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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
DOCKETED
JUL 27 2015
DOCKETED BY

COMMISSIONERS

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

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

ORIGINAL

SEVENTEENTH PROCEDURAL ORDER (Grants Motions and Schedules Telephonic Procedural Conference)

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.

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

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

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

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

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

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

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

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

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

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

On May 9, 2014, the Division filed its Response to Motion to Dismiss by All Respondents.

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

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

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

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

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

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

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

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

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

exchange of witness lists and copies of exhibits was accelerated.

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

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

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

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

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

counsel.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On April 24, 2015, the Division filed a Motion for Leave to File 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. The Division sought leave to amend its Notice of Opportunity for Hearing to provide greater detailed factual allegations and to expound upon the fraud allegations from the original Notice.

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

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

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

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

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

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

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

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

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

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

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

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

On May 7, 2015, the Division filed an 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").

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

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

On June 8, 2015, the ER Respondents filed a Motion to Dismiss and Answer to Amended Notice of Opportunity ("Motion and Amended Answer"). The ER Respondents sought dismissal of the Division's fraud allegation that the ER Respondents failed to disclose to offerees and investors they were engaging in the conduct of an unlicensed escrow business by serving as a Custodian. The ER Respondents argued dismissal was appropriate because the Commission has no jurisdiction to enforce escrow laws and the alleged violation does not constitute securities fraud.

Also on June 8, 2015, Respondent Concordia filed its Answer to 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.

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

On June 22, 2015, the Division filed its Response to Motion to Dismiss by the ER Respondents ("Response"). The Division argued that jurisdiction was proper because they are seeking to enforce anti-fraud provisions of the Securities Act. The Division cited *S.E.C. v. Levine*, 671 F. Supp. 2d 14, 28-29 (D.D.C. 2009), as precedent for finding securities fraud in an investment promoter's non-disclosure of acting as an unlicensed escrow agent. The Division further asserted that the failure of the ER Respondents to disclose their acting as an unlicensed escrow business constituted a material omission.

On June 30, 2015, the ER Respondents filed their Reply in Support of Motion to Dismiss ("Reply"). The ER Respondents argued that *Levine* is non-controlling authority and factually distinguishable. The ER Respondents further contended that materiality is a legal conclusion and that the Division has failed to set forth factual allegations to support its theory.

On July 2, 2015, the Division filed a Motion for Order Requiring Respondent Concordia to

file an Amended Answer that Complies with R14-4-305. The Division contended that Concordia's June 8, 2015 Answer fails to specifically admit or deny several of the allegations made in the Amended Notice.

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

On July 7, 2015, by Procedural Order, the ER Respondents' Motion to Dismiss was denied because the Commission has jurisdiction over an allegation of fraud in connection with the offer or sale of securities and the ER Respondents failed to establish that the Division would be entitled to no relief under any state of facts susceptible of proof as to that portion of the Amended Notice for which dismissal was sought.

On July 15, 2015, the ER Respondents filed a Notice of Service of Updated List of Witnesses and Exhibits.

On that same date, Respondent Concordia filed a Motion for Settlement Conference. Respondent Concordia asserts its belief that the allegations against it can be resolved short of proceeding with a hearing.

Also on July 15, 2015, the Division filed a Motion for Leave to Present Telephonic Testimony. The Division contends that good cause exists to allow the use of telephonic testimony at the hearing as eleven of its witnesses are located in Tucson, Lake Havasu City, or outside Arizona. The Division contends that telephonic testimony is permitted under the Commission's Rules of Practice and Procedure and its use would not abridge the Respondents' due process rights.

On July 16, 2015, a telephonic procedural conference was held as scheduled. The parties appeared through counsel. The ER Respondents provided a status report on their pending Motion to Stay filed with the Arizona Court of Appeals. The parties discussed the merits of holding a settlement conference and agreed upon a date. The parties discussed the Division's Motion for Leave to Present Telephonic Testimony and a schedule was set for responses to the motion. Respondent

Concordia stated its intent to file an amended answer.

Also on July 16, 2015, by Procedural Order, Respondent Concordia's Motion for Settlement Conference was granted. The Division's Motion for an Order Requiring Respondent Concordia to file an Amended Answer was also granted. A settlement conference was set for July 23, 2015. Filing dates were scheduled for Concordia's Amended Answer and for motions regarding requests for telephonic testimony at the hearing.

On July 17, 2015, Respondent Concordia filed an Amended Answer to 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.

On July 20, 2015, the ER Respondents filed a Motion to Allow Telephonic Testimony of Witnesses. The ER Respondents requested that 67 of their listed witnesses be permitted to testify telephonically as these witnesses live outside of the Phoenix area.

Also on July 20, 2015, the ER Respondents filed a Response to the Division's Motion for Leave to Present Telephonic Testimony. The ER Respondents stated no objection to the telephonic testimony of the Division's investor witnesses and no objection to the Division's witness from the California Department of Business Oversight, who will be testifying to only the authentication of documents. The ER Respondents specifically objected to the telephonic testimony of A. Craig Mason, Jr., a non-investor expected to be subject to "substantial" cross-examination.

On July 21, 2015, Respondent Concordia filed its Response to the Division's Motion for Leave to Present Telephonic Testimony, stating no objection to the motion.

Also on that day, Respondent Concordia Filed an Updated List of Witnesses and Exhibits.

On July 23, 2015, a settlement conference was held.

On July 24, 2015, the Division filed its Response/Non-Opposition to the ER Respondents' Motion to Allow Telephonic Testimony of Witnesses, and Reply in Support of Motion for Leave to Present Telephonic Testimony. The Division contended that: good cause exists to allow the out-of-state Mr. Mason to testify telephonically, the Commission cannot subpoena him under A.A.C. R14-3-109(O), it would be cost prohibitive to bring him in for an anticipated direct testimony of less than fifteen minutes, and permitting him to testify telephonically comports with procedural due process.

IT IS THEREFORE ORDERED that, good cause having been found to permit the taking of telephonic testimony, the **Division's Motion for Leave to Present Telephonic Testimony and the ER Respondents' Motion to Allow Telephonic Testimony of Witnesses are hereby granted.**

IT IS FURTHER ORDERED that the respective parties shall arrange for their telephonic testimony witnesses to be available by telephone as needed during the evidentiary hearing, commencing on August 5, 2015, and for those witnesses to call in to the Commission's Hearing Room No. 2 at the appropriate time, using a **landline telephone**,[1] the telephone number 1 (800) 689-9374, and participant passcode 415962#.

IT IS FURTHER ORDERED that a telephonic procedural conference shall be scheduled for **July 29, 2015, at 10:00 a.m.**

IT IS FURTHER ORDERED that on the date of and at least five minutes before the time set for the status conference, the parties shall call 1 (800) 689-9374, passcode 415962#, from a landline telephone, to participate telephonically in the status conference.

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

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

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

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

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

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[1] Mobile telephones do not provide adequate audio quality to permit the verbatim transcription of witness testimony.

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

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

DATED this 27th day of July, 2015.

MARK PRENY
ADMINISTRATIVE LAW JUDGE

Copies of the foregoing mailed/delivered this 27th day of July, 2015, to:

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