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Arizona Corporation Commission

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4 **BEFORE THE ARIZONA CORPORATION COMMISSION**

ARIZONA CORPORATION COMMISSION  
SECURITIES CONTROL

5 IN THE MATTER OF: )

6 ARTHUR ANDERSEN L.L.P. )  
7 501 North 44<sup>th</sup> Street - 300 )  
8 Phoenix, Arizona 85008 )

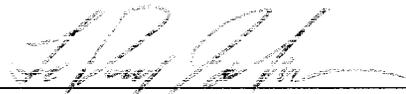
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9 Respondent. )

REPLY TO RESPONSE IN  
OPPOSITION TO MOTION TO LIFT  
STAY AND APPROVE FILING OF  
COMPLAINT IN SUPERIOR COURT

10 )  
11 )  
12 Pursuant to Rules 14-3-101(A) and 14-3-106 of the Arizona Administrative Code, the  
13 Securities Division (the "Division") of the Arizona Corporation Commission (the "Commission")  
14 hereby replies to Arthur Andersen L.L.P.'s ("Arthur Andersen") Response in Opposition to  
15 Motion to Lift Stay and Approve Filing of Complaint in Superior Court (the "Response"). The  
16 following Memorandum of Points and Authorities supports this Reply.

17 DATED this 5th day of January, 2001

18 By   
19 Jennifer Boucek  
20 LeRoy Johnson

21 Attorneys for the Securities Division  
22  
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1 Motion in order for the Commission to address whether the actions of its Hearing Officer were  
2 appropriate given the facts and law of this case.

3 **B. Arthur Andersen's Due Process Rights Will Not be Substantially Prejudiced**  
4 **Absent a Stay of this Proceeding.**

5 Arthur Andersen continues to argue that without the testimony of ex-BFA management, it  
6 will be denied a fair opportunity to defend and therefore the stay is essential to Arthur  
7 Andersen's due process rights. Response at 3. Neither the law nor the facts support Arthur  
8 Andersen's arguments.

9 The law is clear that civil proceedings generally should be stayed only if parallel  
10 proceedings would substantially prejudice the defendant's rights. See, State v. Ott, 167 Ariz. 420,  
11 428, 808 P.2d 305, 313 (Ct. App. 1990) (citing Securities and Exchange Comm'n v. Dresser  
12 Industries, 628 F.2d 1368, 1374 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980)). Further, the  
13 cases cited by Arthur Andersen clearly establish that procedural due process requires nothing  
14 more than an adequate opportunity to present factual and legal claims. See Kessen v. Stewart,  
15 195 Ariz. 488, 492, 990 P.2d 689, 693 (Ct. App. 1999) (procedural due process requires notice  
16 and an opportunity to be heard).

17 As a general rule, the courts allow a civil case to proceed even when the same defendant  
18 is involved in both the civil and criminal cases. See, e.g., State v. Ott, 167 Ariz. 420, 808 P.2d  
19 305 (Ct. App. 1990); Keating v. Office of Thrift Supervision, 45 F.3d 322 (9<sup>th</sup> Cir. 1994), cert.  
20 denied, 516 U.S. 827 (1995); Federal Sav. And Loan Ins. Corp. v. Molinaro, 889 F.2d 899 (9<sup>th</sup>  
21 Cir. 1989); Securities & Exchange Comm'n v. Dresser Indus., 628 F.2d 1368, 1376 (D.C. Cir.)  
22 cert. denied, 449 U.S. 993 (1980). Arthur Andersen distinguishes these cases by arguing that it  
23 has no control over whether ex-BFA management and others assert their rights against self-  
24 incrimination. Response at 5. Arthur Andersen is simply assuming, as if it were fact, that  
25 testimony of ex-BFA management would assist Arthur Andersen in its defense. To the contrary,  
26 ex-BFA management, who met with Arthur Andersen personnel on a regular basis to discuss

1 transactions, may implicate Arthur Andersen directly in their fraud.<sup>1</sup>

2 As the Division has previously pointed out, Arthur Andersen will have access to its own  
3 staff and to many other individuals (including persons currently controlling BFA, New Church  
4 Ventures, ALO and EVIG), as well as voluminous documents, to support its defense. In other  
5 words, it will have more than an adequate opportunity to present its factual and legal claims. The  
6 likelihood that ex-BFA management and others will assert their Fifth Amendment privilege will  
7 not substantially prejudice Andersen, and therefore the proceeding should not have been stayed.

8 **C. The Division's Concern that the Stay Creates a Dangerous Precedent that Could**  
9 **Affect Future Division Cases and the Public Interest is Real.**

10 Arthur Andersen contends that the Division is being hysterical and irrational in its belief  
11 that the Hearing Officer's order could create a dangerous precedent. Response at 6. As the  
12 Division pointed out, it is not unusual in its cases to have parallel civil and criminal  
13 investigations pending at the same time. Further, it is not unusual for targets, and persons  
14 directly or indirectly associated with the targets, to assert the Fifth Amendment privilege during  
15 the Division's investigation or hearing. Surely Arthur Andersen knows that anytime there is a  
16 ruling that is contrary to established law, parties will seize upon the ruling to support their  
17 argument that a stay should be entered.

18 Arthur Andersen further argues that the stay will not adversely affect the BFA investors  
19 because the investors are proceeding on their own behalf. Response at 6. Arthur Andersen does  
20 not address the Division's interest in bringing a public enforcement action of this type. As the  
21 Division has previously pointed out, this case involves thousands of elderly investors who have  
22 lost more than money, they have lost faith. The longer it takes to reach the merits of the case, the  
23 greater the likelihood that memories will fade and all facts will not come out. There is a need to

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24 <sup>1</sup> Ironically, Arthur Andersen would likely be in a better position if the ex-BFA managers refused to testify when this  
25 case came to hearing. Because hearsay testimony is allowed in an administrative proceeding, Arthur Andersen  
26 personnel could testify as to what BFA management did, and did not, tell them, and could describe those conversations  
in the light most favorable to their case. The Division, in turn, could not use BFA management to impeach that  
testimony.

1 determine the liability of parties involved in this tragic situation. As a regulatory body, the  
2 Division is aware of the need to reassure the public that it is seeking a determination of that  
3 responsibility. See, Keating, 45 F.3d at 326.

4 **D. The Division's Request to File a Complaint In Superior Court is Appropriate.**

5 Assuming the Commission lifts the stay entered by the Hearing Officer the Division  
6 requests authorization to file an action against Arthur Andersen in Superior Court. Should the  
7 Commission authorize the filing of an action in Superior Court, the Division and the Attorney  
8 General's office would dismiss the pending administrative action.

9 Arthur Andersen's argument that the filing of an action in Superior Court is now  
10 inappropriate is particularly puzzling when previously it strongly argued that (i) the Superior  
11 Court is far better suited to deal with matters this complex and time consuming, and (ii) requiring  
12 the Division to pursue its complaint in Superior Court frees the Commission to apply its  
13 resources to matters that it alone can address. Respondent's Motion to Decline Jurisdiction at 7.

14 Arthur Andersen contends that the Division's request to file an action in Superior Court is  
15 inappropriate in that a stay of any proceeding brought by the Division in Superior Court will be  
16 just as appropriate as the stay granted in this proceeding. Response at 7. This argument assumes,  
17 of course, that the decision to grant the stay was appropriate. As the Division has shown,  
18 however, the Hearing Officer's order was contrary to established law. Thus, it is unlikely that  
19 the Superior Court will grant such a stay.

20  
21 **III. CONCLUSION**

22 The Division's Motion to Lift Stay was appropriately filed and supports a finding that the  
23 Hearing Officer's order granting the stay is contrary to the law and creates a dangerous  
24 precedent. Therefore, the Commission should lift the stay ordered by the Hearing Officer and

25 ...

26 ...

1 approve the filing of a complaint in Superior Court of Maricopa County.

2 RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of January, 2001

3  
4 BY   
5 Jennifer Boucek  
6 LeRoy Johnson

7 Attorneys for the Securities Division

8 ORIGINAL AND TEN COPIES of the foregoing  
9 Delivered this 5<sup>th</sup> day of January, 2001 to:

10 ARIZONA CORPORATION COMMISSION  
11 Docket Control Center  
12 1200 West Washington Street  
13 Phoenix, AZ 85007-2996

14 COPY of the foregoing mailed this  
15 5<sup>th</sup> day of January, 2001 to:

16 Don P. Martin  
17 QUARLES & BRADY STREICH LANG LLP  
18 Renaissance One  
19 Two North Central Avenue  
20 Phoenix, Arizona 85004-2391

21 By 