistant United States Attorney, Jason Burt arranged a meeting with the Federal Public Defenders. At this meeting, investigators from the IRS and the FBI were present. Discovery, which included interviews, spreadsheets, flow charts and some banking records was provided. It was represented at that time that all of the financial information and the majority of the witness evidence and money flow exhibits came from the receiver, Wayne Klein, appointed in this matter. The government also provided defense counsel a detailed outline of where the government believed Mr. Palmer's criminal sentence would be calculated under the Federal Sentencing Guidelines.

The government represented in this meeting that the criminal case directly mirrored the civil matter in its scope and evidence. More importantly, the government represented that the main allegations in the criminal case would be extremely similar, if not identical, to those in the civil case: The alleged misrepresentations and/or omissions that Mr. Palmer made to potential investors in National Note in order to induce them to invest.

The meeting was cordial and appreciated by counsel for the defense. A proviso was given at the end of the meeting, suggesting that the government had yet to aggressively prepare the case for grand jury and that the government would be more amenable to a resolution of the criminal matter earlier than later.

As the Court is aware. Mr. Palmer retained counsel to assist in this case. Unfortunately, Mr. Palmer's present counsel withdrew, leaving Mr. Palmer in the precarious position of addressing the short response deadlines regarding the Motion for Summary Judgment, as well as

the numerous discovery issues that are still ongoing regarding the case in general. It appears that Mr. Palmer's counsel had to withdraw quite suddenly due to an injury and that responses had not been prepared to meet the deadlines. Furthermore, Mr. Palmer is impecunious, and now does not have the wherewithal to defend himself nor hire counsel on his own.

Argument

In *Securities Exchange Commission v. Dresser Industries Inc.*, 628 F.2d 1368, 1375 (D.C.Cir.1980) the court stated, "a court may decide in its discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions when the interests of justice seem to require such action." *Id.* at 1375 (internal quotation omitted). See also *United States v. Kordel*, 397 U.S. 1, 11–12 (1970) (parallel civil and criminal actions might, in "special circumstances," raise constitutional problems and a defendant might be able to argue that his due process and self-incrimination rights require the stay of proceedings in the civil action).

When considering a stay in a matter involving parallel criminal and civil proceedings, the primary debate centers on the criminal defendant's potential waiver or invocation of his Fifth Amendment rights. See *Cruz v. County of Dupage*, 1997 WL 370194, at *1 (N.D. Ill. June 27, 1997), . . . "ultimate question ... is whether the court should exercise its discretion in order to avoid placing the defendants in the position of having to choose between risking a loss in their civil cases by invoking their Fifth Amendment rights, or risking conviction in their criminal cases by waiving their Fifth Amendment rights and testifying in the civil proceedings."

As noted in *Cruz*, the "severe burden" defendants would face in fighting both proceedings simultaneously outweighed the potential prejudice to the private plaintiffs arising from a stay. *Id.*; see also *Brumfield v. Shelton*, 727 F.Supp. 282, 284 (E.D.La.1989)("In a case where there is a

real and appreciable risk of self-incrimination, an appropriate remedy would be a protective order postponing civil discovery until termination of the criminal action.”); *Brock v. Tolkow*, 109 F.R.D. 116, 120 (E.D.N.Y.1985) (“A stay of civil discovery until after criminal proceedings are complete will enable [defendants] to defend the civil case vigorously without fear of subsequent prosecution”).

In determining whether to stay civil proceedings, courts balance the burden of proceeding with both cases simultaneously against the harm to the civil opponent, in this case the plaintiffs, if a stay were granted. A motion for a stay entails a case-by-case, fact-specific inquiry, with courts frequently citing some combination of six factors in determining whether to enter a civil stay: (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether the defendants have been indicted; (3) the interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest. *See Trs. of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.*, 886 F.Supp. 1134, 1139 (S.D.N.Y.1995); *see also In Re Worldcom, Inc. Securities Litigation*, 2002 WL 31729501 (S.D.N.Y. Dec. 5, 2002); *Digital Equip. Corp. v. Currie Enterprises*, 142 F.R.D. 8, 12 (D. Mass.1991); *White v. Mapco Gas Products Inc.*, 116 F.R.D. 498, 502 (E.D.Ark.1987)

The Status of the cases and their overlap.

As described earlier, Mr. Palmer has not yet been indicted; yet the government has gone to the extraordinary extent to have a criminal defense attorney appointed in order to protect Mr. Palmer's rights and facilitate negotiations in the criminal case. Furthermore, as was represented

by the government and is also evident by the pleadings in this matter, the factual issues in both cases are the same.

The interests of the plaintiffs.

In this matter, a trustee has been appointed, numerous assets have been seized and numerous lawsuits are still outstanding. All of the appropriate orders are in place freezing assets and allowing the trustee to perform his function. If the matter were stayed there does not exist a threat that Mr. Palmer would access, encumber or monetize any asset.

The private interests and burden of the defendant.

Mr. Palmer is confronted with the Hobson's choice between testifying or pleading the 5th Amendment - with its negative inference - in a case which he declares his innocence. National Note was a significant and viable business before the market crash in 2008 and it will be difficult, if not impossible for the plaintiff to find a factually undisputed circumstance that National Note was a ponzi scheme. Furthermore, and for reasons beyond his control, Mr. Palmer is also confronted with the additional burden of proceeding pro se or begging money from family members and seeking new counsel at this late hour of the proceedings.

The interests of the Court and the public interest.

On file before the Court are numerous lawsuits filed by National Note investors. It appears that the majority, if not all of these parties are still conducting and reviewing discovery. As stated earlier, the assets are all frozen.

The Court has an interest in advancing these matters judiciously with decorum and comity. To stay this matter in one manner or another will slow down the present proceedings before the Court. Nevertheless, the Court also has the indelible interest of ensuring that those

litigants who present themselves before the Court are not forced or burdened to expose themselves to liabilities that are not driven by the facts of the case, but rather by the procedural circumstances surrounding the case.

For these reasons, Mr. Palmer respectfully requests that the civil proceedings be stayed until the criminal matter can be resolved.

DATED this 23rd day of January 2014.

/s/ Robert K. Hunt

ROBERT K. HUNT
Assistant Federal Defender

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MOTION TO STAY PROCEEDINGS** document was filed with the Court on this 23rd day of January 2014, was served via ECF on all parties who have requested notice in this case:

/s/ G. Wynhof
Office of the Federal Public Defender
District of Utah