STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT C.A. No. 07-CP-40-3116
HENRY D. MCMASTER, in his official capacity as the SECURITIES COMMISSIONER FOR THE STATE OF SOUTH CAROLINA, Plaintiff, -vs- CAPITAL CONSORTIUM GROUP, LLC; 3 HEBREW BOYS, LLC; TONY POUGH a/k/a TONY BERNARD POUGH; TIM MCQUEEN a/k/a TIMOTHY MCQUEEN; JOSEPH BRUNSON; a/k/a JOSEPH B. BRUNSON; DANIEL DVELOMENT GROUP, LLC; FIRST CITIZENS BANK AND TRUST CO, INC. Defendants.	)	Memorandum in Opposition to Motion for Stay

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BARBARA A. SCOTT
C.C.C. & G.S.

Henry D. McMaster, in his official capacity as the Securities Commissioner for the State of South Carolina, files this Memorandum in Opposition to the Motion for Stay filed on behalf of Defendants Capital Consortium Group, LLC ("Consortium Group"), 3 Hebrew Boys ("3 Boys"), Tony Pough a/k/a Tony Bernard Pough ("Tony Pough"); Tim McQueen a/k/a Timothy McQueen ("Tim McQueen"); and Joseph B. Brunson ("Joseph Brunson").

First Citizens Bank and Trust Co, Inc. ("First Citizens") is simply a stakeholder that has deposit accounts titled in the name of certain of the Defendants. None of the discussions about violation of securities laws or fraud committed upon investors are directed toward First Citizens.

SUBSTANTIAL INVESTOR ASSETS ARE AT RISK

This case is about the recovery of substantial assets on behalf of investors that invested in a fraudulent scheme perpetuated by certain of the Defendants through the sale of unregistered securities in the State of South Carolina.

Judge Childs made a finding in her Order Granting Plaintiff's Motion for Preliminary Injunction dated June 22, 2007 (the "Preliminary Injunction"), that "State witnesses further testified that Defendants have accumulated several million dollars from the unlawful sale of the Investments, and these monies make up the Funds currently deposited in the First Citizens Account in Columbia, South Carolina."

There is testimony in the record at the hearing held in this matter before Judge Childs on May 31, 2007 (the "May Hearing") that resulted in the issuance of the Preliminary Injunction that Consortium Group owns a Gulfstream, multi-engine jet (May Hearing Transcript page 42, line 7 through page 43, line 2). There was testimony in the May Hearing about wire transfers from an account in Bank of America titled in the name of Brunson Outreach, an account with Defendants Joseph Brunson and Tony Bernard Pough as signatories (May Hearing Transcript page 41, line 11 through page 42, line 2). Transfers from this account included over a million dollars to a company that manufacturers luxury coaches (May Hearing Transcript page 43, lines 3-8), transfers for the purchase of real estate (May Hearing Transcript page 43, lines 15-25), transfers to the Bahamas (May Hearing Transcript page 43, lines 15-25), and transfers of $4,400,000.00 to $5,000,000.00 for the apparent purchase of the Gulfstream airplane (May Hearing Transcript page 42, lines 5-24).

Certain of the Defendants are believed to own at least the following real estate assets:

Real Estate Assets				
Owner	Description	County	Recording Information	Market Value[1]
Daniel Development Group, LLC	6209 Main St. a/k/a 6209 N. Main St.,	Richland	Book R1313 at page 1310	$219,800
Daniel Development Group, LLC	Lot eight (8), block K-1, Longcreek Plantation	Richland	Book R1305 at page 1100.	
Daniel Development Group, LLC	6182 Main St. a/k/a 6182 N. Main St.	Richland	Deed Book R1313 at page 70	
Daniel Development Group, LLC	305 Ash Tree Rd.	Richland	Deed Book R1313 at page 94	
Daniel Development Group, LLC	1529 Horseshoe Drive Deed	Richland	Book R1267 at page 444	$674,400.00
Daniel Development Group, LLC	300 Garvey Circle	Richland	Deed Book R1183 Page 1147	$40,000
Daniel Development Group, LLC	20.05 acres in Orange Township	Orangeburg	D-BK:01206 PG:0111	
Timothy McQueen	44 Ravenglass Way	Richland	Book R1107 at page 684	$310,100

[1] Market values are from the applicable tax assessor records.

THE STATE OF SOUTH CAROLINA HAS ALREADY DEMONSTRATED THE LIKELIHOOD OF IRREPARABLE HARM AND THE LIKELIHOOD OF SUCCESS ON THE MERITS

Judge Cooper issued a Temporary Restraining order against Defendants on May 21, 2007, and Judge Childs entered the Preliminary Injunction[2] subsequent to the May Hearing.

Judge Childs found that "[T]he State has put forth evidence demonstrating a likelihood of success on the merits" for causes of action for violations of South Carolina securities law and fraud upon the Defendants' investors. See Preliminary Injunction, paragraph 8.

Judge Childs also found that "Based on the forgoing, I find Plaintiff has demonstrated that irreparable harm will result if an injunction is not granted" (Preliminary Injunction, paragraph 7), and that:

> Defendants' acts as alleged by the State at the Motion hearing constitute violations of South Carolina securities law. The State has further alleged the Defendants have committed fraud upon their investors. On both issues, the State has put forth evidence demonstrating a likelihood of success on the merits.
>
> Further findings set forth in the Preliminary Injunction include:
>
> The State has put forth evidence that Defendants, individually and by and through their agents and representatives, have been holding seminars in several states and foreign countries at which they have been offering an investment scheme ("Investments") to the public, and there is evidence that the Investments, as described at these seminars, constitute "securities" under South Carolina law. See Preliminary Injunction, paragraph 2.
>
> The State provided a witness at the hearing who testified that Defendants are not licensed or registered to sell securities in South Carolina, and the Investments offered by Defendants are not and have never been registered for sale in or from the State of South Carolina. State witnesses further

[2] Daniel was not a party at the time and was not restrained and was not restrained by either the Temporary Injunction or the Temporary Restraining Order. However, the principals of Daniel were restrained.

> testified that Defendants have accumulated several million dollars from the unlawful sale of the Investments, and these monies make up the Funds currently deposited in the First Citizens Accounts in Columbia, South Carolina. See Preliminary Injunction, paragraph 3.
>
> Defendants spent over two million dollars of investor funds in a matter of a few short weeks after the Accounts were opened, and these funds were used in a manner that is inconsistent with the representations made to investors and in violation of securities law. At the rapid pace Defendants are spending the funds and depleting the Accounts, there could be no money left for the investors to recover if a temporary injunction is not issued immediately. See Preliminary Injunction, paragraph 6.

THERE IS NO LEGAL REQUIREMENT TO STAY THIS MATTER AND TO DO SO WILL PREJUDICE THE ABILITY OF THE SECURITIES COMMISSIONER TO TAKE SUCH ACTIONS AS MAY BE NECESSARY TO PREVENT FURTHER VIOLATIONS OF THE LAW BY THE DEFENDANTS, TO PROPTECT AND FREEZE ASSETS AND TO HAVE A RECEIVER APPOINTED TO MARSHAL, PROTECT, AND ULTIMATELY DISTRIBUTE THE ASSETS TO THE INVESTORS AND SUCH OTHER REMEDIES AS MAY BE APPROPRIATE

The limited liability company defendants consisting of 3 Boys, Consortium Group and Daniel are hereafter referred to jointly as the "LLC Defendants". The individual defendants, consisting of Tony Pough, Tim McQueen, and Joseph Brunson are referred to hereafter jointly as the "Individual Defendants."

As to the LLC Defendants, there are no Fifth Amendment or other constitutional rights to be protected by the grant of a stay. The Individual Defendants cannot prevent the disclosure of documents of the LLC Defendants, even if such disclosure incriminates the Individual Defendants:

> Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. [citations omitted] Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. [citation omitted] But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and

> duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally. [citations omitted] Such records and papers are not the private records of the individual members or officers of the organization. Usually, if not always, they are open to inspection by the members and this right may be enforced on appropriate occasions by available legal procedures. [citation omitted] They therefore embody no element of personal privacy and carry with them no claim of personal privilege.

U.S. v. White, 322 U.S. 694, 699-700, 64 S.Ct. 1248, 1251-1252 (1944).

The United States Supreme Court has spoken. There is not a Fifth Amendment right associated with an entity.

As to the Individual Defendants, even if they have some incriminating evidence in their individual capacities as opposed to their capacities as agents or members of the LLC Defendants, the law does not require that the Individual Defendants be protected by a stay. The South Carolina Court of Appeals addressed this issue in *South Carolina Department of Social Services v. Walter*, 369 S.C. 384, 631 S.E.2d 913) (Ct. App. 2006). In *Department of Social Services*, the Court of Appeals stated:

> The issue presented in this appeal is whether William Nelson's due process and equal protection rights were violated by the fact that the family court intervention action proceeded to trial while related criminal charges were also pending against him. We find no constitutional violation and affirm.

Department of Social Services, 369 S.C. at 385, 631 S.E.2d at 913.

The Court of Appeals went on to state:

> The essence of Nelson's position is that the pending criminal charges (and his right to remain silent) unduly and impermissibly influenced his decision whether to testify in the family court action and, more generally,

> his ability to defend himself against the family court abuse allegations, amounting to a constitutional violation.
>
> Case law from other jurisdictions has uniformly rejected Nelson's constitutional challenge. *United States v. Kordel,* 397 U.S. 1, 11, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970) (holding that simultaneous civil and related criminal proceedings do not constitute "unfairness and want of consideration of justice" requiring reversal of a criminal conviction). . .

Id., 369 S.C. at 386, 631 S.E.2d at 914.

Defendants cite several cases in support of their Motion for Stay. The first is *Ex parte Dibble*, 279 S.C. 592, 310 S.E. 2d 440 (1983). In *Dibble*, the court addressed the issue of whether requiring attorneys to represent indigent civil plaintiffs without compensation deprived the lawyer of their constitutional rights. The South Carolina Court of Appeals cited a Missouri case (*State ex rel Gentry v. Becker*, 351 Mo. 769, 174 S.W.2d 181 (1943)) for the general proposition that "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Id.* 279 S.C. at 595, 310 S.E. 2d at 442. This case did not involve the issue of parallel civil and criminal proceedings.

Carolina Water Service Inc. v. Lexington County Joint Municipal Water and Sewer Commission, 367 S.C. 141, 624 S.E. 2d 227 (Ct. App. 2006), does not address the issues of parallel civil and criminal actions. In *Carolina Water Services*, a water and sewer commission filed a condemnation action to acquire wastewater treatment facilities. The owners of the facilities filed an action that challenged the right to condemn. While the eminent proceeding was ongoing, there was an action pending in the South Carolina Administrative Law Court related to whether DHEC had the authority to reject a permit modification related to the wastewater treatment facilities. The circuit court issued a stay of the eminent domain proceeding and of the action by the facilities owner challenging

the right to condemn. The Circuit Court was asked to reconsider the stay of the action challenging the right to condemn. The Circuit Court lifted that portion of the stay. The Court of Appeals received the case on the appeal of the partial lifting of the stay. In footnote two of the opinion, the Court of Appeals stated "The granting or refusing of a stay is discretionary and should be exercised with caution after balancing competing interests." *Id.*, 367 S.C. at 153, 625 S.E. 2d at 233.

The South Carolina Supreme Court reviewed *Carolina Water Services* by writ of certiorari. The Court overruled the decision by the Court of Appeals and held that the appeal of the lifting of the stay was not immediately appealable. See *Carolina Water Service, Inc. v. Lexington County Joint Mun. Water and Sewer Com'n*, 373 S.C. 96, 644 S.E.2d 681 (2007).

Neither of these cases addresses the issue of parallel civil and criminal actions. They do stand for the general proposition that courts have inherent powers to do justice, a principle that the Plaintiff does not challenge.

Defendants cite *In the Matter of Ernest White*, 330 S.C. 595, 507, 499 S.E. 2d 813, 815 (1998) for the proposition that "Proceedings are routinely stayed or held in abeyance where criminal proceedings parallel civil matters." See Memorandum in Support of Motion for Stay, page 4. In *White*, a defense was raised that "Respondent was a target of the federal criminal investigation, and therefore, any requirement imposed upon him to answer the complaint would violate his Fifth Amendment rights." *Id.* 499 S.E. 2d at 508. The Board of Commissioners on Judicial Standards did postpone a scheduled hearing and held the proceedings in abeyance until the federal criminal proceedings could be concluded. There is no discussion of the law with regard to parallel

civil and criminal proceedings or a statement that the continuance and the holding in abeyance were legally required.

The case of *First Union Nat. Bank v. First Citizens Bank and Trust Co.*, 346 S.C. 462, 551 S.E. 2d 301 (2001) does not address a stay in parallel proceedings. This case does stand for the proposition that the Fifth Amendment right against self-incrimination extends to discovery responses. This case was an appeal of the order of the trail court that held the defendant in contempt for not responding to discovery responses. The court stated:

> Thus, his compelled testimony in producing the documents could furnish a link in the chain of evidence needed to prosecute Crull for financial institution fraud. We therefore conclude Crull was justified in exercising his constitutional right to refuse to respond to the requests to produce.

At this point in time, there is no effort to "compel" the testimony of any of the Individual Defendants. The assertion of Fifth Amendment rights may be appropriate at that time if it arises. Plaintiff should be able to proceed with investigations that do not implicate Fifth Amendment rights, if such rights are asserted and confirmed, through independent means of investigation should it become necessary. A stay is not legally required and is not necessary to protect Fifth Amendment rights.

Scott v. Greenville Housing Authority, 353 S.C. 639, 652 579 S.E. 2d 151, 158 (1983) cited by Defendants states that "The gist and gravamen of the discovery rule mandate full and fair disclosure to prevent a trial from becoming a guessing game." The *Scott* case is about significant discovery abuses in a civil case. It does not involve issues of stays or parallel proceedings.

CONCLUSION

A stay is not legally or constitutionally required in this matter against either the LLC Defendants or the Individual Defendants. Granting a stay in this matter will inhibit the ability to marshal and protect assets that will, we believe, be ultimately returned to the investors at the termination of this case.

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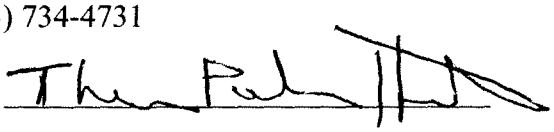
BY: 

June 28, 2007

ATTORNEYS FOR THE STATE OF SOUTH CAROLINA