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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION  
DOCKET CONTROL

COMMISSIONERS

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

ORIGINAL

IN THE MATTER OF:

CONCORDIA FINANCING COMPANY, LTD,  
a/k/a "CONCORDIA FINANCE,"  
ER FINANCIAL & ADVISORY SERVICES, LLC,  
LANCE MICHAEL BERSCH, and  
DAVID JOHN WANZEK and LINDA WANZEK,  
husband and wife.  
  
Respondents.

DOCKET NO. S-20906A-14-0063

Arizona Corporation Commission

DOCKETED

JUL 07 2015

DOCKETED BY 

**FIFTEENTH  
PROCEDURAL ORDER  
(Denies Motion)**

**BY THE COMMISSION:**

On February 27, 2014, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a 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 ("Notice") against Concordia Financing Company, Ltd, a/k/a Concordia Finance ("Concordia"), ER Financial & Advisory Services, LLC ("ER"), Lance Michael Bersch, and David John Wanzek and Linda Wanzek, husband and wife (collectively "Respondents"), in which the Division alleged multiple violations of the Arizona Securities Act ("Act") in connection with the offer and sale of securities in the form of investment contracts and promissory notes within or from Arizona.

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

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

26 On May 21, 2014, oral argument and a status conference were held. The parties appeared  
27 through counsel and oral argument was presented. The Motion was taken under advisement and a  
28 schedule was proposed for the parties to submit supplemental citations.

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

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

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

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

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

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

27 On January 26, 2015, by Procedural Order, the Division's Motion to Quash Discovery  
28 Demands was granted. In light of the ER Respondents' efforts to obtain discovery, the parties'

1 exchange of witness lists and copies of exhibits was accelerated.

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

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

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

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

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

1 counsel.

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

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

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

25 On February 17, 2015, the ER Respondents filed an Application for Administrative Subpoena  
26 requesting a subpoena for the deposition of anticipated Division witness Gary R. Clapper. The ER  
27 Respondents also filed an Application for Administrative Subpoena requesting a subpoena for the  
28 deposition of an Expert Accounting Witness to be designated by the Securities Division.

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

2 On March 9, 2015, by Procedural Order, a telephonic status conference was scheduled to  
3 convene on March 16, 2015. The purpose of the status conference was to address whether the ER  
4 Respondents continued to seek the production of further documents from Respondent Concordia in  
5 light of the upcoming deadline for disclosure of exhibits and witness lists.

6 On March 11, 2015, Respondent Concordia filed its Motion to Extend Time to Exchange List  
7 of Witnesses and Exhibits. Respondent Concordia requested an extension of the deadline to  
8 exchange its List of Witnesses and Exhibits to March 20, 2015, based upon counsel for Concordia's  
9 upcoming depositions and injunction hearings in matters unrelated to this case. In the motion,  
10 counsel for Concordia noted that counsel for the ER Respondents had been contacted and would not  
11 agree to an extension.

12 On March 12, 2015, the ER Respondents filed a Response in Opposition to Motion to Extend  
13 Time to Exchange List of Witnesses and Exhibits. The ER Respondents opposed the motion for the  
14 stated reasons that the hearing is imminent and the information is necessary for their defense.

15 Later on March 12, 2015, Respondent Concordia filed its List of Witnesses and Exhibits. The  
16 ER Respondents also filed a Notice of Service of List of Witnesses and Exhibits.

17 On March 16, 2015, a telephonic status conference was held. The parties appeared through  
18 counsel. The ER Respondents clarified which documents they continued to seek from Concordia.  
19 Counsel for Concordia indicated the Respondents may be able to resolve the issue among themselves  
20 within a couple weeks as Concordia needed time to prepare financial statements and ready board  
21 minutes for disclosure. The Respondents agreed to work toward resolving the discovery issues raised  
22 in the ER Respondents' Motion to Compel pending another status conference, and they further agreed  
23 to include the Division in the discovery process.

24 It was further determined at the status conference that Concordia's Motion to Extend Time to  
25 Exchange List of Witnesses and Exhibits had been rendered moot by Concordia's filing of a List of  
26 Witnesses and Exhibits, though Concordia may supplement its exhibits and witness lists based upon  
27 ongoing discovery. Also discussed was the Division's intent to amend the Notice of Opportunity to  
28 include Linda Wanzek as a participant, as opposed to being joined solely for determining the liability

1 of the marital community. The Division agreed to file a motion to amend the Notice of Opportunity.  
2 The Division also stated its intent to file a motion to quash the scheduled depositions of Gary Clapper  
3 and an expert accounting witness. A schedule was determined for motion practice and oral argument  
4 on the motion to quash.

5 On March 18, 2015, by Procedural Order, oral argument was scheduled for April 2, 2015, to  
6 address the issue of the Division's motion to quash. A status conference regarding Concordia's  
7 production of discovery was set for the same time.

8 On March 20, 2015, the Division filed a Motion to Quash Subpoenas, or in the Alternative,  
9 Motion for a Procedural Order Limiting the Scope of Subpoenas. The Division contended that the  
10 subpoenas should be quashed as they did not comply with the Administrative Procedure Act and the  
11 Respondents now have the documents and information they claim they needed. In the alternative, the  
12 Division argued that the scope of the depositions should be limited to only that information the ER  
13 Respondents specifically identified in their Applications for Subpoenas.

14 On March 27, 2015, the ER Respondents filed a Response to the Securities Division's Motion  
15 to Quash Subpoenas. The ER Respondents contended that the subpoenas complied with the  
16 Commission's rules and the Administrative Procedure Act, that the ER Respondents have a  
17 reasonable need for the depositions, and that the scope of the depositions should not be limited.

18 On that same day, the ER Respondents also filed a copy of a letter sent to counsel for the  
19 Division. The letter was identified as an objection to the Division's investigative subpoenas for  
20 Respondents David and Linda Wanzek. The ER Respondents noted that the Division has contended  
21 in the past that an Administrative Law Judge lacks the power to quash an investigative subpoena.  
22 However, the ER Respondents stated they filed a copy of the letter as a record of their objections.

23 On April 1, 2015, the Division filed its Reply in Support of Motion to Quash Subpoenas, or in  
24 the Alternative, Motion for a Procedural Order Limiting the Scope of Subpoenas. The Division  
25 argued that the subpoenas should be quashed because there is no finding in the record that the ER  
26 Respondents have demonstrated a reasonable need for the deposition testimony, the applications for  
27 subpoena were deficient and misleading as the ER Respondents have now identified additional  
28 matters for discovery beyond those stated in the applications, and the ER Respondents have received

1 all the documents and information they claimed to need. In the alternative, the Division argued that  
2 the scope of the subpoenas should be limited based upon: the matters for which the ER Respondents  
3 have established a reasonable need pursuant to the Administrative Procedure Act; the Division's  
4 deliberative process and attorney-client privileges; and the Securities Act's confidentiality statute,  
5 A.R.S. § 44-2042(A).

6 On April 2, 2015, a status conference and oral argument were held. The parties appeared  
7 through counsel. Counsel for the Respondents stated that Respondent Concordia is in the process of  
8 preparing requested documents for disclosure to the ER Respondents. Respondent Concordia  
9 asserted that some documents are likely in the possession of the Division, having been obtained from  
10 the State of California following proceedings conducted there, and could be more easily obtained  
11 from the Division. The Division asserted that the Securities Act's confidentiality statute applied, but  
12 noted that it would make available supporting documentation used by the Division's accountant in  
13 creating his Financial Data Summary.

14 The Division and the ER Respondents presented oral argument in favor of their respective  
15 positions on the Division's Motion to Quash Subpoenas, or in the Alternative, Motion for a  
16 Procedural Order Limiting the Scope of Subpoenas. Having considered the written and oral  
17 arguments presented by the parties, as well as the statutes, rules and other authority cited therein, the  
18 presiding Administrative Law Judge ruled from the bench and quashed the two subpoenas pursuant to  
19 A.A.C. R14-3-109(O). The Administrative Law Judge found that the Administrative Procedure Act  
20 applies and therefore, the ER Respondents must establish reasonable need for the information sought  
21 in the depositions. In finding that the ER Respondents did not have reasonable need to proceed with  
22 the depositions, the Administrative Law Judge noted: the numerous documents disclosed by the  
23 Division as exhibits subsequent to the issuance of the subpoenas; the forthcoming disclosure by the  
24 Division of the documents used by the accountant; the effect of these disclosed documents upon any  
25 current reasonable need for the depositions regarding those six areas specifically identified in the ER  
26 Respondents' Application for Subpoenas; and the schedule of the hearing, which will allow the ER  
27 Respondents additional time before presenting their case, thereby overcoming any surprise that may  
28 arise during the Division's presentation of its case in chief.

1 On April 3, 2015, by Procedural Order, the two subpoenas commanding attendance of the  
2 Division witnesses for depositions were quashed, as decided at the April 2, 2015 status conference.  
3 The Division was ordered to disclose by April 15, 2015, the supporting documentation relied upon by  
4 the Division's accountant in creating his Financial Data Summary. The Respondents were further  
5 ordered to continue to work toward resolving outstanding discovery issues arising from the ER  
6 Respondents' Motion to Compel.

7 On April 17, 2015, the ER Respondents filed a Motion to Continue Hearing. The reason for  
8 seeking a continuance was due to health conditions of Respondent Lance Michael Bersch. The ER  
9 Respondents requested that a status conference be set in about six months with the ER Respondents  
10 to file a status report at least 21 days before the status conference.

11 On April 22, 2015, by Procedural Order, a status conference was scheduled for April 28,  
12 2015, to address the ER Respondents' Motion to Continue Hearing.

13 On April 24, 2015, Respondent Concordia filed its Response to Motion to Continue.  
14 Respondent Concordia had no objection to the continuance requested by the ER Respondents.

15 On April 24, 2015, the Division filed a Motion for Leave to File Amended Notice of  
16 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order  
17 for Administrative Penalties, and Order for Other Affirmative Action. The Division sought leave to  
18 amend its Notice of Opportunity for Hearing to provide greater detailed factual allegations and to  
19 expound upon the fraud allegations from the original Notice.

20 Also on April 24, 2015, the Division filed its Response to the Motion to Continue Hearing.  
21 The Division contended that the ER Respondents' Motion to Continue should be denied as the ER  
22 Respondents have failed to provide sufficient information to justify a postponement due to illness.  
23 However, the Division proposed a three month continuance of the hearing if leave is granted to  
24 amend the Notice of Opportunity.

25 On April 28, 2015, a telephonic status conference was held. The parties appeared through  
26 counsel. The ER Respondents' Motion to Continue and the Division's Motion for Leave to File  
27 Amended Notice were both discussed. It was also noted that a hearing was scheduled to convene in  
28 Superior Court on April 29, 2015, regarding a Motion to Stay Administrative Hearing filed by

1 Respondents Bersch, Wanzek and Mrs. Wanzek, pursuant to their Notice of Appeal of the final  
2 judgment in the special action. A schedule was set for the filing of motions which would be  
3 addressed at a future status conference. The parties also agreed to vacate the scheduled hearing  
4 commencing on May 11, 2015.

5 On April 28, 2015, by Procedural Order, a status conference was scheduled to be held on May  
6 7, 2015, to address the pending motions and schedule a hearing date. The Procedural Order further  
7 set deadlines for the filing of responses and replies regarding the pending motions. The Procedural  
8 Order also vacated the hearing scheduled to commence on May 11, 2015.

9 On April 29, 2015, the Division filed a Status Report Regarding the Superior Court Hearing  
10 on Motion to Stay Administrative Case Pending Appeal. The Division reported that the Superior  
11 Court hearing on the Motion to Stay Administrative Hearing did not occur as scheduled on April 29,  
12 2015. The Division stated that the hearing was rescheduled for May 4, 2015.

13 On May 4, 2015, the ER Respondents filed a Reply in Support of Motion to Continue  
14 Hearing. The ER Respondents provided additional information regarding the medical condition of  
15 Respondent Bersch. Included as an exhibit to the reply was a letter from Mr. Bersch's doctor, who  
16 projected a recovery date for Mr. Bersch of July 15, 2015.

17 On that same date, the ER Respondents also filed a Response to Securities Division's Motion  
18 for Leave to File Amended Notice of Opportunity. The ER Respondents stated no objection to  
19 granting the Division leave to amend the Notice. The ER Respondents noted they would need  
20 additional time to address the new allegations. The ER Respondents further stated that they would  
21 reserve: the right to challenge the sufficiency of the new allegations by motion to dismiss; the right to  
22 include affirmative defenses, cross-claims, counterclaims or third party claims with their answer to  
23 the amended notice; and the right to review discovery related to the new allegations.

24 Also on May 4, 2015, the Division filed a Status Report Regarding the Superior Court  
25 Hearing on Motion to Stay Administrative Case Pending Appeal. The Division noted that the Court  
26 ruled from the bench and denied the Motion to Stay Administrative Hearing Pending Appeal. The  
27 Division stated, however, that the Court issued a temporary 30-day stay that would apply only to an  
28 evidentiary hearing before the Commission and not to the procedural conference set for May 7, 2015.

1 On May 5, 2015, Respondent Concordia filed its Response to Motion for Leave to File  
2 Amended Notice of Opportunity. Respondent Concordia stated that it had no objection to the  
3 Division's motion.

4 On May 6, 2015, the Division filed a Motion to Take Official Notice of the Superior Court's  
5 Minute Entry Denying Motion to Stay Administrative Case Pending Appeal. The Division attached  
6 as an exhibit a copy of the Superior Court's May 4, 2015 minute entry in Maricopa County Superior  
7 Court Case No. LC2014-000415-001. In denying the request for stay, the Court found that the  
8 Plaintiffs had failed to demonstrate: (1) a likelihood of success on the merits, (2) that they would be  
9 irreparably harmed if a stay is not granted, (3) that a stay would not injure the opposing party, and (4)  
10 that a stay furthers the public interest. The Court did order a temporary stay of thirty days, or until  
11 June 3, 2015, to apply to the Court of Appeals for a stay of the administrative hearing.

12 On May 7, 2015, a telephonic status conference was held as scheduled. The parties appeared  
13 through counsel. Without objection by the Respondents, the Administrative Law Judge took official  
14 notice of the May 4, 2015 minute entry in Maricopa County Superior Court Case No. LC2014-  
15 000415-001. The parties agreed that the temporary stay ordered by the Court did not preclude  
16 present action on the pending motions and the scheduling of a hearing date after June 3, 2015.  
17 Without objection, the Division's Motion for Leave to File Amended Notice of Opportunity was  
18 granted. Discussion was held regarding the scheduling of the hearing and a new hearing date was  
19 agreed upon. Based upon the new hearing date and the projected recovery time for Mr. Bersch, the  
20 ER Respondents acknowledged that their April 17, 2015 Motion to Continue Hearing was now moot.  
21 The ER Respondents also acknowledged that they no longer had any discovery issues with regard to  
22 Respondent Concordia, as raised originally in the ER Respondents Motion to Compel filed on  
23 February 10, 2015. The parties acknowledged that, in light of the soon to be filed amended Notice,  
24 the ER Respondents would reserve their prior arguments as set forth in their April 4, 2014 Motion to  
25 Dismiss and Answer.

26 On May 7, 2015, by Procedural Order, a hearing was scheduled to commence on August 5,  
27 2015.

28 On May 7, 2015, the Division filed an Amended Notice of Opportunity for Hearing

1 Regarding Proposed Order to Cease, and Desist, Order for Restitution, Order for Administrative  
2 Penalties and Order for Other Affirmative Action (“Amended Notice”).

3 On May 19, 2015, the ER Respondents filed Requests for Hearing. Each of the four ER  
4 Respondents filed a separate Request for Hearing.

5 On May 21, 2015, Concordia filed a Request for Hearing.

6 On June 8, 2015, the ER Respondents filed a Motion to Dismiss and Answer to Amended  
7 Notice of Opportunity (“Motion and Amended Answer”).

8 Also on June 8, 2015, Respondent Concordia Finance filed its Answer to Amended Notice of  
9 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order  
10 for Administrative Penalties, and Order for Other Affirmative Action.

11 On June 16, 2015, ER Respondents filed a Status Report regarding their Motion to Stay filed  
12 with the Arizona Court of Appeals.

13 On June 22, 2015, the Division filed its Response to Motion to Dismiss by the ER  
14 Respondents (“Response”).

15 On June 30, 2015, the ER Respondents filed their Reply in Support of Motion to Dismiss  
16 (“Reply”).

17 On July 2, 2015, the Division filed a Motion for Order Requiring Respondent Concordia to  
18 file an Amended Answer that Complies with R14-4-305.

19 On July 6, 2015, Respondent Concordia filed a Stipulated Motion to Extend Time to  
20 Exchange Supplemental List of Witnesses and Exhibits (“Stipulated Motion”). The Stipulated  
21 Motion stated that counsel for the Division and counsel for the Respondents have conferred and  
22 agreed to extend the time to exchange their Supplemental List of Witnesses and Exhibits to July 15,  
23 2015.

#### 24 Motion to Dismiss

25 The ER Respondents contend that the Amended Notice should be dismissed, in part.  
26 Specifically, the ER Respondents seek dismissal of the Division’s fraud allegation that the ER  
27 Respondents failed to disclose to offerees and investors that by serving as a Custodian, they were  
28

1 engaged in the conduct of an unlicensed escrow business.<sup>1</sup> The ER Respondents cite two reasons for  
2 dismissal: 1) the Commission has no jurisdiction to enforce the escrow laws, and 2) even if the ER  
3 Respondents could be viewed as needing an escrow license, “failing to disclose such an obscure and  
4 technical violation of the escrow laws would not constitute securities fraud.”<sup>2</sup>

5 The Fourth Procedural Order, dated August 13, 2014, set forth in detail the standard used to  
6 review the April 4, 2014 ER Respondents’ Motion to Dismiss. As stated in the prior order, it is  
7 proper to apply the Arizona Rules of Civil Procedure in considering a motion to dismiss.  
8 Accordingly, the present motion shall be reviewed under Ariz. R. Civ. P. Rule 12(b) as a motion to  
9 dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which  
10 relief may be granted, with regard to that portion of the Amended Notice for which the Respondents  
11 seek dismissal.

12 The ER Respondents argue that the Commission does not have jurisdiction to make  
13 determinations regarding what constitutes an escrow and who may be an escrow agent.<sup>3</sup> The ER  
14 Respondents contend that these powers are vested in the Arizona Department of Financial  
15 Institutions.<sup>4</sup> The ER Respondents contend that the Commission’s powers are limited and do not  
16 exceed those derived from a strict construction of the Arizona Constitution and implementing  
17 statutes.<sup>5</sup> The ER Respondents further contend that even if the Commission has jurisdiction to  
18 consider this issue, the Division has not alleged that the ER Respondents were aware of the licensing  
19 requirement or that investors would have received any benefit or protection from an escrow license.<sup>6</sup>

20 The Division, in its written response, cites several paragraphs of the Amended Notice which  
21 set forth the Division’s allegations that Respondents ER and Bersch or Wanzek engaged in an escrow  
22 business or acted as escrow agents without disclosing to investors that they were not licensed to do so  
23 by the Arizona Department of Financial Institutions.<sup>7</sup> The Division contends that it is seeking to  
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25 <sup>1</sup> Amended Notice at ¶ 88(e).

26 <sup>2</sup> Motion and Amended Answer at 3.

27 <sup>3</sup> *Id.* at 3-4.

28 <sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 3-4, citing *Tonto Creek Estates Homeowners Ass'n v. Arizona Corp. Comm'n*, 177 Ariz. 49, 55, 864 P.2d 1081, 1087 (Ct. App. 1993) and *Commercial Life Ins. Co. v. Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946).

<sup>6</sup> *Id.* at 4.

<sup>7</sup> Response at 2-5.

1 enforce the anti-fraud provisions of the Securities Act, and therefore jurisdiction is proper.<sup>8</sup> The  
2 Division cites *S.E.C. v. Levine*, 671 F. Supp. 2d 14, 28-29 (D.D.C. 2009), as precedent for finding  
3 securities fraud in an investment promoter's non-disclosure of acting as an unlicensed escrow agent.<sup>9</sup>  
4 The Division asserts that the ER Respondents' failure to disclose that ER was engaged in the conduct  
5 of an unlicensed escrow business constituted a material omission.<sup>10</sup>

6 The Respondents counter that materiality is a legal conclusion and that the Division has failed  
7 to set forth factual allegations to support its theory.<sup>11</sup> The Respondents further argue that *Levine* is  
8 non-controlling authority in Arizona and is distinguishable as the *Levine* defendants knowingly  
9 violated the escrow licensing requirement.<sup>12</sup>

10 Under A.A.C. R14-3-109(C), the Commission may dismiss an application or complaint with  
11 or without prejudice. An Administrative Law Judge may recommend dismissal to the Commission.<sup>13</sup>

12 The Commission's jurisdiction is established by Article XV of the Arizona Constitution and  
13 the Securities Act. Pursuant to A.R.S. § 6-110, the Arizona Department of Financial Institutions is  
14 established with the charge of execution of Arizona laws relating to financial institutions and  
15 enterprises. The Division alleges that the ER Respondents violated A.R.S. §44-1991 through their  
16 failure to disclose to offerees and investors that by serving as a custodian, the ER Respondents  
17 engaged in the conduct of an unlicensed escrow business. An allegation of fraud in connection with  
18 the offer or sale of securities is within the jurisdiction of the Commission, not the Department of  
19 Financial Institutions. The ER Respondents have failed to establish a jurisdictional basis for the  
20 Administrative Law judge to recommend dismissal of the Division's allegation.

21 The Fourth Procedural Order noted the following standards for review of a motion to dismiss  
22 for failure to state a claim upon which relief may be granted:

23 Motions to dismiss for failure to state a claim are not favored in  
24 Arizona.<sup>14</sup> In determining whether a complaint fails to state a claim,

25 <sup>8</sup> *Id.* at 8.

26 <sup>9</sup> *Id.* at 5-6.

27 <sup>10</sup> *Id.* at 7.

28 <sup>11</sup> Reply at 3.

<sup>12</sup> *Id.* at 4.

<sup>13</sup> See A.A.C. R14-3-109(C).

<sup>14</sup> *Acker v. CSO Chevira*, 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997).

1 the truth of the allegations must be assumed and all reasonable  
2 inferences therefrom must be indulged.<sup>15</sup> A motion to dismiss should  
3 not be granted unless it appears certain that the plaintiff would be  
4 entitled to no relief under any state of facts susceptible of proof in the  
5 stated claim.<sup>16</sup>

6 The ER Respondents contend that the Amended Notice must be dismissed, in part, because  
7 the Division has not alleged that they were aware of the escrow licensing requirement. However,  
8 scienter is not a requirement in a civil violation of A.R.S. § 44-1991(A)(2).<sup>17</sup> The ER Respondents  
9 further contend that the Division failed to allege facts necessary to establish materiality. It is unclear  
10 what facts the ER Respondents consider lacking. The Division has made factual allegations that the  
11 ER Respondents acted as unlicensed escrow agents and has further alleged that the ER Respondents  
12 failed to disclose this information to any investor. The question as to whether such non-disclosure is  
13 material does not require additional factual allegations. This is because the test of materiality is an  
14 objective one, not subject to the actual significance of an omission or misstatement to any particular  
15 buyer.<sup>18</sup> The ER Respondents have failed to establish that the Division would be entitled to no relief  
16 under any state of facts susceptible of proof as to that portion of the Amended Notice for which  
17 dismissal is sought.

18 IT IS THEREFORE ORDERED that **the ER Respondents' Motion to Dismiss is denied**, as  
19 the ER Respondents have failed to establish a basis for the Administrative Law Judge to recommend  
20 dismissal, in part, to the Commission at this time.

21 IT IS FURTHER ORDERED that the **hearing remains scheduled to commence on August**  
22 **5, 2015, at 10:00 a.m., at the Commission's offices, 1200 West Washington Street, Hearing**  
23 **Room No. 2, Phoenix, Arizona.**

24 IT IS FURTHER ORDERED that **the parties shall also set aside August 6-7, 10-14, 17 and**  
25 **19-21, 2015, for additional days of hearing**, if necessary.

26  
27 <sup>15</sup> *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008).

<sup>16</sup> *Dressler v. Morrison*, 212 Ariz. 279, 281, 130 P.3d 978, 980 (2006).

<sup>17</sup> *State v. Gunnison*, 127 Ariz. 110, 113, 618 P.2d 604, 607 (1980).

28 <sup>18</sup> *Trimble v. Am. Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136 (App. 1986).

1 IT IS FURTHER ORDERED that, if necessary, the Division and Respondents shall  
2 exchange supplemental or amended copies of their Witness Lists and any additional Exhibits  
3 by July 15, 2015, with courtesy copies provided to the presiding Administrative Law Judge.

4 IT IS FURTHER ORDERED that if the parties reach a resolution of the issues raised in  
5 the Notice prior to the hearing, the Division shall file a Motion to Vacate the Proceeding.

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

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

12 IT IS FURTHER ORDERED that withdrawal or representation must be made in compliance  
13 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the  
14 Rules of the Arizona Supreme Court). Representation before the Commission includes appearances  
15 at all hearings and procedural conferences, as well as all Open Meetings for which the matter is  
16 scheduled for discussion, unless counsel has previously been granted permission to withdraw by the  
17 Administrative Law Judge or the Commission.

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

21 DATED this 7<sup>TH</sup> day of July, 2015.

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25 \_\_\_\_\_  
26 MARK PRENY  
27 ADMINISTRATIVE LAW JUDGE  
28

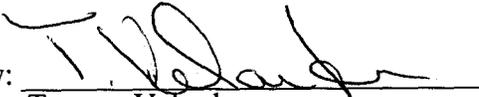
1 Copies of the foregoing mailed/delivered  
2 this 7 day of July, 2015, to:

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