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DOCKETED

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Attorneys for Respondent
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

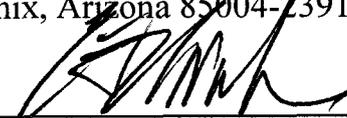
**REPLY IN SUPPORT OF MOTION
TO STAY PROCEEDING**

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

Respondent Arthur Andersen, L.L.P. ("Andersen"), by and through its attorneys, Quarles & Brady Streich Lang LLP, hereby replies in support of its "Motion to Stay Proceeding." This Reply is supported by the accompanying Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 17th day of November, 2000.

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

By 

Don P. Martin
Edward F. Novak
Michael D. Gordon
M. April Wynne

Attorneys for Respondent

1 Arndstein v. McCarthy, 254 U.S. 71, 73 (1920) (noting that the Fifth Amendment privilege
2 against self-incrimination protects persons who are acting as witnesses "in any investigation").
3 The legitimate exercise of the privilege against self incrimination, not the existence of
4 indictments, makes these witnesses unavailable.

5 The Notice alleges that Andersen assisted, among others, William P. Crotts, Donald D.
6 Deardoff, Thomas D. Grabinski, Dwain Hoover, and Jalma Hunsinger, all of whom are, or
7 were, top BFA management or alleged related parties, in defrauding investors. (Notice at 3-5).
8 Andersen's counsel spoke to the attorneys for each of the above named individuals. According
9 to their attorneys, all of these individuals will be unavailable for interviews because they will
10 assert their rights against self-incrimination under the United States Constitution and under the
11 Arizona Constitution. See Affidavit of Michael D. Gordon, attached hereto as Exhibit "A".
12 Deprived of their testimony, Andersen is hobbled in its effort to demonstrate its lack of
13 complicity with BFA.

14 **B. Andersen Will Suffer Prejudice If This Proceeding Is Not Stayed Because**
15 **Critical Witnesses Needed By Andersen In Its Defense Are Unavailable Until**
16 **The Criminal Matter Is Resolved.**

17 The Division claims that Andersen will not be prejudiced by denying a stay of this
18 proceeding because "scores of witnesses (most of whom will not be asserting any Fifth
19 Amendment privilege)" are available to testify. (Resp. at 5). The Division completely misses
20 the point. Perhaps "scores of witnesses" are available to testify. That fact does not protect
21 Andersen's due process rights. The particular witnesses that should be most helpful to
22 Andersen's defense are the ones that are unavailable. These unavailable witnesses have first-
23 hand knowledge of the work performed by Andersen for BFA, the purported fraudulent
24 transactions in which Andersen was allegedly involved, and the devices used by BFA to conceal
25 the alleged fraud from Andersen and others.
26

1 The Division also focuses on the unlikelihood that adverse inferences will be drawn
2 against Andersen when BFA management refuse to testify. (Resp. at 4). Again, the Division
3 misses the point. Such adverse inferences are irrelevant if the Division is allowed to make
4 allegations that Andersen is unable to challenge because the State has made key witnesses
5 unavailable. This scenario results in prejudice to Andersen, avoidance of which is the primary
6 objective of granting a stay. See Volmar Distrib., Inc. v. New York Post Co., Inc., 152 F.R.D.
7 36, 39 (S.D.N.Y. 1993) (observing that the basic goal of granting a stay is to avoid prejudice).

8 Further, the Division's contention that the Volmar case is "very different" is untrue.
9 (Resp. at 4). Like the corporations in Volmar, Andersen cannot defend itself without the
10 testimony of key individuals, whether or not they are officers of Andersen. As even the
11 Division must admit, the Volmar defendants' Fifth Amendment rights left the corporate entities
12 defenseless in the civil trial. See Volmar at 41. Addressing this concern, the Volmar court
13 stressed that the stay would "effectively postpone the civil trial – for everyone – until resolution
14 of the criminal matter." Volmar at 41 (emphasis added). Therefore, the entity defendants that
15 did not have key officers or control persons under indictments were also protected from
16 prejudice by the grant of the stay. See Volmar at 41.

17 Additionally, contrary to the Division's argument, Andersen's access to its own
18 workpapers is totally irrelevant to the fact that key witnesses will be unavailable. These
19 workpapers cannot replace the testimony of BFA management, which testimony is vital to
20 establishing Andersen's lack of complicity in BFA's alleged misconduct. Andersen's
21 workpapers simply do not contain the same information that can be provided by BFA
22 management. The problem is that the Division's allegations sweep well beyond the issues
23 addressed in the workpapers. Instead, the Division's allegations delve into areas that are within
24 the exclusive domain of BFA management.

25 Finally, the Division illogically claims that Andersen is not faced with any additional
26 burden by this proceeding because Andersen is currently defending itself in various other

1 lawsuits. (Resp. at 7). Even a casual observer of legal proceedings would acknowledge that
2 each additional lawsuit imposes an additional burden on Andersen, especially when no
3 consolidation of the cases has been ordered to date.

4 **C. The Division Will Suffer A Loss Of Public Confidence If The Division Makes**
5 **A Faulty And Inaccurate Determination Of Liability.**

6 The Division argues that any delay in the proceeding will "have a detrimental effect on
7 public confidence in the enforcement efforts of the Division." (Resp. at 5). Such a claim is
8 unfounded. The Division's enforcement efforts have been considerably delayed due to the
9 Division's own actions, or inactions. The Division had been on notice of BFA's actions for at
10 least seven years before it decided to take action against BFA, having received a detailed
11 complaint against BFA in 1992. The Division's renewed investigation is itself more than two
12 years old. Under the circumstances, the Division can hardly complain of any loss of public
13 confidence that may result from the comparatively short delay requested by Andersen.

14 The Division now asserts that it suddenly has a "pressing need" to determine liability in
15 order to reassure the public. (Resp. at 8). Should the Division's "need" come at the cost of a
16 fair and accurate assessment of liability? Speed should not be the yardstick of justice. Public
17 confidence certainly will be undermined if the Commission acts in an unfair and unjust manner.

18 The Rules of the Corporation Commission are to be construed to not only achieve a
19 speedy resolution but a "just" one as well. Ariz. Admin. Code. R14-3-101(B) (directing that the
20 Commission's rules be construed "to secure a just and speedy determination."). The Division's
21 newfound focus on a "speedy" resolution at the expense of justice violates the spirit of the rules
22 and, more importantly, Andersen's due process rights. A failure to follow rules may lead to
23 disastrous consequences for all involved resulting in a further loss of public confidence. Cf.
24 State v. Superior Court, 123 Ariz. 324, 331, 559 P.2d 777, 784 (1979) (In Banc) (permitting the
25 imposition of civil liability on the Commission when it failed to perform statutory duties owed
26 to investors), overruled on other grounds, State v. Gunnison, 127 Ariz. 110, 113, 618 P.2d 604,

1 607 (1980) (In Banc). Ultimately, the Division will earn public confidence only with an accurate
2 and just determination of liability, not from a speedy and unjust one.

3 Further resorting to hyperbole, the Division incorrectly attributes all of the investors'
4 losses to Andersen. (Resp. at 8). Andersen audited BFA's financial statements and no others.
5 (Notice at ¶3). Andersen is not liable for losses purportedly caused by NCV, ALO, or EVIG,
6 all of which are consolidated in the BFA bankruptcy. Carelessness with regard to facts so basic
7 to an understanding of the this litigation underscores the need for the Commission to be able
8 to proceed deliberately, but not in haste.

9 Finally, the Division claims a desire to send "a message" to the financial community that
10 it "will take action against professionals *when such action is warranted.*" (Resp. at 8) (emphasis
11 added). The message that the Division sends, however, is far more threatening. By opposing
12 this Motion, the Division signals that it will exploit the absence of key witnesses in order to
13 impose liability on those parties that the Division unilaterally believes are responsible. Clearly,
14 this sort of practice violates Andersen's due process rights and raises serious ethical problems
15 that can only be resolved by the grant of a stay. Cf. Rules of the Supreme Court, ER 3.8 cmt.
16 (requiring a prosecutor to ensure that a defendant is "accorded procedural justice" and that a
17 defendant not be convicted without "sufficient evidence"); State v. Fisher, 176 Ariz. 69, 73, 859
18 P.2d 179, 183 (1993) (insisting that a prosecutor not avoid the pursuit of evidence).

19 **D. The Investors' Desires To Know The Complete Facts Surrounding The**
20 **Fraud Will Not Be Fulfilled If Andersen Is Forced To Defend Itself Without**
21 **The Critical Testimony Of BFA Management.**

22 The Division states that the investors "are seeking justice" and that they want to know
23 "what exactly happened." (Resp. at 7). The Division ignores the fact that Andersen and the
24 Commission, too, seek justice and a full explanation. But, the mutual "desire" for the truth begs
25 the very question raised by the requested stay: How do we best get to the truth?

26 The truth will be uncovered in this proceeding only if Andersen can defend itself with
the testimony of percipient witnesses, such as BFA management. In fact, the investors will

1 never know "what exactly happened" if this proceeding is not stayed precisely because
2 invaluable evidence will never be brought to light due to the assertion of BFA management's
3 constitutional rights. Only after the criminal matter is resolved can BFA management be forced
4 to testify. See Hoffman v. United States, 341 U.S. 479, 486 (1951). Thus, the Division's claim
5 that it is merely seeking "truth" should be rejected in light of its opposition to a reasonable stay,
6 especially because Andersen's request for a stay is made in an effort to avoid the kind of one-
7 sided presentation of facts that distorts the truth.

8 **E. A Stay Of This Proceeding Will Reduce The Scope Of Discovery And**
9 **Alleviate A Substantial Amount of Time and Expense.**

10 The Division makes the unsubstantiated claim that its workload and the scope of
11 discovery will not be affected by the outcome of the BFA criminal investigation. (Resp. at 5).
12 Again, the Division relies on the absence of indictments in the BFA criminal matter. (Resp. at
13 5). With or without indictments, the Attorney General has accumulated, and will continue to
14 accumulate, substantial evidence to which the Division has had and will continue to have
15 access. See, e.g., Ariz. Rev. Stat. Ann. §§ 13-4071(B)(2) (1989 & Supp. 1999) (authorizing
16 grand juries to issue subpoenas) & 21-422(B)(1) (1990) & Supp. 1999) (empowering grand
17 juries to investigate Securities Act violations).

18 Nonetheless, the Division argues that the resolution of the criminal matter in connection
19 with BFA is unlikely to "significantly reduce the scope of discovery in this proceeding" because
20 "the case related to Andersen is based on Andersen's conduct and Andersen's work product, not
21 BFA's." (Resp. at 5). This assertion is nonsense. This proceeding and the criminal
22 investigation concern precisely the same circumstances, precisely the same investors, and
23 precisely the same members of BFA management. The facts are inextricably intertwined. The
24 issues are related and only the remedies may differ; therefore, a resolution of the criminal matter
25 will inevitably reduce the scope of discovery in this proceeding.
26

1 Finally, the Division postulates that because it already possesses much of its evidence,
2 in the form of Andersen's workpapers, and because Andersen cannot guarantee that the evidence
3 gathered in the criminal investigation will be relevant in this proceeding, a stay is not in order.
4 That position is self-serving and dangerous. Andersen should not be forced to rely solely on
5 its accuser's representations in an action alleging complicity. The Division's unchallenged
6 evidence may tell only part of the story. The Commission should stay this proceeding until all
7 evidence can be presented because due process requires no less.

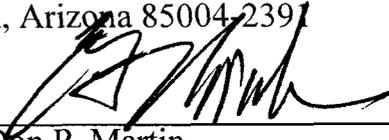
8 **III. CONCLUSION**

9 Based on the foregoing, Andersen respectfully requests that the Commission grant its
10 Motion to Stay Proceeding pending the outcome of the ongoing criminal investigation and the
11 resolution of the criminal proceeding.

12 RESPECTFULLY SUBMITTED this 17th day of November, 2000.

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

16 By _____


17 Don P. Martin
18 Edward F. Novak
19 Michael D. Gordon
20 M. April Wynne

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1 **ORIGINAL and TEN COPIES FILED**
2 this 17th day of November, 2000 with:

3 **ARIZONA CORPORATION COMMISSION**
4 Docket Control Center
5 1200 West Washington Street
6 Phoenix, Arizona 85007-2996

7 COPIES of the foregoing
8 hand delivered this 17th day
9 of November, 2000, to

10 Marc Stern, Hearing Officer
11 Arizona Corporation Commission
12 1200 West Washington
13 Phoenix, Arizona 85007

14 COPIES of the foregoing
15 faxed and mailed this 17th day
16 of November, 2000, to:

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19 1275 West Washington
20 Phoenix, Arizona 85007-2996

21 LeRoy H. Johnson, Esq.
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23 Arizona Corporation Commission
24 1300 West Washington, 3rd Floor
25 Phoenix, Arizona 85007-2929

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for interviews and for testimony before the Arizona Corporation Commission in the above-captioned matter.

Affiant further sayeth not.

11/17/00
Date

Michael D. Gordon
Michael D. Gordon

SUBSCRIBED AND SWORN to before me this 17th day of November, 2000.

Debra A. Lindsey
Notary Public - Arizona

My Commission Expires:

