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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

SUSAN BITTER SMITH, Chairman
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AZ CORP COMMISS
DOCKET CONTROL

DOCKET NO. S-20906A-14-0063

In the matter of:

CONCORDIA FINANCING COMPANY,
LTD, a/k/a "CONCORDIA FINANCE,"

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA
WANZEK, husband and wife,

Respondents.

REPLY IN SUPPORT OF MOTION TO
QUASH SUBPOENAS, OR IN THE
ALTERNATIVE, MOTION FOR A
PROCEDURAL ORDER LIMITING THE
SCOPE OF SUBPOENAS

Arizona Corporation Commission
DOCKETED

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I. THE SUBPOENAS SHOULD BE QUASHED

A. The APA Governs and Required A Finding of Reasonable Need Before The Subpoenas Could Be Issued.

The ER Respondents argue that Commission Rules R14-3-109(O) and (P) allow for parties to obtain subpoenas for documents and take depositions without any showing of "reasonable need," which is the showing required under the Administrative Procedures Act ("APA"). See A.R.S. § 41-1062(A)(4) ("Prehearing depositions and subpoenas for the production of documents may be ordered by the officer presiding at the hearing, provided that the party seeking such discovery demonstrates that the party has *reasonable need* of the deposition testimony or materials being sought.... [N]o subpoenas, depositions or other discovery shall be permitted in contested cases except as provided by agency rule or this paragraph.") (Emphasis added). The ER Respondents

1 misconstrue the last sentence of § 41-1062(A)(4) to argue that because the Commission's Rules do
2 not expressly reference the "reasonable need" requirement, they did not need to demonstrate a
3 reasonable need for the documents and deposition testimony they seek through the Subpoenas to
4 Mr. Clapper and Mr. Beliak. The ER Respondents made the same erroneous argument in their
5 Response to the Division's first Motion to Quash. *See* Response dated 1/26/2015 at 4:11-12:
6 ("[T]he Commission's procedural rules ... allow subpoenas and depositions freely, without
7 meeting any special standard.").

8 The presiding Administrative Law Judge properly rejected that argument, holding "[T]he
9 Administrative Procedure Act applies." Eighth Procedural Order at 5:10-11. That ruling was
10 correct because "[A] rule or regulation of an administrative agency should not be inconsistent with
11 or contrary to the provisions of a statute, particularly the statute it seeks to effectuate." *In re Pima*
12 *County Mental Health No. MH-2010-0047*, 228 Ariz. 94, 99, ¶ 22, 263 P.3d 643, 648 (App. 2011);
13 *Arizona State Board of Regents v. Arizona State Personnel Board*, 195 Ariz. 173, 175, ¶ 9, 985
14 P.2d 1032, 1034 (1999) ("[I]f an agency rule conflicts with a statute, the rule must yield.").

15 Accordingly, Commission Rules R14-3-109(O) and (P) are to be construed consistently
16 with the APA's requirement that the party seeking discovery "demonstrates that the party has
17 *reasonable need* of the deposition testimony or materials being sought." A.R.S. § 41-1062(A)(4).

18 There is no finding in the record that the ER Respondents demonstrated a reasonable need
19 for the documents or subjects of testimony they identified in their Applications for the Subpoenas.
20 Absent such a finding, the Subpoenas do not comply with A.R.S. § 41-1062(A)(4) or the
21 Commission's Rules, which incorporate the "reasonable need" standard. The Subpoenas should
22 not have been issued and should be quashed.

23 **B. The ER Respondents' Applications for the Subpoenas Were Deficient and Misleading.**

24 Commission Rule R14-3-109(O) requires that a party's application for a subpoena "*must*
25 *specify, as clearly as possible*, the books, waybills, papers, accounts or other documents desired."
26 (Emphasis added). That requirement for specificity comports with the APA's requirement for a

1 demonstration of “reasonable need of the deposition testimony or materials being sought.”

2 A.R.S. § 41-1062(A)(4).

3 The ER Respondents’ Applications for Administrative Subpoenas specified only six
4 subjects for which they asserted they had a reasonable need for information.¹

5 In their Response to the pending Motion to Quash/ Motion For A Procedural Order Limiting
6 Scope Of Subpoenas, however, the ER Respondents contend the Subpoenas entitle them to take
7 discovery on a broad range of topics they never identified in their Applications. Applying for
8 Subpoenas on six specified subjects but intending to examine on a host of others was deceptive and
9 misleading.

10 In any event, to the extent the Subpoenas may be construed to allow the ER Respondents to
11 take discovery of matters beyond the six subjects they identified, the Applications were deficient.
12 The Subpoenas should not have issued because the Applications did not comply with Commission
13 Rule R14-3-109(O) (subpoena application “must specify, as clearly as possible...”), or A.R.S. §
14 41-1062(A)(4) (party must demonstrate “reasonable need of the deposition testimony or materials
15 being sought...”).

16 **C. The ER Respondents Do Not Have Reasonable Need.**

17 **1. The ER Respondents have all the documents and information they
18 claimed they needed.**

19 The Subpoenas should also be quashed because the ER Respondents have all the documents
20 and information available to them that they claimed they needed in their Applications. As set forth
21 at pages 5-7 of the Motion, by reviewing the documents the Division has produced, the ER
22 Respondents can now determine: (1) the names of the investors; (2) which investment contract

23 ¹ The Applications asserted the ER Respondents had a reasonable need for information on six
24 subjects: (1) the names of the 193 alleged investors; (2) what amount of restitution the Division
25 seeks against them; (3) which of the 446 alleged investments each of them allegedly sold; (4)
26 which of the 193 investors each respondent allegedly sold to; (5) which of the respondents made
the allegedly fraudulent statements, to whom and when; and (6) the dollar amount of the alleged
securities sold by each particular respondent and the amounts the investor was paid back for each
of those alleged securities.

1 each Respondent sold to each investor; (3) the dollar amount of each investment contract sold by
2 each Respondent; and (4) the principal amounts of restitution the Division seeks for each investor
3 who is still owed money. (With respect to this fourth category of information, the ER Respondents
4 complain they do not know whether the Division will seek pre-judgment interest. The Division
5 states here that it will not seek prejudgment interest on any restitution amounts the Commission
6 may order. So that complaint is eliminated).

7 The ER Respondents can also determine which of them made the fraudulent statements to
8 which investor(s) because the investment contracts demonstrate who was present at the time of the
9 investment. Mr. Bersch, Mr. Wanzek and Mrs. Wanzek each know what he or she said to the
10 investors to whom each sold the investments and whether they used the brochures, presentation or
11 flowcharts the Division has produced. Further, the ER Respondents can interview the investors,
12 just as they could have done at any time since September 2012 when the ER Respondents became
13 aware of the Division's investigation and retained counsel. Nothing prevents the ER Respondents
14 from doing their own investigation and investor interviews, and developing the same information
15 the Division developed.

16 Finally, Mr. Bersch, Mr. Wanzek and Mrs. Wanzek can determine their respective shares of
17 the \$3,993,495 restitution amount the Division seeks because they each know, and can also
18 determine from the documents, which investment contracts each sold and to whom.

19 All the information the ER Respondents identified in their Applications for Subpoenas is
20 within their possession and available to them. There is no longer any reasonable need for the
21 depositions. Accordingly, the Subpoenas should be quashed.

22 2. The ER Respondents Confuse "Reasonable Need" With "We Want."

23 The ER Respondents assert they have a reasonable need for the Division to inform them of
24 "any specifics about who said what to whom [or] its fraud allegations must fail." Response at 5:2-
25 3. This is the same erroneous argument they previously made in arguing that the Notice should be
26 dismissed under Rule 9(b), Ariz. R. Civ. P., for failure to plead fraud with particularity. *See*

1 Motion to Dismiss dated 4/4/2014 at 13:19 to 15:3. The presiding Administrative Law Judge
2 properly rejected that argument, finding that the Division's Notice provides the ER Respondents
3 with "a short and plain statement of the matters asserted, as required by A.R.S. §41-1061(B)(4)."
4 Fourth Procedural Order at 23:15-16.

5 To defend themselves, the ER Respondents do not have a reasonable need to know, as they
6 assert they do, "the specifics of what allegedly fraudulent statements the Division believes were
7 made, to which investors, by which respondent, and when." Response at 5:2-3. Nor do the ER
8 Respondents have a reasonable need to "know all of the investors or other potential witnesses the
9 Division spoke to, [or] what favorable remarks those investors may have made to the Division."²
10 Response at 5:25 to 6:1. This is true for two reasons. First, the ER Respondents are free to
11 interview the investors and determine which of them have spoken to the Division and what they
12 said. While the ER Respondents may *want* the Division to turn over that information, they do not
13 have a reasonable *need* because they can get the same information on their own.

14 Second, the reason the ER Respondents want to know to whom the Division has spoken and
15 what the witnesses said is so that the ER Respondents can determine what the Division knows and
16 what it does not about their conduct. The ER Respondents are trying to determine how far along
17 the Division is in its investigation, but that information is not relevant to whether or not they
18 committed the violations alleged in the Notice. The ER Respondents already know to whom they
19 sold the investment contracts and what they represented when they did so. They have no
20 reasonable need to discover what the Division knows and what it does not because that information
21 does not go to whether they violated the Securities Act. Rather, that information goes to how much
22 they can attempt to whittle away at the Division's asserted restitution number. The ER

23
24 ² The ER Respondents assert that they are entitled to a *Brady/Giglio* certification. See Response at
25 6:1-2. But this is a civil administrative proceeding, not a criminal prosecution. The ER
26 Respondents have not cited any authority for the proposition that they are entitled as respondents in
an administrative proceeding to any information that they would receive under *Brady or Giglio* as
criminal defendants.

1 Respondents' desire to minimize restitution does not constitute reasonable need for information to
2 defend the alleged violations.

3 Similarly, the ER Respondents' have no reasonable need to know why the Division did not
4 name third parties as respondents. *See* Response at 4:17-26. Purported conduct by third parties has
5 no bearing whatsoever on whether the ER Respondents violated the Securities Act. The ER
6 Respondents have no reasonable need for information about the Division's internal deliberations or
7 purported conduct by third parties in order to defend their own alleged violations.

8 **II. IN THE ALTERNATIVE, THE SCOPE OF SUBPOENAS SHOULD BE LIMITED.**

9 If the Subpoenas are not quashed, the Division respectfully requests a Procedural Order
10 limiting the scope of examination at the depositions of Mr. Clapper and Mr. Beliak to the six
11 subjects the ER Respondents identified in their Applications for the Subpoenas. The ER
12 Respondents should not be permitted to examine outside of those subjects for at least three reasons:
13 (i) the APA's requirements; (ii) the Division's deliberative process and attorney-client privilege;
14 and (iii) the Securities Act's confidentiality statute, A.R.S. § 44-2042(A).

15 **A. The APA Requires The Scope Of Examination To Be Limited To Only The**
16 **Subjects For Which A Party Has Demonstrated Reasonable Need.**

17 As set forth in the Motion and above, any application for a subpoena must demonstrate that
18 "the party has reasonable need of the deposition testimony or materials being sought." A.R.S. §
19 41-1062(A)(4). The only "deposition testimony or materials being sought" for which the ER
20 Respondents arguably articulated a reasonable need when the Subpoenas were issued are the six
21 subjects they listed in their Applications. Accordingly, the scope of the Subpoenas should be
22 limited to those six subjects. *See* A.R.S. § 41-1062(A)(4) (absent a demonstration of reasonable
23 need on other subjects, "no subpoenas, depositions or other discovery shall be permitted...").

24 **B. The Division's deliberative process and attorney-client privilege should not be**
25 **invaded.**

26 In their Response, the ER Respondents state their intent to invade the Division's
deliberative process and attorney-client privilege and work product protections. For example:

1 “Why weren’t [investor Lisa Fuhrman and Concordia founder Kenneth
2 Crowder] charged? Did the Division cut a deal with them for their testimony?
3 Is the Division claiming [Kansas City Life or Sunset Financial] made
4 sales? If so, why haven’t they been charged?”³

5 The ER Respondents contend they should be allowed to “explore” these and other areas.⁴ In doing
6 so, the ER Respondents seek to invade the Division’s deliberative process and attorney-client
7 privilege. The scope of any examination should be limited to prohibit such invasions, which are
8 clearly in appropriate.

9 **C. The Securities Act’s Confidentiality Statute Prohibits The Division From**
10 **Disclosing Any Documents Or Information It Has Not Already Made A Matter**
11 **Of Public Record, Absent A Finding By The Commission That Such Disclosure**
12 **Would Not Be Contrary To The Public Interest.**

13 The Securities Act’s confidentiality statute requires the Commission to keep all
14 information and documents obtained by the Division during an investigation confidential, unless
15 the Commission finds that such disclosure would not be contrary to the public interest. A.R.S. §
16 44-2042, provides in relevant part:

17 A. The names of complainants and *all information or documents obtained ... in*
18 *the course of any examination or investigation are confidential* unless the names,
19 information or documents are made a matter of public record. An officer, employee
20 or agent of the commission *shall not make the confidential names, information or*
21 *documents available to anyone* other than a member of the commission, another
22 officer or employee of the commission, an agent who is designated by the
23 commission or director, the attorney general or law enforcement or regulatory
24 officials, except pursuant to any rule of the commission or unless the commission or
25 the director authorizes the disclosure of the names, information or documents as not
26 contrary to the public interest. (Emphases added).

Thus, § 44-2042 makes confidential all information and all documents the Division obtains in the
course of an investigation. Section 44-2042 requires the Division to keep investigative information
and documents confidential until the Division makes such information or documents a matter of
public record, or until the Commission authorizes the disclosure as not contrary to the public
interest.⁵ “The public interest includes consideration of how disclosure would adversely affect the

³ Response at 4:19-26.

⁴ Response at 6:1-2.

⁵ A violation of the confidentiality statute is a class 1 misdemeanor. See A.R.S. § 44-2040.

1 agency's mission." *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 349, ¶ 18, 35 P.3d 105,
2 110 (App. 2001).

3 By enacting § 44-2042, the Legislature balanced several interests, including:

- 4 • *The ability of the Securities Division to fulfill its statutory mandate.* The methods used, the
5 information obtained, the resources available to the Division depend upon the fact that
6 confidences, privacy interests, and privileges are maintained.
- 7 • *The business or personal reputation of investigated persons.* The Commission has broad
8 authority to conduct public or **private** investigations to determine whether any person has
9 violated or is about to violate any provisions of title 44, chapter 12, pursuant to A.R.S. § 44-
10 1822. *Carrington v. Arizona Corp. Comm'n*, 199 Ariz. 303, 18 P.3d 97 (Ct. App. 2001)
11 (courts "give the Commission 'wide berth' when they review the validity of Commission
12 investigations."). If the Securities Division does not bring an enforcement action for
13 violations of the law, the information related to such investigations should not be public.
- 14 • *The personal or private information of third parties.* In the course of an investigation or
15 examination, the Securities Division may obtain information or documents regarding
16 various third parties, such as friends, relatives, investors, employees, or victims. The
17 otherwise private information of those parties should not be generally available to the
18 public. *See e.g. Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531,
19 815 P.2d 900 (1991) (the mere fact that a writing is in the possession of an agency does not
20 make it a public record).
- 21 • *The public's interest in the conduct of state agency business.* With limited exceptions (such
22 as personal identifying information), the confidentiality statute does not apply to the
23 business of the Securities Division in contexts other than investigations or examinations.
- 24 • *The public's interest in joint regulatory actions.* Effective and efficient regulation of
25 people who offer or sell securities requires interagency cooperation—among state, federal,
26 and self-regulatory agencies. The private investigations of those agencies, the privacy
interests of those whose records may be included in the many records and information

1 available to those agencies, and the willingness of those agencies to share information are
2 dependent upon the ability to retain confidentiality.

- 3 • *The ability of the Securities Division to conduct investigations after commencement of an*
4 *action.* The investigative authority of the Securities Division does not end with the
5 commencement of an action. *Cf., e.g., American Microtel, Inc. v. Secretary of State of*
6 *Massachusetts*, 3 Mass. L. Rptr. 479 (Superior Court 1995) citing *FTC v. Browning*, 435
7 F.2d 96, 102-04 (D.C. Cir. 1970) (upholding post-complaint subpoena power of the Federal
8 Trade Commission); *Porter v. Mueller*, 156 F.2d 278, 279-80 (3rd Cir. 1946) (upholding
9 post-complaint subpoena power of Price Administrator under the Emergency Price Control
10 Act of 1942); *Bowels v. Bay of New York Coal & Supply Corp.*, 152 F.2d 330, 331 (2nd Cir.
11 1945); *Sutro Bros. & Co. v. SEC*, 199 F. Supp. 438, 439 (S.D.N.Y. 1961) (institution of
12 public proceedings against brokerage firm did not restrict SEC's investigative powers).
13 Thus, the confidentiality concerns addressed by the statute do not end upon the
14 commencement of an action. *See* A.R.S. § 44-2042.

15 The confidentiality § 44-2042 requires does not terminate until and unless the information
16 or documents are made a matter of public record. Only the information and documents filed by the
17 Division with a public tribunal are “made a matter of public record.” Black’s Law Dictionary (7th
18 Edition) (“Black’s”) defines “matter of record” as “a matter that has been entered on a judicial or
19 other public record and therefore can be proved by producing that record.” A “public record” is “a
20 record that a governmental unit is required by law to keep, such as land deeds kept at a county
21 courthouse.” *Id.* A.R.S. § 41-1061(E) dictates that the record in a contested case shall include:

- 22 1. All pleadings, motions, interlocutory rulings.
- 23 2. Evidence received or considered.
- 24 3. A statement of matters officially noticed.
- 25 4. Objections and offers of proof and rulings thereon.
- 26 5. Proposed findings and exceptions.
6. Any decision, opinion or report by the officer presiding at the hearing.

- 1 7. All staff memoranda, other than privileged communications, or data submitted to
2 the hearing officer or members of the agency in connection with their consideration
3 of the case.

4 Within the meaning of § 44-2042, “made a matter of public record” means that the
5 Securities Division has placed the information or document on the record in an administrative
6 proceeding, filed it with a court, recorded it with a county recorder, or has taken some other similar
7 action.

8 The ER Respondents will argue, as they did in their Response to the first Motion to Quash,
9 that when the Division filed its Notice of Opportunity, the entire investigative file—not just the
10 Notice of Opportunity, the information contained in the Notice, and the fact an enforcement action
11 has commenced—became a matter of public record and the confidentiality statute no longer
12 applies. That interpretation is wrong for at least two reasons: (1) Such an interpretation is so broad
13 that its application would completely defeat the purpose of the confidentiality statute; and (2) The
14 legislature could have, but did not, dictate that the confidentiality statute no longer applied upon
15 the commencement of an administrative or civil action. *See, e.g.,* A.R.S. § 32-129(B)
16 (“Investigation files of any investigation are confidential and are not subject to inspection pursuant
17 to title 39, chapter 1, article 2 until the matter is final, a hearing notice is issued pursuant to title 41,
18 chapter 6, article 10 or the matter is settled by consent order.”)

19 Further, while the Division has provided Respondents with copies of exhibits and a list of
20 witnesses as required by Commission rules and administrative procedure, the Division had not
21 made that information or those documents a matter of public record. Prehearing disclosure to
22 respondents in an administrative action is not the equivalent of making information or documents a
23 matter of public record.

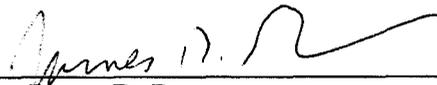
24 In short, the ER Respondents’ intended inquiry into documents and information the
25 Division has not made a matter of public record, and which the Commission has not authorized
26 disclosure of as not contrary to the public interest, would violate the Division’s confidentiality
mandate under § 44-2042. It is unreasonable and oppressive for the ER Respondents to attempt to
put Mr. Clapper and Mr. Beliak into the position of having to choose between violating § 44-2042

1 or facing potential contempt charges for refusing to testify about confidential information and
2 documents.

3 Accordingly, if the Subpoenas are not quashed, the Division respectfully requests that a
4 Procedural Order be issued limiting the scope of examination at the depositions of Mr. Clapper and
5 Mr. Beliak to the six subjects the ER Respondents identified in their Applications for the
6 Subpoenas.

7 RESPECTFULLY SUBMITTED this 1st day of April, 2015.

8 ARIZONA CORPORATION COMMISSION

9 By 
10 _____
11 James D. Burgess
12 Attorney for the Securities Division
13 Arizona Corporation Commission
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1 ORIGINAL and 8 copies of the foregoing
2 Motion to Quash
3 filed this 1st day of April, 2015, with:

4 Docket Control
5 Arizona Corporation Commission
6 1200 W. Washington St.
7 Phoenix, AZ 85007

8 COPY of the foregoing hand-delivered
9 this 1st day of April, 2015, to:

10 The Honorable Mark H. Preny
11 Administrative Law Judge
12 Arizona Corporation Commission
13 1200 W. Washington St.
14 Phoenix, AZ 85007

15 COPIES of the foregoing sent via
16 U.S. Mail and email this 1st day of April, 2015, to:

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