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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiffs,

vs.

NATIONAL NOTE OF UTAH, LC and
WAYNE LAMAR PALMER,

Defendants.

**REPLY IN SUPPORT OF RENEWED
MOTION TO STAY PROCEEDINGS**

Case No.: 2:12-CV-591-BSJ

Mr. Palmer, by and through counsel, hereby submits this reply in support of his renewed motion to stay these on-going civil proceedings until the inevitable criminal proceeding against Mr. Palmer—based on the same allegations at issue in this matter—can be resolved. This Court should temporarily stay these proceedings until resolution of the impending criminal proceedings because the interests of justice require such action.

This Court has wide discretion to grant a stay of proceedings. *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) (the power to stay is “incidental to the power inherent in every court to control the disposition of the causes on its docket. . . . How this can best be done calls for the

exercise of judgment which must weigh competing interests and maintain an even balance”). A stay of civil proceedings pending the completion of parallel criminal prosecutions is appropriate when the interests of justice require such action. *See, e.g., United States v. Kordel*, 397 U.S. 1, 8–9 (1970) (noting that where no one could answer interrogatories addressed to the corporation without risking self-incrimination, the appropriate remedy would be to postpone civil discovery until termination of the criminal action). In determining whether the interests of justice favor a stay, courts consider the following factors:

- 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 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 defendants;
- 5) the interests of the courts; and
- 6) the public interest.

M.D. Diet Weight Loss, 2006 WL 2471524, at *1. No one factor is dispositive. Instead, courts examine the totality of the circumstances to determine if a stay is appropriate. *Id.* at *2 (holding that given the totality of the circumstances, the interests of justice required a stay until the resolution of the criminal case); *Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd.*, 7 F. Supp. 2d 523, 527 (D.N.J. 1998) (holding that in evaluating whether to grant a stay, each case must be evaluated individually). In this case, the interests of justice warrant staying the civil proceedings until the pending criminal case has been completed based on the totality of the circumstances.

I. THE SUBSTANTIAL OVERLAP BETWEEN THE CIVIL AND CRIMINAL PROCEEDINGS WARRANTS A PRE-INDICTMENT STAY.

One of the most important factors in analyzing whether to grant a stay is the extent to which the issues overlap. *Volmar Distributors, Inc. v. New York Post Co., Inc.*, 152 F.R.D. 36, 39 (S.D.N.Y. 1993) (“The most important factor at the threshold is the degree to which the civil issues overlap with the criminal issues”); *Librado v. M.S. Carriers, Inc.*, CIV.A. 3:02-CV-

2095D, 2002 WL 31495988, at *1 (N.D. Tex. Nov. 5, 2002) (recognizing that self-incrimination is more likely if there is significant overlap between cases).

Where there is substantial overlap between civil and criminal proceedings, a stay is appropriate even before an indictment has been issued. *See, e.g., Brumfield v. Shelton*, 727 F. Supp. 282 (E.D. La. 1989) (holding that even pre-indictment, the defendant was subject to a real risk of self-incrimination because the same issues were involved in both matters); *Fed. Ins. Co. v. Tabb*, 90 C 3211, 1991 WL 113204, at *1 (N.D. Ill. June 7, 1991) (granting a pre-indictment stay where “the broad scope of civil discovery may present to the prosecutors of the impending criminal action an irresistible temptation to use that discovery to their advantage in the criminal case”). And the threat of criminal prosecution is sufficient to warrant a stay and is not “speculative” simply because no indictment has been issued. *See, e.g., Tabb*, 1991 WL 113204 at * 1 (granting a stay of proceedings and rejecting the argument that the fear of indictment was mere speculation where the defendant had been served with a grand jury subpoena, was informed that he was a “target” of a grand jury investigation, an indictment was expected by the U.S. Attorney’s Office, and there was substantial overlap of issues between cases); *Walsh Sec., Inc.*, 7 F. Supp. 2d at 523 (holding that although no indictment had been handed down, the “action presented a strong case for a stay” because the government had executed search warrants, issued subpoenas to several defendants, and informed defendants that they were targets of a criminal investigation).

Here, a pre-indictment stay is appropriate because of the substantial overlap between the S.E.C.’s civil enforcement action and the inevitable criminal prosecution. In a 2013 meeting arranged by the United States Attorney’s Office, criminal investigators from the IRS and FBI

showed Mr. Palmer's appointed criminal defense attorney discovery, almost all of which came from the receiver appointed in this civil S.E.C. enforcement action. At that time, the government represented that the criminal case and investigation directly mirrored this case in its scope and that the evidence and main allegations would be extremely similar, if not identical, to those in the civil case. Moreover, if criminal prosecution were not imminent, the United States Attorney's Office would not have arranged with the federal defenders to appoint Mr. Palmer a criminal defense attorney or have calculated his anticipated criminal sentence under the Federal Sentencing Guidelines. The government's anticipated criminal sentence was estimated to be decades. Thus, the S.E.C.'s contentions that there is no overlap between this case and the imminent criminal case and that Mr. Palmer's fear of indictment is "wholly speculative" are absurd.

II. BALANCING THE INTERESTS SHOWS THAT THIS COURT SHOULD GRANT A STAY.

Determining whether the interests of justice require a stay generally requires "balancing the interests of the plaintiff in moving forward with the litigation against the interests of a defendant asserting Fifth Amendment rights who faces the choice of being prejudiced in the civil litigation if those rights are asserted or prejudiced in the criminal litigation if those rights are waived." *AIG Life Ins. Co. v. Phillips*, No. CIV.A. 07-CV-00500PS, 2007 WL 2116383, at *2 (D. Colo. July 20, 2007). Courts will examine the interests of the defendant, the plaintiffs, the public, and the Court. *M.D. Diet Weight Loss*, 2006 WL 2471524, at *1.

In this case, Mr. Palmer's interests in a stay of proceedings are great because he is faced with having to choose between defending himself in this S.E.C. enforcement action and presenting possibly incriminating information that could be used against him in the pending

criminal case—a case which carries a potential sentence of decades in prison. Importantly, the nature of the proceeding—an S.E.C. injunction—makes Mr. Palmer’s dilemma all the more difficult. S.E.C. enforcement actions are equitable in nature, and a defendant is incentivized to take responsibility for any perceived wrongful conduct. In fact, in order to obtain a permanent injunction, the SEC must prove, among other things, a reasonable likelihood that the defendant, if not enjoined, will violate securities laws in the future. *S.E.C. v. Pros Int’l, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993). Determining whether a defendant will violate securities laws in the future requires the court to examine whether the defendant acknowledges and takes responsibility for his wrongful conduct. *Id.* Failure to take such responsibility significantly increases the potential that an injunction will be entered against a defendant. *Compare id.* (declining to grant an injunction where the defendant recognized his wrongful conduct and gave sincere assurances against future violations); *with S.E.C. v. Miller*, 744 F. Supp. 2d 1325, 1339 (N.D. Ga. 2010) (granting an S.E.C. injunction where the defendant failed to acknowledge the wrongfulness of his conduct). Thus, proceeding forward with this case while the criminal case is pending puts Mr. Palmer at a serious disadvantage. He cannot acknowledge or take responsibility for any alleged wrongful conduct without the fear that these statements will be used against him.

In addition, without a stay of proceedings, Mr. Palmer’s ability to settle this case is seriously diminished. In *S.E.C. v. Citigroup Global Markets, Inc.*, a district court from the Southern District of New York refused to accept a settlement where it was unaccompanied by an admission or denial of the underlying allegations in the complaint. 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011). Consistent with this precedent, this Court declined to allow Mr. Palmer to enter into a consent judgment because it did not contain sufficient admissions. This shows that

in the absence of a stay, Mr. Palmer will be unable to settle this enforcement action because any of these necessary admissions could be used against him in the pending criminal proceeding. Thus, Mr. Palmer's interests in staying these proceedings are significant.

The S.E.C. attempts to minimize the importance of Mr. Palmer's interest in the stay by claiming that he waived his rights when he testified under oath and submitted an affidavit in response to a summary judgment motion. However, it has not established that Mr. Palmer's prior statements are sufficient to constitute a waiver that would forever prevent him from asserting a Fifth Amendment privilege. An intention to waive the privilege against self-incrimination is not "lightly to be inferred." *Rogers v. United States*, 340 U.S. 367, 377 (1951) (J. Black, concurring). The Court must indulge every reasonable presumption against waiver. *Klein v. Harris*, 667 F.2d 274 (2nd Cir. 1981). Where a party claims waiver, the court is "required to determine, as it must whenever the privilege is claimed, whether [divulging additional information] present[s] a reasonable danger of further crimination in light of all the circumstances, including any previous disclosures." *Rogers*, 340 U.S. at 374 (holding that even where a defendant 'waived' her privilege of silence when she freely answered some incriminating questions, the court was required to determine whether subsequent questions presented a reasonable danger of further incrimination).

A waiver will therefore be found only where the witness' prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth and the witness had reason to know that his prior statements would be interpreted as a waiver of the Fifth Amendment's privilege against self-incrimination. *See Klein*, 667 F.2d at 287. A witness has "reason to know" he was waiving the privilege only if his prior statements

were “testimonial”, meaning voluntarily made under oath in the context of the same judicial proceeding, and “incriminating”, meaning directly inculcating the witness on the charges at issue, rather than dealing with collateral matters. *Id.* at 288.

Here, the S.E.C. has not established that Mr. Palmer waived his Fifth Amendment Rights. Significantly, when Mr. Palmer was interviewed by the S.E.C. in June 2012, the S.E.C. did not discuss the consequences of his testimony. It provided only a “Form 1662,” which described the scope of the privilege but contained no warning that submitting to examination would act as a waiver of those important rights. Nor did the S.E.C. make any effort to explain the Form 1662 to Mr. Palmer. Moreover, the S.E.C. has not shown that his prior testimony creates a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth or that Mr. Palmer had reason to know that his prior statements would be interpreted as a waiver of his privilege against self-incrimination. And it makes no effort to show that any prior testimony was actually incriminating. In fact, it identifies no specific statements it claims are incriminating or establish waiver. Moreover, any waiver would extend only to incriminating statements Mr. Palmer has already made. Rather than find—as the S.E.C. advocates—that Mr. Palmer forever waived any right to assert his Fifth Amendment privilege, the Court must consider whether divulging additional information presents a reasonable danger of *further* incrimination in light of all the circumstances. Thus, the risk to Mr. Palmer of further incrimination in the absence of a stay remains a significant threat.

Conversely, while Mr. Palmer’s interest in avoiding self-incrimination in this proceeding is high, the interests of the S.E.C. and the public are not served by denying Mr. Palmer’s motion for a stay. There is no risk to the public if this proceeding is stayed because Mr. Palmer’s assets

are frozen and therefore no recoverable assets can be accessed, encumbered or monetized. Similarly, there is no risk that additional investors may be recruited because there is a preliminary injunction in place. The S.E.C. has also failed to show any harm to its case if a stay is granted. It has identified no evidence that will be unavailable at the termination of the stay. Moreover, contrary to the S.E.C.'s assertion, Mr. Palmer does not seek a stay of infinite duration. He seeks a stay only for as long as there is a risk that his statements can be used against him in the imminent criminal proceeding. Thus, any imposition on the S.E.C.'s prosecution or the Court's docket is minimal when compared to Mr. Palmer's need to protect himself from making incriminating statements. Thus, balancing the interests favors granting a stay in this case.

CONCLUSION

In sum, this Court should exercise its discretion and temporarily stay these proceedings until resolution of the impending criminal proceedings. A stay is warranted because of the substantial overlap between the instant case and the impending criminal prosecution and because Mr. Palmer's interests in protecting himself from being forced to choose between defending himself in this action and making further incriminating statements outweigh any competing interests.

DATED this 12th day of March, 2014.

DURHAM JONES & PINEGAR

/s/ Paul T. Moxley

Paul T. Moxley

Z. Ryan Pahnke

Attorneys for Wayne LaMar Palmer

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification to counsel of record in this matter. The foregoing was also served via email on the following:

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/s/ Paul T. Moxley _____