



BEFORE THE ARIZONA CORPORATION COMMISSION

AZ CORP COMMISSION
DOCKET CONTROL

2015 MAR 9 PM 1 34

ORIGINAL

2 COMMISSIONERS

3 SUSAN BITTER SMITH - Chairman
4 BOB STUMP
5 BOB BURNS
6 DOUG LITTLE
7 TOM FORESE

8 IN THE MATTER OF:

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

11 ER FINANCIAL & ADVISORY SERVICES, LLC,

12 LANCE MICHAEL BERSCH, and

13 DAVID JOHN WANZEK and LINDA WANZEK,
14 husband and wife.

15 Respondents.

DOCKET NO. S-20906A-14-0063

Arizona Corporation Commission

DOCKETED

MAR 09 2015

DOCKETED BY

NINTH
PROCEDURAL ORDER
(Sets Status Conference)

16 **BY THE COMMISSION:**

17 On February 27, 2014, the Securities Division ("Division") of the Arizona Corporation
18 Commission ("Commission") filed a Notice of Opportunity for Hearing Regarding Proposed Order to
19 Cease and Desist, Order for Restitution, Order for Administrative Penalties, and Order for Other
20 Affirmative Action ("Notice") against Concordia Financing Company, Ltd, a/k/a Concordia Finance
21 ("Concordia"), ER Financial & Advisory Services, LLC ("ER"), Lance Michael Bersch, and David
22 John Wanzek and Linda Wanzek, husband and wife (collectively "Respondents"), in which the
23 Division alleged multiple violations of the Arizona Securities Act ("Act") in connection with the
24 offer and sale of securities in the form of investment contracts and promissory notes within or from
25 Arizona.

26 The spouse of David John Wanzek, Linda Wanzek ("Respondent Spouse"), is joined in the
27 action pursuant to A.R.S. § 44-2031(C) solely for the purpose of determining the liability of the
28 marital community.

The Respondents were duly served with copies of the Notice.

1 On March 6, 2014, Respondents ER, Lance Michael Bersch and David John Wanzek filed a
2 Request for Hearing. On March 14, 2014, Respondent Linda Wanzek filed a Request for Hearing.

3 On March 17, 2014, by Procedural Order, a pre-hearing conference was scheduled for April
4 10, 2014.

5 On March 26, 2014, Respondent Concordia filed a Request for Hearing.

6 On March 27, 2014, by Procedural Order, the pre-hearing conference scheduled for April 10,
7 2014, was affirmed, with notice issued to Respondent Concordia.

8 On April 4, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda
9 Wanzek (collectively the "ER Respondents") filed a Motion to Dismiss and Answer ("Motion").

10 On April 9, 2014, Respondent Concordia filed an Answer.

11 On April 10, 2014, at the pre-hearing conference, the parties appeared through counsel and
12 requested oral argument regarding the Motion to Dismiss. The parties further proposed a schedule
13 for filing motions prior to oral argument.

14 On April 15, 2014, by Procedural Order, oral argument and a status conference were
15 scheduled to commence on May 21, 2014. It was further ordered that Respondent Concordia shall
16 file any Motion to Dismiss by April 25, 2014, the Division shall file its Response to the Motions to
17 Dismiss by May 9, 2014, and the Respondents shall file any Reply by May 16, 2014.

18 On April 25, 2014, Respondent Concordia filed its Joinder to Motion to Dismiss of
19 Respondents ER Financial & Advisory Services, LLC, Lance Michael Bersh, David John Wanzek
20 and Linda Wanzek.

21 On May 5, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda
22 Wanzek filed Acknowledgments of Possible Conflicts.

23 On May 9, 2014, the Division filed its Response to Motion to Dismiss by All Respondents
24 ("Response").

25 On May 16, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda
26 Wanzek filed their Reply in Support of Motion to Dismiss ("Reply").

27 On May 21, 2014, oral argument and a status conference were held. The parties appeared
28 through counsel and oral argument was presented. The Motion was taken under advisement and a

1 schedule was proposed for the parties to submit supplemental citations.

2 On May 22, 2014, the Division filed its Supplemental Citation of Authorities.

3 On May 29, 2014, Respondents Concordia, ER, Lance Michael Bersch, David John Wanzek,
4 and Linda Wanzek filed their Joint Supplemental Citation of Authorities.

5 On August 13, 2014, by Procedural Order, it was found that the Respondents had not
6 established dismissal to be appropriate and that it was necessary and proper to proceed with the
7 Respondents' request for a hearing. Accordingly, a prehearing conference was scheduled on
8 September 2, 2014.

9 On September 2, 2014, a pre-hearing conference was held. The parties appeared through
10 counsel. The scheduling of a hearing was discussed. Counsel for the ER Respondents stated they
11 would be filing a special action regarding the motion to dismiss. Counsel for the ER Respondents
12 requested that part of the hearing be held in the Lake Havasu area to accommodate witnesses for the
13 ER Respondents. This request was denied. After much discussion, a commencement date for the
14 hearing was agreed to by the parties.

15 On September 2, 2014, by Procedural Order, a hearing was scheduled to commence on May
16 11, 2015.

17 On January 5, 2015, the Division filed a Motion to Quash Discovery Demands by the ER
18 Respondents. The Division asserted that on November 24, 2014, the Division was served by the ER
19 Respondents with a "First Request for Production of Documents," a "First Set of Non-Uniform
20 Interrogatories," a "First Set of Requests for Admissions," a "Notice of 30(b)(6) Deposition," and a
21 "Notice of Deposition of Gary R. Clapper." The Division contended that the discovery demands by
22 the ER Respondents should be quashed because: discovery in this proceeding is governed by the
23 Administrative Procedure Act and the Commission's Rules, not the Arizona Rules of Civil
24 Procedure; the ER Respondents have not demonstrated a reasonable need for the information they
25 demand; the discovery demands include information and documents that are privileged and/or made
26 confidential by statute; and the discovery demands are unreasonably overbroad, unduly burdensome
27 and oppressive.

28 On January 26, 2015, by Procedural Order, the Division's Motion to Quash Discovery

1 Demands was granted. In light of the ER Respondents' efforts to obtain discovery, the parties'
2 exchange of witness lists and copies of exhibits was accelerated.

3 Later that day, the ER Respondents filed a Response to the Division's Motion to Quash. The
4 ER Respondents contended that: the Commission's Rules allow for broad discovery; discovery is not
5 barred by either the Administrative Procedure Act or statutory confidentiality; the ER Respondents
6 have a reasonable need for, and a constitutional right to, discovery; the requested documents are not
7 privileged or work product; and the discovery is not burdensome. The ER Respondents also
8 requested oral argument on the matter.

9 On January 27, 2015, by Procedural Order, oral argument was scheduled to be held on
10 February 11, 2015. Later that day, the Division filed a Notice of Intent to File Reply in Support of
11 Motion to Quash Discovery Demands by the ER Respondents.

12 On February 3, 2015, the Division filed its Reply in Support of Motion to Quash Discovery
13 Demands by the ER Respondents. The Division argued that: the ER Respondents have not properly
14 sought discovery as provided under the Administrative Procedure Act and the Commission's rules;
15 the Arizona Rules of Civil Procedure do not apply to discovery in this proceeding; prior procedural
16 orders and Commission decisions cited by the ER Respondents can be distinguished or otherwise fail
17 to support ordering the discovery sought; the ER Respondents have not demonstrated a reasonable
18 need for the discovery sought; many of the documents sought are protected work product; and the
19 discovery sought is confidential under A.R.S. § 44-2042(A).

20 On February 5, 2015, the Division filed a Notice of Errata Regarding its Reply in Support of
21 Motion to Quash Discovery Demands by the ER Respondents.

22 On February 10, 2015, ER Respondents filed a Motion to Compel seeking discovery from
23 Respondent Concordia and requesting oral argument. The ER Respondents contend that the
24 Commission's rules allow broad discovery; their requests for production of documents are specific
25 and not overbroad or burdensome; Concordia is the custodian of its own records; and a subpoena is
26 not required as Concordia is a party to this proceeding. The ER Respondents further attached an
27 affidavit from Respondent David John Wanzek responding to Concordia's communicated demand for
28 a sworn statement as to the ER Respondents' claims that they returned files to Concordia and that Mr.

1 Bersch and Mr. Wanzek were privy to attorney-client communications between Concordia and its
2 counsel.

3 On that same day, counsel for ER Respondents filed a Notice of Change of Law Firm and
4 Notice of Association with Counsel.

5 On February 11, 2015, oral argument was held. The parties appeared through counsel. The
6 Division and the ER Respondents presented oral argument in favor of their respective positions on
7 the ER Respondents' requests for discovery. In light of the approaching commencement date of the
8 hearing, the presiding Administrative Law Judge ruled from the bench, finding that while the
9 Administrative Procedure Act applies, fairness dictates that in this case the Division more promptly
10 provide the Respondents with certain documents in its possession. Though the prior order quashing
11 the ER Respondents' discovery requests was affirmed, the Division was directed to disclose to the
12 Respondents, by February 26, 2015, the contracts it intends to submit as evidence of the 446 alleged
13 investments. The Division contended that it may not have contracts for all 446 of the alleged
14 investments and that the time required for redaction of this many documents might make it difficult
15 to meet the disclosure deadline. The Administrative Law Judge directed the Division to prioritize
16 those contracts involving the ER Respondents and permitted the Division to disclose by March 12,
17 2015, any contracts which, after a good faith effort, are not ready by February 26, 2015.
18 Additionally, the Division was directed to disclose the transcript from the examination under oath of
19 Respondent Lance Michael Bersch, and the exhibits used therein, by February 26, 2015. The
20 documents ordered to be disclosed by February 26, 2015, are all documents Division counsel stated
21 he planned to use at hearing and, therefore, would have been subject to disclosure by the March 12,
22 2015 scheduled exchange of exhibits and witness lists.

23 On February 13, 2015, by Procedural Order, the Division was directed to disclose documents
24 to the Respondents as set forth at by the Administrative Law Judge at oral argument on February 11,
25 2015.

26 On February 17, 2015, the ER Respondents filed an Application for Administrative Subpoena
27 requesting a subpoena for the deposition of anticipated Division witness Gary R. Clapper. The ER
28 Respondents also filed an Application for Administrative Subpoena requesting a subpoena for the

1 deposition of an Expert Accounting Witness to be designated by the Securities Division.

2 On March 6, 2015, the ER Respondents filed a Notice of Filing Affidavits of Service.

3 No Response has been filed to the ER Respondents' Motion to Compel. In light of the prior
4 orders regarding the disclosure of documents by the Division and the upcoming disclosure date for
5 exhibits and witness lists of all parties, it is appropriate to address whether the ER Respondents
6 continue to seek the production of further documents from Respondent Concordia and to resolve the
7 pending motion.

8 IT IS THEREFORE ORDERED that a telephonic status conference shall be scheduled for
9 **March 16, 2015 at 10:00 a.m.**

10 IT IS FURTHER ORDERED that on the date of and at least five minutes before the time set
11 for the status conference, the parties shall call 1 (888) 450-5996, passcode 457395#, from a landline
12 telephone, to participate telephonically in the status conference.

13 IT IS FURTHER ORDERED that a **hearing shall remain scheduled to commence on May**
14 **11, 2015, at 10:00 a.m., at the Commission's offices, 1200 West Washington Street, Hearing**
15 **Room No. 1, Phoenix, Arizona.**

16 IT IS FURTHER ORDERED that **the parties shall also set aside May 13-15, and 18-22,**
17 **2015, for additional days of hearing,** if necessary.

18 IT IS FURTHER ORDERED that **by March 12, 2015, the Division and Respondents shall**
19 **exchange copies of their Witness Lists and copies of their Exhibits,** excluding those previously
20 disclosed by the Division on February 26, 2015, with courtesy copies provided to the presiding
21 Administrative Law Judge.

22 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized
23 Communications) is in effect and shall remain in effect until the Commission's Decision in this
24 matter is final and non-appealable.

25 IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules
26 of the Arizona Supreme Court and A.R.S. § 40-243 with respect to the practice of law and admission
27 *pro hac vice*.

28 IT IS FURTHER ORDERED that withdrawal or representation must be made in compliance

1 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the
2 Rules of the Arizona Supreme Court). Representation before the Commission includes appearances
3 at all hearings and procedural conferences, as well as all Open Meetings for which the matter is
4 scheduled for discussion, unless counsel has previously been granted permission to withdraw by the
5 Administrative Law Judge or the Commission.

6 IT IS FURTHER ORDERED that the Presiding Administrative Law Judge may rescind, alter,
7 amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by
8 ruling at hearing.

9 DATED this 9th day of March, 2015.

10
11 
12 MARK PRENY
13 ADMINISTRATIVE LAW JUDGE

14 Copies of the foregoing mailed/delivered
15 this 9th day of March, 2015, to:

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