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IN THE UNITED STATES DISTRICT COURT
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.	**MEMORANDUM IN OPPOSITION TO DEFENDANT WAYNE LaMAR PALMER'S RENEWED MOTION TO STAY PROCEEDINGS** Case No. 2:12-cv-00591-BSJ Judge Bruce S. Jenkins

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TREATISES

A. INTRODUCTION

Plaintiff, United States Securities and Exchange Commission ("Commission"), hereby submits this Memorandum in Opposition to Defendant Wayne LaMar Palmer's ("Palmer") Renewed Motion to Stay Proceedings ("Stay Motion") (Docket # 602).

B. PROCEDURAL HISTORY

1. The Commission filed a Complaint against Palmer and his entity, National Note of Utah, LC ("National Note"), on June 25, 2012. Docket # 1.
2. The Commission simultaneously filed ex parte motions seeking (1) a temporary restraining order (Docket # 2); (2) an asset freeze order (Docket # 3); and, (3) the appointment of a receiver (Docket # 4).
3. Palmer filed a Response (Docket # 25) to the Order Freezing Assets and Prohibiting Destruction of Documents (Docket # 8) on July 10, 2012.
4. The Commission filed stipulated motions for preliminary injunctions as to National Note (Docket # 41) and Palmer (Docket # 42) on August 16, 2012. The Court entered Preliminary Injunction Orders against National Note and Palmer on August 17, 2012. Docket #s 45 and 46, respectively.
5. On August 24, 2012, Brennan H. Moss ("Moss") and Nathan S. Dorius ("Dorius") of Pia Anderson Dorius Reynard Moss, LLC entered a Notices of Appearance on behalf of Palmer. Docket #s 47, 48.
6. Palmer, by and through counsel, filed an Answer (Docket # 56) to the Commission's Complaint on September 14, 2012.

7. Moss and Dorius filed a Motion to Withdraw as Attorney for Palmer and National Note on or around January 25, 2013. Docket # 140. The Court granted that motion on March 4, 2013. Docket # 182.
8. On May 20, 2013, Ronald C. Barker ("Barker") entered a Notice of Appearance on behalf of all defendants. Docket # 309.
9. The Commission filed a Motion for Summary Judgment against Palmer on July 19, 2013. Docket # 377.
10. On August 6, 2013, the Commission filed a stipulated motion extending Palmer's deadline for filing a response to the Commission's summary judgment motion to September 20, 2013. Docket # 400. The Court granted that motion at hearing on August 20, 2013. Docket # 417.
11. On September 17, 2013, the Commission filed a Stipulated Motion to Amend the Scheduling Order, thereby further extending Palmer's deadline to reply to the Commission's summary judgment motion to October 14, 2013. Docket # 444. Subsequently, the Court entered an Order on September 19, 2013 vacating the dates of its scheduling order and agreed to set new dates at a hearing on November 1, 2013. Docket # 447.
12. After two extensions, Palmer filed his first response, together with exhibits, to the Commission's Motion for Summary Judgment on October 14, 2013. Docket #s 473, 477.
13. Palmer moved the Court for a third extension of time to supplement his response to the Commission's summary judgment motion on October 16, 2013. Docket # 478.

14. The Commission filed an opposition to Palmer's third request for an extension of time on October 28, 2013. Docket # 496.
15. On October 28, 2013, the Commission replied to Palmer's response to its summary judgment motion. Docket # 496. The Commission concurrently filed an Objection to Exhibit 1, Declaration of Wayne Palmer, which Palmer filed in support of his response. Docket # 497.
16. At a hearing on October 29, 2013, the Court granted Palmer's third extension of time and set a new deadline of November 8, 2013 for Palmer to file his supplemental response to the Commission's summary judgment motion. Docket # 559.
17. Palmer, seeking a fourth extension of the deadline by which to supplement his response to the Commission's summary judgment motion, filed a Stipulation to Change Scheduling Dates on October 31, 2013, citing "a scheduling conflict involving [his] counsel." Docket # 507.
18. On November 7, 2013, the Court entered an Order vacating the Final Pretrial Conference set for November 22, 2013 and scheduled a hearing on Palmer's fourth motion to extend deadlines. Docket # 514. The Court granted Palmer's motion at that hearing. Id. On November 8, 2013, Palmer filed a second response to the Commission's summary judgment motion. Docket # 521.
19. The Commission, in turn, filed a Supplemental Memorandum in Support of Its Motion for Summary Judgment on November 14, 2013. Docket # 530.
20. Palmer responded to the Commission's Objections (Docket # 497) on November 29, 2013. Docket # 545.

21. The Court held a hearing on the Commission's Motion for Summary Judgment against Palmer on December 19, 2013. During that hearing, Palmer asserted that he had relied on the advice of counsel with respect to the promissory notes National Note offered and sold. Consequently, the Court instructed Palmer to decide whether to waive his attorney-client privilege on or before January 3, 2014 and to supplement further his response to the summary judgment motion against him on or by January 17, 2014. Docket # 566.
22. Palmer filed Notice of Re Non-Waiver of Attorney Client Privilege on January 3, 2014. Docket # 570.
23. Barker, Palmer's counsel, filed a Motion for Withdrawal of Counsel on January 10, 2014. Docket # 575.
24. On January 16, 2014, Palmer moved for a sixth extension of time to file a response to the Commission's summary judgment motion, citing his need to retain new counsel and, subsequently, to allow his new counsel to prepare his second supplemental response to the summary judgment motion against him. Docket # 581.
25. Robert. K. Hunt ("Hunt") of the Federal Public Defender's Office filed a Limited Appearance by Defense Counsel on January 22, 2014. Docket # 585.
26. Hunt moved to stay proceedings on behalf of Palmer on January 23, 2014. Docket # 588.
27. At hearing on January 24, 2014, the Court, among other things, (1) granted Barker's Motion for Withdrawal of Counsel; (2) granted Palmer's sixth request for an extension of time; and, (3) struck Palmer's Stay Motion. Docket # 591.

28. Paul T. Moxley ("Moxley") and Z. Ryan Pahnke ("Pahnke") filed Notices of Appearance on behalf of Palmer on January 27, 2014. Docket #s 592 and 593, respectively.

29. The Court entered a revised Scheduling Order and Order Granting Motion to Extend Time on January 30, 2014. Docket # 596. That Order requires Palmer to file a second supplement response to the Commission's summary judgment motion against him on or before March 31, 2014. Id.

30. On February 18, 2014, Palmer filed a Renewed Motion to Stay Proceedings. Docket # 602.

C. ARGUMENT

I. STANDARD FOR GRANT OF STAY

"The Constitution [] does not ordinarily require a stay of [discovery in a civil proceeding] pending the outcome of criminal proceedings." SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980) (en banc), *cert. denied* 449 U.S. 993 (1980). See Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th Cir. 1995); Federal Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989); DeVita v. Skills, 422 F.2d 1172 (3d Cir. 1970); SEC v. Power Sec. Corp., 142 F.R.D. 321, 323 (D. Colo. 1992); SEC v. Grossman, 121 F.R.D. 207, 209 (S.D.N.Y. 1987). In fact, the "[p]rotection of … investors from fraudulent marketing practices may require prompt civil enforcement which can not await the outcome of a criminal investigation." SEC v. First Fin. Group of Tex., Inc., 659 F.2d 660, 667 (5th Cir. 1981). The Fifth Circuit has held:

> There is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies against the same defendant involving the same transactions. Parallel civil and criminal proceedings instituted by different federal agencies are not uncommon occurrences because of the overlapping nature of

> federal civil and penal laws. The simultaneous prosecution of civil and criminal actions is generally unobjectionable because the federal government is entitled to vindicate the different interests promoted by different regulatory provisions even though it attempts to vindicate several interests simultaneously in different forums. The Supreme Court recognized that the federal government may pursue civil and criminal actions either "simultaneously or successively" in 1912 in Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, 52 … and reaffirmed this principle in 1970 in United States v. Kordel, 397 U.S. 1, 11. In both cases, the Supreme Court observed that prompt investigation and enforcement both civilly and criminally were sometimes necessary in order to protect the public interest and that deferring or foregoing either civil or criminal prosecutions could jeopardize that interest. […] This principle is fully applicable when the SEC and Justice Department each seek to enforce the federal securities laws through separate civil and criminal actions.

Id. at 666-7.

A party who is simultaneously subject to both civil and criminal proceedings may move to stay proceedings and carries the burden of demonstrating that there is a "pressing need for delay and that the other party will not suffer harm from entry of the stay order." FDIC v. First Nat'l Bank & Trust Co. of Okla. City, 496 F. Supp. 291, 293 (W.D. Okla. 1978); see also Dawn v. Mecom, 520 F. Supp. 1194, 1197 (D. Colo. 1981); Adolph Coors Co. v. Davenport Mach. & Foundry Co., 89 F.R.D. 148, 153 (D. Colo. 1981). A court may stay a civil proceeding but should only do so "upon a clear showing by the moving party of hardship or inequity so great as to overbalance all possible inconveniences of the delay to his opponent." First Nat'l Bank & Trust Co., 496 F. Supp. at 293. (emphasis added). "The decision whether or not to stay civil litigation in deference to parallel criminal proceedings is discretionary . . . . A movant must carry a heavy burden to succeed in such an endeavor." Microfinancial, Inc. v. Premier Holidays Int'l, Inc., 385 F.3d 72, 77 (1st Cir. 2004) (citations omitted). "[G]ranting a stay is the exception, not the rule." Ticor Title Ins. Co. v. Brezinski, No. 2:08-cv-333, 2009 WL 305810, at *1 (N.D. Ind. Feb. 9, 2009).

Here, Palmer has the heavy burden to establish that a stay is appropriate; however, he has failed to demonstrate hardship, inequity, or substantial prejudice to his rights, or that the Commission will not suffer any harm. As a result, this Court should deny Palmer's Stay Motion.

II. PALMER FAILS TO MEET HIS BURDEN TO PROVE THAT A STAY IS APPROPRIATE

Absent, "'special circumstances' in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party," parallel investigations are unobjectionable.[1] Dresser, 628 F.2d at 1377; United States v. Kordel, 397 U.S. 1, 11-12 (1970) (indicating special circumstances in which a stay of proceedings might be necessary). "Special circumstances" might include malicious governmental tactics or the possibility that the civil proceeding might undermine the party's Fifth Amendment privilege against self-incrimination. Dresser, 628 F.2d at 1375-76. Courts consider several factors when determining whether a stay is appropriate: (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 defendant has been indicted; (3) the private 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 defendant; (5) the interests of the court; and, (6) the public's interest. United States v. Arnold, No. Civ-07-753-C, 2008 U.S. Dist. LEXIS 37862, at *2-3 (W.D. Okla. May 8, 2008).

A. The Extent of Any Overlap is Purely Speculative

The first factor to consider is the extent to which the issues in the civil case overlap with the issues in the criminal case, "because self-incrimination is more likely if there is significant overlap." Librado v. M.S. Carriers, Inc., No. 3:02-CV-2095-D, 2002 U.S. Dist. LEXIS 21592, at *5-6 (N.D. Tex. Nov. 6, 2002) "The most important factor at the threshold is the degree to which

[1] This has been construed as criteria for stays on parallel proceedings. 6 Alan R. Bromberg & Lewis D. Lowenfels, Bromberg & Lowenfels on Securities Fraud § 12:99 (2d ed. 2013)

the civil issues overlap with the criminal issues." Id. (citations omitted). "If there is no overlap, there would be no danger of self-incrimination and accordingly no need for a stay." Id. In the instant case, Palmer has not been indicted and fails to provide any facts which suggest that an indictment is imminent. Since no indictment has been returned, there is no indication that, even should Palmer be indicted, his criminal exposure would be related to the securities violations set forth in the Commission's complaint. Therefore, any discussion regarding an overlap between the civil and criminal cases is wholly speculative. This factor should lead the Court to conclude that a stay is not appropriate.

B. Pre-indictment Stays are Strongly Disfavored

The second factor the Court should consider is the status of the case, which includes whether the defendant has been the subject of a criminal indictment. "[T]he strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter." Dresser, 628 F.2d at 1375-76 (emphasis added). Courts have generally denied a stay of the civil proceedings where no indictment has been issued. See, e.g., Keating, 45 F.3d 322; Molinaro, 889 F.2d 899 (finding no abuse of discretion in denying a stay where no related indictment was pending); CFTC v. A.S. Templeton Group, Inc., 297 F. Supp. 2d 531, 534 (E.D.N.Y. 2003) ("Pre-indictment requests for a stay of civil proceedings are generally denied.") (citing United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 811 F. Supp. 802, 805 (E.D.N.Y. 1992)); SEC v. Rivelli, No. 05-cv-1039-RPM, 2005 U.S. Dist. LEXIS 45208, at *2-4 (D. Colo. Oct. 26, 2005) (holding that an absence of an indictment weighed against delaying proceedings); Citibank, N.A. v. Hakim, 92 Civ. 6233, 1993 U.S. Dist. LEXIS 16299, at *6 (S.D.N.Y. Nov. 18, 1993) (noting that district courts generally granted a stay only

after defendant had been indicted). Absent an indictment, "[t]he mere possibility of a criminal prosecution is usually insufficient to warrant a stay." SEC v. Zimmerman, 854 F. Supp. 896, 899 (N.D. Ga. 1993).

There are two reasons to stay a civil case when a defendant has been indicted for the same conduct: "the likelihood that a defendant may make incriminating statements is greatest after an indictment has issued," and, "the prejudice to the plaintiffs in the civil case is reduced since the criminal case will likely be quickly resolved due to Speedy Trial Act considerations." Librado, 2002 U.S. Dist. LEXIS 21592, at *6-7 (quoting Trustees of the Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc., 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995)). In addition to there being no indictment against Palmer, any concern Palmer might have regarding incriminating statements is moot because he cannot assert his privilege against self-incrimination in the instant case.

A defendant waives his privilege against self-incrimination when he voluntarily testifies without invoking the privilege. Garner v. United States, 424 U.S. 648, 653 (1976) (citing Kordel, 397 U.S. 1, 7-10 (1970)). Similarly, a defendant also waives the ability to invoke his Fifth Amendment protections when he submits an affidavit in response to a motion for summary judgment. In re Edmond, 934 F.2d 1304, 1308 (4th Cir. 1991). Here, Palmer provided voluntary, sworn testimony during the staff's investigation of his entity, National Note.[2] Palmer also provided an affidavit in response to the Commission's summary judgment motion against him.[3] Simply put, Palmer has waived his privilege against self-incrimination. Therefore, there

[2] Testimony of Wayne LaMar Palmer dated May 30, 2012. Palmer's testimony is attached in its entirety at Exhibit 2-A to the Motion for Summary Judgment against Palmer.
[3] Docket # 477, Exhibits to Response to Motion for Summary Judgment against Palmer, at Exhibit 1 (Declaration of Wayne LaMar Palmer).

being no appropriate reason to stay the proceedings, the Court should deny Palmer's Stay Motion.

Palmer relies on cases that do not support his Stay Motion. First, in Brumfield v. Shelton, the court granted a stay of civil proceedings until the criminal proceedings against the defendant were complete in order to avoid a risk of self-incrimination. 727 F. Supp. 282, 284 (E.D. La. 1989). Unlike Palmer, the defendant in that case had been indicted. Furthermore, Shelton had yet to be deposed and had evidenced his intent to invoke his privilege against self-incrimination. Here, Palmer has already testified under oath, filed a declaration opposing summary judgment and consequently waived his privilege. Palmer also relies on Cruz v. County of DuPage, and suggests that this Court has discretion to grant a stay and should do so, "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." No. 96 C 7170, 1997 WL 370194, at *1 (N.D. Ill. Jun. 27, 1997). However, this case lends no support to Palmer because five of the defendants had already been indicted in criminal proceedings when the motion to stay discovery was filed. Id. at *3. Palmer has not been criminally indicted and has waived his Fifth Amendment rights.

Even in the absence of a waiver, however, "it is not unconstitutional to force a litigant to choose between invoking the fifth amendment in a civil case . . . or answering the questions in the civil context." Id. (citing Brock v. Tolkow, 109 F.R.D. 116, 119 (E.D.N.Y. 1985) (citations omitted)). See Creative Consumer Concepts, Inc. v. Kreisler, 563 F.3d 1070, 1080 (10th Cir. 2009) (citing Keating, 45 F.3d at 326); Ticor Title, 2009 WL 305810 at *1.

Denial of a stay in these circumstances is supported by ample authority. As the Creative Consumer Concepts Court explained,

> Morever, Ms. Kreisler provides no concrete examples of how the district court's denial of her motion to stay unfairly prejudiced her. . . . In reality, by the time Ms. Kreisler moved for a stay, the court had little hope of protecting Ms. Kreisler's right against self-incrimination. Ms. Kreisler filed her motion for a stay on September 8, 2005, but Ms. Kreisler had been deposed months earlier, on June 3, 2005. At this deposition, Ms. Kreisler testified about the validity of the severance agreement – the only issue at the bench trial – and about Ms. Flanigan's authority. Ms. Kreisler waived her Fifth Amendment privilege with respect to the questions she answered during her deposition . . . . A later stay would not have changed this.

563 F.3d at 1081. Similarly, as the court explained in Multiven, Inc. v. Cisco Systems, Inc.,

> Here, Adekeye has already voluntarily submitted declarations in support of Multiven's briefs regarding the parties' cross-motions for summary judgment and has been deposed extensively, including fourteen hours of deposition testimony that he voluntarily provided in Vancouver, Canada prior to his arrest. Without deciding whether Adekeye was sufficiently aware of the likelihood of criminal prosecution for his declarations and deposition testimony to effect a waiver of his Fifth Amendment rights,21 the Court finds that continuing the litigation will only minimally implicate Adekeye's Fifth Amendment rights, given the extensive testimony he has already provided in this case. See F.T.C. v. J.K. Publ'ns, Inc., 99 F.Supp.2d 1176, 1199 (C.D.Cal.2000) ("Where a defendant already has provided deposition testimony on substantive issues of the civil case, any burden on that defendant's Fifth Amendment privilege is 'negligible.' "). As to the remaining Keating balancing test factors, the Court finds that the burden on Adekeye *898 of proceeding with the counterclaims does not outweigh the burden on Cisco of proceeding with Multiven's antitrust claims while its counterclaims are stayed. Further, neither the convenience of the Court nor the interests of the public will be served by a stay.

725 F. Supp. 2d 887, 893 (N.D. Cal. 2010). Additional authority is found in Microfinancial, Inc. v. Premier Holidays Int'l, Inc., where the court held:

> Although they focus this argument on the burden imposed on DelPiano's Fifth Amendment rights, the fact remains that during civil discovery, DelPiano freely gave lengthy deposition testimony regarding the events underlying MFI's claims. He also composed and signed a detailed affidavit in opposition to MFI's motion for

> summary judgment. These choices have consequences. By failing to invoke his Fifth Amendment privilege, he likely waived the privilege with respect to the subject matter of his deposition testimony for the duration of the proceeding in which that testimony was given. United States v. Gary, 74 F.3d 304, 312 (1st Cir.1996). A party who chooses to testify in a civil case in spite of the risk that a prosecutor later might seek to use *79 his statements against him in a criminal prosecution involving the same subject matter is hard put to complain about the subsequent denial of a stay. See generally Milton Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 205–06 (1989) (explaining how a party's participation in civil proceedings may affect his position in parallel criminal proceedings). When all is said and done, a stay cannot preserve what a defendant already has surrendered. See Molinaro, 889 F.2d at 903 (noting that the burden on defendant's Fifth Amendment rights was negligible because he already had given deposition testimony in the civil proceeding).

385 F.3d at 78-79. See also Ticor Title, 2009 WL 305810 at *3 ("The [Fifth Amendment] privilege may be waived when a party voluntarily testifies to incriminating facts."); United States v. Sperl, No. 3:06-0175, 2008 WL 2699402, at *7 (M.D. Tenn. Jun. 30, 2008) ("[T]he Court is cognizant of the potential Fifth Amendment implications for Sperl. However, Sperl has fully participated in this litigation by filing an Answer, responding in detail to the Government's Motion for Summary Judgment, filing a 22-page response with attachments to the Government's motion for an injunction, filing assorted other documents, and testifying freely on her own behalf at the evidentiary hearing."); International Business Mach. Corp. v. Brown, 857 F. Supp. 1384, 1390 (C.D. Cal. 1994) ("Where a defendant already has given partial deposition testimony on substantive issues of the case, the Fifth Amendment privilege is 'negligible' and cannot provide the basis for a stay.").

It is a fundamental tenant of jurisprudence that the Fifth Amendment privilege may be waived if it is not asserted at the earliest possible time in a civil proceeding. Minnesota v. Murphy, 465 U.S. 420, 427-29 (1984). In order to obtain the protections against self-

incrimination, the Fifth Amendment privilege must be invoked before answering discovery requests; if a party or witness does not do so, the waiver extends to all related questions. Rogers v. United States, 340 U.S. 367, 373, 375, 378, (1951) ("disclosure of a fact waives the privilege as to details.") Similarly, Palmer has posited no example of how he will be adversely affected by the denial of a stay. Palmer has had the opportunity to defend this case and has availed himself of that opportunity. He seeks to defeat the Commission's summary judgment motion with a litany of purported disputed "facts." He attempts to bolster those facts with a self-serving conclusory declaration. He cannot now shield himself from the assertion of these facts by belatedly raising Fifth Amendment issues.

C. Interest of the Plaintiff and the Public

The power to stay a proceeding is within the discretion of the court and requires the weighing of competing interests to maintain a balance. Landis v. N. Am. Co., 299 U.S. 248, 255-56 (1936). The Court must weigh the Commission's interest "in proceeding expeditiously against the prejudice that will be caused by the delay that will result from the stay." Librado, 2002 U.S. Dist. LEXIS 21592, at *7. The interest in proceeding expeditiously is stronger where a government agency charged with protection of the public acts in the role of a civil litigant. A.S. Templeton Group, 297 F. Supp. 2d at 534; FDIC v. Renda, No. 85-2216-0, 1987 U.S. Dist. LEXIS 8305, at *15-16 (D. Kan. Aug. 6, 1987). "In the context of a civil enforcement suit, the plaintiff's interest and the public interest are intertwined." SEC v. Mersky, No. 93-5200, 1994 U.S. Dist. LEXIS 519, at *9 (E.D. Pa. Jan. 25, 1994). A stay of indefinite duration should not be granted. Landis, 299 U.S. at 257; United States v. All Funds Deposited in Account No. 200008524845, First Union Nat'l Bank, 162 F. Supp. 2d 1325, 1332 (D. Wyo. 2001) ("The Supreme Court has held that stays which are indefinite will not be upheld."); United States v.

United States Currency in the Amount of $294,600, No. CV-91-2567(CPS), 1993 WL 416698 at *4 (E.D.N.Y. 1993) (It is also well settled that a stay of indefinite duration cannot be granted"). See also United States v. Four Contiguous Parcels of Real Prop. Situated in Louisville, 864 F. Supp. 652, 655-56 (W.D. Ky. 1994) (ruling that a stay of civil proceedings until the completion of the criminal proceedings would be unduly burdensome to due process because of uncertain duration and could not be allowed). The Court should weigh the plaintiff's interest along with the public's interest in the just and constitutional resolution of disputes with minimal delay.

In this case, Palmer has not even been indicted. Palmer raises no facts to suggest an indictment is imminent. Even if Palmer were to be immediately charged, there is no means of assessing how long a criminal proceeding would be. The Court should consider the public interest in resolving this case expeditiously, particularly in light of the pending summary judgment.

Civil plaintiffs generally have an interest in proceeding expeditiously and obtaining discovery before the memories of witnesses and parties fade through the passage of time. Id.; Hakim, 1993 U.S. Dist. LEXIS 16299, at *6. The Commission and the Department of Justice must be able to investigate possible violations simultaneously for effective enforcement of the securities laws. Dresser, 628 F.2d at 1377. If the Commission suspects violations of the securities laws, they must be able to act quickly. Id. Therefore, the Commission has a strong interest in proceeding expeditiously in this matter.

The public at large also has a strong interest in a speedy resolution of enforcement actions brought by federal regulatory agencies. A.S. Templeton Group, 297 F. Supp. 2d at 535 (citing United States v. Certain Real Prop. & Premises Known as 1334 Ridge Rd., 751 F. Supp. 1060, 1063 (E.D.N.Y. 1989) (stay not appropriate in "a civil enforcement action brought by a

federal regulatory agency entrusted with the protection of consumers, investors, or other broad segments of the population, whose welfare could be jeopardized by deferral of the action"); see also SEC v. Gilbert, 79 F.R.D. 683, 686 (S.D.N.Y. 1978) ("curtailment of civil actions would be indefensible in a context where, as here, a federal agency has been specifically charged to protect the public through civil enforcement actions").

In Kordel, the Supreme Court stated "[i]t would stultify enforcement of federal law to require a governmental agency [] invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." 397 U.S. 1, 11 (1970). As the Zimmerman Court noted:

> Effective enforcement of the securities laws may require prompt civil and criminal enforcement, and neither proceeding can always await the completion of the parallel proceeding without jeopardizing the public interest in protection of the efficient working of securities markets and of investors from the dissemination of false and misleading information.

854 F. Supp. at 900 (citing SEC v. Horowitz & Ullman, P.C., No. C80-590A, 1982 WL 1576, at *3 (N.D. Ga. 1982)). Likewise, the Dresser Court stated, "The SEC cannot always wait for [the Department of] Justice to complete the criminal proceedings if it is to obtain the necessary prompt civil remedy; neither can [the Department of] Justice always await the conclusion of the civil proceedings without endangering its criminal case." 628 F.2d at 1377. These cases highlight the public's interest in prompt enforcement of the federal securities laws and extreme prejudice to the Commission. To ensure that the defrauded investors are made whole to the greatest extent possible without unnecessary delay, this Court should deny Palmer's Stay Motion.

D. Burden on the Defendant

Palmer seeks to stay the Commission's civil enforcement proceedings because he claims to be confronted with the difficult choice of either testifying or, in the alternative, invoking his Fifth Amendment rights. He conveniently ignores the fact that he has already testified. That argument is without merit, because Palmer already waived these rights when he testified under oath and submitted an affidavit in response to the summary judgment motion pending against him. The burden on Palmer is minimal and does not weigh in favor of staying proceedings. Further, Palmer forwards no evidence that his testimony will be necessary to resolve the Commission's enforcement action. Palmer has already testified twice, so any additional discovery may not impinge on his constitutional rights.

Palmer further claims that he is impecunious and cannot afford to retain counsel. That rationale is baseless given that Palmer has retained two experienced lawyers from one of the largest law firms in Utah. Palmer has retained no fewer than three lawyers in this case; and none of his prior lawyers has withdrawn because they were not paid. There is no evidence of Palmer's putative impecuniosity.

E. Interests of the Court

Finally, the Court should consider its own interests, including but not limited to management of its docket, especially in light of the fact that no indictments have been issued. Librado, 2002 U.S. Dist. LEXIS 21592, at *4. As one court has noted,

> [I]t is unrealistic to postpone indefinitely the pending action until criminal charges are brought or the statute of limitations has run for all crimes conceivably committed by [the defendant]. Such a postponement would require this court either to 'rely upon fortuitous events to manage its docket,' Digital Equip. Corp. v. Currie Enters., 142 F.R.D. 8, 13 (D. Mass. 1991), or to guess what criminal acts [the defendant] might be charged with, and,

> consequently which limitations periods apply to those criminal acts.

Hakim, 1993 U.S. Dist. LEXIS 16299, at *6. Furthermore, courts "must be mindful that 'a policy of issuing stays solely because a litigant is defending simultaneous lawsuits would threaten to become a constant source of delay and an interference with the judicial administration.'" A.S. Templeton Group, 297 F. Supp. 2d at 535-36 (quoting United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolf, Inc., 811 F. Supp. 802, 808 (E.D.N.Y. 1992)). The Molinaro Court found that where the civil action had been pending for a year and the court had an interest in clearing its docket, the court's interest weighed against granting a stay. 889 F.2d at 903.

This Court has already granted Palmer numerous extensions throughout the civil proceedings. See generally Procedural History, above. Further, Palmer recently retained his third new counsel since the Commission filed its Complaint on June 25, 2012. Despite there being no criminal indictment against him and his having provided both sworn testimony and a declaration in his effort to defeat the pending summary judgment motion, Palmer moves to stay these proceedings. The Commission's summary judgment motion has been briefed extensively, and Palmer does not provide the Court that additional testimony, whether via deposition or affidavit, is required. Given these facts, a stay would be indefinite and would subject this Court to reliance upon "fortuitous events to manage its docket." Librado, 2002 U.S. Dist. LEXIS 21592, at *4. Accordingly, this Court should deny Palmer's Stay Motion.

D. CONCLUSION

Palmer has not met his burden to establish that a stay is appropriate. Palmer has waived his privilege against self-incrimination by providing sworn testimony and a declaration in the Commission's case against him and his entity, National Note, retained multiple new attorneys,

and has not been indicted criminally. Furthermore, he has failed to show that the Commission's interest, the public interest, and this Court's interest would not suffer any harm if the Court stays these proceedings. With six extensions, two briefs, and extensive evidence provided by Palmer, he will not be prejudiced by a continuation of the Commission's civil enforcement proceedings against him. The Commission respectfully requests that this Court deny Palmer's Renewed Motion to Stay Proceedings.

Dated this 28th day of February, 2014.

/s/ Thomas M. Melton_____
Thomas M. Melton
Daniel J. Wadley
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Securities and Exchange Commission