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RE THE ARIZONA CORPORATION COMMISSION

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2 CARL J. KUNASEK
CHAIRMAN Arizona Corporation Commission
3 JIM IRVIN
COMMISSIONER
4 WILLIAM A. MUNDELL
COMMISSIONER

DOCKETED

AZ CORP COMMISSION
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NOV 29 2000

5 IN THE MATTER OF: [DOCKETED BY] [Signature]

DOCKET NO. S-03386A-00-0000

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

Respondent.

FOURTH
PROCEDURAL ORDER

9 **BY THE COMMISSION:**

10 On September 27, 2000, the Securities Division ("Division") of the Arizona Corporation
11 Commission ("Commission") filed a Notice of Opportunity for Hearing ("Notice") against Arthur
12 Andersen L.L.P. ("Andersen" or "Respondent") in which the Division alleged multiple violations of
13 the Arizona Securities Act ("Act") by aiding and abetting in the fraudulent offer and sale of various
14 securities products by the Baptist Foundation of Arizona ("BFA") and related entities.

15 The Respondent was duly served with a copy of the Notice.

16 On October 3, 2000, Andersen filed a request for hearing.

17 On October 10, 2000, by Procedural Order, a pre-hearing conference was scheduled for
18 October 18, 2000.

19 On October 17, 2000, Respondent filed a Motion to Dismiss.

20 On October 18, 2000, a pre-hearing conference was held at the Commission's offices in
21 Phoenix, Arizona. The Respondent and Division were represented by counsel. Other pending
22 proceedings arising from Andersen's involvement with the Baptist Foundation of Arizona and the
23 briefing of motions were discussed.

24 On October 25, 2000, Respondent filed a Motion to Stay Proceeding ("Motion to Stay").
25 Respondent claims that its Motion to Stay is founded upon due process rights protected by the
26 Fourteenth Amendment to the United States Constitution and Article Two, Section Four of the
27 Arizona Constitution. In support of the Motion to Stay, Andersen argues that it is at great risk for
28

1 being found in violation of the Act because of a pending criminal investigation by the Arizona
2 Attorney General of former top senior managers of BFA and other related parties. Respondent states
3 that former BFA management and other related individuals will assert their Fifth Amendment rights
4 under the United States Constitution and their state constitutional rights under Article II, Section 10
5 and will be unavailable for either interviews or for testimony before the Commission in the above-
6 captioned proceeding.

7 Respondent argues further that the Commission should seek a full presentation of the facts
8 and that it is within the Commission's discretionary powers to stay this proceeding. Andersen's
9 Motion to Stay cited certain factors in support of a stay in either a civil or administrative proceeding
10 which will not prejudice the Division's rights if a party's rights would be substantially prejudiced by
11 parallel proceedings. While it does not appear that Andersen's Fifth Amendment rights are involved
12 in any way, it is clear that the burden imposed on the Respondent in defense of this proceeding would
13 be significantly increased given that there are four other pending proceedings involving investors'
14 claims, three in Maricopa County Superior Court and one in the United States District Court.
15 Additionally, a significant factor is the efficient use of resources, and based on the initial filings, this
16 case will be extremely cumbersome involving voluminous testimony, records, documents and
17 exhibits which will tax the resources of the Commission to a large degree.

18 Lastly, Andersen raises the issue that it does not believe that negative legal inferences can be
19 drawn against it if witnesses that are called in its defense exercise their rights against self
20 incrimination. However, Respondent argues that a more dangerous result would be that, in the
21 absence of the witness and/or his testimony, it would leave allegations raised by the Division
22 unanswered exposing Respondent to both substantial penalties and substantial amounts due for
23 restitution. Further, Andersen pointed out that a stay of this proceeding could be advantageous to the
24 parties by avoiding duplicative and expensive litigation. In closing, Respondent argues that even if
25 the Division prevails in this proceeding, because of the four year planned liquidation proposed in the
26 BFA bankruptcy and the other civil proceedings, the amount of restitution will be unascertainable for
27 some years in the future.

28 On October 31, 2000, by Procedural Order, the Commission memorialized certain filing dates

1 established by agreement of the parties in a teleconference on October 30, 2000, with respect to the
2 Motion to Stay and Andersen's Motion to Dismiss and scheduled oral argument on the Motion to
3 Dismiss for January 4, 2001, if the Motion to Stay is not granted.

4 On November 8, 2000, the Division filed its Response to Andersen's Motion to Stay. In its
5 Response, the Division argues that Andersen is unable to show that its rights would be substantially
6 prejudiced if a stay is not granted. The Division argues that the proceeding is not about former BFA
7 senior managers and other related parties' conduct, but that of Andersen and its complicity in a
8 fraudulent scheme perpetrated on investors. The Division points out that no indictments have yet
9 been issued in connection with the BFA proceeding, and that, even if indictments are at some point
10 returned against former BFA officials and others, Andersen's arguments regarding these individuals'
11 exercise of their Fifth Amendment rights against self incrimination would adversely effect the
12 Respondent's defense in this proceeding makes no sense. The Division also argues that any delay
13 would have a detrimental effect on public confidence as it relates to the Division's enforcement
14 efforts because of a need to determine liability. Further, the Division argues that its allegations will
15 show that Andersen actually participated in hiding a fraud and that the Division wishes to send a
16 message to the financial community that the Division will take action against independent
17 professionals when such action is warranted.

18 On November 17, 2000, Andersen filed its Reply in support of the Motion to Stay and points
19 out that the Division is requesting the Commission to ignore the need for testimony from former top
20 senior managers of BFA and other related parties with whom Andersen had purportedly acted with
21 complicity in carrying out the fraud alleged in the Notice. Respondent argues that the former BFA
22 managers' first-hand knowledge of the circumstances and events which occurred during the alleged
23 fraud are required in this proceeding to show how the fraud was concealed from Andersen and others.
24 Andersen goes on to point out that the attorneys for certain former BFA managers and others named
25 in the Notice were contacted by its counsel who spoke to the attorneys for these individuals. He was
26 informed that they would be unavailable for interviews because they will assert their rights against
27 self-incrimination under the United States Constitution and the Arizona Constitution. In support of
28 these arguments, Andersen attached the Affidavit of Mr. Michael D. Gordon, one of its attorneys,

1 who had contacted counsel for the various former BFA senior managers and other parties who
2 advised him that their respective clients “would assert their Fifth Amendment rights under the United
3 States Constitution and/or their rights under Article II, Section 10 of the Arizona Constitution and
4 would, therefore, be unavailable for interviews and for testimony before the Arizona Corporation
5 Commission in the above-captioned matter.” Respondent argues that these witnesses would have key
6 testimony which would be probative and relevant to the instant proceeding. Further, Andersen argues
7 that its own work papers and other witnesses cannot replace the testimony of former BFA senior
8 managers which would go to the heart of its defense that it did not take part in BFA’s misconduct.
9 Andersen also points out that the Division had been on notice of BFA’s actions for at least seven
10 years before it decided to take action against BFA after having received a detailed complaint against
11 BFA in 1992 and that the instant investigation is more than two years old.

12 Under the circumstances herein, after reviewing the opposing arguments of the Respondent
13 and the Division and the Notice herein, it can only be concluded that it would be unseemly to proceed
14 without certain key witnesses with first-hand knowledge who were involved at the center of BFA’s
15 fraudulent offerings. It is illogical to argue that Andersen’s rights will not be substantially prejudiced
16 if they are unable to either interview or call as witnesses the very key players whom Andersen is
17 alleged to have been an accomplice to. Therefore, a reasonable stay should be imposed on this
18 proceeding after which time a status conference should be held to determine if actions have taken
19 place which will enable this proceeding to go forward.

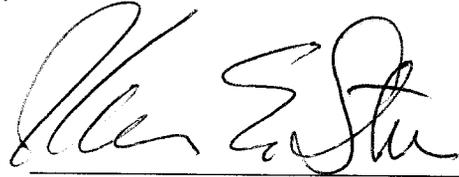
20 IT IS THEREFORE ORDERED that the Motion to Stay Proceeding filed by Arthur
21 Andersen, L.L.P. be, and is hereby, granted for a period of at least 60 days.

22 IT IS FURTHER ORDERED that the hearing scheduled for oral argument on the Motion to
23 Dismiss scheduled for January 4, 2001, at 9:30 a.m., be, and is hereby, vacated.

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25 ...
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28 ...

1 IT IS FURTHER ORDERED that a status conference will be held on March 1, 2001, at 9:30
2 a.m., at the Commission's offices, 1200 West Washington Street, Phoenix, Arizona.

3 DATED this 29TH day of November, 2000.



6 MARC E. STERN
7 ADMINISTRATIVE LAW JUDGE

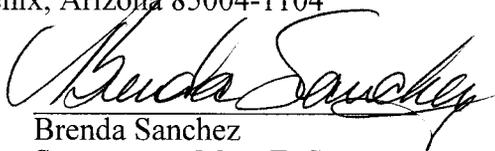
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9 Copies of the foregoing mailed/delivered
10 this 29th day of November, 2000 to:

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By: 
Brenda Sanchez
Secretary to Marc E. Stern