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Arizona Corporation Commission
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3 Attorneys for the Securities Division

AZ CORP COMMISSION
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4 **BEFORE THE ARIZONA CORPORATION COMMISSION**

5 IN THE MATTER OF:)

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

DOCKET NO. S-03386A-00-0000

**SECURITIES DIVISION'S RESPONSE
TO RESPONDENT'S MOTION TO
STAY PROCEEDINGS**

9 Respondent.)

Assigned to the Honorable Marc E. Stern

10)
11)
12 Respondent Arthur Andersen L.L.P. ("Andersen") has requested a stay of this proceeding
13 pending the outcome of a criminal investigation and completion of any criminal proceedings that
14 may arise from such investigation. Andersen asserts that, absent such a stay, it would be
15 deprived of its due process rights. Neither the facts nor the law supports Andersen's contention
16 that it would be deprived of its due process rights absent a stay of this proceeding. Andersen is
17 unable to show the substantial prejudice to its rights required by the law, and therefore the
18 Securities Division of the Arizona Corporation Commission (the "Division") opposes Andersen's
19 Motion to Stay and this response is supported by the following Memorandum of Points and
20 Authorities.

21 DATED this 21 day of November, 2000

22
23 By Jennifer Boucek

Jennifer Boucek
LeRoy Johnson

24 Attorneys for the Securities Division
25
26

1 F.2d at 1375-76. The decisionmaker should consider the extent to which the defendant's Fifth
2 Amendment rights may be implicated. See, e.g., Keating v. Office of Thrift Supervision, 45 F.3d
3 322, 324 (9th Cir. 1994), cert. denied, 516 U.S. 827 (1995). In addition, the decisionmaker
4 should generally consider the following factors: (1) the interest of the plaintiff in proceeding
5 expeditiously with the litigation and any potential prejudice to plaintiff if the proceeding is
6 delayed, (2) the burden that is imposed on the defendant, (3) the convenience of the court in the
7 management of its cases and the efficient use of judicial resources, (4) the interests of persons
8 that are not parties to the civil litigation, and (5) the interest of the public in the pending
9 proceedings. See, e.g., Keating, 45 F.3d at 324-25. When one considers Andersen's Fifth
10 Amendment rights as well as the remaining factors, it is clear the analysis does not support a stay
11 of this proceeding.

12 **A. The Fifth Amendment Rights of Andersen Are not Implicated in this Proceeding**

13 Even where the same individual defendant is involved in both civil and criminal
14 proceedings, the courts can require a litigant to choose between invoking the Fifth Amendment in
15 a civil case, thus risking a loss there, or answering the questions in the civil context, thus risking
16 subsequent criminal prosecution. See, e.g., Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976).
17 Generally, in such cases the courts have allowed the civil case to proceed after weighing the
18 competing interests involved. See, e.g., State v. Ott, 167 Ariz. 420, 808 P.2d 305 (Ct. App.
19 1990); Keating v. Office of Thrift Supervision, 45 F.3d 322 (9th Cir. 1994), cert. denied, 516 U.S.
20 827 (1995); Federal Sav. And Loan Ins. Corp. v. Molinaro, 889 F.2d 899 (9th Cir. 1989);
21 Securities & Exchange Comm'n v. Dresser Indus., 628 F.2d 1368, 1376 (D.C. Cir.) cert. denied,
22 449 U.S. 993 (1980).

23 Like the case here, Keating and Molinaro involve administrative agencies bringing
24 actions in the public interest. But unlike this case, the defendants in Keating and Molinaro were
25 individuals who were charged in both the civil and criminal proceedings. Yet, in both cases the
26 courts found, after weighing the competing interests, including the extent to which the

1 defendants' Fifth Amendment rights were implicated that it was appropriate to allow the civil
2 proceedings to continue. Keating, 45 F.3d at 326; Molinaro, 889 F.2d at 902-03.

3 No indictments have been issued in connection with the BFA matter. Further, Andersen
4 does not claim to be the subject of any criminal investigation. The case for staying civil
5 proceedings is "a far weaker one" when "[n]o indictment has been returned [, and] no Fifth
6 Amendment privilege is threatened." Molinaro, 889 F.2d at 903 (quoting Dresser Industries, 628
7 F.2d at 1376).

8 Even if indictments are at some point returned against ex-BFA management, Andersen's
9 contention that those individuals' Fifth Amendment rights somehow adversely affect Andersen's
10 due process rights makes no sense. While recognizing that such legal inferences are unlikely to
11 prevail, Andersen expresses a concern that adverse inferences may be drawn against *it* if key
12 witnesses invoke their Fifth Amendment rights against self-incrimination. Motion p. 5. In reality
13 however, adverse inferences are drawn only against the party invoking the Fifth Amendment.
14 See, Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid
15 adverse inferences against parties to civil actions when they refuse to testify" (emphasis
16 added)).

17 Andersen cites no case to support a stay of proceedings against an entity defendant where
18 individual defendants unrelated to the entity are subjects of a criminal investigation or
19 prosecution. Andersen cites a federal rules decision, Volmar Distrib., Inc. v. New York Post Co.,
20 152 F.R.D. 36 (S.D.N.Y. 1993), for the proposition that a case should be stayed where an entity
21 defendant is unable to defend itself and will suffer prejudice if individual defendants invoke the
22 Fifth Amendment privilege during discovery and trial. Motion p. 5.

23 Volmar involved a case where the individual defendants were key officers and control
24 persons of entity defendants. That is very different than the case here where Andersen is arguing
25 that the proceeding should be stayed because ex-BFA management may assert the Fifth
26 Amendment privilege. Further, the Volmar court stayed the civil case to preserve the Fifth

1 Amendment rights of the individual defendants only. Volmar 152 F.R.D. at 39-40. In the case of
2 the entity defendants, the Volmar court stayed the proceedings simply to avoid duplication of
3 effort and unnecessary litigation costs, not because of a Fifth Amendment concern. Id. at 40-42.

4 **B. The Division Does Have an Interest in Proceeding Expeditiously**

5 Any delay in prosecuting this matter will adversely affect the Division's interests.
6 Thousands of Arizona investors, many who are elderly, are waiting for an opportunity to have the
7 merits of this case heard. Any delay would have a detrimental effect on public confidence in the
8 enforcement efforts of the Division. It is appropriate for the Hearing Officer to consider this
9 factor in determining whether a stay should be granted. See, Keating, 45 F.3d at 326 (detrimental
10 effect on public confidence in enforcement scheme for thrift institutions would occur from stay);
11 Molinaro 889 F2d at 903 (interests of depositors would be frustrated from stay).

12 Andersen states that a stay would inure to the benefit of the Division because the
13 resolution of the criminal case will reduce the scope of discovery and reduce the Division's
14 workload. Motion p. 6. Again, there have been no indictments in the BFA matter. Further, the
15 case related to Andersen is based on Andersen's conduct and Andersen's work product, not
16 BFA's. Therefore, even assuming there are indictments in the future, it is unlikely that resolution
17 of the criminal matters would significantly reduce the scope of discovery in this proceeding.

18 **C. Andersen will not have any Greater Burden by Denying a Stay**

19 The only prejudice that Andersen has claimed it will suffer is the inability to obtain
20 testimony from certain individuals that might be subject to a State criminal investigation. This
21 case involves scores of witnesses (most of whom will not be asserting any Fifth Amendment
22 privilege) who will testify as to the often-complicated financial transactions involved in the fraud
23 perpetrated on investors and to authenticate the thousands of documents involved. The longer the
24 delay the more likely it is that memories will fade and the harder it will be for Andersen to mount
25 its defense.

26 BFA, Arizona Southern Baptist New Church Ventures, Inc. ("NCV"), A.L.O., Inc

1 (“ALO”). and E.V.I.G., Inc. (“EVIG”) (collectively the “Debtors”) since their bankruptcies have
2 admitted publicly on numerous occasions that their collapse was caused in part by improper
3 business practices summarized in the Division’s Notice. For instance, Debtors recently stated
4 that:

5 The Debtors believe that their failure was primarily due to four

6 factors:

7 . . . Second, as a result of the difficulties generally experienced in the
8 real estate industry in the late 1980’s, the value of BFA’s substantial
9 investment in real estate deteriorated significantly. BFA failed to write
10 down the value of under-performing real estate assets, and effectively
11 shielded such assets from public and [i]nvestor scrutiny by transferring
12 them to ALO and EVIG. Prior to the commencement of these Chapter
13 11 cases, BFA formalized its legal control of both ALO and EVIG, and
14 such entities are part of the Debtors that have filed the above-captioned
15 Chapter 11 cases. By failing to consolidate ALO, EVIG and NCV in
16 BFA’s financial statements included in the offering circulars related to
17 the debt securities, BFA materially misstated the financial position of the
18 combined companies under its control.

19 . . . Finally, the Debtors believe that there are numerous transactions
20 with third parties that were significantly more costly to BFA than terms
21 that could have been obtained in “arms-length” transactions. The
22 Debtors have terminated their relationships with all such parties.

23 Disclosure Statement Concerning the First Amended Joint Liquidating Plan of Reorganization, In
24 re: Baptist Foundation of Arizona, et al., Case No. 99-13275-ECF-GBN, (United States
25 Bankruptcy Court September 8, 2000 at 26 (“Disclosure Statement”)¹.

26 It should be apparent that Andersen will have access to many individuals (including persons
currently controlling BFA, NCV, ALO and EVIG), as well as voluminous documents, to support
its defense.

Andersen has already produced all of its audit, tax and consulting workpapers to the State.
The Division has been cooperating with Andersen in producing the originals of the workpapers
so that Andersen can put the documents on to CD-Rom to assist in its defense. Further, as
Andersen has pointed out, it continues to defend various lawsuits as well as an investigation by

¹ Debtors’ full Disclosure Statement can be viewed at the bankruptcy court web site by selecting item number
833 at <http://ecf.azb.uscourts.gov/cgi-bin/DocketSheet.pl?99-13275>.

1 the State Board of Accountancy. Counsel for the Division, in an appearance before the
2 Bankruptcy Court, stated that, to the extent it is practical and permitted, the Division could
3 participate in coordinated discovery, including depositions. In light of Andersen's continuing
4 need to defend in other forums, it is difficult to see how permitting this case to continue will in
5 any way place an additional burden on Andersen.

6 **D. A Stay will not Provide Greater Convenience to the Parties and Commission**

7 Andersen argues that allowing this case to proceed will necessarily result in duplicative
8 judicial efforts with possible conflicting results. Motion p. 7. Further, Andersen asserts that, at
9 the conclusion of a criminal investigation and prosecution, the Attorney General will possess a
10 great body of additional, relevant information, which may be relevant in this proceeding. *Id.*
11 There is no assurance that either of Andersen's conclusions will in fact come to pass. As
12 discussed earlier, this case involves Andersen's actions and inaction, not that of ex-BFA
13 management. Much of the Division's evidence involves Andersen's own audit, tax and
14 consulting workpapers, which have already been produced by Andersen. There is no way to
15 determine whether facts pertaining to Andersen in the various civil proceedings might overlap,
16 but even if they do, it is no basis for staying this proceeding.

17 **E. Investors will in Fact Suffer if a Stay is Granted**

18 Andersen concludes that because (1) the harm to investors is complete and (2) it may not
19 be possible to assess ultimate damages until BFA's liquidation of assets, that investors do not
20 have a compelling need for immediate resolution of the Division's allegations. Motion pp. 7-8.
21 Andersen's position does not give the respect to, or understanding of, investors' positions that
22 investors deserve.

23 This case involves thousands of elderly investors who have lost more than money they
24 have lost faith. The investors are seeking justice and an understanding of what exactly happened.
25 They want to know how they lost money when there were professionals like Andersen involved
26 with BFA. They want liability determined. This can occur well in advance of a final

1 determination of exact monetary damages. The longer it takes to reach the merits of the case, the
2 greater the likelihood that memories will fade and all facts will not come out.

3 Debtors estimate that they will generate approximately \$240 million in cash in the next
4 three to four years to repay investors and other unsecured creditors. Disclosure Statement at Ex.
5 B. Investor claims alone exceed \$585 million. Disclosure Statement at p. 117. Therefore,
6 regardless of what the ultimate monetary damages to investors may be, BFA will likely be at
7 least \$300 million short of making investors whole. Assuming Andersen is found to have
8 violated the Securities Act as alleged by the Division, its ultimate damages may be more or less
9 than this figure. The fact the exact amount may not be known at this time is no reason to stay
10 this proceeding.

11 **F. The Public Interest will be Adversely Affected by a Stay**

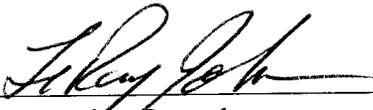
12 Andersen states that there is no public interest at stake essentially because there are no on-
13 going sales of securities by BFA. Motion pp. 8-9. To the contrary, there is a pressing need to
14 determine the liability of parties involved in this tragic situation. As a regulatory body, the
15 Division is aware of the need to reassure the public that it is seeking a determination of that
16 responsibility. See, Keating, 45 F.3d at 326.

17 If the Division's allegations in its Notice are true, there was more than just an audit failure
18 in this case; there was actual participation by Andersen in hiding a fraud. There can be no
19 stronger public interest than to send a message to the financial community that the Division will
20 take action against professionals when such action is warranted. Any delay would be detrimental
21 to public confidence in the enforcement scheme of the Securities Act. Id.

22 **III. CONCLUSION**

23 Based on the foregoing, it is apparent that Andersen has not shown any prejudice, let
24 alone substantial prejudice, to its rights by this case proceeding. Andersen's Fifth Amendment
25 rights are not implicated and the remaining factors all support the conclusion that this matter
26 should continue. Accordingly, the request for a stay should be denied.

1 RESPECTFULLY SUBMITTED this 8th day of November, 2000

2
3 BY 
4 Jennifer Boucek
LeRoy Johnson

5 Attorneys for the Securities Division

6 ORIGINAL AND TEN COPIES of the foregoing
7 Delivered this 8th day of November, 2000 to:

8 ARIZONA CORPORATION COMMISSION
9 Docket Control Center
10 1200 West Washington Street
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11 COPY of the foregoing mailed this
8th day of November, 2000 to:

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BY 