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BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED
AZ CORP COMMISSION
DOCKET CONTROL

COMMISSIONERS

SUSAN BITTER SMITH, Chairman
BOB STUMP
BOB BURNS
DOUG LITTLE
TOM FORESE

2015 JUN 22 PM 4:41

DOCKET NO. S-20906A-14-0063

In the matter of:

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

ER FINANCIAL & ADVISORY
SERVICES, L.L.C.,

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA
WANZEK, husband and wife,

Respondents.

**SECURITIES DIVISION'S RESPONSE
TO MOTION TO DIMISS BY THE
ER RESPONDENTS**

Arizona Corporation Commission
DOCKETED

JUN 22 2015

DOCKETED BY *BAC*

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") respectfully requests that this Tribunal deny the Motion to Dismiss ("Motion") the ER Respondents¹ filed on June 8, 2015. The ER Respondents filed their Motion in response to the Amended Notice Of Opportunity For Hearing Regarding Proposed Order To Cease And Desist, Order For Restitution, Order For Administrative Penalties, And Order For Other Affirmative Action ("Amended Notice").

The ER Respondents preface their Motion and Answer to the Amended Notice with briefing sections they label as (i) a Preliminary Statement and (ii) an

¹ This Response collectively refers to ER Financial & Advisory Services ("ERF&AS"), LLC, Lance Michael Bersch, David John Wanzek and Linda Wanzek as "the ER Respondents."

1 Introduction. In those sections, the ER Respondents attempt to re-argue contentions
2 that this Tribunal and the Superior Court have previously rejected. *See* Fourth
3 Procedural Order dated 8/13/2014 (denying Respondents' first Motion to Dismiss);
4 Minute Entry filed 1/15/2015 in *Bersch et al. v. State of Arizona et al.*, Maricopa
5 County Superior Court No. LC2014-000415-001 DT (dismissing Complaint for
6 Special Action).² Just as there was no need for the ER Respondents to re-argue those
7 issues in their Motion, there is no need for the Division or this Tribunal to address
8 them now.

9 **I. The ER Respondents' Failure To Disclose To Investors That ERF&AS**
10 **Was Engaged In The Conduct Of An Unlicensed Escrow Business**
11 **Constituted Actionable Securities Fraud In Violation Of A.R.S. § 44-**
12 **1991(A).**

13 In the Motion itself, the ER Respondents argue for dismissal of the Amended
14 Notice's allegations that they made omissions of material fact by failing to disclose
15 to investors that by serving as a Custodian under the investment contracts at issue,
16 ERF&AS was engaged in the conduct of an unlicensed escrow business in violation
17 of Arizona law. Specifically, the Amended Notice alleges:

18 ¶ 16: In Section 4.1 of the Servicing Agreements, Concordia
19 represented that it would deliver to a Custodian the originally
20 executed Contracts and all evidences of title with respect to the
21 vehicles covered by the Contracts, with separate assignments
22 executed by Concordia which effect the assignment and transfer of
23 the Contracts and title to Investor....”

24

25 ¶ 23: The Custodian was to hold the Truck Financing Contracts,
26 vehicle titles and any substitute Contracts that Concordia represented

² A true and correct copy of that Minute Entry is attached hereto as Exhibit 1.

1 in Section 4.1 that it had assigned to the investor and would deliver to
2 the Custodian.

3 ¶ 24: The Custodian was obligated to hold the Contracts for the
4 benefit of Concordia and the investor.

5 ¶ 25: Pursuant to § 4.1 of the Servicing Agreements and
6 Custodial Agreements, the Custodian would return a Contract to
7 Concordia upon Concordia's written representation to the Custodian
8 and the investor that the Contract "either (a) has been paid in full and
9 must be returned to the [truck purchaser], or (b) has incurred a
10 Contract Default and is to be concurrently replaced with a substitute
11 Contract."

12 ¶ 26: Pursuant to § 4.2 of the Servicing Agreements and
13 Custodial Agreements, following any default under the Servicing
14 Agreement by Concordia and its failure to cure the default within 30
15 days, upon the investor's instructions, the Custodian was obligated
16 "to release to Investor the originally executed Contracts and all
17 executed assignments then in the possession of the Custodian."

18 ¶ 27: With respect to the investments for which the Custodian
19 held Truck Financing Contracts, vehicle titles and any substitute
20 Contracts in Arizona, the Custodian acted as an escrow agent within
21 the meaning of A.R.S. § 6-801(4) and (5). As such, the Custodian
22 was required to be licensed by the Arizona Department of Financial
23 Institutions pursuant to A.R.S. § 6-813. (Footnote quoting A.R.S. §
24 6-801(4) and (5) omitted).

25 ¶ 28: A.R.S. § 6-813 prohibited any designated Custodian from
26 "engag[ing] in or carry[ing] on ... the escrow business or act[ing] in

1 the capacity of an escrow agent in [Arizona] without first obtaining a
2 license.”

3

4 ¶ 66: ERF&AS or “ER Financial and Advisory Service” were
5 the designated Custodians in the Custodial Agreements for at least
6 132 investments, including those by the fifty-eight (58) investors who
7 are still owed \$3,078,909 of principal.

8 ¶ 67: As the designated Custodians for those investments,
9 ERF&AS or Bersch and Wanzek doing business as “ER Financial
10 and Advisory Service” engaged in and carried on an escrow business
11 and acted in the capacity of escrow agents within the meaning of
12 A.R.S. § 6-801 and A.R.S. § 6-813.

13 ¶ 68: As the designated Custodians for those investments,
14 ERF&AS or Bersch and Wanzek doing business as “ER Financial
15 and Advisory Service” were required to be licensed by the Arizona
16 Department of Financial Institutions pursuant to A.R.S. § 6-813.

17 ¶ 69: Neither ERF&AS, nor Bersch nor Wanzek were licensed
18 by the Arizona Department of Financial Institutions to engage in or
19 and carry on an escrow business, or to act in the capacity of escrow
20 agents.

21 ¶ 70: The Securities Division is not aware of any instance in
22 which ERF&AS, Bersch or Wanzek disclosed to an investor that by
23 serving as a Custodian, they were engaged in the conduct of an
24 unlicensed escrow business.

25 ¶ 71: Upon information and belief, neither ERF&AS, nor
26 Bersch nor Wanzek ever disclosed to any investor that by serving as a

1 Custodian, they were engaged in the conduct of an unlicensed escrow
2 business.

3 ¶ 72: According to Concordia's records, Concordia paid Bersch
4 and Wanzek, through ERF&AS, custodian fees of at least
5 \$2,529,337.

6

7 ¶ 88: [I]n connection with the offer or sale of securities within or
8 from Arizona, ERF&AS, and Bersch or Wanzek, individually or
9 through ERF&AS, directly or indirectly: (i) employed a device,
10 scheme, or artifice to defraud; (ii) made untrue statements of material
11 fact or omitted to state material facts that were necessary in order to
12 make the statements made not misleading in light of the circumstances
13 under which they were made; and/or (iii) engaged in transactions,
14 practices, or courses of business that operated or would operate as a
15 fraud or deceit upon offerees and investors. Specifically, the conduct
16 by Bersch and/or Wanzek, individually or through ERF&AS,
17 includes ... (d) Failing to disclose to offerees and investors that by
18 serving as a Custodian, ERF&AS was engaged in the conduct of an
19 unlicensed escrow business in violation of Arizona law.

20
21 The ER Respondents assert this "unlicensed escrow business" theory of
22 securities fraud "is without precedent and must be rejected."³ They are mistaken.
23 *See S.E.C. v. Levine*, 671 F. Supp.2d 14, 28-29 (D.D.C. 2009). In *Levine*, investment
24 promoters, through companies they controlled, sold stock in other companies "by
25 sending the investor a securities purchase agreement and, after receiving the money

26

³ Motion at 3:9.

1 from the investor, sending the investor the share certificate.” *Id.* at 23. In doing so,
2 the investment promoters acted as escrow agents. *Id.* at 25. Neither the investment
3 promoters nor their companies through which they completed the sales of stock in
4 other companies were licensed under state law as escrow agents. *Levine*, 671 F.
5 Supp.2d at 28. “Investors were not informed that the companies receiving their
6 funds ... were not licensed by the State of Nevada to engage in escrow services.” *Id.*
7 at 29. The court held the investment promoters violated the anti-fraud provisions in
8 § 17(a) of the Securities Act of 1933 and § 10(b) of the Exchange Act of 1934 “by
9 engaging in an illegal escrow business in connection with the offer or sale of
10 securities.” *Id.* at 29. With respect to the material nature of this omission, the court
11 ruled: “Surely, a reasonable investor would want to know that the ‘escrow agent’
12 he/she is sending their money to is not even licensed to be engaged in that type of a
13 business activity.” *Id.* at 29.

14 *Levine* applies with full force here and confirms that the Motion should be
15 denied. By being a Custodian for the underlying Truck Financing Contracts and
16 vehicle titles, ERF&AS fit squarely within the definition of an “escrow agent” under
17 A.R.S. § 6-801(5) (“‘Escrow agent’ means any person engaged in the business of
18 accepting escrows.”). A.R.S. § 6-801(4) defines “Escrow” as:

19
20 [A]ny transaction in which any escrow property is delivered with or
21 without transfer of legal or equitable title, or both, and irrespective of
22 whether a debtor-creditor relationship is created, to a person not
23 otherwise having any right, title or interest therein in connection with
24 the sale, transfer, encumbrance or lease of real or personal property,
25 to be delivered or redelivered by that person upon the contingent
26 happening or nonhappening of a specified event or performance or
nonperformance of a prescribed act, when it is then to be delivered by
such person to a grantee, grantor, promisee, promisor, obligee,
obligor, bailee or bailor, or any designated agent or employee of any
of them....

1 Pursuant to Section 4.1 of the Servicing Agreements, Concordia delivered to
2 ERF&AS the underlying Truck Financing Contracts and vehicle titles. Amended
3 Notice at ¶ 16. ERF&AS was obligated to hold the Contracts and vehicle titles for
4 the benefit of Concordia and the investor. *Id.* at ¶ 24. ERF&AS would deliver those
5 documents to either Concordia or the investor “upon the contingent happening or
6 nonhappening of a specified event or performance or nonperformance of a prescribed
7 act,” within the meaning of A.R.S. § 6-801(4). For instance, ERF&AS would return
8 a Contract to Concordia upon Concordia’s written representation to ERF&AS and
9 the investor that the Contract either (a) has been paid in full and must be returned to
10 the [truck purchaser], or (b) has incurred a Contract Default and is to be concurrently
11 replaced with a substitute Contract. *Id.* at ¶ 25. Alternatively, following any default
12 under the Servicing Agreement by Concordia and its failure to cure the default, and
13 upon the investor’s instructions, ERF&AS was obligated to release to the investor
14 the originally executed Contracts and all executed vehicle title assignments in
15 ERF&AS’ possession. *Id.* at ¶ 26.

16 The fact that Respondents held ERF&AS out as a “Custodian” as opposed to
17 an escrow agent does not negate the fact that it did, in fact, act as an escrow agent.
18 *See Levine*, 671 F. Supp.2d at 25 (“But the fact that Euro Escrow held itself out ... as
19 something other than an escrow agent does not negate the fact that it did, in fact, act
20 as an escrow agent.”). Because ERF&AS acted as an escrow agent, it was required
21 to be licensed by the Arizona Department of Financial Institutions. A.R.S. § 6-813
22 prohibited ERF&AS from “engag[ing] in or carry[ing] on ... the escrow business or
23 act[ing] in the capacity of an escrow agent in [Arizona] without first obtaining a
24 license.”

25 The ER Respondents’ failure to disclose to investors that ERF&AS was
26 engaged in the conduct of an unlicensed escrow business was a material omission.

1 As in *Levine*, a reasonable investor would want to know that the Custodian holding
2 the Truck Financing Contracts and vehicle titles underlying the investment “is not
3 even licensed to be engaged in that type of a business activity.” *Id.* at 29. *See also*
4 *S.E.C. v. Randy*, 38 F. Supp.2d 657, 669 (N.D. Ill. 1999) (fact that bank whose
5 securities were being sold was not legally licensed was material).

6 Finally, the ER Respondents’ argument that the Commission “has no
7 jurisdiction to enforce the escrow laws” is misplaced and should be rejected. The
8 Division is seeking to enforce the anti-fraud provisions of the Securities Act, not the
9 escrow laws. In *Levine*, the S.E.C. was not deemed to be attempting to enforce
10 Nevada’s escrow licensing laws. Similarly, in *Randy*, the S.E.C. was not deemed to
11 be attempting to enforce bank licensing laws. Rather, the securities fraud in those
12 cases, as here, resulted from the defendants’ failure to inform investors of the
13 unlicensed, unlawful activity. Adjudicating the ER Respondents’ material omissions
14 is squarely within the Commission’s jurisdiction and will not in any way intrude on
15 the jurisdiction of the Arizona Department of Financial Institutions.

16 II. CONCLUSION

17 For the foregoing reasons, the Division respectfully requests that the ER
18 Respondents’ Motion to Dismiss be denied.

19
20 RESPECTFULLY SUBMITTED this 22nd day of June, 2015.

21 ARIZONA CORPORATION
22 COMMISSION

23
24 By 
25 James D. Burgess
26 Attorney for the Securities Division
Arizona Corporation Commission

1 ORIGINAL and 8 copies of the foregoing
2 Response to Motion to Dismiss
3 filed this 22nd day of June, 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 22nd day of June, 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 22nd day of June, 2015, to:

17 Paul J. Roshka, Jr.
18 Craig Waugh
19 POLSINELLI
20 One East Washington Suite 1200
21 Phoenix, AZ 85004
22 Attorneys for ER Financial & Advisory Services, LLC,
23 Lance Michael Bersch, David John Wanzek, and Linda Wanzek

24 Timothy J. Sabo
25 SNELL & WILMER
26 400 E. Van Buren St. #1900
Phoenix, AZ 85004
Attorneys for ER Financial & Advisory Services, LLC,
Lance Michael Bersch, David John Wanzek, and Linda Wanzek

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Alan S. Baskin
David Wood
BASKIN RICHARDS, PLC
2901 N. Central Avenue, Suite 1150
Phoenix, Arizona 85012
Attorneys for Concordia Financing Company, Ltd.

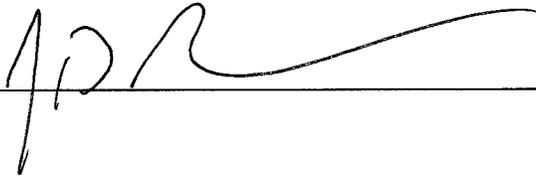


Exhibit 1

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000415-001 DT

01/13/2015

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT
T. DeRaddo
Deputy

LANCE MICHAEL BERSCH
DAVID JOHN WANZEK
LINDA WANZEK

TIMOTHY J SABO

v.

THE STATE OF ARIZONA (001)
THE ARIZONA CORPORATION
COMMISSION (001)
MATTHEW J NEUBERT (001)
MARK PRENY (001)

JAMES D BURGESS
CHARLES A GRUBE

REMAND DESK-LCA-CCC

RULING

Petitioners are respondents in a presently pending administrative enforcement action currently being conducted before the Arizona Corporation Commission [Commission]. Petitioners are certified public accountants. On February 27, 2014 the Securities Division commenced pending enforcement action against these Petitioners, alleging they committed securities fraud and other violations of the State's Securities Act. Briefly stated, the Commission alleges that Petitioners sold unregistered investment contracts to their accounting clients by means of material misrepresentations, omissions and other deceitful practices, all in violation of A.R.S. §§44-1841 and 44-1842.

The Petitioners filed an Answer and a Motion to Dismiss in the underlying action. They argued in their Motion To Dismiss that the applicable statute of limitation [§ 44-2004 of the Securities Act] required dismissal of the action and further, that the investments at issues are not securities subject to enforcement. The assigned Administrative Law Judge addressed the issues and subsequently denied the Motion to Dismiss. An evidentiary hearing in the underlying enforcement action has been set in the near future.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000415-001 DT

01/13/2015

In these Special action proceedings the State of Arizona; The Arizona Corporation Commission [Commission] has filed a Motion to Dismiss Complaint For Special Action requesting that this Court decline special action jurisdiction in this matter. Briefly stated, the Commission argues that the statute of limitation period set forth in A.R.S. §44-2004 is not applicable to the Commission's enforcement action; that there exists substantial evidence supporting the finding that the investments at issue are securities and finally, that there exist no exceptional circumstances warranting special action jurisdiction over this appeal.

Special Action Jurisdiction. The decision to accept or reject special action jurisdiction is highly discretionary.¹ Special action jurisdiction is reserved for "extraordinary circumstances" and generally accepted only in those cases in which "justice cannot be satisfactorily obtained by other means."² Special action jurisdiction may also be assumed to correct plain and obvious errors.³ Rule 3 of the Arizona Rules of Procedure for Special Action states:

The only questions that may be raised in a special action are:

- [a] Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
- [b] Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
- [c] Whether a determination was arbitrary and capricious or an abuse of discretion.

Further, Special action jurisdiction is only appropriate when there is no "equally plain, speedy, and adequate remedy by appeal. Rule 1[a], R.P.S.A.

In determining the propriety of the Commission's action, the evidence is viewed in the light most favorable to upholding the Commission's action unless there is a basis upon which to find that the Commission is proceedings "without or in excess of their jurisdiction or legal authority", or that the Commission's decision to proceed with enforcement action is "arbitrary and capricious or an abuse of discretion."

Discussion. The Court having considered the totality of these circumstances will not accept special action jurisdiction in this matter. The Court concurs with the Commission that Petitioner has failed to establish that the acceptance of jurisdiction is warranted in this matter.

The Court concurs with the Commission, as follows:

¹ *State ex. Rel. Mc Dougall v. Superior Court*, 172 Ariz. 153 [App. 1992].

² *King v. Superior Court*, 138 Ariz. 147, 149 [1983]. See also *Harris Trust Bank of Ariz. v. Superior Court*, 188 Ariz. 159, 162, [App. 1996] and *Williams v. Miles*, 212 Ariz. 155 [App. 2006].

³ *Amos v. Bowen*, 143 Ariz. 324, 326 [App. 1984].

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000415-001 DT

01/13/2015

- That controlling precedent specifically addressed and rejected the application of §44-2004 to the Commission's enforcement action.⁴;
- That Petitioners' estoppel and laches claims will not lie against the state.⁵;
- The Court also finds that there exists no "extraordinary circumstances" warranting the exercise of this Court's discretion in accepting Special action review of this hearing officer's interlocutory denial of Petitioners motions to dismiss.⁶;
- That Petitioners' have an "equally plain, speedy and adequate remedy by appeal". Rule 1[a], R.P.S.A.; and
- Finally, the Court concurs with the Commission that the issues raised are not novel, new or of issues of statewide importance.

For the reasons stated in the Commissions moving papers and those cited above, this Court denies Petitioners request that it exercise its discretion and assume jurisdiction in this matter.

IT IS ORDERED granting Respondents The State of Arizona; the Arizona Corporation Commission, et. al., Motion To Dismiss Complaint For Special Action.

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

⁴ *Trimble v. American Savings Life Insurance Company*, 152 Ariz. 548 [App. 1986].

⁵ *Mohave County v. Mohave-Kingman Estates, Inc.*, 120 Ariz. 417 [1978].

⁶ *Piner v. Superior Court*, 192 Ariz. 182 [1998]; *United States v. Superior Court*, 144 Ariz. 265 [1985].