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**IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT  
SALT LAKE COUNTY, STATE OF UTAH**

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In re:

Special Investigation of  
Attorney General John E. Swallow

**MOTION OF THE SPECIAL  
INVESTIGATIVE COMMITTEE OF  
THE UTAH HOUSE OF  
REPRESENTATIVES TO  
INTERVENE FOR A LIMITED  
PURPOSE UNDER UTAH R. CIV. P.  
24(b) AND MEMORANDUM IN  
SUPPORT**

Civil No. 130905293

Judge: Vernice Trease

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**PRELIMINARY STATEMENT**

This motion to intervene for a limited purpose pursuant to Utah Rule of Civil Procedure 24(b), and memorandum in support, is brought by the Special Investigative Committee of the Utah House of Representatives (the “Special Committee” or “Committee”), which the House of Representatives convened in July of this year to conduct an inquiry into allegations of improper conduct by Attorney General John Swallow. On November 21, 2013, Attorney General Swallow

resigned from office effective at 12:01 a.m. on December 3, 2013. That resignation does not, however, affect the Special Committee's duty under its authorizing resolution to investigate and to report to the House findings of fact about the matters investigated and the need, if any, for legislation, including legislation that might seek to avoid similar situations in the future.

Through this motion, the Special Committee seeks to participate in this proceeding for the limited purpose of seeking an order of the court releasing to the Special Committee the transcript of a deposition and accompanying exhibits (collectively, the "Deposition Documents") of Attorney General Swallow taken in this matter by the Utah Lieutenant Governor's Office (the "Lieutenant Governor"). The Lieutenant Governor has indicated that he has no objection to releasing the Deposition Documents to the Special Committee or to the relief sought herein.

Pursuant to the stipulated protective order (the "Protective Order") entered by the court in this case, the Special Committee understands that the Lieutenant Governor gave notice to two parties of his intent to release these materials to the Special Committee – Attorney General Swallow and an entity known as Softwise, Inc. ("Softwise"), for which the Attorney General previously worked and for which he previously was a registered lobbyist. The Committee further understands that while neither the Attorney General nor Softwise specifically objected under the Protective Order to release of the Deposition Documents to the Committee, neither expressly consented to the release.<sup>1</sup> The Special Committee is advised that the Lieutenant

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<sup>1</sup> In contrast, on November 19, 2013, the Attorney General objected to a separate notice from the Lieutenant Governor that he intended to release the Deposition Documents to the public. The natural inference from the Attorney General's decision to object to the release of the materials to the public but not to the Special Committee is that the Attorney General does not object to the Special Committee receiving the materials. As noted,

Governor and Softwise have since reached an agreement allowing the public release of Softwise documents with certain information redacted. Therefore, the Special Committee understands that Softwise is not a party to the instant proceeding.

With respect to Attorney General Swallow, out of an abundance of caution and given that the Attorney General has not expressly consented to release, the Lieutenant Governor has taken the position that the Special Committee should seek an order of this court authorizing the release of the materials. Therefore, pursuant to Utah Rule of Civil Procedure 24(b), the Court should allow the Special Committee to intervene in this proceeding for the limited purpose of obtaining an order releasing the Deposition Documents.

### **FACTUAL BACKGROUND**

#### **A. The Formation of the Special Committee by the Utah House of Representatives**

1. Shortly after he was sworn into office on January 7, 2013, Attorney General Swallow became the subject of public allegations of illegal or improper conduct.

2. On July 3, 2013, the Utah House of Representatives passed a resolution creating the Special Committee and instructed it to investigate allegations of alleged wrongdoing by Attorney General Swallow and other matters.<sup>2</sup>

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however, the Attorney General also failed to provide express consent to the release of the materials to the Committee, thus necessitating the instant motion.

<sup>2</sup> H.R. 9001 (enacting House Rule HR3-1-202).

3. The Special Committee is specifically charged with “investigat[ing] allegations against the current attorney general,” investigating “matters related to the current attorney general that arise as part of the investigation,” and “report[ing] to the House findings of fact about the matters investigated and the need, if any, for legislation.”<sup>3</sup>

4. The investigation encompasses allegations of wrongdoing dating to the time Attorney General Swallow joined the Office as Chief Deputy Attorney General in December 2009.<sup>4</sup>

5. In this regard, there is overlap with the scope of the Lieutenant Governor’s investigation, which focuses on allegations that Attorney General Swallow violated election laws when he ran for Attorney General in 2012.

**B. The Proceedings Involving the Lieutenant Governor**

6. In March 2013, a verified petition was filed with the Utah Lieutenant Governor alleging that Attorney General Swallow violated the Utah Election Code during his 2012 campaign.

7. After gathering information, the Lieutenant Governor determined that a special investigation was necessary and the Lieutenant Governor retained Special Counsel to assist him.

8. On August 15, 2013, the Lieutenant Governor filed a Petition for a Special Proceeding to Investigate Attorney General Swallow with respect to allegations of violations of the Utah Election Code and to subject the investigation to the Utah Rules of Civil Procedure.

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<sup>3</sup> HR3-1-202(7).

<sup>4</sup> HR3-1-202(8)(a).

9. In response to the Petition, a civil case was opened and the matter was assigned to this court.

10. On September 19, 2013, this Court entered a stipulated protective order governing the production of certain documents and information to the Lieutenant Governor in this matter.<sup>5</sup> Among other provisions, the Protective Order established a process for parties to designate as “Confidential” materials produced to the Lieutenant Governor and for the Lieutenant Governor to challenge such designations and provide notice to producing parties that the Lieutenant Governor proposes to release to others assertedly confidential materials that the parties have produced. The Protective Order further provides that, upon receipt of such a notice from the Lieutenant Governor, a producing party may seek an order of court preventing the proposed release of the materials it provided to the Lieutenant Governor.

11. As part of its investigation, the Lieutenant Governor took the deposition of Attorney General Swallow. The transcript of that deposition, along with the exhibits thereto, are the subject of this motion.

**C. The Special Committee’s Request for Attorney General Swallow’s Deposition Transcript & Exhibits**

12. On October 31, 2013, the Lieutenant Governor notified Attorney General Swallow’s counsel and counsel for Softwise that the Special Committee had requested a copy of Attorney General Swallow’s deposition transcript and accompanying exhibits and that the

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<sup>5</sup> The stipulated protective order appears as Attachment A to Attorney General Swallow’s Objections filed on November 19.

Lieutenant Governor intended to comply with the request. Pursuant to the Protective Order, the Attorney General and Softwise had five business days – until November 7, 2013 – to seek relief of court barring the proposed release of the materials to the Special Committee. Neither sought such relief but, at the same time, neither expressly consented to the release.

13. Separately, on November 12, 2013, the Lieutenant Governor notified Attorney General Swallow’s counsel that it was challenging his designation of certain documents as “Confidential” and that the Lieutenant Governor intended to disclose publicly certain documents consistent with “the statutory and public purpose of” the Lieutenant Governor’s investigation. Letter dated November 12, 2013, from Matthew Lalli to Rodney Snow, re: Disclosure of Documents Under the Protective Order (Attachment A). Attorney General Swallow’s deposition transcript and twenty-two exhibits are listed among the documents that the Lieutenant Governor sought to release publicly.

14. Consistent with the process set forth in the Protective Order, on November 19, 2013, Attorney General Swallow filed his “Objections to Redesignating Confidential Documents and To Dissemination of Confidential Documents” (hereinafter “Objections”). The Objections do not specifically object to production of the deposition transcript or exhibits to the Special Committee. In fact, the Objections make no mention of the October 31, 2013 notification to the Attorney General by the Lieutenant Governor of the Special Committee’s request. The Objections, however, do object to the *public release* of the deposition transcript in its entirety and to the public release of the accompanying exhibits. (Objections, at 6-7.)

15. The Protective Order establishes an expedited procedure for this court to consider any disputes regarding the designation or disclosure of assertedly confidential materials. As of the filing of the instant motion by the Special Committee, no hearing has yet been set.

### **ARGUMENT**

Permissive intervention in a pending matter should be granted when the application is timely, the applicant can show a common question of law or fact, and the intervention will not cause undue delay or prejudice. The Special Committee's application satisfies each of these factors and should be granted.

In addition, the Lieutenant Governor should be permitted to disclose the transcript of Attorney General Swallow's deposition (with accompanying exhibits) to the Special Committee, for two reasons. First, the transcript itself and many of the exhibits are not subject to the terms of the Protective Order, and accordingly the Protective Order does not bar their disclosure. Second, even for those documents covered by the Protective Order, there is good cause for this Court to enter an order permitting the Lieutenant Governor to disclose the transcript and exhibits to the Special Committee given the legislature's historically broad investigative powers and in furtherance of its important mandate to investigate and report on serious allegations of wrongdoing made against a high-ranking executive department official.

#### **A. The Court Should Permit The Special Committee To Intervene**

Utah Rule of Civil Procedure 24(b) permits intervention "[u]pon timely application" to any person as long as the "applicant's claim or defense and the main action have a question of law or fact in common" and "the intervention will [not] unduly delay or prejudice the

adjudication of the rights of the original parties.” Utah R. Civ. P. 24(b); *see also State By & Through Utah State Dep't of Soc. Servs. v. Sucec*, 924 P.2d 882, 887 (Utah 1996) (applying factors); *State of Utah v. Kennecott Corp.*, 801 F. Supp. 553, 572 (D. Utah 1992) (same).<sup>6</sup> This rule is “liberally construed to achieve the purpose of eliminating unnecessary duplication of litigation.” *Centurian Corp. v. Cripps*, Utah 577 P.2d 955 (1978). Whether to allow a party to intervene is left to the sound discretion of this Court. Utah R. Civ. P. 24(b) (court may “exercis[e] . . . discretion”); *see Supernova Media, Inc. v. Pia Anderson Dorius Reynard & Moss, LLC*, 297 P.3d 599, 607 (Utah 2013) (intervention within “sound discretion of the court”) (internal quotation omitted).

All three factors – timeliness, commonality, and lack of prejudice – are satisfied here.

First, the Special Committee’s intervention is timely. Timeliness under Rule 24(b) is “determined under the facts and circumstances of each particular case, and in the sound discretion of the court.” *Republic Ins. Grp. v. Doman*, 774 P.2d 1130, 1131 (Utah 1989) (quotations omitted). Attorney General Swallow objected to making the testimony public on November 19; the Lieutenant Governor’s response to Attorney General Swallow’s Objections is due no later than November 22; and this motion was filed the same day that the Lieutenant Governor’s response is due. The Special Committee’s Motion to Intervene is being filed before

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<sup>6</sup> Because Utah’s rule closely tracks Federal Rule of Civil Procedure 24, cases interpreting the federal rule provide guidance as to the interpretation of the Utah rule. *See Bichler v. DEI Sys., Inc.*, 2009 UT 63, ¶ 24 n. 2, 220 P.3d 1203 (“Because the Utah Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure . . . we may look to the Federal Rules of Civil Procedure for guidance.”); *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 7 n. 2, 53 P.3d 947 (“Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are ‘substantially similar’ to the federal rules.”).



any hearing on the underlying issue has been scheduled. It is therefore clearly “timely” within the meaning of the rule. *See Supernova Media*, 297 P.3d at 607 (intervention motions generally timely if entered before “final settlement of all issues by all parties” and “before entry of judgment or dismissal”).

Second, the Special Committee’s claim shares “a question of law or fact in common” with the disclosure issue being litigated by the parties to the Protective Order. The Special Committee and Lieutenant Governor seek similar (but not identical) relief, and the issue presented by the Special Committee shares a common factual and legal question with the matter being litigated by the parties to the Protective Order, namely, whether the transcript and exhibits qualify as “confidential material” under the Protective Order, and whether good cause exists to allow disclosure even if they are confidential. Allowing the Special Committee to intervene on these common questions promotes efficiency and saves judicial resources by allowing them to be resolved in a single action, argued at a single hearing, with all interested parties before the court at the same time, rather than forcing the Special Committee to initiate an entirely separate action. Federal courts routinely permit intervention for similar purposes. *See EEOC v. National Children’s Center, Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (noting that “every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders” under Rule 24, and citing cases from the 1st, 2d, 3rd, 5th, 6th, 7th, 9th, and 10th Circuits).

Third, granting the Special Committee’s motion to intervene will not result in any undue delay or prejudice to either party. This timely motion to intervene will not delay the court’s

resolution of this matter, as the Special Committee is prepared to attend even a highly expedited hearing on whether the deposition transcript or other documents may be disclosed. Nor will intervention result in any undue prejudice to any party. To the contrary, allowing the Special Committee to intervene will save Attorney General Swallow and any other interested party from having to litigate access to these documents by the Special Committee in an entirely separate proceeding. Given that the Special Committee is an interested party that will be directly affected by the court's decision, both the parties and the court will benefit from the Special Committee's participation in resolving this dispute. *See Carlsen v. Bd. of Adjustment of City of Smithfield*, 287 P.3d 440, 451 (Utah Ct. App. 2012) (finding no error in district court's granting of intervention motion where intervenor "had an interest in the proceeding," "would be bound by the outcome of the" decision, and had an "interest [that] may have been inadequately represented had they not been permitted to intervene").

In sum, the court should exercise its sound discretion to permit the Special Committee to intervene for a limited purpose under Utah Rule of Civil Procedure 24(b).

**B. The Stipulated Protective Order Does Not Prevent The Lieutenant Governor From Disclosing The Transcript Or Exhibits to the Special Committee**

In addition to allowing the Special Committee a limited right to intervene, the Court should order that the Lieutenant Governor may disclose the transcript and exhibits from the Attorney General's deposition to the Special Committee, for two reasons.

First, the transcript itself, and many of the exhibits, are not subject to the protective order at all. The parties in this matter negotiated a very narrow Protective Order that applies only to

materials that are both (1) “marked ‘Confidential,’” and (2) “produced by a Subpoenaed Party in response to a subpoena duces tecum or other request or demand by the Special Counsel to a Subpoenaed Party.” *See* Protective Order, at ¶ 1. Thus, the deposition transcript, which was neither marked confidential nor “produced by” Attorney General Swallow, does not fall within the terms of the protective order. The same is true for many of the exhibits that were never marked confidential. As such, there is no Protective Order-related restriction on the transcript or on any exhibits not previously marked “confidential” and the Lieutenant Governor should be allowed to share that information with the Special Committee immediately.

Second, the Court has authority, under ¶ 4 of the Protective Order, to order the release of even “confidential” documents to a third party. There is good cause here to order the release of these documents to the Special Committee based on the legislature’s broad, longstanding constitutional authority to investigate in any area on which legislation “could be had,” *McGrain v. Daugherty*, 273 U.S. 135, 176 (1927), as well as the many interests motivating the Special Committee’s ongoing investigation that are of crucial importance to Utah and its citizens.

It is a fundamental principle of constitutional law that “the power to investigate is inherent in the power to make laws.” *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975); *see McGrain*, 273 U.S. at 174-76 (investigation is “a necessary and appropriate attribute of the power to legislate”). This power, which belongs to State legislatures as well as to Congress, *see McGrain*, 273 U.S. at 161, stems from the basic principle that “[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.” *McGrain*, 273 U.S. at 175; *see also*

Norman J. Singer & J.D. Shambie, 1 Sutherland Statutory Construction § 12:1 (7th ed. 2008) (same). Moreover, this power takes on heightened importance when the legislature is investigating Executive Branch misconduct. *See Watkins*, 354 U.S. at 187 (recognizing “the danger to effective and honest conduct of the Government if the legislature’s power to probe corruption in the executive branch were unduly hampered”).

Pursuant to the Utah House of Representative’s request, the Committee has undertaken a rigorous examination of the serious allegations against Attorney General Swallow, and the legislature has authorized the Committee to identify information that it needs to serve the public interest with respect to those allegations. The Special Committee has identified the Deposition Documents as relevant to its investigation, and necessary in order to fulfill its mandate of “report[ing] to the House findings of fact about the matters investigated and the need, if any, for legislation.” HR3-1-202(7). The Court should give great weight to the Committee’s investigative decisions. The Supreme Court has in the past specifically “decline[d] to interfere with or second-guess the action of the House of Representatives” where it was acting within its constitutional authority. *State v. Evans*, 735 P.2d 29, 32 (Utah 1987) (rejecting challenge as to qualifications of House members). Moreover, the separation of powers in Utah “requir[es] courts to defer to relevant legislative determinations” and thereby “respect the legislature’s important role in our constitutional system of government.” *Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.*, 16 P.3d 533, 539 (Utah 2000). Indeed, Utah courts have observed that “[h]armonious cooperation among the three branches of government [is]

fundamental to our system of government.”” *Jones v. Utah Bd. of Pardons & Parole*, 94 P.3d 283, 288 (Utah 2004) (citation omitted).

The Committee is mindful that there is value in protecting from unnecessary public disclosure information of a legitimately confidential nature. In disclosing the Deposition Documents to the Committee, the Attorney General may request confidential treatment for portions of the transcript or particular exhibits he believes warrant such protection, and the Special Committee is willing to accommodate the Attorney General’s reasonable requests. As a coordinate branch of government, however, the court should defer to the Special Committee on the appropriate balance between the needs of a serious investigation of the State’s chief legal officer and the protection properly afforded confidential information. To do otherwise would require the court to assess the weight of interests that have been assigned by the Utah Constitution to the legislative branch.

### **CONCLUSION**

For the reasons set forth above, the Special Committee asks this Court to grant its motion to intervene and authorize the Lieutenant Governor to provide the Deposition Documents to the Special Committee.

DATED this 22nd day of November, 2013.

Respectfully submitted,

/s/ John L. Fellows

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# EXHIBIT A



**Snell & Wilmer**  
— L.L.P. —  
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November 12, 2013

DENVER  
LAS VEGAS  
LOS ANGELES  
LOS CABOS  
ORANGE COUNTY  
PHOENIX  
SALT LAKE CITY  
TUCSON

**VIA E-MAIL**

Rodney G. Snow  
Clyde Snow & Sessions  
201 S. Main St. #1300  
Salt Lake City, Utah 84111

Re: Disclosure of Documents under the Protective Order

Dear Rod:

We have reviewed the documents you have provided to date with reference to the protective order entered in this case, and have determined that in the near future certain documents designated confidential will need to be made available for public disclosure at the discretion of the Lieutenant Governor. The documents we intend to make available for disclosure are identified on the attached Exhibit A.

As a foundational matter, we challenge the designation of these documents as confidential under paragraph 2 of the protective order. For instance, Mr. Swallow's invoices related to his Chaparral work were drafted for public consumption months after the work was actually completed. Moreover, the invoices lack any confidential information. Similarly, documents related to Mr. Swallow's finances or the finances of the Super Seven Trust and the companies that it owns directly and indirectly are not the type of information that is protected under Utah R. Civ. P. 37. None of this information has been requested in bad faith, in fact, it is at the heart of the matters we are investigating. Moreover, the documents in question provide no basis for annoyance, embarrassment, oppression or undue burden or expense. Finally, none of the documents include any trade secrets or confidential business information. As a result, we do not believe that any of the identified documents should be protected.

Even if the documents identified in Exhibit A are found to be confidential, we hereby invoke paragraph 4 of the protective order with this notice of the proposed disclosure. Indeed, these documents must be subject to public disclosure to fulfill the statutory and public purpose of this investigation. The purpose of this investigation is to determine whether Mr. Swallow made the necessary disclosures in his Candidate Financial Disclosure or Conflict of Interest form.

Snell & Wilmer  
LLP


Rodney G. Snow  
November 7, 2013  
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Without completing and filing this form, Mr. Swallow could not have run for Attorney General. The information that we intend to disclose is directly related to the accuracy and completeness of the form and pertains directly to the results and conclusions of our investigation. Accordingly, if you wish to challenge disclosure under paragraph 4 of the protective order, you have five business days in which to do so.

I also note there are several documents we identified that do not have Bates numbers and that you did not provide to us. In the interests of full disclosure and good faith, we have included those documents on Exhibit A and they are identified by their deposition exhibit number.

Very truly yours,

Snell & Wilmer



Matthew L. Lalli

MLL:crm

18203958

Exhibit A

1. JS000065-68 Invoices and transmittal documents for Chaparral
2. JS000311-339 Super Seven Trust Documents
3. JS000349 Trust Schematic
4. JS000164-175 MACU SSV 2011 Account Statements
5. JS001093-1108 MACU SSV 2012 Account Statements
6. JS000176 SSV Check Register
7. JS000679-87 MACU Swallow October 2012 Account Statement
8. Depo. Exhibit 12 Business Account Application for SSV Management to MACU
9. Depo. Ex 20 MACU I-Aware Products Account Statement September 2010
10. JS000133 I-Aware Check Register
11. Depo Ex. 22 MACU Swallow September 2010 Account Statement
12. JS000031-42 MACU P Solutions Account Statement 2011
13. JS000055-64 Copies of P Solutions Checks and Check Register
14. Depo. Exhibit 27 April 4, 2011 check from RMR Consulting to P Solutions
15. JS000829-879 IRS 1040 for 2011, John E. and Suzanne Swallow
16. JS000043-54 MACU P Solutions Account Statement 2012
17. JS000835, 866 2011 IRS Schedule C John E. Swallow
18. JS000636-646 MACU Swallow May 2012 Account Statement
19. JS000880-904 IRS 1040 for 2012, John E. and Suzanne Swallow
20. JS000519-627 MACU Swallow April 2011 Account Statement
21. JS001060-63 Emails Re Chaparral
22. RR00096-97 Emails Re Chaparral
23. Transcripts of John Swallow Deposition