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BEFORE THE ARIZONA CORPORATION COMMISSION

2002 MAY 29 P 4: 20

AZ CORP COMMISSION
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3 WILLIAM A. MUNDELL
Chairman
4 JIM IRVIN
Commissioner
5 MARC SPITZER
Commissioner

6 In the matter of:)
7)
8 CLAY EUGENE LAMBERT)
3711 East Minton Place)
9 Mesa, Arizona 85215)
CRD No. 1959853,)
10 Respondent.)
11)

DOCKET NO. S-03413A-01-0000
SECURITIES DIVISION'S RESPONSE
TO RESPONDENT'S MOTION TO
STAY ADMINISTRATIVE
PROCEEDING
(ALJ Philip Dion III)

12 The Securities Division ("Division") of the Arizona Corporation Commission hereby requests
13 that Clay E. Lambert's ("Respondent") Motion To Stay Administrative Proceeding be denied since
14 Respondent has not shown sufficient factors and circumstances to warrant a stay of these proceedings.
15 The Division also requests that the hearing in this matter proceed as scheduled on Monday June 3,
16 2002.

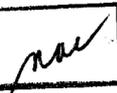
17 Respectfully submitted this 29th day of May, 2002.

18 **Janet Napolitano**
Attorney General for the State of Arizona

19 Arizona Corporation Commission

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21 MAY 29 2002

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23 
24 **Anthony B. Bingham**
25 Special Assistant Attorney General
26 **Moira McCarthy**
Assistant Attorney General
Attorneys for the Securities Division of the
Arizona Corporation Commission

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. DIVISION'S QUESTIONING OF LAMBERT AT MEETING OF CREDITORS**
3 **WAS NOT INAPPROPRIATE**

4 On March 25, 2002, a meeting of creditors was held in Respondent's chapter 11 bankruptcy
5 case. The attorney for the Chapter 11 trustee presided at the meeting of creditors. Respondent appeared
6 at the meeting without counsel and thereby waived his right to be represented by counsel. The attorney
7 for the trustee asked Respondent and his wife questions at the meeting. An attorney for one of
8 Respondent's creditors also asked Respondent questions at the meeting. Other persons with an interest
9 in the case had the opportunity to ask Respondent and his wife questions at the meeting. Counsel for
10 the Division also asked Respondent questions at this meeting. Respondent provided no new documents
11 to the Division at this meeting.

12 The meeting of creditors was recorded. The Division received a recording of the meeting on a
13 cassette tape and has provided a copy of the tape to Respondent's counsel. The Division has also
14 included a copy of the recording of the meeting of creditors as exhibit S-33 with its list of exhibits for
15 the hearing in this matter.

16 Respondent's counsel consumes a fair portion of the motion to stay alleging that the undersigned
17 counsel was aware of the criminal investigation of Respondent at the time of the meeting of creditors
18 and that undersigned's questioning of Respondent at that meeting was improper because Respondent
19 was not represented by counsel. Respondent's counsel attempts to infer that since Respondent was
20 under criminal investigation on April 15, 2002, he was probably under criminal investigation on March
21 25, 2002, and therefore undersigned counsel knew of the criminal investigation at the meeting of
22 creditors. In fact, it was not until after the meeting of creditors that undersigned counsel learned of the
23 criminal investigation of Respondent. To date, no criminal charges have been filed against Respondent.

24 Respondent counsel's claim that it was improper for the undersigned counsel to question
25 Lambert at the meeting of creditors because he was not represented by counsel is flawed. As mentioned
26 above, Respondent waived the presence of counsel by not retaining counsel. Furthermore, Respondent
and his counsel knew that the "victims" as Respondent refers to them in his motion to stay, who

1 vigorously prosecuted their civil action against Respondent, would appear with their counsel at the
2 meeting of creditors and would have an opportunity to question Respondent about his past financial
3 transactions, assets and other information. If Respondent's counsel was so concerned about his client
4 answering questions at the meeting of creditors without the assistance of legal counsel, then he could
5 have represented Respondent at that meeting himself or obtained the help of one of the knowledgeable
6 bankruptcy attorneys in his firm to represent Respondent at the meeting. In a prior hearing in this case
7 involving staying this administrative proceeding due to Respondent's pending bankruptcy case, a
8 bankruptcy attorney from Respondent's counsel's firm did appear and argue on behalf of Respondent.

9 **II. DOCTRINE OF PARALLEL PROCEEDINGS DOES NOT MANDATE THAT**
10 **THIS ADMINISTRATIVE PROCEEDING BE STAYED**

11 The trial court does have discretion to grant or deny a stay. *State v. Ott*, 167 Ariz. 420, 428, 808
12 P.2d 305 (App. 1990), rev. denied. In the case of *State v. Ott*, the defendant was indicted on two
13 criminal counts. While the criminal case was pending, a civil racketeering action against Ott was filed.
14 The civil action was based on the same conduct as the criminal indictment. Ott sought to stay the civil
15 proceedings until the criminal action was resolved. The trial court denied Ott's motion to stay the civil
16 proceedings and the Arizona Court of Appeals upheld the trial court's decision and held that the trial
17 court did not abuse its discretion in denying the stay. *Ott*, 167 Ariz. 429.

18 No where in the federal or state constitution are parallel civil and criminal proceedings
19 prohibited. *Ott*, 167 Ariz. 428. Civil and regulatory laws often overlap with criminal laws. This creates
20 the possibility of parallel civil and criminal proceedings, either successive or simultaneous. Absent
21 substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable.
22 *S.E.C. v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374, (D.C.Cir), cert. denied, 101 S.Ct. 529 (1980).

23 As with this civil administrative case, it would be ineffective and absurd for a government
24 agency such as the Division to have to choose to defer civil proceedings pending the outcome of a
25 criminal case. *U.S. v. Kordel*, 397 U.S. 1, 90 S.Ct. 763, 769 (1970). In *Kordel*, the officers of a
26 company asserted that the use of the civil discovery process to compel answers to interrogatories from
the Food and Drug Administration that could be used as evidence for the government's criminal case in

1 a parallel proceeding was so unfair and such a want of consideration for justice as to require reversal.
2 The United States Supreme Court disagreed and commented that the government had not brought the
3 civil action "solely to obtain evidence for its criminal prosecution," or without notice to the defendant
4 that it contemplated a criminal action. *Kordel*, 90 S.Ct. at 769. The court in *Kordel*, found "no special
5 circumstances" suggesting that the parallel civil and criminal proceedings were unconstitutional or
6 improper. *Kordel*, 90 S.Ct. at 769. The court even assumed that the information one of the defendants
7 supplied the government in his answers to interrogatories was used by the government as proof in the
8 criminal prosecution or at least led the government to useful information in the criminal case. *Kordel*,
9 90 S.Ct. at 766. As in *Kordel*, nothing the Division has done in this administrative matter was solely to
10 obtain evidence for a criminal prosecution against Respondent. According to this dicta in *Kordel*, there
11 is nothing to suggest parallel administrative and criminal proceedings against Respondent are
12 unconstitutional or improper.

13 Respondent's motion to stay lists several factors and circumstances for a court to consider when
14 deciding whether to stay an action or not. Respondent merely lists these factors and circumstances
15 without any supporting facts or argument pertinent to this case.

16 The Division admits that one of these factors is met because the civil administrative proceeding
17 and any criminal proceeding that might occur in the future, will involve the same facts. Respondent
18 cannot show that discovery in this administrative case has been exploited by the Division for the
19 advancement of a criminal case. The criminal investigation was initiated long after this administrative
20 matter began. Nor can the Respondent show that the Division has engaged in malicious prosecution,
21 bad faith, malicious government tactics or any other special circumstances calling for a stay of the
22 administrative proceeding.

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25 ...

26 ...

