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BEFORE THE ARIZONA CORPORATION COMMISSION

2015 JUL -2 P 3: 54

COMMISSIONERS

AZ CORP COMMISSION
DOCKET CONTROL

- SUSAN BITTER SMITH, Chairman
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In the matter of:

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

ER FINANCIAL & ADVISORY SERVICES, L.L.C.,

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA WANZEK, husband and wife,

Respondents.

DOCKET NO. S-20906A-14-0063

MOTION FOR ORDER REQUIRING RESPONDENT CONCORDIA TO FILE AN AMENDED ANSWER THAT COMPLIES WITH R14-4-305

Arizona Corporation Commission
DOCKETED
JUL 02 2015

DOCKETED BY *MLB*

Pursuant to R14-3-106(K), the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") moves for an order requiring Respondent Concordia Financing Company, Ltd. ("Concordia") to file an Amended Answer that complies with Commission Rule R14-4-305. The Answer Concordia filed in response to the Amended Notice Of Opportunity For Hearing ("Amended Notice") does not comply with R14-4-305 because it evades answering dozens of allegations. Concordia variously asserts that it is not required to answer because:

- "The allegations in paragraph *[fill in the number]* refer to documents that speak for themselves, and require no answer.";
- "Paragraph *[fill in the number]* is the Securities Division's legal opinion and not a factual allegation and requires no response."; or

- “The allegations in paragraph [fill in the number] are an inaccurate, incomplete and misleading statement of the facts.”

Commission Rule R14-4-305(B)(2) requires “an admission or denial of each allegation in the notice.” It does not permit these non-responses, which do nothing to inform the Hearing Officer or the Division which allegations in the Amended Notice are and are not in dispute. Accordingly, the Hearing Officer should issue an order requiring Concordia to file an Amended Answer that complies with R14-4-305.

MEMORANDUM OF POINTS AND AUTHORITIES

Commission Rule R14-4-305 (“Answers”) governs the procedure for a respondent to answer a notice of opportunity for a hearing in an enforcement proceeding under the Securities Act. It provides in relevant part:

- A. Within 30 calendar days after the date of service of a notice of an opportunity for a hearing, a respondent who has requested a hearing shall file in the record and serve on the Division an answer to the notice.
- B. The answer shall contain the following:
 - 1. *An admission or denial of each allegation* in the notice.
 - 2. The original signature of the respondent or the respondent’s attorney.
- C. A statement of a lack of sufficient knowledge or information shall be considered a denial of an allegation.
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- E. When a respondent intends in good faith to deny only a part or a qualification of an allegation, the respondent shall specify that part or qualification of the allegation and shall admit the remainder.

Commission Rule R14-4-305 (emphases added).

1 Thus, Rule R14-4-305 requires a respondent to answer “each allegation in the
2 notice” by doing one of three things: (1) admitting the allegation; (2) denying the
3 allegation; or (3) stating the respondent lacks sufficient knowledge or information to
4 either admit or deny the allegation, in which case that statement operates as a denial
5 of the allegation. In this way, Commission Rule R14-4-305 corresponds with Rule
6 8(b) of the Arizona Rules of Civil Procedure, and Rule 8(b) of the Federal Rules of
7 Civil Procedure, which both require a party to admit or deny the opposing party’s
8 allegations, or state that the party lacks sufficient knowledge or information, in
9 which case that statement operates as a denial of the particular allegation.¹ Like Rule
10 8(b) of those Rules of Civil Procedure, Commission Rule R14-4-305 “permits only
11 three possible responses to a complaint: (1) admission; (2) denial; or (3) a disclaimer
12 statement in compliance with [the] provision for lack of knowledge or information,
13 which is deemed a denial.” *Lane v. Page*, 272 F.R.D. 581, 602 (D. N.M. 2011).

14 “Responses that documents speak for themselves ... do not comply with [these
15 Rules’] requirements.” *Id.* at 602-03 (citing numerous cases); *Azza Int’l Corp. v. Gas*
16 *Research Inst.*, 204 F.R.D. 109, 110 (N.D. Ill. 2001) (referring to “impermissible
17 statement that a document ‘speaks for itself’ ”); *Bruce v. Anthem Ins. Cos., Inc.*,
18 2015 WL 1860002 at *2 (N.D. Tex. 4/23/2015) (defendants’ answer was deficient in
19 responding that a “document speaks for itself”; compelling defendants to file an
20 amended answer). Responding by stating “the document ‘speaks for itself’ is an
21 “unacceptable device, used by lawyers who would prefer not to admit something that
22 is alleged about a document in a complaint (or who may perhaps be too lazy to craft
23

24 ¹ Unlike those Arizona and Federal Rules, however, Rule R14-4-305 does not permit
25 a respondent to make a general denial. Nor does Rule R14-4-305 contain any
26 provision similar to the provision in Arizona’s Rule 8(b) allowing a pleader to
“generally deny all the averments except such designated averments or paragraphs as
the pleader expressly admits....” Ariz. R. Civ. P. 8(b).

1 an appropriate response to such an allegation). . . .” *State Farm v. Mut. Auto. Ins. Co.*
2 *v. Riley*, 199 F.R.D. 276, 279 (N.D. Ill. 2001). As the *Riley* court stated:

3
4 This Court has been attempting to listen to such written materials
5 for years (in the forlorn hope that one will indeed give voice)—but
6 until some such writing does break its silence, this Court will
7 continue to require pleaders to employ one of the three alternatives
8 that are permitted by Rule 8(b) in response to all allegations about
9 the contents of documents (or statutes or regulations).

10 *Id.* at 279.

11 Responding that an allegation is “a legal opinion” or “legal conclusion” that
12 requires no answer is also improper. *See Lane*, 272 F.R.D. at 603 (“Rule 8 does not
13 permit a defendant to respond only by stating that the plaintiff’s allegations
14 ‘constitute conclusions of law.’”) (internal quotation omitted); *Riley*, 199 F.R.D. at
15 278 (“Another regular offender is the lawyer who takes it on himself or herself to
16 decline to respond to an allegation because it ‘states a legal conclusion.’ That of
17 course violates the express Rule 8(b) requirement that all allegations must be
18 responded to.”). It is insufficient to deny an allegation on the basis that it is a “legal
19 conclusion.” *Bruce*, 2015 WL 1860002 at *2. “[I]t disregards established law from
20 the highest authority on down that legal conclusions are an integral part of the
21 federal notice pleading regime.” *Riley*, 199 F.R.D. at 278 (citing *Neitzke v. Williams*,
22 490 U.S. 319, 325 (1989), and *Denton v. Hernandez*, 504 U.S. 25, 31 (1992)).
23 “Therefore, legal conclusions must be addressed in one of the three ways
24 contemplated by Rule 8.” *Lane*, 272 F.R.D. at 603.

25 Concordia ignores these basic rules of pleading and Commission Rule R14-4-
26 305. Concordia refused to answer thirty (30) paragraphs of the Amended Notice by
repeatedly asserting, “The allegations in paragraph [fill in the number] refer to
documents that speak for themselves, and require no answer,” or similar statements

1 that documents “speak for themselves.” *See* Answer at ¶¶ 12, 13, 14, 15, 16, 17, 18,
2 19, 20, 21, 22, 23, 24, 25, 26, 30, 31, 32, 33, 34, 40, 48, 49, 62, 63, 64, 66, 72, 73,
3 76. *See also* Answer at ¶¶ 27 and 28 (asserting that the referenced “statutes speak
4 for themselves”).

5 Concordia refused to answer Paragraphs 67 and 68 of the Amended Notice by
6 asserting each “is the Securities Division’s legal opinion and not a factual allegation
7 and requires no response.”

8 In other places, Concordia simply avoided answering at all. For instance,
9 Paragraph 51 of the Amended Notice alleges: “According to Concordia, the
10 statements by Bersch and Wanzek that they were Concordia’s ‘Investor Relations
11 Office’ were false statements.” Concordia responded with a non-responsive
12 statement: “Concordia admits that Bersch and Wanzek were not its Investor
13 Relations Office.” Answer at ¶ 51. Paragraph 51 of the Amended Notice called for
14 Concordia to admit or deny the falsity of Bersch’s and Wanzek’s statements that they
15 were Concordia’s Investor Relations Office. Concordia’s slippery non-response
16 avoided its obligation to answer that straightforward allegation. “This type of
17 pleading is insufficient.” *Bruce*, 2015 WL 1860002 at *2 (ordering defendants to file
18 an amended answer because, among other defects, “the answer does not fairly
19 respond to the substance of the allegations of the complaint.”).

20 Concordia avoided answering other allegations by arguing, “The allegations in
21 paragraph [fill in the number] are an inaccurate, incomplete and misleading
22 statement of the facts,” and then asserting an affirmative allegation. *See* Answer at
23 ¶¶ 38 and 39. Concordia’s argumentative response does not comply with Rule R14-
24 4-305(B)(1)’s requirement that it (1) admit the allegations of Paragraphs 38 and 39,
25 (2) deny them, or (3) state it lacks sufficient knowledge or information to either
26 admit or deny the allegations.

1 Concordia should be required to promptly file an Amended Answer that
2 complies with Commission Rule R14-4-305. See *Azza Int'l*, 204 F.R.D. at 110 and
3 n.1 (ordering defense counsel to prepare an amended answer; “No charge is to be
4 made to defendants by their counsel for the added work and expense incurred in
5 correcting counsel’s own errors.”); *Lane*, 272 F.R.D. at 604; *Bruce*, 2015 WL
6 1860002 at *4 (granting motion to compel defendants to file an amended answer).
7 Concordia should be required to be “far more meticulous in specifying exactly which
8 allegations of the [Amended Notice] are and which are not being put into issue, thus
9 avoiding needless time and effort on [the Division’s] part in having to prove
10 undisputed matters.” *Azza Int'l*, 204 F.R.D. at 110.

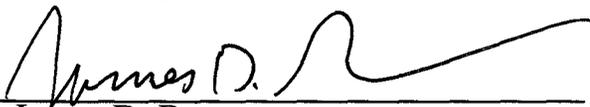
11 **CONCLUSION**

12 For all the foregoing reasons, the Securities Division respectfully requests an
13 order requiring Concordia to file an Amended Answer that complies with
14 Commission Rule R14-4-305.

15 RESPECTFULLY SUBMITTED this 2nd day of July, 2015.

16 ARIZONA CORPORATION
17 COMMISSION

18 By


19 James D. Burgess
20 Attorney for the Securities Division
21 Arizona Corporation Commission
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1 ORIGINAL and 8 copies of the foregoing
2 Response to Motion to Continue Hearing
3 filed this 2nd day of July, 2015, with:

4 Docket Control
5 Arizona Corporation Commission
6 1200 W. Washington St.
7 Phoenix, AZ 85007

8 COPY of the foregoing hand-delivered
9 this 2nd day of July, 2015, to:

10 The Honorable Mark H. Preney
11 Administrative Law Judge
12 Arizona Corporation Commission
13 1200 W. Washington St.
14 Phoenix, AZ 85007

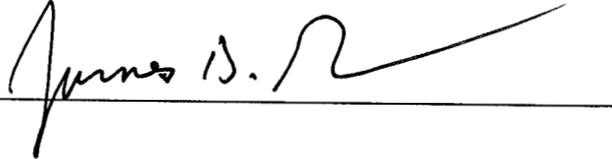
15 COPIES of the foregoing hand-delivered and emailed
16 this 2nd day of July, 2015, to

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