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**COMMISSIONERS**

SUSAN BITTER SMITH, Chairman  
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2015 JAN 26 P 3: 58

**ORIGINAL**

AZ CORP COMMISSION  
DOCKET CONTROL

**BEFORE THE ARIZONA CORPORATION COMMISSION**

In the matter of:

CONCORDIA FINANCING COMPANY, LTD,  
a/k/a "CONCORDIA FINANCE,"  
ER FINANCIAL & ADVISORY SERVICES,  
LLC,  
LANCE MICHAEL BERSCH, and  
DAVID JOHN WANZEK and LINDA  
WANZEK, husband and wife,

Respondents.

Docket No. S-20906A-14-0063

(Assigned to the Honorable Mark Preny,  
Administrative Law Judge)

Oral Argument Requested

Arizona Corporation Commission  
**DOCKETED**

JAN 26 2015

DOCKETED BY 

**ER RESPONDENTS'  
RESPONSE TO MOTION TO QUASH**

**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

**TABLE OF CONTENTS**

1		
2	I.	Introduction.....1
3	II.	The Commission’s rules provide for broad discovery.....1
4	III.	The Administrative Procedure Act does not bar discovery in this case. ....4
5	IV.	Alternatively, “reasonable need” exists under the Administrative Procedure Act. ....4
6	V.	The ER Respondents have a constitutional right to discovery. ....5
7	VI.	The confidentiality statute does not bar discovery. ....6
8	VII.	The requested documents are not privileged or work product.....7
9	VIII.	The discovery is not burdensome. ....9
10	IX.	Conclusion .....9
11		
12		
13		
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1 **I. Introduction.**

2 The Division's Motion to Quash rails against the discovery sought by the ER  
3 Respondents.<sup>1</sup> The Division would prefer to hand-select the documents the ER Respondents are  
4 allowed to see, and it would prefer the ER Respondents receive those documents only 45 days  
5 before the hearing (despite noting that they have been preparing their case for two years). But the  
6 Commission's rules provide for a right to broad discovery – a right confirmed by decades of  
7 Commission practice and countless ALJ rulings. With only a few months to go before the  
8 hearing, the ER Respondents still lack even the most basic information about the Division's case.  
9 The ALJ should compel the Division to respond to the ER Respondents' discovery.

10 This is not an ordinary administrative case. The Division alleges Concordia raised a total  
11 of "about \$35,206,803" from "about 192 investors," approximately 116 are allegedly Arizona  
12 residents. As of July, 2013, Concordia is alleged to have paid investors approximately  
13 \$32,929,066. It is baffling how the Division could maintain that no discovery is available in a  
14 case of this size.

15 **II. The Commission's rules provide for broad discovery.**

16 The Commission's Rules of Practice and Procedure provide that "In all cases in which  
17 procedure is set forth neither by law, nor by these rules, nor by regulations or orders of the  
18 Commission, the Rules of Civil Procedure for the Superior Court of Arizona as established by the  
19 Supreme Court of the state of Arizona shall govern." A.A.C. R14-3-101(A). Where the  
20 Commission's rules provide for specific types of discovery, such as subpoenas or depositions,  
21 those rules govern. But where the Commission's rules are silent as to a specific type of discovery,  
22 the Arizona Rules of Civil Procedure (ARCP) govern. The ARCP, in turn, provides for broad  
23 discovery: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to  
24 the subject matter involved in the pending action.... It is not ground for objection that the  
25

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26 <sup>1</sup> ER Financial & Advisory Services, LLC, Lance Michael Bersch, David John Wanzek, and Linda  
27 Wanzek.

1 information sought will be inadmissible at the trial if the information sought appears reasonably  
2 calculated to lead to the discovery of admissible evidence.”<sup>2</sup>

3 Numerous rulings by the Commission’s Administrative Law Judges confirm that the scope  
4 of discovery afforded by the Commission’s procedural rules is broad.

5 As Assistant Chief ALJ Nodes has explained in a Procedural Order, “[t]he standard for  
6 conducting discovery is **intentionally broad** to allow parties to a proceeding to prepare for  
7 hearing or trial and to mitigate the necessity for unnecessary discovery-based cross-examination  
8 on the witness stand.”<sup>3</sup> Judge Nodes specifically applied the Rules of Civil Procedure, including  
9 the rule allowing all discovery requests “reasonably calculated to lead to the discovery of  
10 admissible evidence.”<sup>4</sup> Judge Rodda applied that same standard in denying a motion to quash a  
11 subpoena in another Procedural Order.<sup>5</sup> To the same effect is Judge Nodes’ earlier Procedural  
12 Order applying the Rules of Civil Procedure to a motion to compel.<sup>6</sup> These Procedural Orders all  
13 recognize that the Commission’s Procedural Rules incorporate the Rules of Civil Procedure and  
14 allow the same broad discovery allowed in civil cases under those rules.

15 Similarly, the Commission itself in its decisions has repeatedly acknowledged the broad  
16 scope of discovery in Commission proceedings.<sup>7</sup> For example, in Decision No. 70011 (Nov. 27,  
17 2007), the Commission refused to consider an argument raised by a utility, reasoning that the  
18 argument was raised too late, thus giving the other parties “insufficient time to conduct  
19

20  
21 <sup>2</sup> ARCP Rule 26(b)(1).

22 <sup>3</sup> Procedural Order dated November 23, 2009 in Docket Nos. SW-01428A-09-0103 at p. 5. (emphasis  
added).

23 <sup>4</sup> *Id.*, citing Arizona R. Civ. Pro. 26(b)(1)(A).

24 <sup>5</sup> Procedural Order dated November 13, 2009 in Docket Nos. RT-00000H-97-0137 at p. 2.

25 <sup>6</sup> Procedural Order dated August 11, 2006 in Docket No. T-03632A-06-0091.

26 <sup>7</sup> *See, e.g.*, Decision No. 70355 (May 16, 2008) at Finding of Fact No. 9 (noting granting of motion to  
27 compel); Decision No. 66984 (May 11, 2004) at Finding of Fact No. 55 (same); Decision No. 70011 (Nov.  
27, 2007) at 48 (rejecting new argument raised by utility due to “insufficient time to conduct discovery.”);  
Decision No. 67454 (January 4, 2005) (discussing “reasonably calculated to lead to the discovery of  
admissible evidence” discovery standard); Decision No. 65121 (August 23, 2002) at Finding of Fact No. 8  
(noting that a hearing was vacated and rescheduled in order to allow for further discovery).

1 discovery.”<sup>8</sup> Thus, the Commission recognized that: (1) discovery exists in cases under the  
2 Procedure Rules; and (2) that such discovery is central to the fairness of the Commission’s  
3 hearings. Along similar lines, in Decision No. 65121 (August 23, 2002), the Commission noted  
4 that a hearing was vacated and rescheduled in order to allow for further discovery.<sup>9</sup> Further, in  
5 Decision No. 67454 (January 4, 2005) the Commission discussed the “reasonably calculated to  
6 lead to the discovery of admissible evidence” discovery standard from the Rules of Civil  
7 Procedure.<sup>10</sup>

8 The examples above all deal with utilities cases. However, the Commission has a single  
9 set of procedural rules that is equally applicable to utilities and securities cases. *See* A.A.C. R. 14-  
10 23-101 *et seq.* Therefore, the precedents above are equally applicable to securities cases.

11 Thus, there are many similar examples in securities cases. For example, over twenty years  
12 ago, the Division filed a motion for “waiver of civil discovery”; the Hearing Officer denied the  
13 motion and granted a Respondent’s motion to compel.<sup>11</sup> More recently, in the Hockensmith case,  
14 the Administrative Law Judge granted a motion to compel against the Securities Division,  
15 ordering them to produce certain documents in response to a request for production of  
16 documents.<sup>12</sup> Likewise, the Division was compelled to provide discovery in the Yucatan case<sup>13</sup>  
17 and in the Reserve Oil case.<sup>14</sup>

18 In short, the Division’s argument that the ARCP’s discovery provisions do not apply in  
19 Commission proceedings is without merit and is contrary to decades of Commission practice.  
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23 <sup>8</sup> Decision No. 70011 (Nov. 27, 2007) at 48.

24 <sup>9</sup> Decision No. 65121 (August 23, 2002) at Finding of Fact No. 8.

25 <sup>10</sup> Decision No. 67454 (January 4, 2005) at p. 39.

26 <sup>11</sup> Procedural Order dated February 10, 1989 in Docket No. S-2430-I.

27 <sup>12</sup> Procedural Order dated May 18, 2009 in Docket No. S-20631A-08-0503, at p. 2, lines 8-10 (noting that  
Division was ordered to provide discovery).

<sup>13</sup> Docket No. S-03539A-03-0000.

<sup>14</sup> Docket No. S-20437A-05-0925.

1 **III. The Administrative Procedure Act does not bar discovery in this case.**

2 The Division also points to A.R.S. § 41-1062.A, which provides for limited discovery in  
3 “contested cases” governed by the Arizona Administrative Procedure Act. But that statute  
4 contains an exception – “except as provided by agency rule,” and here the Commission’s  
5 Procedure Rules have incorporated the ARCP. *See* A.A.C. R14-3-101(A).

6 The Division argues that under A.R.S. § 41-1062.A, subpoenas and depositions are  
7 available only upon a “reasonable need” standard, rather than the familiar “reasonably calculated  
8 to lead to the discovery of admissible evidence” pursuant to Rule 26(b) of the Arizona Rules of  
9 Civil Procedure. This argument runs afoul of Commission and ALJ orders using the “reasonably  
10 calculated” standard in Commission cases, as cited above. The Division’s argument also ignores  
11 the Commission’s procedural rules, which allow subpoenas and depositions freely, without  
12 meeting any special standard. A.A.C. R14-3-109.O and -109.P.

13 **IV. Alternatively, “reasonable need” exists under the Administrative Procedure Act.**

14 With the hearing only months away, the ER Respondents still lack even the most basic  
15 information about the charges against them. They do not know:

- 16 1) what amount of restitution the Division seeks against them;
- 17 2) which of the 446 alleged investments each of them sold;
- 18 3) which of the 193 investors each respondent allegedly sold to;
- 19 4) which of the respondents made the allegedly fraudulent statements, to whom, and  
20 when;
- 21 5) the names of all of the alleged 193 investors; and
- 22 6) the dollar amount of the alleged securities sold by each particular respondent, and the  
23 amounts the investor was paid back for each of those securities.

24 Moreover, the Respondents lack even the most basic documents, including copies of the very  
25 contracts they are alleged to have sold. As will be set forth in their forthcoming Motion to  
26 Compel against Concordia, the Respondents returned thousands of pages of files to Concordia in  
27

1 2010 at Concordia's insistence. This constituted the vast majority of their files regarding the  
2 Concordia investments. A hard drive failure destroyed remaining electric files, and Respondents  
3 have only a handful of remaining records (approximately two "redwells"). It appears that both  
4 Concordia and the Division have copies of all or almost all of these contracts and related files  
5 (such as correspondence and emails) for each investor, but both Concordia and the Division are  
6 refusing to provide these crucial documents. Respondents cannot prepare their defense without  
7 these basic documents.

8 In addition, the Division's files will contain other important documents, such as copies of  
9 the deposition of Concordia in California proceedings (a deposition we understand the Division  
10 requested), as well as the transcript of the Divisions "Examination Under Oath" of ER Respondent  
11 David Wanzek.

12 Further, the Division's investigators always give hearsay testimony about what various  
13 investors told them. Copies of the Division's communications with investors, and notes of  
14 interviews, are thus critical for preparing for cross-examine such testimony.

15 Thus, "reasonable need" exists for the discovery requested by Respondents.

16 **V. The ER Respondents have a constitutional right to discovery.**

17 The Division argues that there is no constitutional right to discovery in an administrative  
18 case. This argument misses the mark, because the Commission's rules incorporate the ARCP,  
19 thus providing broad discovery, as borne out by many prior Commission proceedings. Thus, there  
20 is no need to look for a constitutional basis for discovery. But in any event, constitutional due  
21 process requires disclosure of the "substance of the relevant supporting evidence". *Brock v.*  
22 *Roadway Express, Inc.*, 481 U.S. 252, 264 (1987)(4 justice plurality opinion) and 481 U.S. at 259  
23 (Justice Brennan concurring on this point); and 481 U.S. at 277-78 (Justice Stevens concurring on  
24 this point, and noting that "Secrecy is not congenial to truth-seeking"). Thus, courts have held that  
25 agencies must allow discovery where "a refusal to do so would prejudice the party as to deny him  
26 due process." *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

1 **VI. The confidentiality statute does not bar discovery.**

2 The Division relies heavily on A.R.S. § 44-2042 to suggest that discovery cannot be  
3 permitted because all document in their files for this case are “confidential”. But “confidential”  
4 does not mean “not discoverable”. Indeed, A.R.S. § 44-2024 allows disclosure where “pursuant to  
5 any rule of the commission or unless the commission or the director authorizes the disclosure of  
6 the names, information or documents as not contrary to the public interest.” Here, the disclosure  
7 would be “pursuant to any rule of the commission”, because as shown above the Commission’s  
8 rules provide for broad discovery. Alternatively, discovery is in the “public interest” because the  
9 requested documents are essential to preparing a defense.

10 Moreover, it is common practice in Commission proceedings to enter into a protective  
11 agreement to protect confidential information, or to have a protective order be issued to protect  
12 confidentiality. For example, this is done in almost every “Class A” rate proceeding.

13 Notably, there is also a very strong confidentiality statute for utilities matters. A.R.S. § 40-  
14 204.C requires that “no information” provided by utilities “shall be open to public inspection or  
15 made public” except when authorized by the Commission. Both A.R.S. §§ 40-204.C and 44-2042  
16 are broad statutes that render information confidential, except when public release is authorized by  
17 the Commission. Discovery is authorized by the Commission rules, and thus these statutes do not  
18 bar providing confidential documents to the ER Respondents. However, reasonable measures,  
19 such as a protective agreement or protective order, are available to protect confidential  
20 information.

21 Nor is there anything uniquely sensitive or confidential about securities “investigatory”  
22 files. For example, in FINRA enforcement cases, FINRA rules provide that the FINRA  
23 Department of Enforcement must provide its entire investigatory file to the Respondent.<sup>15</sup>  
24 Confidentiality concerns in FINRA cases are typically addressed through a protective order.

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27 <sup>15</sup> FINRA Rule 9251.

1           Moreover, if the Division believes that specific documents are confidential, the proper  
2 response is to designate the specific documents that are confidential, and provide the remaining  
3 documents. The Division did not do this – it simply ignored the discovery request, and then at the  
4 last day to respond filed this motion to quash. Essentially, the Division is contending that every  
5 single document in its possession is confidential. Such a sweeping claim must be rejected.

6 **VII. The requested documents are not privileged or work product.**

7           The Division also contends that certain documents are protected by attorney-client  
8 privilege or the attorney work product doctrine. To clarify, the ER Respondents do not seek  
9 communications between the Division’s attorneys, or communications with consulting experts, if  
10 any. Further, the ER Respondents do not seek the Division’s legal research, as suggested by the  
11 Division.

12           The Division also contends that interview notes and witness statements are confidential  
13 work product. As the Division notes in its Motion (p. 11), the work product doctrine only applies  
14 when interviews, statements, memoranda, etc. are prepared in “anticipation of litigation.” The  
15 Division cannot avail itself of this doctrine for the entire period of the investigation. It is arguably  
16 only available since the date of the Notice, assuming it is available at all.

17           This case is far different from a typical civil case with respect to non-testifying investors.  
18 The Division investigator typically gives hearsay testimony about what non-testifying investors  
19 told the investigator. Sometimes, it is even double hearsay, with the investigator testifying as to  
20 what an investor told him or her or what an investor told a different investigator. Remarkably,  
21 such testimony has been permitted in administrative hearings despite the fact this testimony denies  
22 Respondents the right to cross-examine the individuals who provided the information. Unless the  
23 Division agrees to forego offering such hearsay testimony, notes of interviews and witness  
24 statements are needed to cross-examine the Division’s investigation or investigators whose  
25 testimony will provide this unreliable hearsay.

1           Moreover, work product protection is waived for any matters disclosed in a public  
2 document, such as the Notice of Opportunity. *Slate v. Schneider*, 212 Ariz. 176, 192, ¶ 32, 129  
3 P.3d 465, 471 (App. 2006). In that case, a Division investigator submitted an affidavit to support  
4 a TRO. The affidavit referred to the number of investors and made various statements. The court  
5 held that the “Commission therefore must disclose the names of the investors referred to in the  
6 investigator’s entire affidavit and any materials upon which the investigator relied in compiling or  
7 assessing the information disclosed in the affidavit.” *Id.*

8           Further, to the extent the Division intends on calling an expert, the entire case file of the  
9 testifying expert is discoverable “to the extent that he obtained those materials in the course of his  
10 investigation and they relate to the subject of his testimony”. *Id.*, 212 Ariz. at 180-81, ¶ 25, 129  
11 P.3d at 469-70.

12           The Division also states that witness statements or notes of discussions with investors are  
13 not needed because “ER Respondents have equal access to the investors”.<sup>16</sup> That is far from the  
14 case. The Division has investigators with badges and state IDs acting under the color of authority  
15 of State law. These are powerful tools the ER Respondents lack. The Division has the power to  
16 compel Examinations Under Oath (EUO).<sup>17</sup> An EUO is far different from a deposition, with the  
17 defense lawyer’s role severely constrained<sup>18</sup>, and where the transcript is typically withheld from  
18 the witness and their attorney. The Division also has the power to issue investigative subpoenas  
19 without gaining approval from the ALJ or Executive Director. Moreover, Respondents do not  
20 even know the names of many of the 192 investors who invested in Concordia’s program; thus,  
21 how could they have “access” to them?

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<sup>16</sup> Division Motion to Quash at p. 13, line 15.

26 <sup>17</sup> A.A.C. R14-4-304.

27 <sup>18</sup> A.A.C. R14-2-304(A).

1 **VIII. The discovery is not burdensome.**

2 As already shown, the requested discovery seeks many critical facts and documents that  
3 the ER Respondents do not have. The discovery is thus not “overbroad, unduly burdensome, and  
4 oppressive” as alleged by the Division. The Division further alleges that the ER Respondents  
5 have “blatantly disregard[ed] the controlling provision of the APA, the Commission’s Rules and  
6 the confidentiality provision of A.R.S. § 44-2041(A)” by propounding discovery “in bad faith  
7 mainly to harass and create undue burden”.<sup>19</sup> As already shown, the discovery is reasonably  
8 needed to prepare a defense and well within the broad discovery routinely allowed in Commission  
9 cases.

10 The only specific burden asserted by the Division is the “need to redact confidential  
11 information”.<sup>20</sup> As discussed above, most confidentiality issues can be addressed by a protective  
12 agreement or protective order. If any remaining information must be redacted, that is hardly  
13 unusual. Redaction is a routine part of discovery.

14 **IX. Conclusion.**

15 The ER Respondents do not have even the most basic information and documents they  
16 need to prepare their defense. This flat refusal is contrary to the Commission rules, which adopt  
17 the ARCP for most discovery issues. The Commission has a long practice of allowing broad  
18 discovery. The “confidentiality” issues raised by the Division can easily be addressed by a  
19 protective order, protective agreement, or redaction. The hearing is only months away, and the  
20 volume of documents, while unknown is surely large. Thus, the Division should be ordered to  
21 promptly and fully respond to the discovery served by the ER Respondents on November 24,  
22 2014. The Division refuses to provide any discovery to the ER Respondents even though it  
23 alleges over \$35,000,000 was raised from about 192 investors. Given the magnitude of this case,  
24 the Division’s denial of discovery is unconscionable.

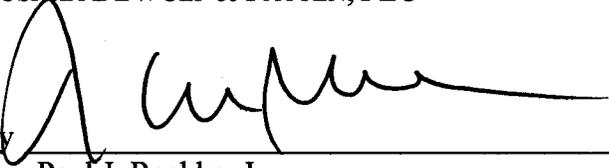
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26 <sup>19</sup> Division Motion to Quash at p. 15, line 23 to p. 16, line 2.

27 <sup>20</sup> Division Motion to Quash at p. 16, line 9.

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RESPECTFULLY SUBMITTED this 26th day of January 2015.

ROSKA DEWULF & PATTEN, PLC

By 

Paul J. Roshka, Jr.  
Timothy J. Sabo  
One Arizona Center  
400 East Van Buren Street, Suite 800  
Phoenix, Arizona 85004

**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

**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 Original + 13 copies of the foregoing  
filed this 26th day of January 2015, with:

2 Docket Control  
3 Arizona Corporation Commission  
1200 West Washington  
4 Phoenix, Arizona 85007

5 Copies of the foregoing hand-delivered  
6 this 26th day of January, 2015, to:

7 Mark H. Preny, Esq.  
Administrative Law Judge  
8 Hearing Division  
9 Arizona Corporation Commission  
1200 West Washington  
10 Phoenix, Arizona 85007

11 James D. Burgess, Esq.  
Securities Division  
12 Arizona Corporation Commission  
1300 West Washington, 3rd Floor  
13 Phoenix, Arizona 85007

14 Copies of the foregoing mailed  
15 this 26th day of January, 2015, to:

16 Alan S. Baskin, Esq.  
17 David E. Wood, Esq.  
Baskin Richards, PLC  
18 80 East Rio Salado Parkway, Suite 511  
Tempe, Arizona 85281  
19 *Attorneys for Concordia Finance Company, LTD.*

20  
21 By *Ruth B. Autrey*  
22  
23  
24  
25  
26  
27