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BEFORE THE ARIZONA CORPORA

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**COMMISSIONERS**

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

RECEIVED  
AZ CORP COMMISSION  
DOCKET CONTROL

2015 JUN 30 PM 4 21

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

**REPLY IN SUPPORT OF  
MOTION TO DISMISS**

Arizona Corporation Commission

**DOCKETED**

JUN 30 2015

DOCKETED BY MLB

The ER Respondents<sup>1</sup> reply in support of their Motion to Dismiss a portion of the Amended Notice Of Opportunity. The Amended Notice invents a new theory of fraud—one that has never been heard of, much less accepted, in Arizona. The Division’s novel theory is that it was fraudulent for the ER Respondents to not tell investors that the ER Respondents were acting as escrow agents without an escrow license from ADFI. Accepting this novel theory would exceed the Commission’s jurisdiction and unduly intrude into the jurisdiction of ADFI. Further, whether the ER Respondents were licensed as escrow agents is not a “material fact” [A.R.S. § 44-1991(A)], so this theory cannot support a finding of securities fraud.

Of course, it is far from a given that the Division’s expansive interpretation of the escrow laws is correct, or if correct, that the Division will be able to prove an escrow violation at the hearing. Moreover, application of Arizona law in this context—to contracts governed by

<sup>1</sup> All defined terms in this Reply have the meanings given them in the Motion to Dismiss filed on June 8, 2015, unless otherwise defined in this Reply.

SNELL & WILMER

LLP  
ONE ARIZONA CENTER  
400 E. VAN BUREN, SUITE 1900  
PHOENIX, ARIZONA 85004-2202

1 California law in connection with California loans made by a California business (Concordia)—  
2 may violate the Commerce Clause to the United States Constitution. *See e.g. Garkane Electric*  
3 *Coop. Inc.*, Decision No. 72175 (Feb. 11, 2011) at pages 10-19 (finding that the Commerce  
4 Clause preempts certain Arizona statutes even when applied to an entity operating in Arizona  
5 and subject to ACC jurisdiction). The ER Respondents reserve the right to develop a Commerce  
6 Clause argument in their closing brief in this docket. However, it is not necessary for the ACC  
7 to resolve this difficult Constitutional issue, because the Division’s escrow allegations suffer a  
8 number of other fatal defects which require the escrow allegations to be dismissed.

9 The Division’s escrow theory faces an insurmountable problem—escrow regulation is the  
10 business of ADFI, not the ACC. The Division does not refute the fundamental position that the  
11 Commission may exercise only those powers “derived from a strict construction of the  
12 Constitution and implementing statutes.” *Tonto Creek Estates Homeowners Ass'n v. Arizona*  
13 *Corp. Comm'n*, 177 Ariz. 49, 55, 864 P.2d 1081, 1087 (App. 1993); *Commercial Life Ins. Co. v.*  
14 *Wright*, 64 Ariz. 129, 139, 166 P.2d 943, 949 (1946)(“The Corporation Commission has no  
15 implied powers and its powers do not exceed those to be derived from a strict construction of the  
16 Constitution and implementing statutes.”) Thus, the Commission may adjudicate escrow law  
17 issues only if some provision in the Arizona Constitution or state statute gives it that power. The  
18 Division identifies no statute or constitutional provision. Thus, the ACC may not adjudicate  
19 violations of the escrow laws.

20 And even if the ACC had such a jurisdiction, it should not intrude into the jurisdiction of  
21 ADFI. The escrow statutes are far from clear, and ADFI as the agency charged with interpreting  
22 them, should have the opportunity to interpret and apply them. Further, ADFI has the  
23 enforcement jurisdiction over the escrow laws [A.R.S. §§ 6-121 to 6-138], and thus ADFI has  
24 the enforcement discretion to decide whether to enforce any alleged violations. Here, the alleged  
25 escrow violation is technical, minor, and occurred long ago. It no surprise that ADFI has taken  
26 no action here. The ACC should respect ADFI’s apparent decision to take no action.

1 Further, any escrow violation is not material. Indeed, the ADFI's failure to pursue the  
2 alleged escrow violation shows that any such violation was technical and minor, and thus could  
3 not be material to investors. As explained in the motion to dismiss:

4  
5 The Division does not allege that any of the investors thought that the ER  
6 Respondents had an escrow license, or indeed, had ever heard of Arizona's  
7 escrow licensing scheme or the ADFI. Nor does the Division point to any  
8 protection or benefit that an escrow license would have given investors. Further,  
9 the Division does not allege that the ER Respondents knew about this obscure  
10 licensing requirement. Failing to disclose the absence of an escrow license (if one  
11 was needed), when neither the ER Respondents nor the alleged investors had ever  
12 heard of the licensing scheme, and when the licensing scheme would have offered  
13 no additional protection to the investors, cannot be securities fraud.

14 [Motion, page 4]. The Division fails to respond to any of these points. Nor does the Division  
15 point to any other facts alleged in the Amended Notice that would support a finding that the  
16 failure to disclose the escrow violation was material. All the Amended Notice offers is a bare  
17 allegation of a legal conclusion—that the failure to disclose was material—without out any  
18 factual allegations to show why the failure to disclose was material. [Amended Notice at ¶ 88,  
19 quoted in the Division's Response at page 5.]. This is insufficient—the Division must allege  
20 facts to support its theory. See *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d  
21 344, 346 (2008) (“a complaint that states only legal conclusions, without any supporting factual  
22 allegations, does not satisfy Arizona's notice pleading standard.”). The Division has conceded  
23 that the notice pleading standard applies to Notices of Opportunity.<sup>2</sup> Indeed, the relevant  
24 statutory language—requiring “a short and plain statement”—is taken directly from the Rules of  
25 Civil Procedure.<sup>3</sup> The Division was required to allege facts to support its allegation that the  
26 failure to disclose the alleged escrow violation was material, and it has failed to allege any such  
27 facts. The escrow allegations must therefore be dismissed.

28 <sup>2</sup> See Securities Division's May 9, 2014 Response to Motion to Dismiss, at page 11, line 1.

<sup>3</sup> See Securities Division's May 9, 2014 Response to Motion to Dismiss, at page 11, lines 1 to 7  
and footnote 4.

1           Rather than pointing to specific factual allegations supporting the Division's theory that  
2 the alleged escrow violations are material, the Division relies on *S.E.C. v. Levine*, 671 F.Supp.2d  
3 14, 28-29 (D.D.C. 2009). This out-of-state case is not controlling authority in Arizona, and as a  
4 solitary district court case, it has limited (if any) persuasive value. Moreover, the Division's  
5 reliance on this SEC case is highly ironic, given the Division's objection to applying even U.S.  
6 Supreme Court SEC cases, such as *Gabelli v. S.E.C.*, 133 S.Ct. 1216, 1221, 1223 (2013), to this  
7 docket. Apparently, the Division believes that only the SEC decisions that favor it should apply  
8 here.

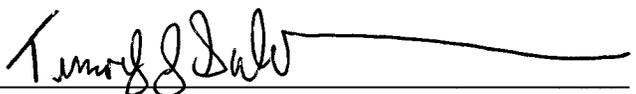
9           To the extent *Levine* is considered, it is distinguishable. Presumably, the SEC complied  
10 with the Rules of Civil Procedure, and alleged (and then proved) sufficient facts to support a  
11 finding that the failure to disclose in that case was material. Further, in *Levine*, the entities at  
12 issue were named "Delaware Escrow" and "Euro Escrow", and the accepted investor funds for  
13 investment in stocks, a traditional escrow activity. Further, the Court found that the defendants  
14 knew of the licensing requirement and intentionally chose not to comply. The Court noted that  
15 "The Levines also must have known that escrow companies need to be licensed in Nevada  
16 because their daughter filled out an application for a business license for Euro Escrow and  
17 represented that Euro Escrow was not an escrow agency." *Id.*, 671 F.Supp. 2d. at 31. Thus,  
18 there were reasons to believe that the investors may have expected an escrow license, that the  
19 defendants knew of the licensing requirement, and that they knowingly violated the requirement.  
20 Similar allegations are wholly lacking in this case.

21           Further, the defendants in *Levine* violated a prior injunction, and the court found that their  
22 testimony on various points was not believable. They weren't going to get the benefit of the  
23 doubt on any point.

24           The federal securities laws have existed for over 80 years. In those eight decades, there  
25 has apparently been exactly one case accepting the Division's "unlicensed escrow agent" theory  
26 of securities fraud. That case is an out-of-state district court decision. There is very little  
27 support of the Division's theory, and it should be rejected.  
28

1 In sum, the ACC should leave escrow issues to the ADFI. Further, the Division has not  
2 alleged any facts to support its legal conclusion that the escrow issue was material. The only  
3 support for the Division's position is *Levine*, which is both distinguishable and very weak  
4 authority. Accordingly, the Division's escrow allegations should be dismissed.

5  
6 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June 2015.  
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8  
9 By 

10 Timothy J. Sabo  
11 SNELL & WILMER L.L.P.  
12 One Arizona Center  
13 400 East Van Buren  
14 Phoenix, AZ 85004-2202  
15 Phone: 602.382.6347  
16 Email: [tsabo@swlaw.com](mailto:tsabo@swlaw.com)

17 and

18 Paul J. Roshka, Jr.  
19 Craig Waugh  
20 POLSINELLI, P.C.  
21 One East Washington St., Suite 1200  
22 Phoenix, AZ 85004-2568  
23 Phone: 602.650.2098  
24 Email: [proshka@polsinelli.com](mailto:proshka@polsinelli.com)  
25 Email: [cwaugh@polsinelli.com](mailto:cwaugh@polsinelli.com)

26 *Attorneys for the ER Respondents*  
27  
28

SNELL & WILMER  
L.L.P.

ONE ARIZONA CENTER  
400 E. VAN BUREN, SUITE 1900  
PHOENIX, ARIZONA 85004-2202

1 Original + 13 copies of the foregoing  
2 filed this 30<sup>th</sup> day of June 2015, with:

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 West Washington  
6 Phoenix, Arizona 85007

7 Copies of the foregoing hand-delivered/mailed  
8 this 30<sup>th</sup> day of June 2015, to:

9 Mark H. Preny, Esq.  
10 Administrative Law Judge  
11 Hearing Division  
12 Arizona Corporation Commission  
13 1200 West Washington  
14 Phoenix, Arizona 85007

15 James D. Burgess, Esq.  
16 Securities Division  
17 Arizona Corporation Commission  
18 1300 West Washington, 3rd Floor  
19 Phoenix, Arizona 85007

20 Alan S. Baskin, Esq.  
21 David E. Wood, Esq.  
22 Baskin Richards, PLC  
23 80 East Rio Salado Parkway, Suite 511  
24 Tempe, Arizona 85281  
25 *Attorneys for Concordia Finance Company, LTD.*

26 By *Jack Motoward*

27 21965194  
28