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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

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COMMISSIONERS:
GARY PIERCE-CHAIRMAN
BOB STUMP
SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

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DOCKETED

AUG 20 2012

AZ CORP COMMISSION
DOCKET CONTROL

DOCKETED BY
TJM

In the matter of:

Docket No. S-20823A-11-0407

THOMAS LAURENCE HAMPTON,
CRD #2470192, and STEPHANIE YAGER,
husband and wife,

**RESPONDENTS TIMOTHY D. MORAN
AND PATRICIA MORAN'S MOTION
TO STAY PROCEEDINGS**

TIMOTHY D. MORAN, CRD # 2326078, and
PATRICIA MORAN, husband and wife,

PATRICK MORAN, CRD # 1496354, and
KELLY MORAN, husband and wife,

HAMPTON CAPITAL MARKETS, LLC, an
Arizona limited liability company,

Respondents.

Respondents Timothy D. Moran and Patricia Moran respectfully request that the Commission stay the proceedings against them in this docket, due to the realistic threat of criminal prosecution. A stay is necessary to protect to protect Mr. Timothy D. Moran's constitutional right to remain silent, as well as his due process right to present an effective defense in this case. These are some of the most fundamental rights recognized in United States and Arizona law. The right to remain silent is is guaranteed by the 5th Amendment to the United States Constitution, and also by Article II § 10 of the Arizona Constitution. The threat of criminal proceedings is real and serious, as shown in the attached affidavits of Edward F. Novak (Exhibit A) and Paul J. Roshka, Jr. (Exhibit B). Where there is a reasonable fear of criminal prosecution, civil and administrative proceedings should be stayed to protect the right to remain silent.

Memorandum of Points and Authorities

I. A stay is necessary to protect constitutional rights.

When a defendant in a civil or administrative case faces a current or threatened parallel

1 criminal prosecution, the defendant's constitutional rights are threatened. Under the United States
2 and Arizona Constitutions, the defendant has the right to remain silent, and also the right to due
3 process, including the right to present an effective defense to the civil or administrative proceeding.
4 Testifying (including trial testimony and testimonial responses to discovery) is necessary for an
5 effective defense of the civil or administrative proceeding, but will waive the right to remain silent.
6 Courts have long recognized that defendants in this dilemma should not be forced to choose
7 between their constitutional rights. Therefore, Federal law and Arizona law both recognize that
8 stays of civil and administrative proceedings are appropriate to protect the defendant's
9 constitutional rights.

10 As the United States Supreme Court explained, it is "in accord with common practice, to
11 stay the civil action until the criminal case or the likelihood of a criminal case is ended." *Wallace*
12 *v. Kato*, 549 U.S. 384, 393-94 (2007). Likewise, the Arizona Supreme Court has emphasized that
13 when faced with potential criminal liability, a person should not be forced to choose between their
14 constitutional rights to remain silent and to due process in a civil matter. *Wohlstrom v. Buchannan*,
15 180 Ariz. 389, 392, 884 P.2d 687, 690 (1994). The court agreed that it is "intolerable that one
16 constitutional right should have to be surrendered in order to assert another." *Id.*, quoting *Simmons*
17 *v. United States*, 390 U.S. 377, 394 (1968). To the same effect is the Arizona Court of Appeals'
18 statement that where "parallel proceedings would substantially prejudice the defendant's rights...
19 the court should stay the civil proceedings." *State v. Ott*, 167 Ariz. 420, 428-29, 808 P.2d 305, 314
20 (Ct. App. 1990)

21 Approving stays in such situations is common practice. For example, the Supreme Court of
22 Minnesota explained that "it has long been a practice to 'freeze' civil proceedings when a criminal
23 prosecution involving the same facts is warming up or underway." *State v. Deal*, 740 N.W.2d 755,
24 764 (Minn. 2007)(quoting *Peden v. United States*, 512 F.2d 1099, 1103 (Ct.Cl. 1975)). Likewise,
25 California follows the federal practice that, "when both civil and criminal proceedings arise out of
26 the same or related transactions, an objecting party is generally entitled to a stay of discovery in the
27 civil action." *Pacers, Incorporated v. Superior Court*, 208 Cal. Rptr. 743, 745-46 (Cal. App.

1 1984).

2 **II. Mr. Timothy D. Moran faces a realistic fear of criminal prosecution, justifying a stay.**

3 An affidavit from criminal defense counsel that the government has confirmed that a person
4 is the target of a criminal investigation is a sufficient factual basis for granting a motion for stay of
5 a related civil proceeding. *See Ex parte Antonucci*, 917 So.2d 825, 830 (Ala. 2005). In *Antonucci*,
6 the court noted that a person need only show a “reasonable apprehension of criminal prosecution”
7 to claim 5th Amendment privilege. *Id.* (citation and quotation omitted). The court also stated that
8 defense counsel’s “affidavit clearly demonstrated the existence of an ongoing criminal
9 investigation.” *Id.*

10 Arizona law follows the same path. A person need only show a “realistic threat of criminal
11 prosecution” in order to invoke the 5th Amendment. *Wohlstrom v. Buchanan*, 180 Ariz. 389, 391
12 n. 2, 884 P.2d 687, 689 (Ariz. 1994).

13 Attached are the affidavits of Edward F. Novak (Exhibit A) and Paul J. Roshka, Jr. (Exhibit
14 B). These affidavits demonstrate that the existence of a federal criminal investigation involving
15 Mr. Timothy D. Moran, including specific communications from the United States Department of
16 Justice. Accordingly, Mr. Moran faces a realistic threat of criminal prosecution.

17 **III. Conclusion.**

18 Mr. Timothy D. Moran faces a federal criminal investigation and this state administrative
19 proceeding. He is faced with a choice between defending himself in this case – thus waiving his
20 right to remain silent – or exercising the right to remain silent, and thus losing his right to defend
21 himself in this case. Federal law and Arizona law both recognize that he should not have to make
22 that choice; both his constitutional rights are important and should be protected. Accordingly, the
23 Commission should grant a stay.

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ROSHKA DeWULF & PATTEN, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN STREET - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1 RESPECTFULLY SUBMITTED this 20th day of August, 2012.

2 ROSHKA DeWULF & PATTEN, PLC

3
4 By 

5 Paul J. Roshka, Jr.
6 Timothy J. Sabo
7 One Arizona Center
8 400 East Van Buren Street, Suite 800
9 Phoenix, Arizona 85004
602-256-6100 (telephone)
602-256-6800 (facsimile)

10 *Attorneys for Respondents*
11 *Timothy D. and Patricia Moran*

12 ORIGINAL and thirteen copies of the foregoing
13 filed this 20th day of August, 2012 with:

14 Docket Control
15 Arizona Corporation Commission
16 1200 West Washington Street
17 Phoenix, Arizona 85007

18 Copy of the foregoing hand-delivered
19 this 20th day of August, 2012 to:

20 Marc E. Stern, Administrative Law Judge
21 Hearing Division
22 Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

23 Phong (Paul) Huynh, Esq.
24 Securities Division
25 Arizona Corporation Commission
1300 West Washington Street, 3rd Floor
26 Phoenix, Arizona 85007

ROSHKA DEWULF & PATTEN, PLC
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Copy of the foregoing mailed
this 20th day of August, 2012 to:

Thomas Hampton and Stephanie Yager
9026 East Calle De Las Brisas
Scottsdale, Arizona 85255
Respondents

Michael D. Curran, Esq.
Maynard Cronin Erickson Curran & Reiter, P.L.C.
3200 North Central Avenue, Suite 1800
Phoenix, Arizona 85012
Attorneys for Respondents
Patrick Moran and Kelly Moran

By Rebecca Amund

Exhibit

"A"

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS:

GARY PIERCE-CHAIRMAN
BOB STUMP
SANDRA D. KENNEDY
PAUL NEWMAN
BRENDA BURNS

In the matter of:

Docket No. S-20823A-11-0407

THOMAS LAURENCE HAMPTON,
CRD #2470192, and STEPHANIE YAGER,
husband and wife,

AFFIDAVIT OF EDWARD F. NOVAK

TIMOTHY D. MORAN, CRD # 2326078, and
PATRICIA MORAN, husband and wife,

PATRICK MORAN, CRD # 1496354, and
KELLY MORAN, husband and wife,

HAMPTON CAPITAL MARKETS, LLC, an
Arizona limited liability company,

Respondents.

Edward F. Novak, having been duly sworn, deposes and says:

1. I have been retained as the criminal defense counsel for Mr. Timothy D. Moran.

2. I am the managing partner of the Phoenix Office of Polsinelli Shughart. I have over thirty years of experience as an attorney, including extensive criminal defense experience.

3. I have been recognized by the following publications:

- Selected for inclusion in The Best Lawyers in America® 1995-2012, Criminal Defense: White Collar

- Ranked in Chambers USA: America's Leading Lawyers For Business, Litigation: White-Collar Crime & Government Investigations, 2010-2012

- Selected for inclusion in Southwest Super Lawyers 2009-2012, Criminal Defense: White Collar

- Martindale Hubble, AV Preeminent rating

1 ● Selected as one of Arizona's Finest Lawyers, 2011
2 ● AZRE's Top People to Know in Commercial Real Estate 2011, for Commercial
3 Litigation
4 4. I am a member (2009 to present) of the Character and Fitness Committee of the
5 Arizona Supreme Court. I have been appointed as a Judge Pro Tem of the Maricopa County
6 Superior Court for 1990 – 1996 and 1999 to present.

7 5. I hold or have held the following positions with State Bar of Arizona:

- 8 ● Board of Governors, Member, 1999-present
- 9 ● Board of Governors, Second Vice President, 2005-2006
- 10 ● Board of Governors, First Vice President, 2006-2007
- 11 ● Board of Governors, President Elect, 2007-2008
- 12 ● Board of Governors, President, 2008-2009
- 13 ● Criminal Rules Committee, Chairman, 1993-1997
- 14 ● Criminal Justice Section, Chairman, 1986-1987

15 6. I am aware of a federal criminal investigation involving Mr. Thomas L. Hampton
16 and Mr. Timothy D. Moran.

17 7. On December 29, 2011, I spoke with Ms. Jillian B. Berman, Assistant United States
18 Attorney for the Southern District of New York, United States Department of Justice regarding this
19 federal criminal investigation. I followed up with an email to her on December 30, 2012.

20 8. Based upon my discussions with Ms. Berman and my experience in such matters,
21 the federal criminal investigation concerns facts and issues which are likely to be indistinguishable
22 from the current administrative investigation by the Securities Division of the Arizona Corporation
23 Commission.

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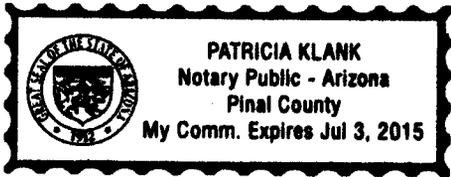
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9. Based on the foregoing, I believe that Mr. Timothy D. Moran faces a realistic threat of criminal prosecution.



Edward F. Novak

SUBSCRIBED AND SWORN BEFORE ME THIS 17th DAY OF AUGUST 2012



Patricia Klank
Notary Public

My commission expires:

ROSHKA DEWULF & PATTEN, PLC
ONE ARIZONA CENTER
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Exhibit

"B"

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS:
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In the matter of:

THOMAS LAURENCE HAMPTON,
CRD #2470192, and STEPHANIE YAGER,
husband and wife,

TIMOTHY D. MORAN, CRD # 2326078, and
PATRICIA MORAN, husband and wife,

PATRICK MORAN, CRD # 1496354, and
KELLY MORAN, husband and wife,

HAMPTON CAPITAL MARKETS, LLC, an
Arizona limited liability company,

Respondents.

Docket No. S-20823A-11-0407

AFFIDAVIT OF PAUL J. ROSHKA, JR.

Paul J. Roshka, Jr. having been duly sworn, deposes and says:

1. I am counsel for Mr. Timothy D. Moran in the above-captioned matter.
2. I am a member of the State Bar of Arizona and a founding partner with the law firm of Roshka DeWulf & Patten, PLC (“RDP”). I was admitted to the State Bar of Arizona in 1984 and since that time have practiced in the areas of defense of securities regulatory matters before the U. S. Securities and Exchange Commission’s (“SEC”) offices across the country; before various offices of the Financial Industry Regulatory Authority (“FINRA” f/k/a NASD Regulation, Inc.), a self-regulatory organization for the securities industry; the Securities Division of the Arizona Corporation Commission (“ACC”); and the securities agencies of a number of other states. My practice also involves the arbitration, mediation and litigation of securities related disputes.
3. Prior to entering private practice, I served as the Assistant Director and as the Director of Enforcement of the ACC Securities Division. Before moving to Arizona, I was a

1 prosecutor with the Connecticut Chief State's Attorney's Office. I was admitted to the State Bar
2 of Connecticut in 1973.

3 4. I have appeared on numerous State Bar of Arizona panels regarding securities
4 litigation and enforcement proceedings and have been retained in the United States and Canada
5 as an expert witness relating to securities matters. For approximately ten years, I taught
6 undergraduate courses on white collar crime and organized crime in the College of Public
7 Programs at Arizona State University. I also twice taught a graduate course on corporate crime.

8 5. I have been recognized by the following awards and publications:

- 9
- 10 • Martindale-Hubble Preeminent AV rating.
 - 11 • Super Lawyers, Securities Litigation, Business Litigation, 2007 - 2012
 - 12 • Super Lawyers, Arizona Top 50, 2012
 - 13 • The Best Lawyers in America, Commercial Litigation, Litigation - Regulatory
14 Enforcement (SEC), Litigation - Securities, 2003 - 2012
 - 15 • Arizona's Finest Lawyers, Business Litigation, 2006 - 2012
 - 16 • Recipient, KPNX TV's 12 Who Care Hon Kachina Award
 - 17 • Recipient, Jefferson Award, American Institute for Public Service

18 6. I have also served in the following civic and charitable organizations:

- 19
- 20 • Chairman Emeritus, Board of Directors, Phoenix Children's Hospital
 - 21 • Past Chairman, Phoenix Children's Hospital Foundation
 - 22 • Past Chairman, Phoenix Suns Charities Board of Trustees
 - 23 • Past Chairman, Board of Directors, Children's Cancer Center
 - 24 • Past President, The Phoenix Zoo's Wildest Club in Town

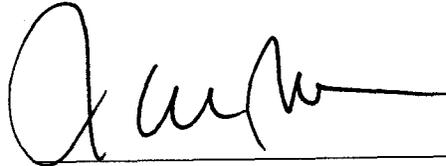
25 7. In December 2011, I spoke on the telephone to Ms. Jillian B. Berman, Assistant
26 United States Attorney for the Southern District of New York. Based on my discussion with her, I
27 believe that there is a federal criminal investigation involving Mr. Thomas L. Hampton and Mr.
Timothy D. Moran. On December 22, 2012, Ms. Berman emailed me what she called "our
standard proffer agreement". A copy of the email and its attachment is included as Attachment 1 to

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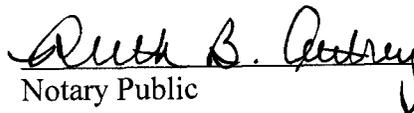
this Affidavit.

8. Based on the foregoing, I believe that Mr. Timothy D. Moran faces a realistic threat of criminal prosecution.



Paul J. Roshka, Jr.

SUBSCRIBED AND SWORN BEFORE ME THIS 20th DAY OF AUGUST 2012



Notary Public

My commission expires: 4-12-15



Attachment 1

Tim Sabo

From: Paul Roshka
Sent: Wednesday, July 11, 2012 4:54 PM
To: Tim Sabo
Subject: FW: proffer agreement
Attachments: proffer agreement.pdf

Paul J. Roshka, Esq.
ROSHKA DeWULF & PATTEN, PLC
One Arizona Center
400 E. Van Buren Street, Suite 800
Phoenix, AZ 85004
Phone: 602-256-6100
Fax: 602-256-6800
Email: roshka@rdp-law.com

For more information about Roshka DeWulf & Patten, please see our website at www.rdp-law.com.

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From: Berman, Jillian B. (USANYS) [<mailto:Jillian.B.Berman@usdoj.gov>]
Sent: Thursday, December 22, 2011 11:38 AM
To: Paul Roshka
Subject: proffer agreement

Hi Paul,
Thank you for calling me earlier. Attached is a copy of our standard proffer agreement.
Happy holidays and I look forward to hearing from you next week.

Jillian B. Berman
Assistant U.S. Attorney
U.S. Attorney's Office
Southern District of New York
1 St. Andrews Plaza
New York, NY 10007
jillian.b.berman@usdoj.gov
W: 212-637-2197
F: 212-637-0083

PROFFER AGREEMENT

With respect to the meeting of _____ ("Client") and his attorney, _____, Esq., with Assistant United States Attorney _____ to be held at the Office of the United States Attorney for the Southern District of New York on [Meeting Date] ("the meeting"), the following understandings exist:

(1) **THIS IS NOT A COOPERATION AGREEMENT.** The Client has agreed to provide the Government with information, and to respond to questions, so that the Government may evaluate Client's information and responses in making prosecutive decisions. By receiving Client's proffer, the Government does not agree to make a motion on the Client's behalf or to enter into a cooperation agreement, plea agreement, immunity or non-prosecution agreement. The Government makes no representation about the likelihood that any such agreement will be reached in connection with this proffer.

(2) In any prosecution brought against Client by this Office, except as provided below the Government will not offer in evidence on its case-in-chief, or in connection with any sentencing proceeding for the purpose of determining an appropriate sentence, any statements made by Client at the meeting, except in a prosecution for false statements, obstruction of justice or perjury with respect to any acts committed or statements made during or after the meeting or testimony given after the meeting.

(3) Notwithstanding item (2) above: (a) the Government may use information derived directly or indirectly from the meeting for the purpose of obtaining leads to other evidence, which evidence may be used in any prosecution of Client by the Government; (b) in any prosecution brought against Client, the Government may use statements made by Client at the meeting and all evidence obtained directly or indirectly therefrom for the purpose of cross-examination should Client testify; and (c) the Government may also use statements made by Client at the meeting to rebut any evidence or arguments offered by or on behalf of Client (including arguments made or issues raised sua sponte by the District Court) at any stage of the criminal prosecution (including bail, all phases of trial, and sentencing) in any prosecution brought against Client.

(4) The Client understands and agrees that in the event the Client seeks to qualify for a reduction in sentence under Title 18, United States Code, Section 3553(f) or United States Sentencing Guidelines, Sections 2D1.1(b)(11) or 5C1.2, the Office may offer in evidence, in connection with the sentencing, statements made by the Client at the meeting and all evidence obtained directly or indirectly therefrom.

(5) To the extent that the Government is entitled under this Agreement to offer in evidence any statements made by Client or leads obtained therefrom, Client shall assert no claim under the United States Constitution, any statute, Rule 410 of the Federal Rules of Evidence, or any other federal rule that such statements or any leads therefrom should be suppressed. It is the intent of this Agreement to waive all rights in the foregoing respects.

