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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

2015 MAR 20 P 4: 44

AZ CORP COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission  
DOCKETED

MAR 20 2015

DOCKETED BY [Signature]

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.

SECURITIES DIVISION'S MOTION TO  
QUASH SUBPOENAS, OR IN THE  
ALTERNATIVE, MOTION FOR A  
PROCEDURAL ORDER LIMITING THE  
SCOPE OF SUBPOENAS

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") respectfully requests that the Hearing Officer issue an order quashing: (1) the Subpoena issued for the deposition of Gary Clapper on April 6, 2015; and (2) the Subpoena Duces Tecum for the production of documents and deposition of the Division's Accountant, Avi Beliak, scheduled for April 17, 2015, (collectively, "the Subpoenas"). The Subpoenas should be quashed because:

1. They were issued without any finding of reasonable need, contrary to the requirements of A.R.S. § 41-1062(A)(4) of the Administrative Procedures Act ("APA").
2. The ER Respondents now have all the documents and information they claimed they needed in their Applications for the Subpoenas. Any reasonable need the ER Respondents previously may have had no longer exists.

1 In the alternative, if the Subpoenas are not quashed, the Division respectfully requests,  
2 pursuant to R14-3-108, that this Tribunal issue a Procedural Order limiting the scope of  
3 examination at the depositions of Mr. Clapper and Mr. Beliak to the six subjects the ER  
4 Respondents identified in their Applications for the Subpoenas. Those are the only subjects for  
5 which the ER Respondents arguably articulated a reasonable need for information. Therefore,  
6 any other subjects should be deemed outside the scope of the Subpoenas. Such a Procedural  
7 Order is necessary to protect the confidentiality of the Division's investigation, as A.R.S. § 44-  
8 2042(A) expressly requires, as well as the Division's work product.

9  
10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. Procedural Background**

12 On November 24, 2014, the ER Respondents served the Division with a Notice of  
13 30(b)(6) Deposition, a Notice of Deposition of Mr. Clapper, and numerous other discovery  
14 requests purportedly pursuant to the Arizona Rules of Civil Procedure, which the ER  
15 Respondents insisted applied. The Division filed a Motion to Quash, which the presiding  
16 Administrative Law Judge granted on January 26, 2015, and reaffirmed on February 11, 2015,  
17 following oral argument. See Sixth and Eighth Procedural Orders.

18 At the February 11th oral argument, the presiding Administrative Law Judge held that the  
19 APA governs discovery in this proceeding and not the discovery provisions of the Arizona Rules  
20 of Civil Procedure.<sup>1</sup> The presiding Administrative Law Judge observed that while the overall  
21 concern is fairness to all parties, the "[T]he scope of what's being requested by the respondents  
22 and what was submitted in the multiple discovery requests to the Division, I think far exceeds  
23 anything that has been allowed in a securities case"<sup>2</sup>

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25  
26 <sup>1</sup> See Transcript of 2/11/2015 Oral Argument at 54:7-8; Eighth Procedural Order at 5:10-11.

<sup>2</sup> Transcript of 2/11/2015 Oral Argument at 54:9-18.

1 The ER Respondents then argued they “ought to, at the very least, be able to take a couple  
2 of depositions of the Division’s own employees who are critical to this case.”<sup>3</sup> The ER  
3 Respondents did not identify any particular information for which they had a reasonable need to  
4 depose Division employees. Rather, the ER Respondents stated that they felt entitled to take  
5 such depositions because the Division had stated it would conduct investigatory examinations  
6 under oath (“EUOs”) of Mr. Wanzek and ER Financial’s custodian of records<sup>4</sup> (whose  
7 appearances the Division unsuccessfully attempted to obtain for EUOs in 2012).

8 The presiding Administrative Law Judge directed the ER Respondents to apply to the  
9 Commission’s Executive Director for subpoenas.<sup>5</sup> The record does not contain any finding that  
10 the ER Respondents had a reasonable need for the depositions.

11 On February 17, 2015, the ER Respondents submitted two Applications for  
12 Administrative Subpoenas to the Commission’s Executive Director for depositions of Mr.  
13 Clapper and Mr. Beliak. The Applications asserted the ER Respondents had a reasonable need  
14 for information on six subjects:

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

23  
24 <sup>3</sup> Transcript of 2/11/2015 Oral Argument at 64:8-11.

25 <sup>4</sup> Mr. Sabo: “Mr. Burgess has now disclosed that he intends to do EUOs of various people. If  
26 they’re going to be entitled to do that, we ought to, at the very least, be able to take a couple of  
depositions of the Division’s own employees who are critical to this case.” Transcript of 2/11/2015  
Oral Argument at 64:8-11.

<sup>5</sup> Transcript of 2/11/2015 Oral Argument at 64:12-16.

1 Three days later, on February 20, 2015, the Executive Director signed the requested  
2 Subpoenas, which the ER Respondents subsequently served on the Division.<sup>6</sup>

3 **II. Motion to Quash Subpoenas**

4 **A. The Subpoenas Were Not Issued In Compliance With The APA.**

5 The Subpoenas should be quashed because they were not issued in compliance with  
6 A.R.S. § 41-1062(A)(4) of the APA. That statute provides in relevant part:

7 The officer presiding at the hearing may cause to be issued subpoenas for the  
8 attendance of witnesses and for the production of books, records, documents  
9 and other evidence.... Prehearing depositions and subpoenas for the  
10 production of documents may be ordered by the officer presiding at the  
11 hearing, provided that the party seeking such discovery demonstrates that the  
12 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.  
A.R.S. § 41-1062(A)(4).

13 Thus, the APA expressly provides that prehearing depositions and subpoenas for the  
14 production of documents may be ordered by the hearing officer (the presiding Administrative  
15 Law Judge) provided that the party seeking such discovery demonstrates it has a reasonable need  
16 for the documents or testimony being sought. This procedure stands in marked contrast to the  
17 procedure under Rule 45, Arizona Rules of Civil Procedure. Under Rule 45, the clerk of the  
18 superior court issues a subpoena as a ministerial act without any showing of need or good cause  
19 by the party requesting it: "The clerk shall issue a signed but otherwise blank subpoena to a party  
20 requesting it...." Ariz. R. Civ. P. 45(a)(2).

21 The procedure that was followed here was akin to the procedure under Rule 45, not the  
22 procedure required by the APA. The Subpoenas were issued by the Commission's Executive  
23 Director, not the Administrative Law Judge, without any record finding that the ER Respondents  
24 have demonstrated a reasonable need for the subpoenaed documents or testimony. To the extent  
25 the ER Respondents may argue that the Executive Director must have implicitly found

26 \_\_\_\_\_  
<sup>6</sup> See Notice of Filing Affidavits of Service (filed 3/6/2015).

1 reasonable need because she issued the Subpoenas, that argument ignores that the APA directs  
2 that the Administrative Law Judge must find reasonable need. See A.R.S. § 41-1062(A)(4). In  
3 contrast, A.R.S. § 40-105, which governs the powers and duties of the Commission's Executive  
4 Director, does not contain any express provision regarding making determinations of reasonable  
5 need, issuing subpoenas or controlling discovery.

6 Requiring the Administrative Law Judge to determine whether or not a party has  
7 demonstrated reasonable need for discovery makes perfect sense since he or she is in the best  
8 position to do so. That procedure also comports with the principle that administrative proceedings  
9 are intended to be less costly and speedier than civil litigation.<sup>7</sup>

10 The ER Respondents' stated justification for wanting to depose the Division was not the  
11 reasonable need for information to defend the alleged violations of the Securities Act. Rather, the  
12 ER Respondents' justification was that because the Division planned to exercise its authority to  
13 investigate through EUOs pursuant to A.R.S. § 44-1823, the ER Respondents should be entitled to  
14 take some testimony too. That is "tit for tat" retaliation. It is not reasonable need under the APA.

15 **B. The ER Respondents Now Have All The Documents And Information That**  
16 **They Claimed They Needed.**

17 The Subpoenas should also be quashed because the ER Respondents have all the documents  
18 and information available to them that they claimed they needed in their Applications for the  
19 Subpoenas. Any reasonable need the ER Respondents may have had no longer exists.

20 At the February 11<sup>th</sup> oral argument, the Division was directed to produce the investment  
21 contracts at issue to the Respondents by February 26, 2015. The Division complied. On February  
22 26<sup>th</sup>, the Division hand-delivered to Respondents disks containing all the investment contracts at  
23 issue, which consist of: (i) Sale of Contracts and Servicing Agreements between Concordia and  
24 each investor ("Servicing Agreements"); and (ii) Custodial Agreements between Concordia, each  
25 investor and the identified Custodian, who was to hold the underlying truck financing contracts and

26 <sup>7</sup> See R14-3-108(A) (Administrative Law Judge is to address "matters which may expedite orderly  
conduct and disposition of the proceedings or settlements thereof.").

1 vehicle titles in exchange for payment of custodial fees. In approximately 95% of the investment  
2 contracts, the Custodian was ER Financial. For at least three investment contracts, the Custodian  
3 was Linda Wanzek. The Division will submit at the hearing that whichever Respondent signed an  
4 investor's Custodial Agreement was the salesperson for that investment and the person who made  
5 the misrepresentations of guaranteed income and liquidity at issue.

6 The Servicing Agreements identify each investor, and the dates and amounts of the  
7 investments. The Custodial Agreements in which Linda Wanzek is the Custodian are signed by  
8 her. The Custodial Agreements in which ER Financial is the Custodian are signed by either Mr.  
9 Bersch, Mr. Wanzek, or simply as "ER Financial." With respect to the investors whose Custodial  
10 Agreements are signed by "ER Financial," Mr. Bersch and Mr. Wanzek know which of those  
11 investors to whom they sold. In many instances, the investors were their own accounting clients.  
12 Mr. Bersch and Mr. Wanzek can no longer feign ignorance of which investors each sold to because  
13 they can look at the Custodial Agreements and see if the handwriting on the signature line is their  
14 own.

15 On March 12, 2015, the Division produced its List of Witnesses and Exhibits to  
16 Respondents. Included in that production were the previously produced investment contracts; the  
17 brochures, PowerPoint presentation, and flowcharts alleged in Paragraphs 16, 17 and 19 of the  
18 Division's Notice; and the Financial Data Summary Mr. Beliak has prepared.

19 The Financial Data Summary lists, among other information, the names of the investors  
20 who have received partial repayments of their investment amounts, the amounts of those  
21 repayments, and the balances of their principal investment amounts that are still owed, i.e.  
22 restitution. The Financial Data Summary also details by investor name, amount, finders' fee rate,  
23 and check number the \$565,424.58 in finders' fees ER Financial received between February 2004  
24 and August 2008. The Financial Data Summary also states by year the respective amounts ER  
25 Financial and Linda Wanzek received in custodial fees, which total \$3,022,495.

26

1 By reviewing the documents the Division has produced, the ER Respondents can now  
2 determine: (1) the names of the investors; (2) which investment contract each Respondent sold to  
3 each investor; (3) the dollar amount of each investment contract sold by each Respondent; and (4)  
4 the principal amounts of restitution the Division seeks for each investor who is still owed money.

5 The ER Respondents can also determine which of them made the fraudulent statements to  
6 which investor(s) because the investment contracts demonstrate who was present at the time of the  
7 investment. Mr. Bersch, Mr. Wanzek and Mrs. Wanzek each know what he or she said to the  
8 investors to whom each sold the investments and whether they used the brochures, presentation or  
9 flowcharts the Division has produced. Further, the ER Respondents can interview the investors,  
10 many of who were or still are accounting clients of Mr. Bersch and Mr. Wanzek.

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

14 The ER Respondents no longer have any need, reasonable or otherwise, for the information  
15 they identified in their Applications for Subpoenas. All that information is within their possession  
16 and available to them. There is no longer any reasonable need for the depositions. Accordingly,  
17 the Subpoenas should be quashed.

### 18 **III. MOTION FOR PROCEDURAL ORDER LIMITING THE SCOPE OF** 19 **SUBPOENAS**

20 In the alternative, if the Subpoenas are not quashed, the Division respectfully requests,  
21 pursuant to R14-3-108, that this Tribunal issue a Procedural Order limiting the scope of  
22 examination at the depositions of Mr. Clapper and Mr. Beliak to the six subjects the ER  
23 Respondents identified in their Applications for the Subpoenas.

24 Pursuant to § 41-1062(A)(4) of APA, any application for a subpoena must demonstrate that  
25 "the party has reasonable need of the deposition testimony or materials being sought." The only  
26 subjects for which the ER Respondents arguably articulated a reasonable need are the six subjects

1 they listed in their Applications for the Subpoenas. The ER Respondents have not demonstrated a  
2 reasonable need for any other information. Accordingly, the scope of the Subpoenas should be  
3 limited to those six subjects.

4 The APA requires this limitation. See A.R.S. § 41-1062(A)(4) (absent a demonstration of  
5 reasonable need, “no subpoenas, depositions or other discovery shall be permitted except as  
6 provided by agency rule or this paragraph.”).

7 The ER Respondents will argue that the Commission’s Rules permit broader discovery than  
8 the APA does. That argument should be rejected. The Commission’s Rule authorizing subpoenas  
9 and depositions, R14-3-109, should be construed consistently with the APA’s requirement of  
10 reasonable need. See *In re Pima County Mental Health No. MH-2010-0047*, 228 Ariz. 94, 99, ¶ 22,  
11 263 P.3d 643, 648 (App. 2011) (“[A] rule or regulation of an administrative agency should not be  
12 inconsistent with or contrary to the provisions of a statute, particularly the statute it seeks to  
13 effectuate.”). In other words, R14-3-109 should not be construed to allow subpoenas or  
14 depositions where the APA would not.

15 If the Subpoenas are not quashed, this Tribunal should issue a Procedural Order limiting the  
16 scope of examination at the depositions of Mr. Clapper and Mr. Beliak. The ER Respondents have  
17 previously sought to obtain the Division’s entire investigative file, including its work product and  
18 information the Division is required to keep confidential pursuant to A.R.S. § 44-2042(A). Absent  
19 a Procedural Order limiting the scope of examination, the ER Respondents will not confine their  
20 questioning to the six subjects for which they have asserted a reasonable need for information.  
21 They will continue to attempt to obtain information that goes well beyond what they asserted they  
22 needed the Subpoenas to obtain, and the Division will object and instruct Mr. Clapper and Mr.  
23 Beliak not to answer such questions. To avoid those potential disputes, the Tribunal should issue a  
24 Procedural Order limiting the scope of examination to only those subjects the ER Respondents  
25 identified in their Applications for the Subpoenas.

26 ....

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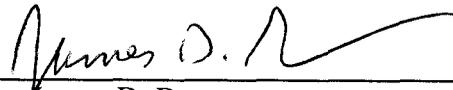
1  
2 **IV. CONCLUSION**

3 The Subpoenas should be quashed because they were issued without any finding of  
4 reasonable need, contrary to the requirements of A.R.S. § 41-1062(A)(4). In addition, the ER  
5 Respondents now have all the documents and information they claimed they needed in their  
6 Applications for the Subpoenas. Any reasonable need the ER Respondents previously may have  
7 had no longer exists.

8 In the alternative, if the Subpoenas are not quashed, the Division respectfully requests  
9 that a Procedural Order be issued limiting the scope of examination at the depositions of Mr.  
10 Clapper and Mr. Beliak to the six subjects the ER Respondents identified in their Applications  
11 for the Subpoenas.

12 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of March, 2015.

13 ARIZONA CORPORATION COMMISSION

14 By   
15 \_\_\_\_\_  
16 James D. Burgess  
17 Attorney for the Securities Division  
18 Arizona Corporation Commission  
19  
20  
21  
22  
23  
24  
25  
26

1 ORIGINAL and 8 copies of the foregoing  
2 Motion to Quash  
3 filed this 20<sup>th</sup> day of March, 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 20<sup>th</sup> day of March, 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 20<sup>th</sup> day of March, 2015, to:

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