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1 ORIGINAL

2  
3 BEFORE THE ARIZONA CORPORATION COMMISSION

4  
5 COMMISSIONERS

6 MIKE GLEASON, Chairman  
7 WILLIAM A. MUNDELL  
8 JEFF HATCH-MILLER  
9 KRISTIN K. MAYES  
10 GARY PIERCE

Arizona Corporation Commission

DOCKETED

SEP 11 2008

DOCKETED BY

11 In the matter of: )  
12 MARK W. BOSWORTH and LISA A. )  
13 BOSWORTH, husband and wife; )  
14 STEPHEN G. VAN CAMPEN and DIANE )  
15 V. VAN CAMPEN, husband and wife; )  
16 MICHAEL J. SARGENT and PEGGY L. )  
17 SARGENT, husband and wife; )  
18 ROBERT BORNHOLDT and JANE DOE )  
19 BORNHOLDT, husband and wife; )  
20 MARK BOSWORTH & ASSOCIATES, )  
21 L.L.C., an Arizona limited liability company; )  
22 3 GRINGOS MEXICAN INVESTMENTS, )  
23 L.L.C., an Arizona limited liability company; )  
24 Respondents. )

DOCKET NO. S-20600A-08-0340

**RESPONSE TO JOINDER OF RESPONDENTS  
STEPHEN VAN CAMPEN AND DIANE VAN  
CAMPEN IN RESPONDENTS SARGENT'S  
MOTION TO STAY PROCEEDINGS**

(Assigned to the Honorable Marc E. Stern)

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20 The Securities Division ("the Division") of the Arizona Corporation Commission ("the  
21 Commission") hereby responds to the Joinder of Respondents Stephen Van Campen and Diane Van  
22 Campen's ("Van Campen") in Respondents Sargent's Motion to Stay Proceedings ("the Joinder")  
23 and requests that it be denied. This Response is supported by the following Memorandum of Points  
24 and Authorities.

25  
26

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Van Campen says that he is the subject of two criminal investigations and he would like  
4 the Administrative Law Judge to believe this because he says it is so. This can be neither  
5 confirmed nor denied. What can be confirmed, however, is that Van Campen is **NOT** the  
6 defendant in any criminal case, he does **NOT** face criminal charges, and he has **NOT** been  
7 indicted.

8 In the Joinder, Van Campen has requested a stay of this proceeding because he **MAY**  
9 wish to assert his Fifth Amendment right to remain silent when asked questions by the Division.  
10 This argument is speculative on at least two levels. First, Van Campen may in fact answer  
11 questions put to him by the Division and refrain from asserting his right to remain silent. Second,  
12 even if he asserts his right, the Division may not ask Van Campen any questions and may instead  
13 prove its case through witness testimony, documentary evidence, etc.

14 Van Campen is essentially asking the Administrative Law Judge to indefinitely delay  
15 justice for the dozens of investors who deserve to have the merits of this case heard and to have  
16 liability for their millions of dollars of losses determined. To maintain public confidence in the  
17 enforcement efforts of the Division, this case must not be delayed.

18 Van Campen cannot show the substantial prejudice to his rights that is required by law for  
19 a stay. As such, the Joinder should be denied.

20 **II. ARGUMENT**

21 Whether to grant a stay in this proceeding is within the sound discretion of the  
22 Administrative Law Judge. See, State v. Ott, 167 Ariz. 420, 428, 808 P.2d 305, 313 (Ct. App. 1990)  
23 (citing Afro-Lecon v. United States, 820 F.2d 1198, 1202 (Fed. Cir. 1987)). Neither the federal nor  
24 the state constitution prohibits parallel civil and criminal proceedings. Id. (citing United States v.  
25 Kordel, 397 U.S. 1, 12 n. 27 (1970)). In fact, civil proceedings generally should be stayed only if  
26 parallel proceedings would substantially prejudice the defendant's rights. Id. (citing Securities and

1 Exchange Comm'n v. Dresser Industries, 628 F.2d 1368, 1374 (D.C. Cir.), cert. denied, 449 U.S.  
2 993 (1980)). The decision whether to stay civil proceedings in the face of a parallel criminal  
3 proceeding should be made "in light of the particular circumstances and competing interests  
4 involved in the case." Federal Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9<sup>th</sup> Cir.  
5 1989).

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

18 **A. Van Campen's Fifth Amendment Rights are not Implicated in this Proceeding.**

19 Even where the same individual defendant is involved in both civil and criminal  
20 proceedings, the courts can require a litigant to choose between invoking the Fifth Amendment in  
21 a civil case, thus risking a loss there, or answering the questions in the civil context, thus risking  
22 subsequent criminal prosecution. See, e.g., Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976).  
23 Generally, in such cases the courts have allowed the civil case to proceed after weighing the  
24 competing interests involved. See, e.g., State v. Ott, 167 Ariz. 420, 808 P.2d 305 (Ct. App. 1990);  
25 Keating v. Office of Thrift Supervision, 45 F.3d 322 (9<sup>th</sup> Cir. 1994), cert. denied, 516 U.S. 827  
26 (1995); Federal Sav. And Loan Ins. Corp. v. Molinaro, 889 F.2d 899 (9<sup>th</sup> Cir. 1989); Securities &

1 Exchange Comm'n v. Dresser Indus., 628 F.2d 1368, 1376 (D.C. Cir.) cert. denied, 449 U.S. 993  
2 (1980).

3 Like this case, Keating and Molinaro involved administrative agencies bringing actions in  
4 the public interest. But unlike this case, the defendants in Keating and Molinaro were individuals  
5 who were charged in both the civil and criminal proceedings. In both cases the courts found, after  
6 weighing the competing interests (including the extent to which the defendants' Fifth Amendment  
7 rights were implicated), that it was appropriate to allow the civil proceedings to continue. Keating,  
8 45 F.3d at 326; Molinaro, 889 F.2d at 902-03.

9 The case for staying civil proceedings is "a far weaker one" when "[n]o indictment has been  
10 returned [and thus] no Fifth Amendment privilege is threatened." Molinaro, 889 F.2d at 903  
11 (quoting Dresser Industries, 628 F.2d at 1376). No indictments have been returned in this case, thus  
12 no Fifth Amendment rights are threatened.

13 **B. The Division's Interest in Proceeding Expeditiously is Great.**

14 Any delay in prosecuting this matter will adversely affect the Division's interests. Dozens of  
15 Arizona investors are waiting for an opportunity to have the merits of this case heard. Any delay  
16 would have a detrimental effect on public confidence in the enforcement efforts of the Division. It is  
17 appropriate for the Administrative Law Judge to consider this factor in determining whether a stay  
18 should be granted. See, Keating, 45 F.3d at 326 (detrimental effect on public confidence in  
19 enforcement scheme for thrift institutions would occur from stay); Molinaro 889 F2d at 903  
20 (interests of depositors would be frustrated from stay).

21 **C. Van Campen will not have any Greater Burden upon Denial of a Stay.**

22 Denial of a stay will not negatively affect (in fact, it may enhance) Van Campen's ability to  
23 mount his defense in this case. Even though he may exercise his right to remain silent, Van Campen  
24 will still be able to cross examine the witnesses against him (in this case, scores of investors and  
25 others who will testify as to the often-complicated financial transactions involved in the fraud  
26 perpetrated on investors and to authenticate the hundreds of documents involved), introduce and

1 challenge evidence, etc. The longer the delay as a result of a stay, the more likely it is that memories  
2 will fade and the harder it will be for Van Campen to mount his defense.

3 **D. A Stay will not Provide Greater Convenience to the Parties and/or Division.**

4 A stay would be inconvenient not only because of the delay, but because the Division  
5 would be forced to put on its case at least twice – first against respondents who are not the  
6 subject of a stay and later against the others. Of course, a stay as to all respondents is out of the  
7 question and would not only be violative of the law, it would be contrary to the interests of the  
8 investors in this case and the public as a whole.

9 **E. Investors will Suffer if a Stay is Granted.**

10 It could be said that the harm to investors is complete and that investors do not have a  
11 compelling need for immediate resolution of the Division's allegations. Such an argument does not  
12 give the respect to, or understanding of, investors' positions that investors deserve.

13 This case involves dozens of investors who have lost more than money, they have lost faith.  
14 The investors are seeking justice and an understanding of what exactly happened. They want to  
15 know how they lost money when there were professionals like Van Campen involved with Mark  
16 Bosworth and his companies. They want and deserve liability determined.

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

18 Citing uncontrolling authority, Van Campen essentially argues that the public's interest in a  
19 prospective criminal case is entitled to precedence over this, pending case. Van Campen also argues  
20 that, since the Division is immune to any statutes of limitation and since there are no ongoing sales  
21 of securities, the public's interest will not be adversely affected by a stay. On the contrary, there is a  
22 pressing need to determine the liability of parties involved in this tragic situation. As a regulatory  
23 body, the Division is keenly aware of the need to reassure the public that it is seeking a  
24 determination of responsibility. See, Keating, 45 F.3d at 326. It would be completely unacceptable  
25 to allow this case to drag on unprosecuted for months, years even.

26

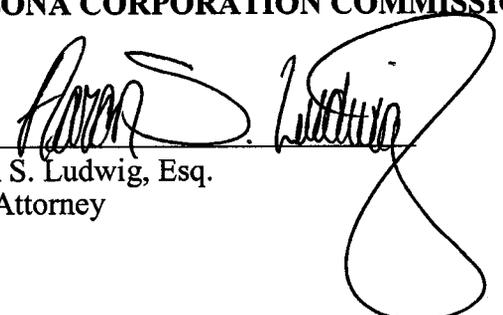
1 If the Division's allegations in its Notice are true, there is more to this case than just a  
2 failure to disclose risks; there was actual perpetration of fraud by Van Campen. There can be no  
3 stronger public interest than to send a message to the financial community that the Division will  
4 take action against professionals when such action is warranted. Any delay would be detrimental  
5 to public confidence in the enforcement scheme of the Securities Act. Id.

6 **III. CONCLUSION**

7 Based on the foregoing, it is apparent that Van Campen has not shown any prejudice, let  
8 alone substantial prejudice, to his rights by this case proceeding. Van Campen's Fifth  
9 Amendment rights are not implicated and the remaining factors all support the conclusion that  
10 this matter should continue. Accordingly, the Joinder should be denied.

11 RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of September 2008.

12  
13 **SECURITIES DIVISION of the**  
**ARIZONA CORPORATION COMMISSION**

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16 \_\_\_\_\_  
17 Aaron S. Ludwig, Esq.  
18 Staff Attorney

18 **ORIGINAL and 13 COPIES** of the foregoing filed  
19 this 11<sup>th</sup> day of September 2008 with:

20 Docket Control  
21 Arizona Corporation Commission  
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23 Phoenix, AZ 85007

24 **COPY** of the foregoing mailed/delivered  
25 this 11<sup>th</sup> day of September 2008 to:

26 The Honorable Marc E. Stern  
Hearing Division  
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Phoenix, AZ 85007

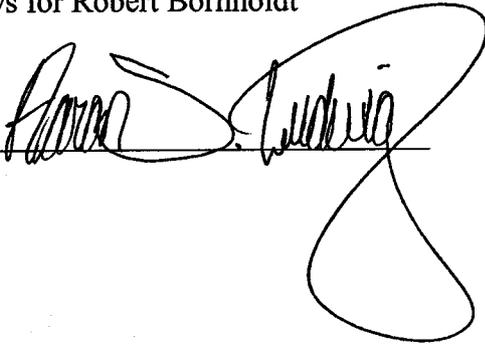
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