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16 **BEFORE THE ARIZONA CORPORATION COMMISSION**

18 In the matter of:

19 DAVID PAUL SMOOT,
20 MARIE KATHLEEN SMOOT,
21 NATIVE AMERICAN WATER, LLC, dba
22 NATAWA, NATAWA CORPORATION,
23 dba NATAWA AND AMERICAN INDIAN
24 TECHNOLOGIES INTERNATIONAL, LLC,
25 aka AITI,

24 Respondents.

Docket No. S-20814A-11-0313

RESPONDENTS' MOTION TO STAY

(Expedited Ruling Requested)

26 Respondents David Paul Smoot, Marie Kathleen Smoot, Native American Water, LLC,
27 Natawa Corporation and American Indian Technologies International, LLC ("Respondents"), by
28

1 and through their undersigned counsel, hereby respectfully request that this action brought by the
2 Arizona Corporation Commission ("Commission") ("Commission Action") be stayed as to all
3 Respondents¹ – including the upcoming deadline of March 8, 2012 ordered by Judge Stern on
4 February 15, 2012 for the parties to submit additional briefing regarding Ariz. R. Civ. P. 26.1
5 disclosures – pending the outcome of the recently initiated criminal proceedings against Respondent
6 David Paul Smoot ("Mr. Smoot"), Maricopa County Criminal Case No. 2012-005978-001
7 ("Criminal Proceeding").
8

9 **I. RECENT EVENTS RELATED TO RESPONDENT DAVID PAUL SMOOT.**

10 On February 7, 2012, a Maricopa County Grand Jury indicted Mr. Smoot on the following
11 four felony counts related to actions allegedly taken in March 2003 through October 2010: (1)
12 pursuing a scheme or artifice to defraud; (2) selling unregistered securities; (3) selling securities
13 without proper individual registration; and (4) taking the identity of another. Mr. Smoot, a sixty-
14 five year old man in ill health, was arrested on February 13, 2012 and taken into custody. Mr.
15 Smoot was released on February 14, 2012 on his own recognizance. On February 16, 2012, Mr.
16 Smoot entered a Not Guilty plea related to all counts. An Initial Pretrial Conference is scheduled
17 for April 3, 2012. Mr. Smoot and his counsel intend to defend and fight the Criminal Proceeding
18 with vigor.
19

20 The facts and circumstances underlying the pending felony counts are the same facts and
21 circumstances upon which the Commission brought the Commission Action. *See* Notice at ¶¶ 119-
22 126. Additionally, upon information and belief, the Criminal Proceeding was instigated by
23

24 ¹ Respondent Kathleen Smoot is "joined in this action under A.R.S. § 44-2031(C) solely for
25 purposes of determining the liability of the marital community." *See* 10-20-11 Notice of Opp. for
26 Hearing, at ¶ 10 ("Notice"). As alleged by the Commission in the Notice, Mr. Smoot is allegedly
27 the founder of Respondent Natawa Corporation and Respondent American Indian Technologies
28 International, LLC. Notice at ¶ 2. Therefore, it is only logical that a stay, if granted, should apply
to all Respondents.

1 Commission investigator Gary Clapper. Therefore, not only is Mr. Smoot being subject at this time
2 to the parallel Civil Proceeding and Criminal Proceeding, both proceedings are being pursued by the
3 State of Arizona – on by the Commission, an agency of the State, and one by the County Attorney,
4 who prosecutes on behalf of the State. See SEC v. Graystone Nash, 25 F.3d 187, 193-94 (3rd Cir.
5 1994) ("Courts must bear in mind that when the government is a party in a civil case and also
6 controls the decision as to whether criminal proceedings will be initiated, special consideration
7 must be given to the plight of the party asserting the Fifth Amendment.").

9 II. STAYING THE COMMISSION ACTION IS APPROPRIATE.

10 The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case
11 to be a witness against himself" This privilege against self-incrimination "can be asserted in
12 any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory"
13 Kastigar v. U.S., 406 U.S. 441, 444 (1972) (emphasis added); see also State v. Ott, 167 Ariz. 420,
14 425, 808 P.2d 305, 310 (Ct. App. 1990) (the "privilege against self-incrimination unequivocally
15 applies to civil proceedings," and "privileges [a defendant] not to answer official questions put to
16 him in any other proceedings, civil or criminal, formal or informal, where the answers might
17 incriminate him in future criminal proceedings."); Phelps Dodge Corp. v. Superior Court, 438 P.2d
18 424, 428 (Ct. App. 1968) ("The constitutional guarantee against testimonial compulsion embraces
19 not only testimony which is directly incriminatory but also that which would furnish a link in the
20 chain of evidence needed to prosecute the one claiming the privilege.").

23 If the Commission Action is not stayed, since the matters underling the Commission Action
24 and Criminal Proceeding are so intertwined, Mr. Smoot would be faced with the dilemma of: (1)
25 invoking his constitutional Fifth Amendment rights against self-incrimination, thereby leaving the
26 Commission's allegations in the Commission Action to go, for all intensive purposes, unchecked; or
27

1 (2) defending himself in the Commission Action by testifying on his own behalf on matters that are
2 at issue in both the Commission Action and Criminal Proceeding, thereby waiving his constitutional
3 Fifth Amendment rights against self-incrimination and risking that the State of Arizona will use his
4 statements against him in the Criminal Proceeding. Neither of these options are equitable or
5 palatable, especially in light of the Fifth Amendment's liberal construction. *See Wehling v.*
6 *Columbia Broad. Sys.*, 608 F.2d 1084, 1088 (5th Cir. 1979) ("a party claiming the Fifth
7 Amendment privilege should suffer no penalty for his silence"); *see also Wohlstrom v. Buchannan*,
8 180 Ariz. 389, 392, 394, 884 P.2d 687, 690, 692 (1994) (a person should not be forced to "choose
9 between surrendering his constitutional privilege and forfeiting property" in a civil case.).
10

11 Many courts have recognized that a stay of discovery or an entire civil case is appropriate in
12 these types of circumstances, and "the strongest case for deferring civil proceedings until after
13 completion of criminal proceedings is where a party under indictment for a serious offense is
14 required to defend a civil or administrative action involving the same matter," as is the case here.
15 *See Afro-Lecon, Inc. v. United States*, 820 F. 2d 1198, 1203, 1207 (Fed. Cir. 1987); *Brock v.*
16 *Tolkaw*, 109 F.R.D. 116, 119-121 (E.D.N.Y. 1985) ("A stay of civil proceedings is most likely to be
17 granted where the civil and criminal actions involve the same subject matter, and is even more
18 appropriate when both actions are brought by the government") (internal citations omitted); *Pacers,*
19 *Inc. v. Superior Court*, 208 Cal. Rptr. 743, 744 (Cal. Ct. App. 1984) ("This remedy is in accord with
20 federal practice where it has been consistently held that when both civil and criminal proceedings
21 arise out of the same or related transactions, an objecting party is generally entitled to a stay of
22 discovery in the civil action until disposition of the criminal matter."); *see also Wehling*, 608 F.2d
23 at 1089; *United States v. Mellon Bank, N.A.*, 545 F.2d 869, 872-74 (3d Cir. 1976); *State Farm*
24 *Lloyds v. Wood*, No. H-06-503, 2006 U.S. Dist. LEXIS 89566, at *9 (S.D. Tex. Dec. 12, 2006);
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26
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1 Maloney v. Gordon, 328 F. Supp. 2d 508, 511-14 (D. Del. 2004); SEC v. Mutuals.com, No. 3:03-
2 CV-2912-D, 2004 U.S. Dist. LEXIS 13718, at *13-14 (N.D. Tex. July 20, 2004); Frierson v. City of
3 Terrell, No. 3:02-CV-2340-H, 2003 U.S. Dist. LEXIS 26443, at *24 (N.D. Tex. June 6, 2003);
4 Bureerong v. Uvawas, 167 F.R.D. 83, 87 (C.D. Cal. 1996); Volmar Distrib., Inc. v. New York Post
5 Co., 152 F.R.D. 36, 39-40 (S.D.N.Y. 1993); United States v. Moultonboro, 781 F. Supp. 830, 834-
6 35 (D.N.H. 1992); Ex parte Rawls, 953 So.2d 374, 384-87 (Ala. 2006); State v. Deal, 740 N.W.2d
7 755, 764-70 (Minn. 2007).

9 In determining whether a stay is appropriate, courts apply a multi-factor test. See Fed. Sav.
10 & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989). Each factor is discussed below,
11 and all factors come down in favor of Mr. Smoot's requested stay.

12
13 **A. The Extent to Which a Defendant's Fifth Amendment Rights are**
14 **Implicated.**

15 As discussed above, Mr. Smoot was indicted on February 7, 2012, and entered a Not Guilty
16 plea on February 16, 2012 for the same alleged acts that are the subject of the Civil Proceeding.
17 Therefore, the Criminal Proceedings are active and Mr. Smoot's Fifth Amendment rights are of
18 utmost importance at this time. That is why a stay is most appropriate in a case such as this, as
19 compared to a situation where an individual who is involved in a civil proceeding is merely
20 operating under the fear or possibility of criminal charges being filed.

21 **B. The Interest of a Plaintiff in Proceeding Expeditiously With Civil**
22 **Litigation and the Potential Prejudice to Plaintiff of a Delay.**

23 The relief that Mr. Smoot seeks is temporary – only until the conclusion of the Criminal
24 Proceeding. A stay would be a minor inconvenience to the Commission, especially when compared
25 to civil stays that are issued automatically upon a party's bankruptcy, for an appeal of a variety of
26 interlocutory orders by a trial court, or when an insurance company is placed in receivership. In
27 each of these situations, there is a recognition that there are other interests at stake that trump a
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1 litigant's right to an expeditious pursuit of its claim. The same is true of Mr. Smoot's Fifth
2 Amendment rights in these circumstances. Here, Mr. Smoot is not engaging in any activities about
3 which the Commission complains of in its Notice.

4
5 Additionally, staying the Commission Action will not prejudice the Commission as Mr.
6 Smoot will not be offering securities of any kind during this intervening time. Other than losing an
7 opportunity to improperly leverage Mr. Smoot's Fifth Amendment dilemma into an advantage in the
8 Commission Action, it is difficult to understand why the Commission would be unfairly prejudiced
9 by a stay of the Commission Proceeding pending the outcome of the Criminal Proceeding.
10 Additionally, the Commission should have to establish "more prejudice than simply a delay in [its]
11 right to expeditiously pursue [its] claim" to avoid the imposition of a stay of the Commission
12 Proceeding. State Farm Lloyds, 2006 U.S. Dist. LEXIS 89566, at *6-7.

13
14 In Pacers, Inc., the California Court of Appeals chastised the lower court for forcing
15 defendants "to choose between their silence and a 'meaningful chance of avoiding the loss through
16 judicial process of a substantial amount of property,'" and made clear that "[a] party asserting the
17 Fifth Amendment privilege should suffer no penalty for his silence." 208 Cal. Rptr. at 744 (quoting
18 People v. Coleman, 120 Cal. Rptr. 384 (Ct. App. 1975)). The Court acknowledged that while a stay
19 may cause some "inconvenience and delay" to the plaintiffs in that case, "protecting a party's
20 constitutional rights is paramount." *Id.* Therefore, a stay is appropriate in this case.

21
22 **C. The Burden the Civil Proceedings May Impose on a Defendant.**

23 The Administrative Law Judge's resolution of whether Mr. Smoot is entitled to a stay to
24 preserve his ability to fully and fairly defend both the civil and criminal allegations against him has
25 enormous legal significance. Absent a clear ruling, Mr. Smoot will continue to be forced to choose
26 between testifying on his own behalf in the Commission Proceeding (and risk waiving his Fifth
27

1 Amendment rights against self-incrimination and/or prematurely revealing his arguments, defenses
2 and rebuttals to the prosecutors in the Criminal Proceeding), and not testifying on his own behalf,
3 invoking his Fifth Amendment rights (handing an enormous tactical advantage to the Commission.
4 This, the Pacer Court recognized, is far too costly a penalty for the exercise of a critical
5 constitutional right and "violate[s] concepts of fundamental fairness." *See also Ott*, 167 Ariz. at
6 428, 808 P.2d at 313 ("If parallel proceedings would substantially prejudice the defendant's rights,
7 however, the court should stay the civil proceedings.") (citing SEC v. Dresser Indus., 628 F.2d
8 1368, 1374 (D.C. Cir. 1980)).

9
10 That is why so many courts have granted a stay in similar types of situations. *See* cases
11 cited *supra* at pg. 3-4; *see also* Javier H. v. Garcia-Botello, 218 F.R.D. 72, 74-76 (W.D.N.Y. 2003);
12 SEC v. Kozlowski, No. 02-Civ. 7312 (RWS), 2003 U.S. Dist. LEXIS 6261, at *1-2 (S.D.N.Y. Apr.
13 15, 2003); People ex rel. Hartigan v. Kafka & Sons Bldg. Co., 625 N.E.2d 16, 20 (Ill. App. Ct.
14 1993); Ex parte White, 551 So.2d 923, 925-26 (Ala. 1989); Zonghetti v. Jeromack, 541 N.Y.S.2d
15 235, 237 (N.Y. App. Div.); DeSiervi v. Liverzani, 523 N.Y.S.2d 147, 147-48 (N.Y. App. Div.
16 1988).²

17
18 Because the Fifth Amendment "protects against *any* disclosures which the witness
19 reasonably believes could be used in a criminal prosecution *or could lead to other evidence that*
20 *might be so used*," Mr. Smoot would be forced to continually assert his Fifth Amendment rights if
21

22
23 ² The matter of staying civil proceedings pending criminal proceedings has also been the subject of
24 numerous legal commentators, all leading to the conclusion that a stay should be granted in the
25 Commission Proceeding. *See, e.g.*, David U. Gourevitch, Between a Rock and a Hard Place:
26 Parallel Proceedings in the Post-Enron Era, 1383 PLI/Corp. 503, 507 (2003), available at
27 http://www.gourevitchlaw.com/pdf/between_a_rock.pdf ("In today's post-Enron world, those
28 enmeshed in regulatory investigations face a difficult dilemma: if they testify in the regulatory
investigation, they damage their position in the increasingly likely event of a criminal
investigation.")

1 the Civil Proceeding is not stayed. Kastigar, 406 U.S. at 444. A stay is intended to help a defendant
2 avoid this trap and preserve the sanctity of his Fifth Amendment rights without compromising his
3 ability to defend himself civilly, when the balancing of interests weighs in his favor. *See State Farm*
4 *Lloyds v.*, 2006 U.S. Dist. LEXIS 89566, at *7 ("Because [Defendant] is under criminal indictment
5 in a case concerning nearly identical issues with respect to the alleged insurance scheme and
6 because the facts between the two cases overlap substantially, the risks to the fair resolution of the
7 criminal case outweigh the benefits of expedition in the civil case.").

9 Additionally, Mr. Smoot's ability to take discovery, gather evidence, interview witnesses and
10 otherwise prepare for the contemplated hearing on the Commission Action will be severely limited
11 given the restrictions placed on Mr. Smoot by virtue of the Criminal Proceeding from contacting or
12 speaking with persons who have been designated as "victims" in the Criminal Proceeding.

14 **D. The Interest of the Court Where the Civil Litigation is Pending.**

15 Issues common to both civil and criminal proceedings are often more effectively addressed
16 in the criminal context first. A stay pending the resolution of criminal proceedings can promote
17 judicial efficiency, because "[if] the civil action is stayed until the conclusion of the criminal
18 proceedings, there is no need to make rulings regarding potential discovery disputes involving
19 issues that may affect the criminal case." *Id.* at *8; *see also Shaw v. Hardberger*, No. SA-06-CA-
20 751-XR, 2007 U.S. Dist. LEXIS 35745, at * (W.D. Tex. May 16, 2007). Further, "the outcome of
21 the criminal proceedings may guide the parties in settlement discussions and potentially eliminate
22 the need to litigate some or all of the issues in [the civil litigation]." *Id.* at *8; Shaw, 2007 U.S.
23 Dist. LEXIS 35745 at *7. Moreover, the Commission cannot make a showing that granting Mr.
24 Smoot's requested relief will unduly interfere with the Civil Proceeding, merely postpone it for a
25 matter of time, so this factor does not weight against a stay. Mutuals.com, 2004 U.S. Dist. LEXIS
26 13718, at *12; Librado v. M.S. Carriers, No. 3:02-CV-2095-D, 2002 U.S. Dist. LEXIS 21592, at *
27
28

1 8-9 (N.D. Tex. November 6, 2002). Additionally, while Respondents do not concede this point, it is
2 well known the Commission takes the position that its administrative proceedings are immune from
3 the effect of any statutes of limitation.

4 **F. The Interest of the Public/Third Parties in the Pending Civil and**
5 **Criminal Litigation.**

6 The public's interest weighs in favor of a stay where it would "not 'impose an undue
7 hardship' on [the] plaintiff and [where] it would allow for a constitutional resolution of the
8 concurrent disputes while protecting [a defendant] from unnecessary adverse consequences."
9 Frierson, 2003 U.S. Dist. LEXIS 26443, at *12-13. Further, "[t]he public's interest in the integrity
10 of the criminal case is entitled to precedence over the civil litigant." State Farm Lloyds, 2006 U.S.
11 Dist. LEXIS 89566, at *8-9 (quoting Javier H. v. Garcia-Botello, 218 F.R.D. 72, 75 (W.D.N.Y.
12 2003); *see also* Shaw, 2007 U.S. Dist. LEXIS at *7. Here, the integrity of the Criminal Proceeding
13 is entitled to precedence over the Civil Proceeding.

14
15 **III. CONCLUSION.**

16 Based upon all of the foregoing, Respondents respectfully request that Judge Stern stay
17 these proceedings brought by the Commission until the criminal proceedings against Respondent
18 David Paul Smoot have been resolved. This action is a very serious and important matter to
19 Respondents, who merely seek to have the opportunity to fully and fairly defend their actions and
20 personal and professional reputations at the evidentiary hearing – otherwise Respondent Smoot's
21 likely inevitable invocation of his constitutional Fifth Amendment rights will substantially hamper
22 Respondents' ability to fully prepare and present their defenses.
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RESPECTFULLY SUBMITTED this 6~~th~~ day of March, 2012.

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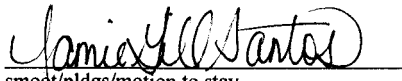
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7 COPIES of the foregoing mailed
8 on or about 6th day of March, 2012 to:

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20 smoot/pldgs/motion to stay
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