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March 27, 2015

By first class mail and electronic mail

James Burgess, Esq.
Enforcement Attorney
Securities Division
Arizona Corporation Commission
1300 W. Washington St., 3rd Floor
Phoenix, AZ 85007

Arizona Corporation Commission
DOCKETED

MAR 27 2015

Re: **Objection to Subpoenas**
In the Matter of Concordia Finance Ltd, et al.
ACC Docket No. No. S-20906A-14-0063
Securities Division investigation number 8371

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|-------------|-----------|
| DOCKETED BY | <i>RC</i> |
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Dear Mr. Burgess:

This letter constitutes the objection of David Wanzek and Linda Wanzek to the investigative subpoenas dated March 5, 2015.¹ The subpoenas are unduly burdensome, oppressive, void, and contrary to law. Further, the subpoenas have not been properly served. In addition, medical issues preclude Mrs. Wanzek from travelling to the examination. Lastly, it is improper to subpoena an innocent spouse like Mrs. Wanzek.

1. David and Linda Wanzek should not be required to travel over two thousand miles for an examination.

As your investigators have undoubtedly learned, David and Linda Wanzek have ten children, eight of whom are minor children living with David and Linda in Florida. Five of the children are adopted. It is unconscionable to demand that the mother of eight minor children leave her children and travel over two thousand miles for a needless "examination under oath". Moreover, by scheduling the examinations of Linda and David Wanzek on back-to-back days,

¹ The Division's subpoenas were investigatory subpoenas under A.A.C. R14-4-304, and not administrative subpoenas issued under A.A.C. R14-3-109. We understand that in the past the Division has contended that the Administrative Law Judge lacks the power to quash an investigative subpoena. However, we are filing a copy of this letter with Commission's docket control, so that there is a record of these objections.

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over two thousand miles from their home, the Division has made it very difficult for them to travel without leaving the children alone. Thus, the subpoenas are unduly burdensome and oppressive.

2. Linda Wanzek's medical condition precludes her from travelling over two thousand miles of miles for an examination

Linda Wanzek has a medical condition—serious chronic rheumatoid arthritis—that imperils her health if she travels. Attached as **Exhibit A** is a letter from Ms. Wanzek's doctor describing her condition and noting that "For the benefit of Linda's health I would prefer that she not travel." In light of Linda Wanzek's medical condition, a subpoena forcing her to travel over two thousand miles is unduly burdensome and oppressive.

3. Linda Wanzek as an innocent spouse, so there are no grounds to subpoena her.

There is simply no reason to subpoena Linda Wanzek. Linda Wanzek is the classic "innocent spouse." With ten children to raise, she is, and for decades has been, a stay-at-home mother with no involvement in her husband's business. The Division's own Notice of Opportunity alleges that "Linda Wanzek has been the spouse of Respondent David John Wanzek at all relevant times. Linda Wanzek may be referred to as "Respondent Spouse." Respondent Spouse is joined in this action under A.R.S. § 44-2031(C) solely for purposes of determining the liability of the marital community." (Notice, ¶ 6).

The Division has threatened to move to amend the Notice, arguing that Linda Wanzek is not an innocent spouse because her name is on three contracts. But these are all family contracts, and Linda Wanzek was listed as a document custodian simply as an accommodation to family members so that she would receive some income. She had no role in selling these contracts, or any other contracts. The contracts in question are for Robert and Beverly Garst, Dorothy and Vincent Wanzek and Gary Wanzek. Robert and Beverly Garst are Linda Wanzek's parents. Robert Garst, now deceased, was a retired Superior Court Judge. They were sold the investment by Kenneth Crowder (who is Linda Wanzek's uncle), who met with them in person and obtained the check from them directly. Linda Wanzek had no role in the sale and was listed a custodian only to receive the custodian fees.

Likewise, Dorothy and Vincent Wanzek are David Wanzek's parents, and Gary Wanzek is David Wanzek's brother. Again, Linda Wanzek had no role in selling to them and was listed solely to collect the custodial fees as a family member.

None of these people support the Division's current case, and they certainly won't support a case against Linda Wanzek. Linda Wanzek is an innocent spouse, and there are no

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grounds to examine her, and certainly not to force her to travel over two thousand miles with a serious medical condition for the examination. Thus, the subpoena to Linda Wanzek is unduly burdensome and oppressive.

4. The State of Arizona lacks subpoena jurisdiction over David and Linda Wanzek.

As specifically found in the Fourth Procedural Order in this docket, David and Linda Wanzek “have been residents of Florida since April 2010.” [4th Procedural Order at 25:7]. The State does not have subpoena jurisdiction over these out-of-state residents, unless they are personally served in the state. “Subpoenas to compel the attendance of a witness may run to the boundaries of the state and a witness present at any place in the state may be compelled to attend.” *Helge v. Druke*, 136 Ariz. 434, 437, 666 P.2d 534, 537 (App. 1983).

No such service has been made, and the subpoenas are without jurisdiction. The Commission has recognized this fundamental limitation on the State’s power in its subpoena rule, which provides:

Subpoenas requiring the attendance of a witness **from any place in the state of Arizona** to any designated place of hearing for the purpose of taking testimony of such witnesses orally before the Commission may be issued upon application in writing.

A.A.C. R14-3-109(O)(emphasis added).

Of course, under the civil discovery rules, a party may be required to attend a deposition. However, the 7th and 8th Procedural Orders found that discovery under the Arizona Rules of Civil Procedure will not be permitted in this case. As you know, we strongly disagree with this ruling, and broad civil-type discovery continues in Utilities Division proceedings. Despite this, it appears that the Administrative Law Judge will not allow civil discovery in this case.

In any event, even if the civil discovery rules applied, a defendant would not be forced to travel over two thousand miles for a deposition. “It has been held that although a plaintiff can designate any place for the taking of a deposition, it is presumed that the defendant will be examined at his residence or place of business or employment; and if another place is named and the defendant files a timely objection, it should be sustained absent some unusual circumstances to justify putting the defendant to such inconvenience.” *Rogers v. Fenton*, 115 Ariz. 217, 218, 564 P.2d 906, 907 (Ct. App. 1977); *see also O’Sullivan v. Rivera*, 229 F.R.D. 187, 189 (D.N.M. 2004) (“[i]n the absence of exceptional or unusual circumstances, when a deponent resides at a substantial distance from the deposing party’s residence, the deposing party should be required to take the deposition at a location in the vicinity in which the deponent resides, even if the

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deponent is a party.”)(quoting *Metrex Research Corp. v. United States*, 151 F.R.D. 122 (D.Colo.1993)); *Reishus v. Almaraz*, CV-10-0760-PHX-LOA, 2011 WL 676920, at *3 (D. Ariz. Feb. 23, 2011)(“Courts presume that a defendant's deposition will proceed at his place of residence, business or employment”)(citation omitted).

Moreover, where the deposition or examination is by subpoena—as is the case here—the civil rules are even stricter. Under Rule 45(b)(3)(B):

A subpoena commanding a person who is neither a party nor a party's officer to attend and give testimony at a hearing or deposition may not require the subpoenaed person to travel to a place other than:

- (i) the county in which the person resides or transacts business in person;
- (ii) the county in which the person is served with a subpoena, or within forty miles from the place of service; or
- (iii) such other convenient place fixed by a court order.

In short, the State does not have jurisdiction to subpoena these out-of-state witnesses. Moreover, under any standard, it is unreasonable to command a respondent to travel over two thousand miles to attend an examination.

5. The subpoenas were not issued by a proper officer of the Commission.

The subpoenas have not been signed by an “officer of the commission” as required by A.R.S. § 44-1823(A). That statute provides that for “the purpose of investigations or hearings which, in the opinion of the commission, are necessary and proper for the enforcement of this chapter, **any member of the commission, the director or any officer or officers designated by the commission** may administer oaths and affirmations, subpoena witnesses, take evidence and require by subpoena duces tecum or by citation the production of books...” (emphasis added). The subpoena was signed by Mark Dinell, the Assistant Director of the Commission. The Assistant Director is not a Commissioner, the Director of Securities, nor can he be considered an “officer” of the Commission. Assistant Director Dinell reports to the Director, who reports to the Executive Director, who reports to the Commission. He is multiple levels removed from the Commissioners elected by—and accountable to—the people of Arizona for the administration of the Securities Act. As explained in the Arizona Attorney General Office’s *Arizona Agency Handbook* (2014 ed.), Section 2.2:

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2.2 Definition of "Public Officer." A "public officer" is "the incumbent of any office, member of any board or commission, or his deputy or assistant exercising the powers and duties of the officer, other than clerks or mere employees of the officer." A.R.S. § 38-101(3). The executive heads of all state agencies and the members of all state boards and commissions are considered "public officers." Generally, all others working for the state are "employees."

While Assistant Director Dinell deserves great respect for his long service to the State, he is an employee, and not an officer. Because the subpoenas were not signed by a Commissioner, the Director, or an officer, the subpoenas were not properly issued under A.R.S. § 44-1823(A) and are void.

6. The subpoena was not properly served and the required witness fees were not paid.

Further, the subpoenas were not properly served. During the Procedural Conference on September 2, 2014, counsel for the Division moved that the Administrative Law Judge allow the Division to serve subpoenas for examinations under oath on counsel for the Mr. and Mrs. Wanzek. The ALJ denied this motion:

MR. BURGESS: One last request, Your Honor. We were wondering if Mr. Roshka and Mr. Sabo would accept service of subpoena for the examination under oath of Mr. Wanzek.

....

ALJ PRENY: I don't know whether I can – I think it is up to Mr. Sabo if he is willing to accept service or not. And I think the answer is no. So, Mr. Burgess, I think you may have to find other means.

[September 2, 2014 Transcript at pages 17 to 18]. Yet the Division served the subpoenas by mail to counsel. This violates the ALJ's ruling.

Lastly, the Division has failed to tender the required witness fees. See A.A.C. R14-23-109(O)(requiring same fees as in Superior Court).

7. Conclusion.

The subpoenas purport to compel parents to travel thousands of miles from their minor children. They imperil the health of an innocent spouse. For all of these reasons, the subpoenas to David and Linda Wanzek are unreasonably burdensome and oppressive. In addition, the

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subpoenas suffer from multiple legal deficiencies, rendering them void and of no effect. They were not served in Arizona, and thus exceed the subpoena jurisdiction of the State. They were not signed by an officer of the Commission, and were served by a method forbidden by the Administrative Law Judge.

Thus, David and Linda Wanzek will not be appearing for their examinations the subpoenas purport to require.

Very truly yours,

Snell & Wilmer, L.L.P.



Timothy J. Sabo

cc: Paul J. Roshka, Esq.
Craig Waugh, Esq.
David Wood, Esq.
Alan Baskin, Esq.
Hearing Division
ACC Docket Control (original + 13 copies)

Exhibit A

Anika Alar MD
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Rheumatology



Anika Alar MD

3/16/15

To Whom It May Concern:

This letter is in regard to patient Linda Wanzek. The patient has rheumatoid arthritis which can cause joint pain, joint swelling, stiffness, and fatigue. This is a chronic condition that usually persists for the patient's lifetime. She can develop flares for multiple reasons including stress. For the benefit of Linda's health I would prefer she not travel. Please provide accommodations to patient so that flares can be minimized. Thank you.

Sincerely,

Dr. Anika Alarakhia

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