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BEFORE THE ARIZONA CORPORATI...

IN THE MATTER OF:)	DOCKET NO.
)	S-03450A-02-0000
Philip William Merrill)	
3788 N. 156th Drive)	
Goodyear, AZ 85338)	PREHEARING
CRD#2436444,)	CONFERENCE
)	
Respondent.)	

At: Phoenix, Arizona

Date: March 5, 2002

Filed: **MAR 18 2002**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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BE IT REMEMBERED that the above-entitled and numbered matter came on regularly to be heard before the Arizona Corporation Commission, 1200 West Washington Street, Phoenix, Arizona, commencing at 1:30 p.m. on the 5th day of March, 2002.

BEFORE: MR. PHILIP J. DION, III,
Administrative Law Judge

APPEARANCES:

ANTHONY BINGHAM, Attorney, Securities Division, on behalf of the Arizona Corporation Commission;

BEGAM, LEWIS, MARKS & WOLFE, P.A.,
BY FRANK LEWIS, Attorney at Law, on behalf of the Respondent.

MICHELE E. BALMER
Certified Court Reporter
CCR No. 50489

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1 ALJ DION: Good afternoon everyone. My name is
2 Phil Dion. Welcome to the Arizona Corporation
3 Commission.

4 I'll be presiding over the hearing in the
5 matter of Philip William Merrill. The Docket Number in
6 this case is S-03450A-02-0000. As I indicated, this is
7 the time set for the prehearing.

8 And at this time I will be take appearances on
9 behalf of the Securities Division.

10 MR. BINGHAM: Anthony Bingham for the
11 Securities Division.

12 ALJ DION: And on behalf of Mr. Merrill?

13 MR. LEWIS: My name is Frank Lewis, an attorney
14 at 111 West Monroe, Phoenix, Arizona.

15 ALJ DION: Good afternoon, Mr. Lewis.

16 MR. LEWIS: Thank you.

17 ALJ DION: In this particular case, I believe
18 Mr. Merrill requested the hearing or at least the
19 prehearing on the notice in this matter.

20 Mr. Lewis, just a quick question. Did you file
21 a notice of appearance in this matter? Sometimes
22 things from Docket Control to my office get lost or
23 misplaced. I was just wondering.

24 MR. LEWIS: I'm not sure that I did. The
25 request for hearing was filed by my client. But I

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1 certainly can file a notice of appearance.

2 ALJ DION: Okay. As I understand it,
3 Mr. Bingham, there's been some conversation with
4 Mr. Lewis, but the Securities Division has not made an
5 offer in this case. But that is forthcoming this week;
6 is that correct?

7 MR. BINGHAM: That is correct. It is my intent
8 and the Division's intent to extend that offer within
9 the next few days.

10 ALJ DION: And Mr. Lewis, it's my understanding
11 you've been recently retained. Is that fair to say?

12 MR. LEWIS: Yes.

13 ALJ DION: Based on perhaps your limited
14 knowledge, Mr. Lewis, but certainly yours Mr. Bingham,
15 can you give me an estimate as to the number of
16 witnesses and number of days this hearing, if it were
17 to proceed -- well, how many days -- how many people do
18 you think?

19 MR. BINGHAM: My best estimate as far as
20 witnesses is eight. Number of days my best estimate is
21 two. I don't believe it will be more than three.

22 ALJ DION: Okay. Mr. Lewis, I know you're a
23 bit handicapped.

24 MR. LEWIS: Yes. In talking with my client, he
25 was at Dean Witter and there are things that happened

263000016

1 between Dean Witter and the people who are set forth in
2 the notice as having had problems with Mr. Merrill that
3 would be material to the hearing in this case.

4 There are, for instance, settlements with these
5 people. They were paid sums of money. Mr. Merrill has
6 no documentation, has no idea what it was, and we don't
7 have any papers. So I would need to get those papers
8 from Dean Witter. I don't know what the process is
9 with them and if they'll give them to me voluntarily or
10 whether we have to go through a subpoena process to get
11 them.

12 In order to determine the answer to your
13 question as to how many, we may need some witnesses
14 from Dean Witter. There may be others. There
15 certainly will be documents. And I don't know if
16 Mr. Bingham has those documents, whether he got them
17 from Dean Witter or not. If he does, it would make my
18 life easier. If he doesn't, it would be a little more
19 complicated. And I'm sure that our defense is going to
20 need at least one day and maybe two.

21 ALJ DION: Okay. So it might be prudent to
22 just reserve a week, meaning five days, and kind of
23 we'll go from there, assuming this case does go towards
24 hearing.

25 With that in mind and with Mr. Lewis's recent

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1 retention in mind, and I know for a fact Mr. Bingham's
2 and my schedule, and I'm certain that Mr. Lewis's
3 schedule as well, based on all of that, I'm thinking a
4 minimum of 60 days.

5 Mr. Bingham, what do you think about that?

6 MR. BINGHAM: For the hearing?

7 ALJ DION: Yes. For the hearing itself.

8 MR. BINGHAM: I would request no more than 60
9 days. 45 to 60 days.

10 We will -- some of the documents that Mr. Lewis
11 is seeking we may have. We may be able to provide
12 those documents to him. It does take a motion or a
13 letter to the Director of the Securities Division and
14 his approval to release documents. But it is possible
15 that, for instance, some of the settlement agreements
16 may be provided to him by the Securities Division.

17 ALJ DION: Well, I'm for anything that
18 circumvents complexity and gets this moving.

19 MR. LEWIS: Sir, in terms of the amount of time
20 between now and 60 days, I was involved in a hearing
21 all last week that took three weeks to prepare for and
22 we're not finished. And we're going to reconvene in
23 March again, and I'm not sure when we're going to
24 finish. And I have gotten substantially behind as a
25 result of that commitment of time in a bunch of other

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1 matters.

2 I have several hearings set. They're
3 securities arbitrations. That's mostly what I do. And
4 I have one that's set to start May 28th, and it's set
5 for a minimum of three days. And there are hundreds of
6 documents, and I haven't even started preparing for
7 that.

8 I really would not like to have this hearing
9 set before that was concluded. So I'm looking at my
10 calendar, and the first date that I would like to have
11 Mr. Merrill's hearing is June 10th. It's a Monday.

12 That is a little bit more than 90 days from
13 now. But under all of the circumstances here with what
14 happened -- and it's not that we didn't try. We did
15 have a tentative meeting set up with Mr. Bingham
16 earlier. And he wasn't in a position to have the
17 meeting because he didn't have the information, which
18 is understandable.

19 And so we set a tentative date for March 20th
20 to reconvene. Not reconvene, but to convene on that to
21 sit down and discuss and see whether this matter can
22 be resolved.

23 And I'm not sure it can be resolved, but we
24 certainly wish to try and I want to focus on that. And
25 if he gets the information to me and I can get the data

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1 I need so that Mr. Merrill and I can conclude what it
2 is we want to do in response to that demand, I will go
3 ahead with the meeting on March 20th.

4 But I'm guessing if there's a process where
5 I've got to start filing papers to get papers, and I
6 don't know in advance what they're going to be or
7 whether I have to get them from Dean Witter, I may not
8 be in a position by March 20th, which is just two weeks
9 from tomorrow, to have that meeting with him and to
10 have anything really to discuss with him.

11 We would like to try and resolve the matter
12 without a hearing. Mr. Merrill very much would like to
13 do that. But Mr. Bingham has told me that he believes
14 that from his standpoint restitution is an important
15 element of any settlement. We disagree with that and
16 we need the documentation as to how much he's asking by
17 way of restitution and how much the people actually
18 received from Dean Witter, who Mr. Merrill felt was
19 representing his interests in making payments on his
20 behalf to these people.

21 So we need to be able to present that whole
22 picture to Mr. Bingham. And if it doesn't persuade
23 him, we need to present it at the hearing of this
24 matter, and I'm not sure I can get all of that done by
25 March 20th.

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1 So since we do really want to try to settle it,
2 it may be 20 or 30 days before we can have that
3 meeting. And if that meeting doesn't resolve the
4 matter, then we need to start preparing for the
5 hearing.

6 MR. BINGHAM: Your Honor, if Mr. Lewis wants to
7 send us a letter as soon as he can delineating what
8 documents it is he would like to have, we can certainly
9 see if we have them and then determine whether or not
10 we're going to release them.

11 And particularly since it was I who did
12 postpone the first meeting, if we can't meet on the
13 20th we certainly don't have any objection to moving
14 that to a later date so that we can both be prepared to
15 adequately discuss settlement and the issues that are
16 in this proceeding.

17 ALJ DION: Well, I'm going to look to the both
18 of you to work all of that stuff out.

19 Now, as I understand it, Mr. Lewis, you had
20 indicated you have a arbitration starting on May 28th;
21 is that correct?

22 MR. LEWIS: Yes. It's set for three days. It
23 may go four. I think May 28th is a Tuesday. Yeah. My
24 guess is that that will end that week. I'm
25 representing a broker/dealer in that case, and I think

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1 that we will be able to complete the matter.

2 ALJ DION: Is that -- excuse me. I'm sorry. I
3 didn't mean to interrupt you. Is that an arbitration
4 pursuant to a Superior Court case or an arbitration?

5 MR. LEWIS: No. It's a National Association of
6 Securities Dealers arbitration before three
7 arbitrators. And it's going to be in this area. They
8 haven't set a location yet, but it's going to be in the
9 Phoenix area or Scottsdale.

10 But that would give me the opportunity,
11 assuming that ends that week, and I believe it will,
12 the following week to work on preparation of
13 Mr. Merrill's hearing. And that's why I said June 10th
14 would be the earliest date I would like to see it so
15 that I can properly prepare. Assuming that we're
16 unable to resolve the matter, of course.

17 ALJ DION: Mr. Bingham, do you want to be heard
18 on that? And also I want to hear your schedule.

19 MR. BINGHAM: I certainly understand
20 Mr. Lewis's schedule. It was due to a hearing that
21 ended up being continued that I was not able to get the
22 information and an offer to Mr. Lewis as soon as I had
23 anticipated and wanted to.

24 I certainly want to be courteous to his
25 schedule; however, I would like to see this case

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1 resolved as soon as possible. If we put the hearing in
2 June, then that's, like Mr. Lewis said, about 90 days
3 out. It's a little further than what I had
4 anticipated.

5 MR. LEWIS: Your Honor, I would like to point
6 out something. Mr. Merrill is not active in the
7 securities industry right now. He is not engaged in
8 any activities representing customers or giving advice.
9 He is not working as a registered representative in the
10 securities business right now.

11 So if -- I mean, if this were a case where
12 there had been all kinds of things happening and might
13 may be still happening, I could understand
14 Mr. Bingham's concern about getting to this as soon as
15 possible. But he's not in any position now to do what
16 the complaint alleges -- which we disagree with -- but
17 do what the complaint in this matter alleges he did in
18 the past. He's not doing that. I mean, he's not in
19 the business any longer.

20 ALJ DION: Okay. Great. That was going to be
21 one of the questions I had. I appreciate you
22 interjecting that and putting that on the record.

23 Frankly, if I was to set this in the middle of
24 May, we would run into, Mr. Bingham, some open meeting
25 concerns. And then I'm also reluctant to schedule it a

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1 week before something that Mr. Lewis has previously
2 scheduled because I think it would just mean all of us
3 coming back in here and arguing a motion to continue.
4 And quite frankly, I don't think any of us have the
5 time for that.

6 90 days is outside the scope. This is an
7 administrative hearing. It is supposed to work quicker
8 than, shall we say, other courts or other systems. But
9 I think in this particular case, because of a situation
10 where Mr. Merrill might not be in possession of all of
11 the documents he might need to adequately either defend
12 himself or negotiate a settlement with, and those
13 papers might be in the hands of a third party and not
14 just the Securities Division or the Attorney General's
15 office. I know for a fact that trying to pry that
16 information loose can be difficult and it can be a
17 situation where if t's not difficult it is certainly
18 time consuming.

19 So I don't think in this particular case the
20 90-day request is out of line. That being said, if
21 this case -- if we come to this case in June and we're
22 looking to continue it, I may be reluctant in that I
23 think we've given a lot of time in this particular
24 matter to get those things accomplished.

25 However, that does not mean that I would turn a

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1 deaf ear to any reasonable request based on certain
2 circumstances that I'm sure counsel could --

3 MR. LEWIS: Could I tell you what one of them
4 might be? And it's completely outside of my control.

5 I have two other matters pending right now with
6 Morgan Stanley Dean Witter concerning events that
7 occurred, one of them late last year and others in
8 earlier years.

9 And they have advised me that there is a
10 tremendous amount of documentation that they cannot
11 produce and they don't have. Morgan Stanley Dean
12 Witter had 40 floors in the World Trade Center, and
13 apparently that was the location of a lot of their
14 records.

15 I'm not necessarily agreeing with them. I
16 think some of the records that I'm looking for might be
17 in the branches. And I'm not sure whether the records
18 that Mr. Merrill's customer had would be in the
19 branches, but I have been told by them that there's no
20 way for them to produce certain documents because they
21 don't exist as a result of September 11th.

22 And there's no way for me to contest that. I
23 can't say, go in the rubble and get it. I hope that
24 he's got the documents. Then I won't have to go to
25 Morgan Stanley Dean Witter to try and get them. But

263000016

1 that is a potential that I'll ask Mr. Bingham for them,
2 he won't have them, and I'll go to Morgan Stanley Dean
3 Witter and they'll tell me that they don't exist, and
4 then I've got a real problem.

5 But I just wanted to mention that there could
6 be a reason why even the June 10th wouldn't work. I
7 hope it doesn't happen. I mean, as a trial attorney, I
8 don't do my job and I don't earn my living by having
9 things postponed. I earn my living by trying cases,
10 and that's what I will do.

11 ALJ DION: And I certainly understand that.
12 And if there's -- you know, hopefully in this
13 particular case we won't be affected by those actions
14 or the actions of others. And hopefully the Securities
15 Division and the Attorney General's office have
16 procured that information and this will move smoothly.

17 However, on the outset that it wouldn't or it
18 won't, and because of some of the scheduling in the
19 middle of May, I think it's -- and because of
20 Mr. Lewis's hearing at the end of May, I think it's
21 probably prudent to set this case for June 10th.

22 I will tell both parties that that is an
23 awfully congested week on the calendar. There might be
24 a securities case -- it's called the Carrington matter
25 I think -- scheduled here for like a month. So we may

1630000015

1 not be in this particular room and we may be up in a --
2 upstairs in the conference room. It's a nice
3 conference room.

4 MR. LEWIS: Is that the viatical settlement
5 matter?

6 ALJ DION: You know what? It might be. I
7 think that rings a bell. That's in front of Judge
8 Stern.

9 MR. BINGHAM: It's settled from what I
10 understand.

11 ALJ DION: Is it settled or --

12 MR. BINGHAM: Well --

13 MR. LEWIS: There was a case in the Court of
14 Appeals that held that the viatical settlements under
15 Arizona law were a security. I guess that's why the
16 Securities Commission got involved in it, and it
17 involved Carrington.

18 It's a very interesting issue because there's a
19 federal court case holding exactly the same facts that
20 it isn't a security, but in Arizona it is.

21 ALJ DION: Right.

22 MR. LEWIS: We'll see if the Court of Appeals --

23 ALJ DION: That's why I thought for sure that
24 one would be litigated because -- but in any event, but
25 as to what Judge Stern and the Carrington matter is, I

263000016

1 obviously do not have -- I'm not positive.

2 But I just wanted to inform both sides that we
3 might be in the conference room. And so if you can
4 keep that in the back of your mind, it's not going to
5 be as comfortable, and obviously the ability to handle
6 a great number of people or a great number of witnesses
7 is going to be limited. So I just wanted to give you
8 guys that heads up before.

9 MR. LEWIS: Thank you.

10 ALJ DION: Before you get here.

11 Anything else, gentlemen?

12 MR. BINGHAM: So we'll start on June 10th?

13 ALJ DION: Correct. What day of the week is
14 that?

15 MR. LEWIS: Monday.

16 ALJ DION: It's a Monday.

17 MR. LEWIS: At least that's what it says on my
18 calendar.

19 ALJ DION: And I'll probably -- but just
20 another thing so there's -- just so you know, I'll
21 probably have the same 10:00 start time that we usually
22 do around here, but if we go through the hearing I'm
23 one who likes to start at 8:30 or 9:00, and then we can
24 really accomplish things.

25 MR. LEWIS: So we're going to start on June

263000016

1 10th at 10:00 a.m.?

2 ALJ DION: 10:00 a.m. That way if there are
3 any out-of-state, out-of-county witnesses, it gives
4 those individuals time to get here. They don't have to
5 be up at the crack of dawn to be present at 8:00 a.m.
6 And so I would expect those witnesses to be handled in
7 the first day.

8 MR. LEWIS: I understand. I think that's fair.
9 I have no problem.

10 ALJ DION: But after that we're going to handle
11 it like a regular workday.

12 MR. LEWIS: I have no problem with that.

13 ALJ DION: Anything else, Mr. Bingham?

14 MR. BINGHAM: Will there be the usual order that
15 exhibits be exchanged at least 10 days prior to the
16 hearing date?

17 ALJ DION: Yeah. And I'll certainly leave it
18 to you guys to work that out. But certainly by at
19 least two weeks prior or 10 days prior, I expect to see
20 a list so that I can be prepared and have my Staff
21 prepared in case we do have to go to that other
22 conference room so I know the numbers and what I'm
23 dealing with.

24 And then if there's anything else, if something
25 comes up, Mr. Lewis, Mr. Bingham, please feel free to

263000016

1 contact me. I'm pretty amiable about doing either a
2 teleconference or getting us all in here on short
3 notice.

4 MR. LEWIS: Thank you. I appreciate that.

5 ALJ DION: You're welcome. Good luck.

6 (The Prehearing Conference concluded at
7 2:00 p.m.)

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