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BEFORE THE ARIZONA CORPORATION AND COMMISSION

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

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

RESPONDENTS TIMOTHY D. MORAN  
AND PATRICIA MORAN'S REPLY IN  
SUPPORT OF MOTION TO STAY  
PROCEEDINGS

Respondents Timothy D. Moran ("Mr. Moran") and Patricia Moran respectfully reply in support of their motion for stay. The Division's response argues that the motion should be denied because: (1) there is no pending criminal case; and (2) there is no substantial prejudice to Mr. and Mrs. Moran. The Division's arguments should be rejected. The law is clear that a stay does not require pending criminal case; rather the test is whether there is a realistic threat of criminal prosecution. In this case, the realistic threat of criminal prosecution is shown by the affidavit of one of the most respected criminal defense attorneys in Arizona (and former President of the State Bar of Arizona), Mr. Edward F. Novak. Remarkably, the Division's Response never mention's Mr. Novak's affidavit. As for the Division's substantial prejudice argument, substantial prejudice is exists, even under the test as stated by the Division. Mr. Moran will be forced to choose between exercising his right to remain silent, and defending himself in this administrative proceeding. Although the Division's amended notice of opportunity does not state how much in restitution it

1 seeks from Mr. Moran, the Division alleges overall losses of \$4.7 million dollars.<sup>1</sup> As noted in Mr.  
2 Moran's Motion to Dismiss, the Division has not alleged that Mr. Moran made any specific sale or  
3 offer to sell. Nevertheless, given that the Division often seeks restitution without regard to the  
4 degree of involvement of each individual respondent, Mr. Moran could well be defending himself  
5 against a claim of \$4.7 million dollars. Clearly, this is a very serious matter and Mr. Moran should  
6 not be impeded from presenting a full defense.

7 **I. A pending criminal proceeding is not a requirement for a stay.**

8 The Division emphasizes that no criminal case is currently pending. However, under  
9 Arizona law, a person can invoke their right to remain silent whenever they have a "realistic threat  
10 of criminal prosecution". *Wohlstrom v. Buchanan*, 180 Ariz. 389, 391 n. 2, 884 P.2d 687, 689  
11 (Ariz. 1994). Notably, the Division does not contest that Mr. Moran may invoke the right to  
12 remain silent.<sup>2</sup>

13 And once a realistic threat exists, a stay of related civil or administrative proceedings is  
14 common practice. For example, the United States Supreme Court said that it is "in accord with  
15 common practice, to stay the civil action until the criminal case or the likelihood of a criminal case  
16 is ended." *Wallace v. Kato*, 549 U.S. 384, 393-94 (2007)(emphasis added).

17 Indeed, there are many examples of courts granting stays before a criminal case is filed. *See*  
18 *e.g. Chao v. Fleming*, 498 F. Supp. 2d 1034, 1038 (W.D. Mich. 2007); *Ashworth v. Albers Med.,*  
19 *Inc.*, 229 F.R.D. 527, 531 (S.D.W. Va. 2005); *Ex parte Antonucci*, 917 So.2d 825, 830 (Ala. 2005);  
20 *Ex parte Ebbers*, 871 So.2d 776, 790-96 (Ala. 2003); *S.E.C. v. Healthsouth Corp.*, 261 F. Supp. 2d  
21 1298, 1327 (N.D. Ala. 2003); *Baranski v. Fifteen Unknown Agents of ATF*, 195 F. Supp. 2d 862,  
22 871 (W.D. Ky. 2002); *Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd.*, 7 F. Supp. 2d 523, 529 (D.N.J.  
23 1998); *United States v. Certain Real Property and Premises Known as 1344 Ridge Road*, 751  
24 F.Supp. 1060, 1063 (E.D.N.Y. 1989); *Integrated Generics, Inc. v. Bowen*, 678 F.Supp. 1004, 1009  
25 (E.D.N.Y. 1988); *United States v. Hugo Key and Son, Inc.*, 672 F.Supp. 656, 658 (D.R.I. 1987);

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27 <sup>1</sup> Division's Amended Notice of Opportunity, filed July 12, 2012, at page 10, lines 12-13.

<sup>2</sup> Division Response to Motion to Stay, page 5, lines 20-22.

1 *Pacers, Incorporated v. Superior Court*, 208 Cal.Rptr. 743, 746 (Cal. App. 1984).

2 The proper method to establish the “likelihood of a criminal case” or the “realistic threat of  
3 criminal prosecution” is to file an affidavit from defense counsel establishing the facts. *See Ex*  
4 *Parte Antonucci*, 917 So.2d 825, 830 (Ala. 2005). Although *Antonucci* was prominently cited in  
5 Mr. Moran’s motion for stay, the Division’s response does not mention *Antonucci*. The Court in  
6 *Antonucci* explained that a person need only show a “reasonable apprehension of criminal  
7 prosecution” to claim 5th Amendment privilege. *Id.* (citation and quotation omitted). The Court  
8 also stated that defense counsel’s “affidavit clearly demonstrated the existence of an ongoing  
9 criminal investigation.” *Id.* The Court noted that in “balancing the interests of the parties, we must  
10 favor the constitutional privilege against self-incrimination over the interest in avoiding the delay  
11 of a civil proceeding.” *Id.*, 917 So.2d at 832. The Court therefore found that the lower court erred  
12 in failing to grant a stay of the civil proceeding. Here, the Administrative Law Judge should give  
13 Mr. Moran’s constitutional right to remain silent greater weight than the Division’s desire to avoid  
14 delay in this proceeding.

15 In this case, to establish the “realistic threat of criminal prosecution” and the “likelihood of  
16 a criminal case”, Mr. Moran submitted the affidavits of Mr. Edward F. Novak and Mr. Paul J.  
17 Roshka, Jr. The Division notes that Mr. Roshka’s affidavit “is not proof that a parallel proceeding  
18 exists.”<sup>3</sup> Of course it isn’t—as explained above, that’s not the test. The test is whether the  
19 Respondent faces a “realistic threat of criminal prosecution.” The Division does not even mention  
20 Mr. Novak’s affidavit. But Mr. Novak is a highly credible witness. Indeed, he is a former  
21 President of the State Bar of Arizona, and a current member of the Arizona Supreme Court  
22 Committee on Character and Fitness. He has served on the State Bar Board of Governors from  
23 1999 to present, and he is listed “The Best Lawyers in America”, “Chambers USA”, “Southwest  
24 Superlawyers” and “Arizona’s Finest Laywers”. After reciting these qualifications, Mr. Novak  
25 states that:  
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<sup>3</sup> Division Response to Motion to Stay at p. 4, line 18.

- 1           ●        “I am aware of a federal criminal investigation involving Mr. Thomas L. Hampton
- 2                    and Mr. Timothy D. Moran.”
- 3           ●        He has had discussion with the United States Department of Justice regarding this
- 4                    matter.
- 5           ●        “Based on my discussions with [the the DOJ] and my experience in such matters,
- 6                    the federal criminal investigation concerns facts and issues that are likely to be
- 7                    indistinguishable from the current investigation by the Securities Division of the
- 8                    Arizona Corporation Commission.”
- 9           ●        “Based on the foregoing, I believe that Mr. Tmothy D. Moran faces a realistic threat
- 10                   of criminal prosecution.”

11 These sworn statements from one of Arizona’s most respected lawyers are more than enough to  
12 establish that Mr. Moran faces a realistic threat of criminal prosecution.

13           Lastly, the Division raises the specter that all respondents in future cases would be entitled  
14 to stays, because there is potential criminal liability for all securities violations.<sup>4</sup> The Division’s  
15 concern is unfounded. Few respondents are the target of an active criminal investigation by the  
16 United States Department of Justice. Even fewer can present affidavits from respected defense  
17 counsel attesting to the ongoing investigation and the realistic threat of criminal prosecution.  
18 Under the Division’s approach, stays would never be available before formal charges are filed (and  
19 perhaps, not even then). Yet as shown above, numerous courts have issues stays before formal  
20 charges have been filed. And as the Division concedes, the “decision to grant a stay must be  
21 decided on its own unique facts.”<sup>5</sup> Thus, the Division’s argument for a blanket prohibition on  
22 pre-indictment stays should be rejected.

23 **II.    Mr. Moran faces substantial prejudice is a stay is not granted.**

24           The Division repeatedly argues that there is no constitutional right to a stay. But courts  
25 have repeatedly held that while there is no absolute, unqualified constitutional right to a stay,

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27 <sup>4</sup> Division Response to Motion for Stay, at page 9, lines 13 to 16; page 10, lines 16 to 10.  
<sup>5</sup> Division’s Response to Motion for Stay, page 4, line 1.

1 parallel criminal and civil proceedings present a significant risk of impairing the right to remain  
2 silent, and stays may be granted to prevent this injustice. For example:

3 While nothing in the Constitution requires a civil action to be stayed in the face of  
4 a pending or impending criminal indictment, a court still has broad discretion in  
5 determining whether to stay a civil action while a criminal action is pending or  
6 impending.... However, simultaneous criminal and civil cases involving the same  
or closely related facts may give rise to **Fifth Amendment concerns sufficient to  
warrant a stay** of the civil proceedings.

7 *Chao v. Fleming*, 498 F. Supp. 2d 1034, 1037 (W.D. Mich. 2007)(emphasis added). And:

8 Although, as the Court has noted, it is not unconstitutional to force defendants  
9 into this choice, the Court finds that the **strong potential for an unjust result**  
10 outweighs the efficiencies gained by allowing the case to proceed.

11 *Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd.*, 7 F. Supp. 2d 523, 529 (D.N.J. 1998)(emphasis  
12 added). Therefore, whether to grant or stay or not is within the judge’s discretion, but if the  
13 “parallel proceedings would substantially prejudice the defendant’s rights... the court should stay  
14 the civil proceedings.” *State v. Ott*, 167 Ariz. 420, 428, 808 P.2d 305, 313 (Ct. App. 1990).

15 The prejudice to Mr. Moran is substantial. If a stay is not granted, he will face a stark  
16 choice between waiving his right to remain silent—a right guaranteed by the United States and  
17 Arizona Constitutions—and failing to effectively defend himself in this case. In practical terms  
18 defending this case may require Mr. Moran to testify in order to tell his story. The Division can  
19 select its witnesses to present the picture most advantageous to itself. Moreover, the Division  
20 frequently lumps all Respondents together; thus in order to present a clear picture of Mr. Moran’s  
21 actual activities may require his testimony.

22 The Division asserts that Mr. Moran can defend himself in other ways, such as calling other  
23 witnesses.<sup>6</sup> But this points out another problem. The same people Mr. Moran would call are all  
24 either possible witnesses or targets in the pending Federal criminal investigation. Mr. Moran  
25 would likely subpoena these people, and would also likely seek discovery of the Division’s  
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<sup>6</sup> Division Response to Motion to Stay at page 7, lines 19 to 20.

1 investigative file and its communications (if any) with prosecuting agencies. Such actions could  
2 interfere with the Federal criminal investigation—indeed this is another reason courts often grants  
3 stays, to prevent a prospective criminal defendant from gaining access to civil discovery.

4 The degree of overlap between the criminal and civil proceedings is considered the most  
5 important factor, because it shows the degree to which testimony regarding the criminal issues will  
6 be necessary in the civil matter. *See e.g. Chao v. Fleming*, 498 F. Supp. 2d 1034, 1039 (W.D.  
7 Mich. 2007)(“the extent to which the issues in the criminal case overlap with those in the civil case,  
8 is regarded as the most important factor”)(quotation marks and citation omitted); *King v. Olympic*  
9 *Pipeline Co.*, 16 P.3d 45, 55 (Wash. App. 2000)(extent of factual overlap is one “of the most  
10 important factors”); *see also State v. Ott*, 167 Ariz. 420, 429, 808 P.2d 305, 314 (Ct. App.  
11 1990)(“In deciding whether to grant a stay, the court should consider a number of factors, including  
12 whether the civil and criminal proceedings involve the same matter”).

13 Here, there is a complete overlap between this administrative proceeding and the  
14 prospective criminal proceeding. As noted in Mr. Novak’s affidavit, “Based on my discussions  
15 with [the DOJ] and my experience in such matters, the federal criminal investigation concerns facts  
16 and issues that are likely to be indistinguishable from the current investigation by the Securities  
17 Division of the Arizona Corporation Commission.” This factor points strongly towards granting a  
18 stay.

19 The Division cites *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995). But  
20 in *Keating*, the administrative proceeding had little or no overlap with the criminal charges. *Id.*, 45  
21 F.3d at 325-26. Indeed, in *Keating*, the agency served the administrative charges that overlapped  
22 with the criminal case, and proceeded only on the unrelated charges. *Id.* Here, the criminal  
23 investigation is focused on the same set of facts as the administrative proceeding, and there are no  
24 unrelated charges to pursue. Thus, *Keating* is of little guidance.

25 **III. The Molinaro case does not weigh against a stay here.**

26 The Division points to the goal of protecting “the integrity of the financial markets, the  
27 public and investors.” But Mr. Moran has no securities license, and the Division has not contended

1 that he is offering or selling any securities currently. What investors, then, is the Division  
2 protecting? The Division has not explained how the “integrity of the financial markets” would be  
3 impaired if a stay is granted.

4 The Division cites *Federal Savings and Loan Ins. Corp. v. Molinaro*, 889 F.2d. 899, 902-03  
5 (9<sup>th</sup> Cir. 1989) in support of its argument. The Division describes the holding of *Molinaro* as  
6 finding the agency would be prejudiced by a stay because the party “continued to attempt to dispose  
7 of his assets”, the “action had been pending for years and the court had interest in clearing its  
8 docket” and the “interest of nonparties including depositors and the public.”<sup>7</sup> But the Division  
9 makes no attempt to apply any of these factors to Mr. Moran. The Division makes no allegation  
10 that Mr. Moran is disposing of assets. That is a very serious allegation, and to the extent the  
11 Division is attempting to suggest it by innuendo, the suggestion must be rejected as being without  
12 any evidentiary basis whatsoever. Unlike the agency action in *Molinaro*, the Division asserted its  
13 claim against Mr. Moran only months ago. There is no harm to the Division in staying the case at  
14 this early stage. There are many other matters that the Division can turn its attention to if this case  
15 is stayed. Lastly, there are no “depositors” here, and there is no allegation that Mr. Moran offered  
16 or sold the securities in question to any specific investors.

17 Moreover, *Molinaro* is a cautionary tale for defendants. In *Molinaro*, the defendant testified  
18 at a deposition in the civil case before filing his motion for stay. *Molinaro*, 889 F.2d at 903. In  
19 doing so, he waived his right to remain silent. *See United States v. Stringer*, 535 F.3d 929, 939(9th  
20 Cir. 2008)(describing waiver of 5th Amendment privilege by testifying in civil deposition). Thus,  
21 it is not surprising that the court denied the stay – there wasn’t anything left to protect. *See e.g.*  
22 *FTC v. J.K. Publications, Inc.*, 99 F.Supp.2d 1176, 1199 (C.D. Cal. 2000)(citing *Molinaro* for  
23 proposition that once defendant is deposed, any remaining burden on 5th Amendment rights is  
24 “negligible”). Mr. Moran has not waived his right to remain silent, and therefore *Molinaro*  
25 provides little guidance about whether a stay is appropriate here.

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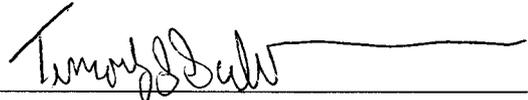
<sup>7</sup> Division Response to Motion to Stay at 10, lines 1-3).

**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

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RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of September, 2012.

ROSHKA DeWULF & PATTEN, PLC

By 

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

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

**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 ORIGINAL and thirteen copies of the foregoing  
filed this 18<sup>th</sup> day of September, 2012 with:

2 Docket Control  
3 Arizona Corporation Commission  
1200 West Washington Street  
4 Phoenix, Arizona 85007

5 Copy of the foregoing hand-delivered  
6 this 18<sup>th</sup> day of September, 2012 to:

7 Marc E. Stern, Administrative Law Judge  
Hearing Division  
8 Arizona Corporation Commission  
1200 West Washington Street  
9 Phoenix, Arizona 85007

10  
11 Phong (Paul) Huynh, Esq.  
Securities Division  
12 Arizona Corporation Commission  
1300 West Washington Street, 3rd Floor  
13 Phoenix, Arizona 85007

14 Copy of the foregoing mailed  
15 this 18<sup>th</sup> day of September, 2012 to:

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

19 Michael D. Curran, Esq.  
Maynard Cronin Erickson Curran & Reiter, P.L.C.  
20 3200 North Central Avenue, Suite 1800  
Phoenix, Arizona 85012  
21 Attorneys for Respondents  
22 Patrick Moran and Kelly Moran

23

24 By *Rebbie Amarel*

25

26

27