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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

2015 JUL 28 P 1:10

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

AZ CORP COMMISSION
DOCKET CONTROL

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:

- (1) RESPONSE TO MOTION FOR SETTLEMENT CONFERENCE, and**
- (2) OBJECTION TO COUNSEL'S UNANNOUNCED DEPARTURE FROM SETTLEMENT CONFERENCE**

The Securities Division ("Division") respectfully submits this Response to Respondent Concordia Financing Company, Ltd.'s ("Concordia") Motion for Settlement Conference (filed 7/15/2015) to address certain statements in it. The Division's counsel did not have the opportunity to read, let alone respond to, that Motion before the telephonic status conference on July 16, 2015.

The Division also submits its objection to the unannounced departure of Concordia's lead trial counsel from the status conference before the settlement judge had even caucused with the Division and before any settlement offers had been exchanged.

Arizona Corporation Commission

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RESPONSE TO MOTION FOR SETTLEMENT CONFERENCE

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2 On May 18, 2015, Concordia Financing Company, Ltd. (“Concordia”) emailed
3 a settlement offer to the Securities Division (“Division”).¹ On May 20, 2015, the
4 Division requested that Concordia clarify a certain statement made in its offer. On
5 May 22, 2015, instead of answering the Division’s question about that statement,
6 Concordia referred the Division to prior statements by Concordia and its agents
7 contained in hundreds of pages of testimony and correspondence and in previous
8 settlement discussions. In the Division’s opinion, Concordia’s prior statements did not
9 answer the Division’s question, and Concordia’s response avoided the question with a
10 non-answer.

11 On June 4, 2015, the Division declined Concordia’s settlement offer and
12 informed Concordia that the Division also declined to make a counteroffer.²
13 Concordia subsequently inquired why the Division would not counter Concordia’s
14 offer. On June 16, 2015, the Division answered, explaining its view that preparing a
15 counteroffer would not be a productive use of the Division’s time and resources
16 given what it viewed to be a completely unrealistic offer from Concordia. The
17 Division further informed Concordia that while the Division would consider a good
18 faith settlement offer and respond in kind, it has no obligation to make a counteroffer
19 or otherwise spend time and resources responding to an extremely unrealistic
20 proposal simply because a respondent has made one.

21 On July 15, 2015, the parties were required to exchange Supplemental Lists of
22 Witnesses and Exhibits (“Supplemental LWEs”).³ The July 15th deadline had been
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24

25 ¹ See Concordia’s Motion for Settlement Conference (filed 07/15/2015) at 1:20-21.

26 ² See *id.* at 1:21-22.

³ See Fifteenth Procedural Order at 16:1-3.

1 set at Concordia's request for an extension to that date.⁴ On July 15th, however,
2 instead of serving a Supplemental LWE, Concordia filed a Motion for Settlement
3 Conference and requested an expedited ruling.

4 The Division's undersigned counsel left for a family vacation on July 15, 2015
5 and was traveling to New York when Concordia filed its Motion. The Division's
6 counsel first learned that Concordia had moved for a settlement conference during
7 the 10:00 a.m. telephonic status conference on July 16, 2015. Counsel had not read
8 Concordia's assertions about its "scarce funds"⁵ or how it has fought insolvency
9 supposedly "so it could attempt to meet its obligations to its [investors]...."⁶ If
10 Counsel had been aware of these assertions, the Division would have responded
11 during the July 16th status conference that Concordia suffers from "scare funds" in
12 large part because its principals are paying themselves so handsomely in salary and
13 consulting fees, and have been for years. Concordia's principals are generously
14 compensating themselves despite the damage they have inflicted by writing off as
15 "bad debt" 55% of their investors' principal and refusing to repay the other 45%
16 unless the investors signed releases that purport to absolve Concordia's principals of
17 any liability.

18 The Division also would have pointed out that with respect to Concordia's
19 purported desire "to meet its obligations to its [investors],"⁷ Concordia has been and
20 remains free to resume repaying its investors the remaining principal amounts it
21 owes them. Nothing has prevented Concordia from making at least partial
22 repayments to investors or from doing so now. As Concordia's counsel knows well,
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24 ⁴ See Concordia's Stipulated Motion to Extend Time to Exchange Supplemental
25 Lists of Witnesses and Exhibits (filed 7/6/2015).

26 ⁵ Motion for Settlement Conference at 2:2-3.

⁶ Motion for Settlement Conference at 2:13-14.

⁷ Motion for Settlement Conference at 2:13-14.

1 the Commission's rules mandate that Concordia be given full credit for any for any
2 payments it may make to investors prior to the date when an order for restitution is
3 entered. *See* R14-4-308(C)(1). Instead of meeting its obligations to investors by
4 repaying their principal, Concordia has decided to wait to see if it will be ordered to
5 do so. In the meantime, its principals continue to compensate themselves
6 generously.

7 During the July 16th status conference, the ER Respondents joined in
8 Concordia's request for a settlement conference. The Division expressed its real
9 concerns that: (i) the Respondents' request was yet another stall tactic instead of a
10 good faith effort at resolving this case, especially coming so close to the August 5th
11 hearing date; and (ii) the Division did not want to lose a full day in the little time left
12 before the hearing by engaging in settlement negotiations with the ER Respondents,
13 who had never made a settlement offer, and with Concordia, which made such an
14 unrealistic one that it did not warrant any counter.

15 In response, Concordia's counsel, Alan Baskin, invoked the comment to ER
16 3.8 that "[a] prosecutor has the responsibility of a minister of justice,"⁸ and accused
17 the Division of not working with Concordia to achieve a settlement. Mr. Baskin
18 argued for the need to get everyone together and have a neutral settlement judge
19 "bang some heads together."⁹

20 The Administrative Law Judge asked the parties for a date when the settlement
21 conference could be held. The Division offered July 23rd. Mr. Baskin and counsel
22 for the ER Respondents, Timothy Sabo, agreed to the July 23rd date. Mr. Baskin was
23 silent about any possibility that he, Concordia's lead trial counsel, would leave the
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25

26 ⁸ Comment 1 to ER 3.8, Arizona Rules of Professional Conduct.

⁹ The transcript of the July 16th, 2015, status conference is not yet available.

1 July 23rd settlement conference before the parties exchanged any offers so that he
2 could fly to California.

3
4 **OBJECTION TO COUNSEL'S UNANNOUNCED DEPARTURE FROM**
5 **SETTLEMENT CONFERENCE**

6 At the July 23rd settlement conference, Assistant Director Mark Dinell, Chief
7 Accountant Ricardo Gonzales and undersigned counsel appeared for the Division.
8 Respondents Michael Bersch and David Wanzek appeared with their counsel, Paul
9 Roshka and Timothy Sabo. Concordia's President, Christopher Crowder, attended
10 along with its consultant, Armen Dekmejian; Concordia's California counsel, Mark
11 Horoupian; and Mr. Baskin and his associate, David Wood. Administrative Law
12 Judge Yvette Kinsey began the settlement conference shortly after 10:00 a.m. with a
13 brief joint session to discuss logistics for the day. The parties then went to separate
14 rooms to meet with ALJ Kinsey.

15 At approximately 12:45 p.m., ALJ Kinsey first met with Assistant Director
16 Dinell and the Division's counsel. ALJ Kinsey informed the Division that Mr.
17 Baskin already had or was then leaving the settlement conference so he could fly to
18 California for a hearing in another case on July 24th. ALJ Kinsey related that Mr.
19 Baskin had said that Mr. Wood and Concordia's California counsel would represent
20 Concordia for the rest of the settlement conference.

21 The parties subsequently exchanged offers and counteroffers, but no
22 settlement was reached. ALJ Kinsey concluded the settlement conference at
23 approximately 4:45 p.m. so that Concordia's remaining representatives (except for
24 Mr. Wood) could make their flight back to California.

25 The Division believes that in scheduling the July 23rd settlement conference,
26 which Concordia requested on an expedited basis and without any notice to the

1 Division, Mr. Baskin had a professional obligation to disclose that he would leave in
2 the middle of it. The Division devoted essentially the entire days of its Assistant
3 Director, its Chief Accountant, and lead counsel in this matter. But before ALJ
4 Kinsey even had an opportunity to meet with the Division, Mr. Baskin was gone.

5 If Mr. Baskin had a scheduling conflict, it was incumbent on him to inform the
6 Hearing Division and the Securities Division about it during the July 16th status
7 conference. The Securities Division would have proposed another date, including
8 Wednesday, July 22nd, or during the week of July 27th-31st, so that Concordia's lead
9 counsel could be present for the entirety of the settlement conference. In short, if the
10 Division had known of Mr. Baskin's scheduling conflict, we could have worked
11 around it. But during the July 16th status conference, Mr. Baskin was silent about
12 any possibility that he would leave before any settlement offers had even been
13 exchanged. Mr. Baskin remained silent during the initial joint session at the July 23rd
14 settlement conference, and only communicated his departure through ALJ Kinsey.

15 In light of Division's expressed concerns during the July 16th status
16 conference, and Mr. Baskin's response, the Division believes it is important for the
17 record to state what occurred at the July 23rd settlement conference.

18
19 RESPECTFULLY SUBMITTED 28th day of July, 2015.

20 ARIZONA CORPORATION
21 COMMISSION

22 By 

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

1 ORIGINAL and 8 copies of the foregoing
2 filed this 28th day of July, 2015, with:

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

7 COPY of the foregoing hand-delivered
8 this 28th day of July, 2015, to:

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

14 COPIES of the foregoing mailed and emailed
15 this 28th day of July, 2015, to

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