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BEFORE THE ARIZONA CORPORATION COMMISSION

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**COMMISSIONERS**

- SUSAN BITTER SMITH, Chairman
- BOB STUMP
- BOB BURNS
- DOUG LITTLE
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AZ CORP COMMISSION  
DOCKET CONTROL

ORIGINAL

In the matter of:

Docket No. S-20906A-14-0063

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

RESPONSE TO THE SECURITIES  
DIVISION'S MOTION TO QUASH

ER FINANCIAL & ADVISORY SERVICES,  
LLC,

Arizona Corporation Commission

DOCKETED

LANCE MICHAEL BERSCH, and

MAR 27 2015

DAVID JOHN WANZEK and LINDA  
WANZEK, husband and wife,

DOCKETED BY	RC
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Respondents.

Respondents ER Financial & Advisory Services, LLC, Lance Michael Bersch, David John Wanzek, and Linda Wanzek (the "ER Respondents") respond in opposition to the Securities Division's Motion to Quash Subpoenas, or in the Alternative, Motion for a Procedural Order Limiting the Scope of Subpoenas. The Motion should be denied because the two subpoenas were issued in compliance with Commission rules. Moreover, the subpoenas are for the depositions of the Division's key witnesses. The hearing in this case is only weeks away, and depositions should be allowed to go forward to enable the ER Respondents to prepare their defense.

**I. The Subpoenas comply with the Commission's Subpoena Rule and Deposition Rule.**

The Commission has specific rules governing subpoenas and depositions. These rules provide a broad right to parties to Commission cases set for hearing to have subpoenas and depositions in order to prepare for hearing. The subpoenas issued for the depositions of Division witnesses Clapper and Beliak complied with the Commission's Deposition Rule and Subpoena Rule. Those rules provide:

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1           **Deposition Rule – A.A.C. R14-3-109(P)**

2           Depositions. The Commission, a Commissioner, or any party to any proceeding  
3           before it may cause the depositions of witnesses to be taken in the manner  
4           prescribed by law and of the civil procedure for the Superior Court of the state of  
5           Arizona.

6           **Subpoena Rule – A.A.C. R14-3-109(O)**

7           Subpoenas. Subpoenas requiring the attendance of a witness from any place in the  
8           state of Arizona to any designated place of hearing for the purpose of taking  
9           testimony of such witnesses orally before the Commission may be issued upon  
10          application in writing. A subpoena may also command the person to whom it is  
11          directed to produce books, papers, documents or tangible things designated  
12          therein. The application for such subpoenas must specify, as clearly as possible,  
13          the books, waybills, papers, accounts or other documents desired....

14          The Division does not claim that the subpoenas violate these rules in any way. Rather, the  
15          Division argues that the subpoenas violate the Administrative Procedures Act (“APA”),  
16          specifically A.R.S. § 41-1062(A)(4). However, that statute provides that “[N]o subpoenas,  
17          depositions or other discovery shall be permitted in contested cases **except as provided by**  
18          **agency rule** or this paragraph.” (emphasis added). Because the Commission’s rules expressly  
19          provide for these subpoenas, they are part of the exception in A.R.S. § 41-1062(A)(4), and the  
20          subpoenas therefore do not violate the APA.

21          The ER Respondents continue to disagree with the Securities Division about whether  
22          broad civil discovery is available under A.A.C. R14-3-101(A) through that rule’s incorporation  
23          of the Rules of Civil Procedure. Indeed, broad civil-type discovery continues unabated in  
24          Utilities Division matters. But there is no need to revisit that debate here, because the  
25          Commission’s Deposition Rule and Subpoena Rule control. There is no need to look to a  
26          general incorporation of civil rules or civil discovery, because the subpoenas were authorized by  
27          specific Commission rules.

28          The Commission’s Subpoena Rule also provides for a specific procedure and specific  
29          grounds for a motion to quash a Commission-issued subpoena:

30                 The Commission or presiding officer, upon motion made promptly and, in any  
31                 event, at or before the time specified in the subpoena for compliance therewith  
32                 may:

- 1 1. Quash the subpoena if it is unreasonable or oppressive, or
- 2 2. Condition denial of the motion upon the advancement by the person in whose
- 3 behalf the subpoena is issued, of the reasonable cost of producing the books,
- 4 waybills, papers, accounts or other documents desired.

5 The Division does not allege that the subpoenas are “unreasonable or oppressive” or that they  
6 face unreasonable copying costs. Because the Division has not alleged any of the grounds for  
7 quashing a subpoena allowed by the subpoena rule, its motion should be denied.

8 **II. The subpoenas also comply with the Administrative Procedures Act.**

9 **A. The Executive Director did not violate statute by signing the subpoenas.**

10 The Division argues that under the APA, the Executive Director cannot sign a subpoena,  
11 and that the subpoena must be signed by the Administrative Law Judge instead. This argument  
12 fails in light of the Executive Director’s specific statutory authority to “issue necessary writs.”  
13 A.R.S. § 40-105(B)(1). A writ, of course, is “an order or precept in writing issued in the name of  
14 the state or by a court or judicial officer.” A.R.S. § 1-215(44). The subpoenas are orders issued  
15 in the name of the State, and are thus writs. *See e.g.* BLACK’S LAW DICTIONARY (7<sup>th</sup> ed.  
16 1999)(defining subpoena as a “writ commanding a person to appear before a court or other  
17 tribunal...”) Thus, the Executive Director has statutory authority to sign the subpoenas.

18 Moreover, the Division’s argument is contrary to longstanding Commission practice.  
19 The Commission’s website states that proposed subpoenas should be submitted to the Executive  
20 Director for signature:

21 Below are sample formats for Subpoenas for Utilities matters and Securities  
22 matters. Please select the applicable sample forms below and submit to the  
23 Executive Director’s Office, Arizona Corporation Commission, 1200 West  
24 Washington, 2nd Floor

25 <http://www.azcc.gov/Divisions/Administration/Subpoena/subpoena.asp>. The subpoena forms  
26 posted on that website all contain signature blocks for the Executive Director’s signature.  
27 Indeed, this procedure was expressly required by the Administrative Law Judge. The Division  
28 notes that the “presiding Administrative Law Judge directed the ER Respondents to apply to the  
Commission’s Executive Director for subpoenas.” [Division Motion at 3:8-9]. If the Division is

1 correct, the Administrative Law Judge ordered an illegal procedure, and the Executive Director  
2 acted unlawfully in signing the subpoenas. That is not the case.

3 Further, the Division's argument again ignores that A.R.S. § 41-1062(A)(4) specifically  
4 allows agencies to provide for subpoenas and depositions by agency rule. The Commission  
5 Subpoena Rule and Deposition Rule control here, and the subpoenas comply with those rules.

6 **B. Reasonable need exists for the subpoenas.**

7 Next, the Division argues that there must be a showing of reasonable need under the  
8 APA. Again, by adopting the Subpoena Rule and Deposition Rule, the Commission has  
9 provided for an avenue of discovery over and above the minimum amount specified in the APA.  
10 The Commission has every right under the APA do so. A.R.S. § 41-1062(A)(4).

11 To the extent a showing of reasonable need is required, the ER Respondents have a  
12 reasonable need for the depositions. The Division argues that "[a]ny reasonable need the ER  
13 Respondents may have had no longer exists." [Division Motion at 5:19]. That is incorrect. For  
14 example, the Division states "The Division will submit at the hearing that whichever Respondent  
15 signed an investor's Custodial Agreement was the salesperson for that investment...." [Division  
16 Motion at 6:3-5]. The ER Respondents are entitled to know what basis, if any, the Division has  
17 for this claim. Indeed, the ER Respondents intend to present evidence at the hearing that others  
18 sold some of the contracts, including Division witnesses Kenneth Crowder (of Concordia) and  
19 Lisa Fuhrman. Why weren't these people charged? Did the Division cut a deal with them for  
20 their testimony? Or was the Division unaware of the sales their own witnesses made? In  
21 addition, ER was not the only custodian. We understand that Chino Commercial Bank (a bank in  
22 California) and Kansas City Life or its affiliate Sunset Financial also served as the custodian of  
23 some of the contracts. Is the Division claiming these firms made sales? If so, why haven't they  
24 been charged? Is all the evidence the Division has of who made a sale the signature on the  
25 Custodial Agreement? The ER Respondents should be allowed to explore these questions at the  
26 depositions.

27 The Division also contends that the person who signed the Custodial Agreement is "the  
28 person who made the misrepresentations of guaranteed income and liquidity at issue." [Division

1 Motion at 6:3-5]. Is the Division truly saying that the exact same statements were made for each  
2 of the alleged 446 distinct investments? If the Division is unable to offer any specifics about  
3 who said what to whom, then its fraud allegations must fail. But if the Division intends to offer  
4 any specific evidence about the allegedly fraudulent statements, the ER Respondents are entitled  
5 to know about it. Only weeks from the hearing, the ER Respondents still do not know the  
6 specifics of what allegedly fraudulent statements the Division believes were made, to which  
7 investors, by which respondent, and when. The need for this information is only compounded  
8 by the fact that these transactions occurred many years ago, stretching back to the 1990's. Yet  
9 the Division has offered only generic and vague information about the fraud claims it will try to  
10 prove at the hearing. Either the Division must give specifics to allow the ER Respondents a fair  
11 opportunity to prepare for the hearing, or the Division must be precluded from offering evidence  
12 on the fraud allegations.

13 The Division also points to the "Financial Data Summary" prepared by the Division's  
14 accounting witness, Mr. Beliak. This summary document is a far cry from an expert report. The  
15 ER Respondents should be entitled to explore the basis for this document, and the methods the  
16 witness used to prepare it.

17 The Division also claims that, based as on the documents the Division produced, the ER  
18 Respondents now know the "principal amounts of restitution the Division seeks for each  
19 investor." [Division Motion at 7:4]. The key word here is "principal." The ER Respondents do  
20 not know the whether the Division seeks pre-judgment interest, or if so, in what amount, using  
21 what calculations, and on what basis. Nor do the ER Respondents know the amount of the  
22 administrative penalty the Division seeks, or the basis on which the Division will make its  
23 request. The ER Respondents need this information to prepare for their defense.

24 In addition, the ER Respondents do not know whether the Division has unproduced  
25 documents that support the ER Respondents claims or defenses. Nor do they know all of the  
26 investors or other potential witnesses the Division spoke to, nor what favorable remarks those

1 investors may have made to the Division. The Division has not produced a *Brady / Giglio*  
2 certification<sup>1</sup>, and the ER Respondents should be allowed to explore these areas.

3 For all these reasons, to the extent a showing of reasonable need is required, the ER  
4 Respondents have shown reasonable need. The Division argues that the depositions are sought  
5 as “tit for tat” “retaliation” for the examinations under oath the Division is seeking. [Division  
6 Motion at 5:14]. But the ER Respondents have been seeking depositions from the Division since  
7 they served Notices of Deposition on the Division in November 2014. [See Exhibits 6 and 7 to  
8 the Securities Division’s January 5, 2015 Motion to Quash Discovery Demands]. The  
9 depositions were not, and could not have been, prompted by the Division’s February 2015  
10 statements.

11 **III. The scope of the depositions should not be limited.**

12 Lastly, the Division argues that the depositions should be limited to the topics listed in  
13 the subpoena applications. But this list was illustrative only, and was not intended or presented  
14 as an exhaustive list of all of the topics for the deposition. The Applications included the  
15 following language “Moreover, the ER Respondents still do not know basic and critical facts  
16 regarding the administrative charges against them, including...” Both applications noted that  
17 these two particular witnesses are expected be important witnesses at the hearing. Further, each  
18 subpoena application had the following footnote:

19 The subpoena application form on the Commission’s website contains no  
20 provision for a showing of “reasonable need” and such a showing has traditionally  
21 not been required by the Commission for the issuance of a subpoena. However,  
22 this information is included to prevent an anticipated objection from the Securities  
23 Division.

23 As explained above, the ER Respondents have a reasonable need for the depositions and they  
24 should be allowed to question the Division’s witnesses without artificial constraints, given the  
25 witnesses’ broad scope of expected hearing testimony.

26 \_\_\_\_\_  
27 <sup>1</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972);  
28 see e.g. *Milke v. Mroz*, 236 Ariz. 276, 339 P.3d 659, 663 (App. 2014), review denied (Mar. 17,  
2015).

1 **IV. Conclusion.**

2 The depositions are necessary for the ER Respondents to prepare for the hearing. The  
3 Executive Director has specific statutory authority to issue subpoenas, and the subpoenas were  
4 issued in compliance with the Commission's Subpoena Rule and Deposition Rule. The Division  
5 has not alleged any of the grounds for a motion to quash proved in the Commission's Subpoena  
6 Rule. The motion should be denied.

7  
8 RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of March 2015.

9  
10  
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1 Original + 13 copies of the foregoing  
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7 Copies of the foregoing hand-delivered/mailed  
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