



0000088757

ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS:  
MIKE GLEASON – Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
KRISTIN K. MAYES  
GARY PIERCE

2008 SEP 17 P 4:02  
AZ CORP COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

SEP 17 2008

DOCKETED BY [Signature]

In the matter of:

Docket No. S-20600A-08-0340

MARK W. BOSWORTH and LISA A. BOSWORTH, husband and wife;  
STEPHEN G. VAN CAMPEN and DIANE V. VAN CAMPEN, husband and wife;  
MICHAEL J. SARGENT and PEGGY L. SARGENT, husband and wife;  
ROBERT BORNHOLDT and JANE DOE BORNHOLDT, husband and wife;  
MARK BOSWORTH & ASSOCIATES, LLC, an Arizona limited liability company;  
3 GRINGOS MEXICAN INVESTMENTS, LLC, an Arizona limited liability company;

RESPONDENTS  
MICHAEL J. SARGENT  
AND PEGGY L. SARGENT'S

REPLY IN SUPPORT OF  
MOTION TO STAY

(Oral Argument Requested)

Respondents.

I. Summary of Argument.

Uncontroverted evidence demonstrates that Mr. Michael J. Sargent is the subject of a criminal investigation. The Securities Division's ("the Division") subpoena presents Mr. Sargent with the "cruel dilemma" of choosing between defending himself in this case and waiving his constitutional right to remain silent. The Administrative Law Judge should grant the Sargent Respondents' motion to stay to preserve their constitutional rights. Such stays are commonly granted. And when the criminal investigation and the civil or administrative proceeding cover the same ground, as is the case here, the case for a stay is even stronger. The Division places great emphasis on the fact Sargent has not been indicted. But numerous cases grant pre-indictment stays. The Division also makes generic comments about the interests of the Division, investors, and the public. The Division's comments lack any specificity and fail to demonstrate how such concerns

1 should trump the Sargents' constitutional concerns. The Division's response rests on three key  
2 cases (*Keating*, *Molinaro*, and *Ott*). But upon close examination, those cases do not support denial  
3 of a stay. Overall, the Sargents' strong interest in preserving their right to remain silent and  
4 considerations of judicial economy and fairness outweigh the factors cited by the Division. Thus,  
5 the Administrative Law Judge should grant a stay.

6 **II. Stays Are Common and Appropriate.**

7 The Division seeks to portray a stay as an uncommon, drastic remedy. But as the United  
8 States Supreme Court recently noted, it is "common practice" to stay a civil proceeding in the face  
9 of a "criminal case or the likelihood of a criminal case." *Wallace v. Kato*, 127 S.Ct. 1091, 1098  
10 (2007). Likewise, the Supreme Court of Minnesota recently noted "it has long been a practice to  
11 'freeze' civil proceedings when a criminal prosecution involving the same facts is warming up or  
12 underway." *State v. Deal*, 740 N.W.2d 755, 764 (Minn. 2007)(quoting *Peden v. United States*, 512  
13 F.2d 1099, 1103 (Ct.Cl. 1975)). And California courts follow the federal practice that "when both  
14 civil and criminal proceedings arise out of the same or related transactions, an objecting party is  
15 generally entitled to a stay of discovery in the civil action." *Pacers, Incorporated v. Superior*  
16 *Court*, 208 Cal. Rptr. 743, 745-46 (Cal. App. 1984).

17 The Division contends that stays are not generally granted, citing *State v. Ott*, 167 Ariz.  
18 420, 808 P.2d 305 (App. 1990). But *Ott* does not state that stays are not generally granted. Indeed,  
19 it states that if "parallel proceedings would substantially prejudice the defendant's rights... the  
20 court should stay the civil proceedings." *Id.*, 167 Ariz. at 428-29; 808 P.2d at 314. Moreover,  
21 while *Ott* did not overturn the denial of a stay, it opined that a stay "may have been preferable" but  
22 it was up to the trial judge unless the court abused its discretion. *Id.*

23 And while the Division cites *Ott*, an Arizona Court of Appeals case from 1990, it does not  
24 cite the more recent Arizona Supreme Court case on point. In *Wohlstrom v. Buchannan*, 180 Ariz.  
25 389, 392, 884 P.2d 687, 690 (1994), the court stated that when faced with potential criminal  
26 liability, a person should not be "forced to chose between surrendering his constitutional privilege  
27 and forfeiting property" in a civil case. The Division's Notice of Opportunity seeks substantial

1 financial penalties and clearly brings this case within *Wohlstrom*.

2 The Division also cites *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995).  
3 But in that case, the administrative claims had little or no overlap with the criminal charges. *Id.*, 45  
4 F.3d at 325-26. Here, the criminal investigation is focused on the same set of facts as the  
5 administrative proceeding. Thus, *Keating* is of little guidance. The degree of overlap between the  
6 criminal and civil proceedings is a critical factor, because it shows the degree to which testimony  
7 regarding the criminal issues will be taken. Thus, courts have looked to whether the factual issues  
8 are the same or largely the same. *See State v. Deal*, 740 N.W.2d 755, 766 (Minn. 2007) (“the extent  
9 to which the evidentiary material in the civil and criminal cases overlap”); *King v. Olympic*  
10 *Pipeline Co.*, 16 P.3d 45, 55 (Wash. App. 2000)(extent of factual overlap is one “of the most  
11 important factors”); *Integrated Generics, Inc. v. Bowen*, 678 F.Supp. 1004, 1009 (E.D.N.Y.  
12 1988)(granting stay when the facts are the same). This factor points strongly towards granting a  
13 stay.

14 **III. Mr. Sargent Faces A Realistic Threat of Criminal Prosecution.**

15 **A. Mr. Sargent is the target of a criminal investigation.**

16 The Division begins by stating, “Sargent allegedly heard that he is the target of a criminal  
17 investigation.” (Response at 2) That is not correct. Mr. Sargent’s counsel was advised by the  
18 Chief of the Criminal Section of the Attorney General’s Office that Sargent is the target of a  
19 criminal investigation concerning the activities of Mark Bosworth & Associates. This fact was  
20 substantiated by affidavit. Notably, the Division did not submit a controverting affidavit. The  
21 Division does not state that: (1) Mr. Sargent is not the target of a criminal investigation; or (2) that  
22 the Division attempted to find out from the Attorney General’s office but was denied any  
23 information. Instead of making any factual claims, the Division states that whether Mr. Sargent is a  
24 target “can be neither confirmed nor denied.” The Division’s words in this regard are both careful  
25 and telling. Either the Division knows that Mr. Sargent is a target and is unable or unwilling to  
26 share this information, or it buried its head in the sand and made no effort to find out. Either way,  
27 the affidavit from Mr. Sargent’s criminal counsel stands uncontroverted.

1 An affidavit from criminal defense counsel that the government has confirmed that a person  
2 is the target of a criminal investigation is a sufficient factual basis for granting a motion for stay of  
3 a related civil proceeding. *See Ex parte Antonucci*, 917 So.2d 825, 830 (Ala. 2005). In *Antonucci*,  
4 the court noted that a person need only show a “reasonable apprehension of criminal prosecution”  
5 to claim 5th Amendment privilege. The court also stated that defense counsel’s “affidavit clearly  
6 demonstrated the existence of an ongoing criminal investigation.” *Id.*

7 Arizona law follows the same path. A person need only show a “realistic threat of criminal  
8 prosecution” in order to invoke the 5th Amendment. *Wohlstrom v. Buchanan*, 180 Ariz. 389, 391  
9 n. 2, 884 P.2d 687, 689 (Ariz. 1994). Here, the uncontroverted evidence is that Mr. Sargent is the  
10 target of a criminal investigation and that he therefore faces a “realistic threat” of criminal  
11 prosecution. Thus, the Division simply has no basis for its statements that Mr. Sargent’s 5th  
12 Amendment rights are “not [i]mplicated” or that “no Fifth Amendment rights are threatened.”  
13 (Division Response at 3, 4) To the contrary, stays are frequently granted in similar circumstances  
14 out of concern to protect 5th Amendment rights.

15 **B. Stays are often granted without any indictment.**

16 The Division emphasizes that Mr. Sargent “is **NOT** the defendant in any criminal case, he  
17 does **NOT** face criminal charges, and he has **NOT** been indicted.” (Division Response at 2.) This  
18 is simply three different ways of saying the same thing: that Mr. Sargent has not been indicted.  
19 “All caps” and bold, no matter how often repeated, is no substitute for legal authority.

20 In fact, numerous courts have granted stays of civil proceedings or discovery on the grounds  
21 that a party is the target of a criminal investigation, even when no indictment has been issued. *See*  
22 *e.g. Ex parte Antonucci*, 917 So.2d 825, 830 (Ala. 2005); *Ex parte Ebbers*, 871 So.2d 776, 790-96  
23 (Ala. 2003); *King v. Olympic Pipeline Co.*, 16 P.3d 45, 51-61 (Wash. App. 2000); *Grubbs v. Irely*,  
24 2008 WL 906246 at \* 4 (E.D. Cal. 2008); *SEC v. Schroder*, 2008 WL 152227 at \*2 (N.D. Cal.  
25 2008); *SEC v. Downe*, 1993 WL 22126 (S.D.N.Y. 1993); *United States v. Certain Real Property*  
26 *and Premises Known as 1344 Ridge Road*, 751 F.Supp. 1060, 1063 (E.D.N.Y. 1989); *Integrated*  
27 *Generics, Inc. v. Bowen*, 678 F.Supp. 1004, 1009 (E.D.N.Y. 1988); *United States v. Hugo Key and*

1 *Son, Inc.*, 672 F.Supp. 656, 658 (D.R.I. 1987); *Pacers, Incorporated v. Superior Court*, 208  
2 Cal.Rptr. 743, 746 (Cal. App. 1984).

3 Moreover, the Division's fixation on an indictment runs counter to the Supreme Court's  
4 statement about stays for the "likelihood of a criminal case" in *Wallace v. Kato*, 127 S.Ct. 1091,  
5 1098 (2007). The Division's position is also difficult to square with the statement approving stays  
6 when criminal cases are "warming up" as noted by the court in *State v. Deal*, 740 N.W.2d 755, 764  
7 (Minn. 2007).

8 The Division only cites one case [*Federal Savings and Loan Insurance Corp. v. Molinaro*,  
9 889 F.2d 899 (9th Cir. 1989)] in support of its claim that the absence of an indictment should bar a  
10 stay. But *Molinaro* is not on point. In *Molinaro*, the defendant testified at a deposition in the civil  
11 case before filing his motion for stay. *Molinaro*, 889 F.2d at 903. He, therefore, waived his right  
12 to remain silent. See *United States v. Stringer*, 535 F.3d 929, 939(9th Cir. 2008)(describing waiver  
13 of 5th Amendment privilege by testifying in civil deposition). It is, therefore, not surprising that  
14 the court denied the stay – there just wasn't anything left to protect. Thus, *Molinaro* provides little  
15 guidance about whether pre-indictment stays are appropriate because *Molinaro* waived his privilege  
16 by testifying. *King*, 16 P.3d at 354; see also *FTC v. J.K. Publications, Inc.*, 99 F.Supp.2d 1176,  
17 1199 (C.D. Cal. 2000)(citing *Molinaro* for proposition that once defendant is deposed, any  
18 remaining burden on 5th Amendment rights is "negligible").

19 The fact that Mr. Sargent has not been indicted is no reason to deny a stay, as shown by the  
20 many cases cited above. Mr. Sargent is the target of a criminal investigation, and his right to  
21 remain silent is directly implicated by this proceeding. That right is guaranteed by the 5th  
22 Amendment to the United States Constitution, and also by Article II § 10 of the Arizona  
23 Constitution. And that right is to be "interpreted liberally." *Wohlstrom v. Buchannan*, 180 Ariz.  
24 389, 394, 884 P.2d 687, 692 (1994). Proceeding with discovery in this case will "burden"  
25 Sargent's "right to remain silent" given Sargent's reasonable fear of criminal prosecution. *Id.*  
26 Thus, the Sargents' part in this case, and discovery against them, should be stayed.

27

1           **C.     Discovery has already started.**

2           Absurdly, the Division rhetorically asks what if the Division “doesn’t ask him any  
3 questions?” (Response at 2). The Division has already begun to ask questions by submitting its  
4 investigative subpoena for documents. The right to remain silent extends to demands in civil  
5 discovery for the production of documents. *State v. Ott*, 167 Ariz. 420, 425, 808 P.2d 305, 310  
6 (App. 1990). And it would be unprecedented for the Division to stop there. Indeed, if there really  
7 is a chance that the Division wouldn’t ask questions of Mr. Sargent, then why is the Division  
8 spending its limited resources fighting this stay now? If the need for discovery from Mr. Sargent  
9 came up later, the Division could always ask to end or modify the stay. The Division’s discovery is  
10 already underway, and more is sure to come. This is the time for a stay to protect Mr. Sargent’s  
11 rights.

12           **IV.     The Division Gives Little Reason To Oppose A Stay.**

13           The Division and the Sargents agree on the factors that should be considered in evaluating a  
14 stay. However, the Division’s discussion of those factors provides little reason to deny the stay.  
15 The Division’s reasons are all generic reasons that apply to every case. Under their approach, stays  
16 would never be granted. But stays are common. And the decision to grant or deny a stay is based  
17 on the facts of each case. *Molinoro*, 889 F.2d at 902. The Division’s boilerplate response simply  
18 does not provide a factual basis specific to this case for denying a stay.

19           The Division contends that denial of the stay will not “negatively affect” Mr. Sargent’s  
20 ability to mount a defense, and it “may enhance” it. Thankfully, the Division is not in charge of  
21 Mr. Sargent’s defense. Defending both criminal and administrative charges will strain  
22 Mr. Sargent’s resources – he does not have teams of in-house attorneys as does the Division. It will  
23 be difficult, perhaps impossible, for Mr. Sargent to defend this case without testifying or  
24 responding to discovery. And answering the Division’s questions will waive Mr. Sargent’s 5th  
25 Amendment rights. It has hard to see how that will not prejudice his criminal defense.

26           The Division claims that there was “actual perpetration of fraud by Sargent.” (Response at  
27 5). That remains to be proven. Mr. Sargent asks that his hands not be tied in responding to the

1 Division's allegations. The Division also objects that it "would be forced to put on its case at least  
2 twice." But nothing is forcing the Division to go forward now. And criminal convictions against  
3 any of the respondents could be used against that respondent in this matter, greatly simplifying the  
4 Division's task. The Division's problem, if there is one, is of its own making.

5 The Division also claims that investors have "lost faith" and that they are "seeking justice"  
6 and need an "understanding of what happened." (Response at 5). Which investors? Why? Will  
7 they not gain an understanding from the criminal proceeding, from the bankruptcy proceeding or  
8 department of real estate proceedings, or from the numerous news accounts? Will those investors  
9 see an administrative restitution order (often uncollectable) as restoring faith in the justice system?

10 Likewise, the Division points to "the need to reassure the public", citing *Keating*.  
11 (Response at 5). But what *Keating* actually says is that the government is "frequently aware of the  
12 need to reassure the public that they are taking prompt action in response to a crisis. In such high  
13 visibility situations, it is especially necessary to guard the rights of defendants, and concern for the  
14 public deterrence value of an enforcement proceeding must not be allowed to override the  
15 individual defendant's due process rights." 45 F.3d at 326. The *Keating* court's comment about  
16 "reassuring the public" does not support the Division's position, and indeed it serves as a  
17 cautionary warning against following the Division's approach.

18 The Division's desire "to send a message" (Division Response at 5) should not trump  
19 Mr. Sargent's constitutional rights. Nor will public confidence in justice be enhanced by denial of  
20 the very rights that stand at the core of our justice system.

21  
22  
23  
24  
25 ...  
26 ...  
27 ...

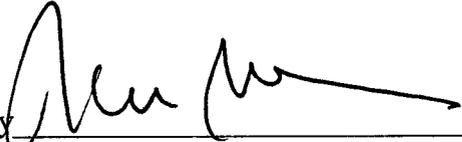
ROSKA DEWULF & PATTEN, PLC  
ONE ARIZONA CENTER  
400 EAST VAN BUREN STREET - SUITE 800  
PHOENIX, ARIZONA 85004  
TELEPHONE NO 602-256-6100  
FACSIMILE 602-256-6800

1 V. Conclusion.

2 For the foregoing reasons, the Sargent Respondents request that their motion for stay be  
3 granted.

4 RESPECTFULLY SUBMITTED this 17th day of September, 2008.

5 ROSKA DeWULF & PATTEN, PLC

6  
7  
8 By 

9 Paul J. Roshka, Jr., Esq.  
10 Timothy J. Sabo, Esq.  
11 One Arizona Center  
12 400 East Van Buren Street, Suite 800  
13 Phoenix, Arizona 85004  
14 602-256-6100 (telephone)  
15 602-256-6800 (facsimile)  
16 Attorneys for Respondents  
17 Michael J. Sargent and Peggy L. Sargent

18 ORIGINAL and thirteen copies of the foregoing  
19 filed this 17th day of September, 2008 with:

20 Docket Control  
21 Arizona Corporation Commission  
22 1200 West Washington Street  
23 Phoenix, Arizona 85007

24 Copy of the foregoing hand-delivered  
25 this 17th day of September, 2008 to:

26 Marc E. Stern, Administrative Law Judge  
27 Hearing Division  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

Aaron S. Ludwig, Esq.  
Securities Division  
Arizona Corporation Commission  
1300 West Washington Street, 3rd Floor  
Phoenix, Arizona 85007

**ROSHKA DEWULF & PATTEN, PLC**

ONE ARIZONA CENTER  
400 EAST VAN BUREN STREET - SUITE 800  
PHOENIX, ARIZONA 85004  
TELEPHONE NO 602-256-6100  
FACSIMILE 602-256-6800

1 Copy of the foregoing mailed  
2 this 17th day of September, 2008 to:  
3 Robert D. Mitchell, Esq.  
4 Joshua R. Forest, Esq.  
5 Julie M. Beauregard, Esq.  
6 Mitchell & Forest, P.C.  
7 1850 North Central Avenue, Suite 1715  
8 Phoenix, Arizona 85004  
9 Attorneys for Respondent Robert Bornholdt  
10  
11 Norman C. Keyt, Esq.  
12 Keyt Law Offices  
13 3001 E. Camelback Road, Suite 130  
14 Phoenix, Arizona 85016  
15 Attorneys for Respondents  
16 Stephen G. and Diane V. Van Campen  
17  
18 Mark W. and Lisa A. Bosworth  
19 18094 North 100th Street  
20 Scottsdale, Arizona 85255  
21 Pro Per

22   
23 \_\_\_\_\_  
24 Sargent.ACC/pld/Reply in Support of Motion to Stay Sargent.doc  
25  
26  
27