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7
8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 SACRAMENTO DIVISION
11

12 SECURITIES AND EXCHANGE
13 COMMISSION,

Case No.: 2:07-cv-01724-LEW-CMK

14 Plaintiff,

AMENDED NOTICE OF MOTION
AND MOTION TO STAY CIVIL
ACTION PENDING
DETERMINATION OF CRIMINAL
ACTION

15 v.

MEMORANDUM OF POINTS AND
AUTHORITIES

16 SECURE INVESTMENT SERVICES,
17 INC., AMERICAN FINANCIAL
SERVICES, INC., LYNDON GROUP,
18 INC., DONALD F. NEUHAUS, AND
KIMBERLY A. SNOWDEN.

19 Defendants.
20

Date: April 6, 2009
Time: 9:00 a.m.
Courtroom: 10

21 TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

22 PLEASE TAKE NOTICE that on April 6, 2009 at 9:00 a.m., or as soon thereafter as the matter
23 may be heard in Courtroom 10 of the above-entitled Court located at 501 I Street, Room 4200,
24 Sacramento, California, defendant Kimberly Snowden will and hereby does move this Court to stay
25 further proceedings in this case pending final determination of the criminal action on the ground that
26 defendant Kimberly Snowden cannot adequately defend the civil action until completion of the
27 criminal action filed against her.

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This motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, the Declaration of Jonz Norine, the pleadings, records and papers filed herein, and such other and further oral and documentary evidence and legal memoranda as may be presented at or by the hearing on said Motion.

Dated: March 4, 2009

KENNY, SNOWDEN & NORINE

6779:126345

JONZ NORINE
Attorneys for Defendant
Kimberly Snowden

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the interest of justice and to preserve her Fifth Amendment privilege against self-incrimination, defendant Kimberly Snowden respectfully requests that the Court stay the civil action filed by the SEC pending determination of the criminal action in which she is currently under indictment and which arises from the same facts.

The specific procedural nature of a Motion for Summary Judgment places Ms. Snowden in a position where she must either consent to civil liability of hundreds of thousands of dollars, or, testify against herself through admitting undisputed material facts or providing her own undisputed material facts in a manner that the Securities and Exchange Commission may turn around and use against her in the concurrent criminal proceeding.

The Securities and Exchange Commission is using this leverage in an attempt to gain an unfair advantage. Ms. Snowden hereby requests a stay of the civil action, and the hearing on the Motion for Summary Judgment, to allow her rights to be protected in defending the criminal action currently pending against her.

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II. STATEMENT OF FACT

This action arises out of Ms. Kimberly Snowden's employment with Secure Investment Services, Inc. and American Financial Services, Inc. These companies were run by her stepfather, Donald Neuhaus.

On August 22, 2007, Kimberly Snowden and Donald Neuhaus were indicted in a criminal case filed by The United States of America, through the Securities and Exchange Commission. This case is currently pending in the United States District Court for the Eastern District of California, case number 2:07-cr-00366-GEB.

The very next day, the Securities and Exchange Commission filed a civil enforcement action against Kimberly Snowden, among others, also in the Eastern District of California, Case 2:07-cv-01724-LEW-CMK. A receiver was appointed over Secure Investment Services, Inc. and American Financial Services, Inc. company at the request of the SEC, on August 24, 2007.

Donald Neuhaus has passed away, leaving Ms. Snowden as the only viable target of either the criminal or civil actions.

The Securities and Exchange Commission took Ms. Snowden's deposition on December 11, 2008. During the course of the deposition, Ms. Snowden invoked her Fifth Amendment privilege against being compelled to be a witness against herself.

On or about February 4, 2009, the Securities and Exchange Commission filed a Motion for Summary Judgment in the civil case filed against Ms. Kimberly Snowden, with full knowledge that Ms. Snowden's ability to respond to its Motion would be significantly impaired, if not eliminated, unless she waived her rights under the Fifth Amendment.

On February 25, 2009, as a result of substantial financial losses resulting from the failure of Secure Investment Services and American Financial Services, Ms. Snowden filed Bankruptcy in the Eastern District of California, Case No. 2009-23233.

The Motion for Summary Judgment is set to be heard on March 9, 2009.

III. POINTS AND AUTHORITIES

The Motion for Summary Judgment unjustly penalizes Kimberly Snowden for invoking her rights under the Fifth Amendment of the United States Constitution.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In responding to a Motion for Summary Judgment, the responding party must submit responses to each of the alleged Statements of Undisputed Material Fact, by either admitting or denying each by setting forth "concrete particulars". *Dressler v. The MV Sandpiper* (2nd Cir. 1964), 331 F.2d 130, 133.

Because the underlying factual circumstances are substantially similar, if not identical, in both the criminal complaint and the civil complaint pending against Ms. Snowden, any attempt to respond and defend herself in the civil action places her in the position of being forced to testify against herself in violation of the Fifth Amendment.

The Fifth Amendment privilege against self-incrimination applies in both criminal and civil cases. *United States v. 4003-4005 Fifth Ave.* (2d Cir. 1995) 55 F.3d 78,82. However, unlike the rule in criminal cases, “reliance on the Fifth Amendment in civil cases may give rise to an adverse inference against the party claiming its benefits.” *SEC v. Graystone Nash, Inc.* (3d Cir. 1994) 25 F.3d 187, 190, citing *Baxter v. Palmigiano* (1976) 425 U.S. 308, 318.

Federal Rule of Civil Procedure 26(b)(5) provides that claims of privilege may be made to withhold material otherwise subject to discovery. A refusal to respond to discovery in such circumstances is proper and does not justify the imposition of penalties. *Wehling v.Columbia Broadcasting Sys.* (5th Cir. 1979) 608 F.2d 1084, 1087.

The Supreme Court has cautioned that the Constitution limits “the imposition of any sanction which makes assertion of the Fifth Amendment privilege ‘costly.’” *Spevak v. Klein* (1967) 385 U.S. 511, 515, (quoting *Griffin v. California* (1965) 380 U.S. 609, 614).

“A trial court must carefully balance the interests of the party claiming protection against self-incrimination and the adversary’s entitlement to equitable treatment. Because the privilege is

1 constitutionally based, the detriment to the party asserting it should be no more than is necessary to
 2 prevent unfair and unnecessary prejudice to the other side.” *SEC v. Graystone Nash, Inc.* (3d Cir.
 3 1994) 25 F.3d 187. The same court stated that “the effects than an invocation of the privilege
 4 against self-incrimination will have in a civil suit depends to a large extent on the circumstances of
 5 the particular litigation.” *Ibid.*

6 In the instant case, the circumstances do not involve a civil case pending against a
 7 defendant who has yet to be indicted. Neither do the circumstance include a civil case tangentially
 8 touching issues and facts included in a pending criminal case.

9 Here, the government is using both the criminal case and the civil case as leverage against
 10 the defendant Kimberly Snowden because the factual circumstances are inextricably intertwined.
 11 Knowing that Ms. Snowden has invoked her privilege against self-incrimination, the Securities and
 12 Exchange Commission seeks to pounce on her vulnerability to secure an easy victory. (Since Ms.
 13 Snowden is bankrupt, any judgment is likely to go unsatisfied.) In the alternative, the Securities
 14 and Exchange Commission can use the threat of a large money judgment to force Ms. Snowden to
 15 waive her Fifth Amendment privilege, thereby aiding them in the pending criminal prosecution.

16
 17 Any undue punishment or penalty for Ms. Snowden's invoking her rights under the Fifth
 18 Amendment would be eliminated by the Court granting a stay of the civil action pending the
 19 outcome of the criminal action pending against Ms. Snowden.

20 Though a court is not required to stay civil proceedings pending the outcome of parallel
 21 criminal proceedings, a court may do so in its own discretion in light of the particular circumstances
 22 and competing interests involved in the case. *Federal Savings and Loan Insurance Corp. v. Molinaro*,
 23 889 F.2d 899 (9th Cir. 1989).

24 The Ninth Circuit Court of Appeals in *Molinaro* cited *Securities & Exchange Commission v.*
 25 *Dresser Industries* 628 F.2d 1368 (Dist. of Columbia Cir. 1980) for the factors a court should consider
 26 in deciding whether or not to stay civil proceedings pending determination of criminal proceedings.
 27 See *Molinaro*, 889 F.2d at 902-903.

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1 The court in *Dresser Industries* stated that the strongest case for a stay of civil proceedings is
 2 where the a party's Fifth Amendment privilege against self-incrimination might be undermined in
 3 having to defend a civil action while being under indictment for a criminal action involving the same
 4 matter. *Dresser Industries*, *supra*, 628 F.2d at 1375-1376.

5 “[T]he strongest case for deferring civil proceedings until after completion of criminal
 6 proceedings is where a party under indictment for a serious offense is required to defend a civil or
 7 administrative action involving the same matter. The noncriminal proceeding, if not deferred, might
 8 undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal
 9 discovery beyond the limits of Federal Rule of Criminal Procedure 16b, expose the basis of the
 10 defense to the prosecution in advance of criminal trial, or otherwise prejudice the case. [] If delay of
 11 the noncriminal proceeding would not seriously injure the public interest, a court may be justified in
 12 deferring it. [Citations.]” *Ibid.*

13 Other factors include: “(1) the interest of the plaintiffs in proceeding expeditiously with this
 14 litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the
 15 burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience
 16 of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests
 17 of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and
 18 criminal litigation. [Citations.]” *Molinaro*, *supra*, 889 F.2d at 903.

19 In addressing each of these factors: First, there is no prejudice to the Securities and Exchange
 20 Commission in delaying the civil action either in enjoining further actions or obtaining a money
 21 judgment as both Secure Investment Services and American Financial Services are under receivership,
 22 Donald Neuhaus passed away, and Kimberly Snowden is bankrupt. Second, the burden imposed on
 23 defendants in proceeding with the Motion for Summary Judgment is great, as is discussed in detail
 24 above. Third, with the filing of the Bankruptcy action by Ms. Snowden, the Eastern District will now
 25 have three cases pending before it, consuming additional judicial resources, unless a stay is granted.
 26 Fourth, although the Securities and Exchange Commission seeks disgorgement on behalf of persons
 27 not parties to the litigation, the Bankruptcy stay prevents execution of any judgment obtained. In
 28 addition, due to the insolvency, the amounts and timing of any recovery obtained are uncertain.

1 Finally, and especially considering the above circumstances, the interest of the public would be greater
2 in the government's allocation of resources in prosecution of the criminal action as opposed to the
3 civil action.

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5 **Should the Court deny the Motion for Stay, the Court should grant a continuance of the hearing**
6 **on the Motion for Summary Judgment to allow Kimberly Snowden an adequate opportunity to**
7 **oppose the Motion.**

8 Federal Rule of Civil Procedure §56(f) provides discretion to the Court to issue any "just
9 order" when a party "cannot present facts essential to justify its opposition". FRCP §56(f), (f)(3).
10 Here, and as shown in the affidavit of Jonz Norine, the opposing party is unable to present facts
11 essential to justify its opposition due to her constitutional right to not be forced to testify against
12 herself.

13 Concurrent with this Motion for Stay, the undersigned has filed a Motion to Withdraw as
14 Attorney of Record for Kimberly Snowden. That Motion is based in part on the continuing lack of
15 payment for fees and expenses incurred to date and by the filing of the bankruptcy action.

16 Should the Court deny the Motion for Stay, the Court has the authority to allow Ms. Snowden
17 an adequate opportunity to consider whether or not to waive her constitutional rights and attempt to
18 defend herself and to prepare an opposition to the extensive Motion for Summary Judgment filed by
19 the Securities and Exchange Commission. Such a continuance, under these circumstances, would not
20 work a hardship on the plaintiff and would clearly be equitable considering the burden on Ms.
21 Snowden.

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23 **IV.**

24

CONCLUSION

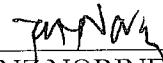
25 For the reasons stated above, Defendant Kimberly Snowden respectfully requests that the
26 Court issue an Order to stay the civil action against her pending determination of the criminal action
27 involving the same matter. In the alternative, Ms. Snowden respectfully requests a continuance of the

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1 hearing date for the Motion for Summary Judgment for a sufficient time to allow her to consider her
2 rights under the Constitution and prepare her defense.

3 Dated: March 4, 2009

KENNY, SNOWDEN & NORINE

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JONZ NORINE
6 Attorneys for Defendant
7 Kimberly Snowden
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