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BEFORE THE ARIZONA CORPORATION COMMISSION

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In the matter of: THOMAS LAURENCE HAMPTON, CRD#2470192, and STEPHANIE YAGER, husband and wife, TIMOTHY D. MORAN, CRD#2326078, and PATRICIA MORAN, husband and wife, PATRICK MORAN, CRD#1496354, and KELLY MORAN, husband and wife, HAMPTON CAPITAL MARKETS, LLC, an Arizona limited liability company, Respondents	DOCKET NO. S-20823A-11-0407 **SECURITIES DIVISION'S RESPONSE TO TIMOTHY D. MORAN AND PATRICIA MORAN'S MOTION TO STAY PROCEEDINGS** **AND RESPONSE TO PATRICK MORAN AND KELLY MORAN'S JOINDER TO TIMOTHY D. MORAN AND PATRICIA MORAN'S MOTION TO STAY PROCEEDINGS** **(Assigned to Administrative Law Judge Marc E. Stern)**

The Securities Division ("Division") of the Arizona Corporation Commission responds to Timothy and Patricia Moran's Motion to Stay ("Motion to Stay") this case, apparently for an indefinite duration, and requests that it be denied.[1] Based on the facts, or lack thereof, presented by Respondents, the Administrative Law Judge ("ALJ") should not stay the administrative matter because there is no substantial prejudice to any Respondent or their respective spouses by proceeding forward.

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[1] Since Patrick and Kelly Moran filed a motion to join the Motion to Stay but did not include any additional facts or exhibits, the Division's response shall be applicable to their motion to join, and as a result their motion should also be denied.

A. SUMMARY.

Respondent Timothy D. Moran ("Tim") and Patricia Moran seek to stay this administrative proceeding because of a "threat" of a criminal indictment, which may never occur. To date, neither a criminal proceeding nor indictment has been filed against Tim or Patricia Moran.

The Fifth Amendment states that "[n]o person shall ... be compelled in any criminal case to be a witness against himself."[2] However, it is not a blanket protection that allows a party to stop all civil proceedings against him. Rather, courts will stay a parallel proceeding when a respondent, in invoking his Fifth Amendment privilege, would be substantially prejudiced for doing so. A respondent who threatens that he will invoke his Fifth Amendment right, without more, has not shown substantial prejudice since such a privilege cannot be claimed before an actual question has been put forth.[3] Further, there is no constitutional right to stay a proceeding based on a mere threat of a criminal proceeding and Respondents have not cited nor provided any case law that states such.

Respondent Tim believes that since he will invoke his right to remain silent, he will be prejudiced because he will not be able to put forth his most effective defense. The Ninth Circuit recognizes that defendants may be forced into such a quandary, but due process is not violated merely because they have to make such a choice. The Fifth Amendment merely protects respondents from being compelled to testify against themselves.

Furthermore, the Sixth Amendment provides that a defendant has a right to have the assistance of counsel for his defense, not the "most effective defense" he might be able to put forward. Here, there is no substantial prejudice because Respondents, through counsel, can still put forward an effective defense to the Division's allegations by cross-examining the Division's witnesses and documents, calling their own third party witnesses, and raising any applicable defenses or exemptions.

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[2] U.S. Const. amend. V.

[3] *See Thoresen v. Sup. Ct.*, 11 Ariz.App. 62, 66-67, 461 P.2d 706, 710-711 (Ct. App. 1970).

Respondent Patrick Moran ("Pat") and Kelly Moran filed a motion seeking joinder to Tim and Patricia Moran's Motion to Stay on the basis that they will require the testimony of Thomas L. Hampton and Tim, and that the proceedings not be bifurcated. However, they fail to include any testimony, evidence, or exhibit that discloses a criminal proceeding or even a criminal investigation involving Pat or Kelly Moran. Notwithstanding this omission, Pat and Kelly Moran do not explain how moving forward in the administrative proceedings would substantially prejudice their rights or even a hint that they anticipate invoking their Fifth Amendment right. Even if the proceedings were bifurcated, without additional facts, this mere inconvenience does not arise to substantial prejudice to grant them a stay of this proceeding.

Tim and Pat may collectively be referred to as "Respondents."[4]

B. ARGUMENT.

1. THERE IS NO CONSTITUTIONAL RIGHT TO STAY THE ADMINISTRATIVE PROCEEDING BASED ON A POTENTIAL THREAT OF CRIMINAL PROSECUTION.

Arizona courts have held that a person does not have a constitutional right to stay a civil action pending the resolution of a related criminal matter. *State ex rel. Corbin v. Goodrich*, 151 Ariz. 118, 125, 726 P.2d 215, 222 (Ct. App. 1986)(reasoning that "nothing prohibits simultaneous maintenance of criminal and civil actions," and the court found that trial court properly denied a defendant's request to stay the civil proceeding, in part, because the "state had a legitimate interest in pursuing the civil action and seeking to enjoin any further violations of the Arizona securities laws in order to protect its residents."); *See also State v. Ott*, 167 Ariz. 420, 428, 808 P.2d 305, 313 (Ct. App. 1990)(court noted that neither the federal nor the state constitution prohibits parallel or simultaneous civil and criminal proceedings, and the court held that the defendant was not entitled to a stay of a civil action pending the outcome of a related criminal proceeding). Since there is no constitutional right to stay a civil action when a criminal matter is present, there is also no constitutional right to stay a civil action on a mere threat of a criminal action.

[4] Patricia Moran and Kelly Moran were named in the Division's Notice solely for the purposes of determining marital liability pursuant to A.R.S. §§ 44-2031(C) and 44-3291(c). To the extent that an order or ruling is made in this matter, it should apply to them respectively, as appropriate.

The decision to grant a stay must be decided on its own unique facts. *Lewis v. Moultree*, 627 P.2d 94, 96 (Utah 1981). Under these facts, a stay is not warranted.

2. RESPONDENTS HAVE NOT PROVEN THAT A PARALLEL PROCEEDING CURRENTLY EXISTS.

As noted in Respondent's brief, the Court of Appeals has stated that a stay should be granted if "parallel proceedings would substantially prejudice the defendant's rights." *Ott,* 167 Ariz. at 428, 808 P.2d at 313. The ALJ may also consider whether: (a) there are "identical" parties and issues in both actions, and that a decision in one will settle or resolve the other;[5] (b) "whether resolution of the criminal case 'moot, clarify, or otherwise affect various contentions in the civil case.'";[6] (c) whether a "party might 'exploit civil discovery for the advancement of the criminal case.'"[7] (d) and the particular circumstances and competing interests involved in the case.[8]

Here, there has been no proof or facts presented that show an indictment of Tim or Pat has occurred, which relates to these same facts or allegations in issue. Without an actual parallel proceeding, factors (a), (b), and (c) above are inapplicable and can not be a basis to grant a stay.

Respondent Tim's attorney, Paul Roshka, avers that "I **believe** that there is a federal criminal investigation involving Mr. Thomas L. Hampton and Mr. Timothy D. Moran." *Resp't. Mot. To Stay,* Ex. B, p.2, ln. 24-26 (emphasis added). The "proffer letter" that Respondent Tim's counsel includes in his affidavit is not proof that a parallel proceeding exists. The proffer letter does not cite or reference any current criminal proceeding filed against any Respondent. Rather,

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[5] *See Lewis v. Moultree*, 627 P.2d at 96 (court reversed decision staying employee's civil action against employer until resolution of industrial commission proceeding, in part, because of prejudice to employee; court noted that a common ground for a stay is the pendency of another action involving identical parties and issues and where a decision in one action settles the issues in another, or when the decision in an action is essential to the decision in another); *See also Ott*, 167 Ariz. at 429, 808 P.2d at 314. It should be noted that even if a criminal proceeding were to materialize against Respondents, the Division is not a criminal agency and thus would not be a party to that criminal proceeding

[6] *Ott*, 167 Ariz. at 429, 808 P.2d at 314.

[7] *Id.*

[8] *See Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324-326 (9th Cir. 1995)(upholding ALJ's decision to proceed with enforcement proceeding against defendant despite ongoing federal and state criminal cases, in part, because defendant had sufficient time to prepare for the regulatory case).

from its express terms, it is allowing Tim to voluntarily provide information to the Office of the United States Attorney and such information may merely relate to the acts and actions of Thomas L. Hampton.

Pat and Kelly Moran fail to offer any evidence that they are even under criminal investigation and thus their request to stay the administrative proceeding is even more tenuous.[9] Without even a hint in their motion that a criminal investigation is underway, there is no parallel proceeding to consider.

In all the cases cited by Respondents, a parallel proceeding was in issue because there was an actual criminal proceeding underway, an indictment already attempted, or a seizure of defendant's property which amounted to a penalty for invoking their Fifth Amendment privilege. None of those facts are present here.

3. RESPONDENTS HAVE FAILED TO EXPLAIN HOW THE ADMINISTRATIVE PROCEEDING WOULD SUBSTANTIALLY PREJUDICE THEIR RIGHTS.

The Respondents have failed to provide a proper basis to the ALJ to grant a stay and have failed to provide any special factors to favor staying the proceedings against all Respondents.

First, Respondents have not explained how proceeding with the administrative case would "**substantially prejudice** the defendant's rights." *Ott,* 167 Ariz. at 428, 808 P.2d at 313 (emphasis added). Respondents believe that because (a) a threat of criminal prosecution exists, and (b) that they must choose between invoking their Fifth Amendment privilege and testifying, they are substantially prejudiced. This is incorrect. Respondents confuse the right to *invoke* their Fifth Amendment privilege with the need to prove how absent a stay of the administrative proceeding their rights would be unduly or substantially prejudiced. They have not. The mere threat or belief that a criminal proceeding *may* some day come to fruition does not arise to substantial prejudice. If a threat of possible criminal proceedings is all that is needed, then all actions that contain alleged violations of A.R.S. §§ 44-1841, 44-1842, and 44-1991, which are class 4 felonies, could be stayed,

[9] *See n.5, supra.*

whether or not an actual criminal investigation is filed. *See* A.R.S. §§ 44-1841(B), 44-1842(B), and 44-1995. Establishing more than a mere threat is needed.

It should also be noted that *Ott* involved a civil forfeiture action against a defendant, the defendant was also indicted in a parallel criminal prosecution based on the same conduct, the defendant invoked his Fifth Amendment right, and the state was a party in both cases. The factors in *Ott* were overwhelmingly more persuasive and yet the court still refused to stay the civil proceeding.

Respondents further argue that a stay should be granted when an investigation is underway and cites a line of dicta from *State v. Deal*, 740 N.W.2d 755 (Minn. 2007) for the proposition that "it has long been a practice to 'freeze' civil proceedings when a criminal prosecution involving the same facts is warming up or underway." A review of *Deal* is in order. In *Deal* a defendant was charged with criminal sexual conduct in a parallel criminal proceeding and was also involved in a civil custody/marriage dissolution proceeding. The defendant sought to circumvent the criminal statutes, which restricts discovery, by seeking to depose the criminal victim in the civil proceeding by using the broader civil discovery rules and possibly to annoy or harass the victim. The *Deal* court stated that to "determine whether a stay is appropriate … a district court should balance the interests of 'litigants, non-parties, the public, and the court itself.' We also conclude that "[b]alancing these interests is a *situation-specific* task." *Id* at 766 (emphasis in original). The *Deal* court went on to state that under those facts, the "risk of compromising the testimony [of the victim] is substantial." *Id* at 768. As a result, the court found substantial prejudice and issued a stay of the victim's civil deposition. The *Deal* case in no way stands for the proposition that a stay should be granted merely because a criminal prosecution is warming up or underway.

Finally, Pat and Kelly Moran have not put forth any facts showing how they would be substantially prejudiced by proceeding forward in the administrative proceeding. As discussed above, there is no existing parallel criminal proceeding involving them so there is no criminal party who will be using such testimony. They further fail to explain, if the proceedings where bifurcated

because a stay is granted to Tim, how they would be substantially prejudiced by a bifurcation. Pat is charged with his own allegations and would be providing a defense to the charges against him.

4. RESPONDENTS WILL NOT BE SUBSTANTIALLY PREJUDICED BECAUSE THEY CAN FULLY DEFEND THE DIVISION'S ALLEGATIONS AT HEARING AND NO DUE PROCESS VIOLATION IS IN ISSUE HERE.

Just because Respondents may not be able to put forth the most effective defense does not arise to substantial prejudice. Tim argues that because he may invoke his right to remain silent, he will be substantially prejudiced because he will not be able to effectively defend himself at the administrative proceeding, thus violating his due process right to "present an effective defense in this case." *Resp't Mot.* p.1, ln. 18. The Division disagrees. Respondents can participate and defend themselves in the administrative proceeding without being compelled to testify. In many instances respondents, through invocation of their Fifth Amendment privilege or for tactical reasons, do not provide testimony directly. Going further, a "decision not to put forth a defense may be a conscious strategic option." *United States v. Appoloney*, 761 F.2d 520, 525 (9th Cir.1985). Neither the Fifth Amendment nor Sixth Amendment states that due process has been violated where a defendant refuses to testify on his own behalf, especially since it is the defendant's choice.

Moreover, Respondents' invocation of their Fifth Amendment privileges will not prevent them from introducing other documentary evidence, cross-examining the Division's witnesses and exhibits, or offering other witness testimony in their defense including, without limitation, that other persons may be responsible for violations of the Act or that they qualify for an exemption. These avenues are still available to the Respondents to effectively defend themselves at a hearing.

In addition, the burden is on the Division to prove its case and all elements of the alleged statutory violations. The Division is prepared to do so without the need of Respondents' testimony.

The Ninth Circuit has recognized that choosing to remain silent may have its pitfalls but stated, "[n]ot only is it permissible to conduct a civil proceeding at the same time as a related

criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995). In addition, the Court of Appeals has stated that even if some prejudice may be shown, it must arise to actual and substantial prejudice. *State v. Lemming*, 188 Ariz. 459, 462, 937 P.2d 381, 384 (Ct. App. 1997)(upholding trial court's refusal to dismiss case on basis that defendant's trial was delayed by 20 months by prosecution during which time some witnesses died, court of appeals noted that, "while the Defendant may have shown some prejudice, he has not shown actual and substantial prejudice.... the unavailability of a witness, without more, is not enough to establish prejudice"). Thus, the ability to present a defense is wholly different than the right to present the most effective defense. As *Keating* notes, adverse inferences for invoking the Fifth Amendment are permissible. Coupled with *Lemming*, it is clear that proving substantial prejudice requires more than showing that a respondent may experience some prejudice, whether by adverse inference or by refusing to provide potentially exculpatory evidence because the Fifth Amendment has been invoked.

Respondent cites *Wohlstrom v. Buchannan*, 180 Ariz. 389, 884 P.2d 687 (1994) for the proposition that a person should not be required to choose between the right to remain silent and due process in a civil matter. *Resp't Mot.* p.2, ln. 12-15. However, *Wohlstrom* is clearly distinguishable. In *Wohlstrom* the party invoking his Fifth Amendment right was substantially prejudiced and suffered a penalty because by invoking his right to remain silent, he was not allowed to contest the forfeiture of his property. In *Wohlstrom* the defendant's Fifth Amendment due process right, of being deprived of property without due process of law, was in issue. The *Wohlstrom* court went on to state, "The United States Supreme Court has defined 'penalty' as 'the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' Further, the Court has held that 'automatic' economic sanctions for invoking the privilege satisfy this definition and thus are forbidden." *Wohlstrom*, 180 Ariz. 389, 391, 884 P.2d 689. The sanction

"must be the sole reason for the loss." *Id.* Respondents suffer no such automatic penalty or sanction here for invoking their rights to remain silent. There is no due process right in issue for the Respondents. Arizona courts have recognized that defendants may be forced to choose between having to testify and remaining silent, but such a quandary does not arise to a due process violation. *See State v. Comer,* 165 Ariz. 413, 799 P.2d 333 (Ariz., 1990)(Fifth Amendment is not violated by the fact that the defendant must elect to testify on all or none of the counts). Thus, Respondents fail to cite an actual due process right that they are being denied by invoking their Fifth and thereby they fail to establish substantial prejudice.

5. THE FACTS OF THIS CASE FAVOR A CONTINUATION OF THE ADMINISTRATIVE PROCEEDING.

Since Respondents have failed to show how the continuation of the administrative proceeding would substantially prejudice them, the best course of action is to permit the proceeding to go forward and a hearing to be conducted, as appropriate. Staying administrative proceedings on the mere threat that a criminal proceeding may some day occur is not supported by the case law and is too tenuous since all respondents, going forward, could stay all administrative proceedings where A.R.S. §§ 44-1841, 44-1842, and 44-1991 are alleged.

The Commission is constitutionally and legislatively tasked with enforcing the Arizona Securities Act to protect the integrity of the financial markets, the public and investors.[10] Courts routinely give great weight to an agency's regulatory power when deciding whether to stay a civil or administrative action. *See Federal Sav. And Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902-03 (9th Cir. 1989)(held that district court's refusal to stay an administrative agency's civil action against sole shareholder for breach of fiduciary duty to savings and loan after his arrest by the FBI was not abuse of discretion; court determined, in part, that agency would be prejudiced by delay

[10] *See e.g., Siporin v. Carrington*, 200 Ariz. 97, 98, 23 P.3d 92, 93 ("By legislative design, the Arizona Securities Act protects the public by preventing dishonest promoters from selling financial schemes to unwary investors who have little or no knowledge of the realistic likelihood of the success of their investments.").

since shareholder continued to attempt to dispose of his assets, action had been pending for years and the court had interest in clearing its docket, and interest of nonparties including depositors and the public would be frustrated by further delay); *See also Keating*, 45 F.3d at 325-26 (the public's interest in a speedy resolution of the controversy and agency's concern for efficient administration would have been unnecessarily impaired had the proceeding been stayed, and any delay would have been detrimental to public confidence in the enforcement scheme for thrift institutions).

As noted in *Keating*, the ALJ can consider the competing interest of the parties involved. *Id.* at 324-326. Under these current facts, allowing the proceeding to continue furthers the legislature's intent of public protection by allowing the Division to enforce the Securities laws. More importantly, there is no hardship or inequity to Respondents in going forward since they have multiple avenues to effectively defend against the Division's allegations.

C. CONCLUSION.

The ALJ should deny the Motion to Stay and the related joinder since no criminal proceedings have been filed against the Respondents and they cannot prove that they will be substantially prejudiced if the administrative proceeding were to continue forward. Staying administrative proceedings on the mere threat that a parallel criminal proceeding may some day occur is not supported by the case law and is too tenuous since all respondents, going forward, could stay all administrative proceedings where A.R.S. §§ 44-1841, 44-1842, and 44-1991 are alleged.

RESPECTFULLY SUBMITTED this 6th day of September, 2012.

ARIZONA CORPORATION COMMISSION

By_____

Phong (Paul) Huynh
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