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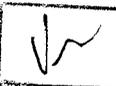
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ARIZONA CORPORATION COMMISSION
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Arthur Andersen, L.L.P.

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF:

ARTHUR ANDERSEN L.L.P.
501 North 44th Street - 300
Phoenix, Arizona 85008

Respondent

DOCKET NO. S-03386A-00-0000

MOTION TO STAY PROCEEDING

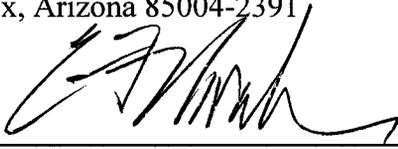
(Assigned to the Honorable Marc E. Stern)
(Oral Argument Requested)

Pursuant to Rule 14-3-109 of the Rules of Practice and Procedure before the Corporation Commission, Respondent Arthur Andersen, L.L.P. ("Andersen"), by and through its attorneys, Quarles & Brady Streich Lang LLP, hereby moves for a stay of this proceeding pending the outcome of a criminal investigation and resolution of the criminal proceedings currently being conducted by the Arizona Attorney General's ("AG") office. This Motion is based on Andersen's due process rights protected by the Fourteenth Amendment to the United States Constitution and the inherently greater protection provided by Article Two, Section Four of the Arizona Constitution. Andersen supports this motion with the following Memorandum of Points and Authorities.

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DATED this 25 of October, 2000.

QUARLES & BRADY STREICH LANG LLP
Two North Central Avenue
Phoenix, Arizona 85004-2391

By 

Don P. Martin
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Edward F. Novak

Attorneys for Respondent

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. BACKGROUND**

3 The allegations in this proceeding are complex. Reduced to its basics, however, it is alleged that
4 between 1985-1999, the Baptist Foundation of Arizona ("BFA") defrauded its investors when it held
5 itself out as a legitimate and safe repository for investment funds, selling unregistered securities in the
6 form of promissory notes. Allegedly using a so-called "ponzi" scheme, top-level BFA managers and
7 directors employed a series of complicated financial maneuvers specifically designed to hide their fraud
8 from its auditor Andersen and the investors. If the allegations contained in the Commission's "Notice
9 of Opportunity for Hearing" ("Notice") are even partially accurate, BFA successfully hid fraud from
10 Andersen who audited BFA's financial statements during those years and opined that they were accurate.
11 No one alleges that Andersen authorized BFA to provide its audit opinions to prospective investors or
12 that BFA ever provided the opinions to prospective investors.

13 Notwithstanding Andersen's lack of complicity, it is Andersen that is now under siege while BFA
14 has largely escaped responsibility by filing for bankruptcy protection. Though clearly a primary victim
15 of BFA's fraud, Andersen has become and continues to be the bull's-eye of everyone's target. At present,
16 Andersen defends itself in several civil lawsuits and related matters in other forums against hundreds
17 of the investors' claims, some of whom are represented in two or more of the lawsuits. Grant, et al. v.
18 Arthur Andersen L.L.P., et al., CV 99-19093 (First Amended Complaint filed in Maricopa County
19 Superior Court, February 18, 2000); Bartlett, et al. v. Arthur Andersen L.L.P., et al., CIV 00-0852 (First
20 Amended Complaint filed in the United States District Court, August 7, 2000); Verde Baptist Church
21 v. Arthur Andersen L.L.P. et al., (Motion to Intervene in Grant filed March 10, 2000, pending); Dunn
22 Investors v. Arthur Andersen L.L.P. et al., (Motion to Intervene in Grant filed July 24, 2000, pending);
23 Kimsey, et al. v. Baptist Foundation of Arizona, Inc., CV 99-15593 (special action pending before the
24 Arizona Supreme Court addressing statutory stay and its applicability against Andersen).

25 Additionally, the Securities Division ("Division") of the Arizona Corporation Commission filed
26 the pending Notice seeking restitution on behalf of these same investors and is also seeking

1 administrative penalties against Andersen. Ironically, BFA has even sued Andersen claiming that
2 Andersen is liable for investors' losses because it did not discover BFA's own fraud.

3 Separate and apart from the civil litigation stands a criminal investigation. The AG has targeted
4 top-level BFA management based on the obvious criminal nature of BFA's conduct. While the criminal
5 investigation is entirely appropriate, it threatens to deprive Andersen of any meaningful way to defend
6 itself. BFA management, now cloaked with the federal constitutional protections of the Fifth
7 Amendment and the state constitutional protections of Article II, section 10, will be unavailable to give
8 crucial testimony.

9 **II. THE LAW**

10 **A. The Division and the Commission Should Seek a Full Presentation of the Facts.**

11 This Motion to Stay proceeding is predicated on the very real risk that the parallel criminal
12 investigation will deprive Andersen of a meaningful opportunity to defend itself against the serious
13 allegations contained in the Notice. Once the criminal proceedings are resolved, the privilege against
14 self-incrimination disappears because no such privilege exists without the threat of criminal prosecution.
15 See Hoffman v. United States, 341 U.S. 479, 486 (1951) (extending the privilege only to matters "which
16 would furnish a link in the chain of evidence needed to prosecute . . ."). Thus, by staying this
17 proceeding until then, the Commission will open the door to all relevant testimony because key
18 witnesses will no longer be able to assert their Fifth Amendment rights.

19 Indeed, the relief Andersen seeks will result in a fuller and fairer presentation of the facts to the
20 Commission and will not prejudice the Division's efforts in any way. After the stay, both Andersen and
21 the Division will have full access to all relevant information and may fully, fairly, and completely litigate
22 the matter.

23 Under these circumstances, where the Division's Notice contains quasi-criminal allegations, it
24 too should support Andersen's motion to stay. Arizona's rules of ethics demand no less:

25 A prosecutor has the responsibility of a minister of justice and not simply
26 that of an advocate. This responsibility carries with it specific obligations
to see that the defendant is accorded procedural justice and that the guilt

1 is decided upon the basis of sufficient evidence.

2 Cf. Rules of the Supreme Court, ER 3.8 cmt.; State v. Fisher, 176 Ariz. 69, 73, 859 P.2d 179, 183
3 (1993) (requiring prosecutor to seek justice and to not avoid the pursuit of evidence). It is hoped,
4 therefore, that the Division will support this Motion and not seek the procedural advantage generated
5 by the absence of key material witnesses – an absence created by another arm of the State.

6 **B. The Commission Has the Discretion to Stay this Proceeding.**

7 Clearly, the Commission has the authority to act on this pending motion to stay proceeding as
8 it does with any and all motions filed before it. See Ariz. Admin. Code R. 14-3-109(D) (instructing the
9 presiding officer to "act upon any pending motions"); see also Ariz. Admin. Code R. 14-3-109(Q)
10 (permitting the Commission to continue proceedings upon a showing of "good cause"). Undoubtedly,
11 related, on-going criminal proceedings can provide the Commission with "good cause." See, e.g., In
12 the Matter of the Offering of Sec. By: Boucher, Oehmke & Co., et al., 1992 WL 309152 (Ariz. Corp.
13 Comm. 1992) (noting that the Commission granted a series of continuances due to "a related criminal
14 investigation by the Office of the Attorney General into Respondent's conduct in the matters alleged in
15 the Notice."). As demonstrated below, Andersen has the required good cause to request a stay.

16 **C. The Commission Should Stay this Proceeding.**

17 Where, as here, pending criminal proceedings intersect with civil proceedings, the clearly
18 advisable practice is to stay the civil action until after the termination of the criminal case. See, e.g.,
19 Campbell v. Eastland, 307 F.2d 478, 480 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963). In Arizona,
20 a court or an administrative agency should stay a civil or administrative proceeding "[i]f parallel
21 proceedings would substantially prejudice [a party's] rights" State v. Ott, 167 Ariz. 420, 428, 808
22 P.2d 305, 313 (Ct. App. 1990) (citing Sec. and Exch. Comm'n v. Dresser Indus., Inc., 628 F.2d 1368,
23 1375 (D.C. Cir. 1980), cert. denied, 449 U.S. 993 (1980)). Such prejudice may take the form of denying
24 a party its constitutional rights. Id.

25 The courts have directed the consideration of six factors. These factors are (1) the extent to
26 which Fifth Amendment rights are implicated, (2) the interest of the plaintiff in proceeding expeditiously

1 with the litigation and any potential prejudice to the plaintiff if the proceeding is delayed, (3) the burden
2 that is imposed on the defendant, (4) the convenience of the court in the management of its cases and
3 the efficient use of judicial resources, (5) the interests of persons that are not parties to the civil
4 litigation, and (6) the interest of the public in the pending proceedings. See Keating v. Office of Thrift
5 Supervision, 45 F.3d 322, 324 (9th Cir. 1994), cert. denied, 516 U.S. 827 (1995); Federal Sav. and Loan
6 Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989). These factors militate in favor of a stay.

7 ***1. Andersen's Constitutional Rights are Threatened.***

8 The protection of a party's constitutional rights by granting a stay must weigh more heavily than
9 any inconvenience to the government. See Brock v. Tolkow, 109 F.R.D. 116, 120-121 (E.D.N.Y. 1985).
10 This constitutional concern usually arises when a criminal target faces the Hobsean choice of either
11 defending against civil liability, thereby waiving Fifth Amendment rights, or invoking the Fifth
12 Amendment and suffering the pecuniary consequences in the civil lawsuit. Id.

13 Andersen's circumstances offer a slight variation with equally grave implications. Andersen must
14 defend itself in the Commission's proceeding but cannot do so without the testimony of top BFA
15 managers. The top management will refuse to testify until the resolution of the criminal proceeding.
16 Thus, while Andersen's Fifth Amendment rights are not at stake, Andersen's due process rights to
17 fundamental fairness are threatened by the State's use of parallel proceedings. See U.S. Const. amend.
18 IV; Stoffel v. Arizona Dep't of Econ. Sec., 162 Ariz. 449, 451, 784 P.2d 275, 277 (Ct. App. 1990)
19 (observing that a "claimant is entitled to fundamental procedural protections at an administrative
20 hearing"); Rouse v. Scottsdale Unified Sch. Dist., 156 Ariz. 369, 371, 729 P.2d 22, 24 (Ct. App. 1987)
21 (same); Ariz. Const. Art. II, § 4. These due process rights, of course, extend to business entities like
22 Andersen. See Blawis v. Bolin, 358 F. Supp. 349, 354 (D. Ariz. 1973) (extending due process
23 protections to corporations); see also Thomas, Head and Greisen Employees Trust v. Buster, 95 F.3d
24 1449, 1460 (9th Cir. 1996), cert. denied, 520 U.S. 1116 (1997) (analyzing the due process claims of a
25 limited partnership).

26 At the heart of the problem is the fact that the invocation of the rights against self-incrimination

1 by BFA's managers and directors will deny Andersen of its ability to defend itself. Courts have
2 expressly recognized that stays in these circumstances will permit a fair resolution of the proceedings.
3 See Volmar Distrib., Inc. v. New York Post Co., 152 F.R.D. 36 (S.D.N.Y. 1993). In Volmar, for
4 example, the United States District Court stayed a civil proceeding precisely because the corporate client
5 in that case was left defenseless when key witnesses asserted their Fifth Amendment rights. The court
6 accepted the argument that:

7 [the corporation] cannot defend [itself] in the instant civil case without
8 the testimony of [the individual defendants] and will suffer prejudice if
9 [the individual defendants] invoke the Fifth Amendment privilege during
discovery and trial.

10 Volmar, 152 F.R.D. at 41.

11 It should not be lost to anyone that Andersen's exposure in this proceeding arises from the
12 conduct of BFA's management whose Fifth Amendment rights are denying Andersen a defense in this
13 proceeding. The Notice is replete with allegations that require the testimony of BFA management for
14 a meaningful defense. The Notice alleges Andersen's direct participation and aiding and abetting
15 liability, all predicated on BFA's fraud. Notice ¶¶ 30-38, 51-71, 71-73, 82 & 82. Thus, without the
16 testimony of BFA's management, Andersen will be left without an adequate defense.

17 As if the absence of key witnesses is not enough to completely cripple Andersen's ability to
18 defend itself in this proceeding, the Division may argue that Andersen should suffer adverse inferences
19 based upon the invocation of the Fifth Amendment and Article Two, Section 10 by these parties. See,
20 e.g., Keating v. Office of Thrift Supervision, 45 F.3d 322, 325 (9th Cir. 1995), cert. denied, 516 U.S. 827
21 (1995). Such legal inferences, while unlikely to prevail, are intolerable. More dangerous to Andersen,
22 however, is the fact that the Division need not rely on such adverse legal inferences. The Division may
23 simply exploit the absence of these key witnesses by raising and leaving unanswerable allegations that
24 implicate Andersen. See, e.g., Notice at id. That result, of course, is equally intolerable given the
25 undeniable fact that it is the State that brings this action, and at the same time, makes material witnesses
26 unavailable.

1 investigation and pursue the allegations at a later time, once the criminal proceeding is resolved.

2 **3. *A stay will provide greater convenience to the parties and to the Commission.***

3 A stay of the Commission proceeding is convenient and advantageous to all involved. The
4 Commission proceeding and the AG criminal investigation involve the same issues. Both of the actions
5 are being brought by Arizona governmental agencies, seeking redress for the same investors. Assistant
6 Attorneys General represent the Commission and are conducting the criminal investigation.

7 The Commission, like the criminal courts, will be forced to address varying claims of work-
8 product and attorney-client privilege. The parallel proceedings will necessarily result in duplicative
9 judicial efforts, which could involve conflicting results, all of which are avoidable with a stay of the
10 administrative proceeding. See Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87
11 F.R.D. 53, 57 (E.D. Pa. 1980); Trustees of the Plumbers and Pipefitters Nat'l Pension Fund v.
12 Transworld Mechanical, Inc., 886 F. Supp. 1134, 1141 (S.D.N.Y. 1995).

13 Moreover, at the conclusion of its investigation and prosecution, the AG will possess a great
14 body of additional, relevant information. The same evidence gathered by the AG may be as relevant in
15 the administrative proceeding as it is in the criminal proceeding. The evidence will be neither lost nor
16 destroyed during the stay. Thus, at the conclusion of the stay, the Division will have access to a whole
17 new body of relevant evidence, much of it provided under oath. See, e.g., Ariz. Rev. Stat. Ann. § 21-422
18 (B)(1) (1990 & Supp. 1999) (empowering grand juries to investigate Securities Act violations); Ariz.
19 Rev. Stat. Ann. § 13-4071(B)(2) (1989 & Supp. 1999) (authorizing grand jury to issue subpoenas); Ariz.
20 R. Crim. P. 15 (providing for reciprocal discovery); Ariz. Rev. Stat. Ann. § 13-807 (1994) (precluding
21 convicted parties from denying "essential allegations of the criminal offense" in a civil action brought
22 by the State).

23 **4. *Investors will not suffer any adverse effects if a stay is granted.***

24 The investors that were purportedly harmed by alleged securities fraud violations will not be
25 prejudiced by a stay of this proceeding. As previously noted, the investors are currently proceeding with
26 their own lawsuits. Moreover, the harm they have suffered is already complete. BFA is no longer

1 selling securities. See Order to Cease & Desist and Other Affirmative Action and Consent to Same, In
2 the Matter of: Baptist Foundation of Arizona, et al., Docket No. S-2773A-99-000 (Ariz. Corp. Comm'n
3 August 12, 1999) ("Decision No. 61881").

4 Additionally, even if restitution is appropriate in this case, the investors will not be harmed by
5 a stay of this proceeding. In the BFA bankruptcy proceeding, BFA's proposed plan of liquidation
6 provides a four-year timetable to complete. See Disclosure Statement Concerning the First Amended
7 Joint Liquidating Plan of Reorganization, In re: Baptist Foundation of Arizona, et al., Case No. 99-
8 13275-ECF-GBN, (United States Bankruptcy Court September 8, 2000) at 67. Thus, even assuming that
9 the Commission awards restitution in this case, the amount of damages will be unascertainable until the
10 Trustee has sold all of its properties within the next four years. See id. Moreover, even after the assets
11 are sold, the Trustee may choose not to recover the full purchase price immediately, thereby further
12 delaying the distributions to creditors for several more years. See id. at 110. Hence, the investors do
13 not have a compelling need for an immediate resolution of the Division's allegations. A stay of this
14 proceeding, pending the criminal investigation, will not prejudice any third parties.

15 **5. *The public interest will not be adversely affected by the grant of a stay.***

16 A stay is inappropriate only if a prompt resolution of the case is needed in order to protect the
17 public interests. See United States v. Kordel, 397 U.S. 1, 11 (1970), cert. denied, 400 U.S. 821 (1970);
18 Securities and Exch. Comm'n v. Dresser Indus., Inc., 628 F.2d 1368, 1377 (D.C. Cir. 1980), cert. denied,
19 449 U.S. 993 (1980). In Dresser, for example, the court denied a motion to stay a civil action pending
20 the outcome of a Grand Jury investigation because the prospect of future "dissemination of false or
21 misleading information by companies to the investing public" was of great concern to the court. See
22 Dresser at 1377. Unlike Dresser, the allegations against Andersen do not involve a continuing risk of
23 future injury to the investing public. Indeed, the Division successfully brought an action against BFA,
24 the seller of the securities at issue, that involved the same events as the Notice against Andersen. The
25 Commission ordered BFA to "[cease and desist] from selling securities within or from the State of
26 Arizona in violation of the Securities Act." See Decision No. 61881. There are no allegations that even

1 remotely suggests that BFA has not complied with this Order. The public will not be injured in any way
2 by staying this proceeding.

3 **III. CONCLUSION**

4 Based on the foregoing, Andersen respectfully requests that the Commission grant its Motion
5 to Stay Proceeding, pending the outcome of the ongoing criminal investigation resolution of the criminal
6 proceedings. The stay is vital to Andersen's procedural due process rights. The stay provides the
7 Commission and the Division with a just process to resolve the claims while, at the same time,
8 prejudicing no interested party. Accordingly, the Commission should grant the motion to stay.

9 RESPECTFULLY SUBMITTED this 25 day of October, 2000.

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