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BEFORE THE ARIZONA CORPORATION COMMISSION

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2015 JUL 15 A 11:23

SUSAN BITTER SMITH, Chairman  
BOB STUMP  
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TOM FORESE

AZ CORP COMMISSION  
DOCKET CONTROL

DOCKET NO. S-20906A-14-0063

In the matter of:

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

SECURITIES DIVISION'S MOTION  
FOR LEAVE TO PRESENT  
TELEPHONIC TESTIMONY

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

Arizona Corporation Commission

DOCKETED

LANCE MICHAEL BERSCH, and

JUL 15 2015

DAVID JOHN WANZEK and LINDA  
WANZEK, husband and wife,

DOCKETED BY

Respondents.

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") respectfully requests leave to present the telephonic testimony of the following witnesses during the hearing in the above-referenced matter:

- Lisa Fuhrman, a resident of Lake Havasu City, Arizona;
- Bryan Peters, a resident of Lake Havasu City, Arizona;
- Stephen Dennison, a resident of Tucson, Arizona
- Jill McClaran, a resident of Chino Hills, California;
- Phil Hatch, a resident of Lake Havasu City, Arizona;
- Andrea MacKay, a resident of Bethesda, Maryland;
- Verne Singleton, a resident of Thornton, Colorado;
- Wesley Luhr, a resident of Lake Havasu City, Arizona;



1 sale of the securities at issue and what Messrs. Bersch and Wanzek said and did not  
2 say in connection with those sales.

3 Mr. Mason is not an investor but he is the Senior Vice President and General  
4 Counsel for Kansas City Life Insurance Company and its subsidiary, Sunset  
5 Financial Services. He can testify whether Kansas City Life or Sunset Financial ever  
6 “approved” investments in Concordia, as Messrs. Bersch’s and Wanzek’s marketing  
7 materials misrepresented those companies did.

8 Finally, to the extent Ms. Gutierrez of the California Department of Business  
9 Oversight may be needed to lay foundation, she should be allowed to testify  
10 telephonically.

11 The burden of traveling to Phoenix to provide testimony in person is  
12 impractical for these witnesses because five of them reside out of state, five reside  
13 193 miles away in Lake Havasu City, and one resides 115 miles away in Tucson.  
14 The simple and well-recognized solution to this problem is to permit them to testify  
15 telephonically. Through this manner, not only will relevant evidence be preserved  
16 and introduced, but all parties will have a full opportunity for questioning, whether  
17 by direct or cross-examination of these witnesses.

## 18 **II. Argument**

### 19 **A. Good cause exists for permitting telephonic testimony.**

20 “When considering telephonic testimony, the initial inquiry should be whether  
21 good cause has been shown for its use.” *In re HM-2008-000867*, 225 Ariz. 178,  
22 182, 236 P.3d 405, 409 (2010). “In determining whether good cause has been  
23 demonstrated, the court may consider whether the hearing can conveniently be  
24 continued to allow in-person testimony.” *In re HM*, 225 Ariz. at 181 n.4, 236 P.3d  
25 at 408 n.4. “It may also consider the costs of bringing experts or other witnesses to  
26 court....” *Id.*

1 In the instant case, the investor witnesses listed above possess relevant  
2 knowledge of the offer and sale of the investments at issue, Respondents'  
3 communications with them about the investments, and related documents, but,  
4 because they reside in other states or long distances from Phoenix, they are  
5 practically unavailable for in-person testimony. The cost of bringing the witnesses  
6 to Phoenix would be prohibitively expensive for the Division. Moreover, the  
7 Division anticipates they would testify under direct examination for less than one  
8 hour each. Continuing the hearing date would do nothing to alleviate the significant  
9 inconvenience to the witnesses and the prohibitive expense to the Division of having  
10 them travel to Phoenix to testify in person.

11 It is more practical to allow these witnesses to testify telephonically during the  
12 Division's case in chief given that the Division's other witnesses have made  
13 themselves available for the current hearing dates. Permitting the witnesses to  
14 appear telephonically would greatly reduce the burden on both the witnesses and the  
15 Division of presenting their testimony.

16 Therefore, good cause exists for permitting the witnesses listed above to  
17 testify by telephone.

18  
19 **B. Permitting telephonic testimony does not infringe upon the Respondents'**  
20 **procedural due process rights and is within the Commission's**  
21 **administrative rules and practice.**

22 Upon finding good cause for using telephonic testimony, consideration should  
23 be given to "whether admission of telephonic testimony comported with due  
24 process." *In re HM*, 225 Ariz. at 182, 236 P.3d at 409. What constitutes due  
25 process "is not a technical conception with a fixed content unrelated to time, place  
26 and circumstances," but, rather, takes into account "such procedural protections as

1 the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)  
2 (internal quotations omitted). In a civil administrative proceeding, procedural due  
3 process requires balancing: (1) the individual’s interests; (2) government’s interests;  
4 and (3) the “likely impact of telephonic testimony on the accuracy and fairness of  
5 the process.” *In re HM*, 225 Ariz. at 182, 236 P.3d at 409.

6 These competing interests are protected by procedural safeguards inherent in  
7 telephonic testimony. Individuals have an interest in due process, property and  
8 liberty. Government interests typically include, among other things, protecting the  
9 public from harm (*id.*) and in “conserving fiscal and administrative resources.”  
10 *Mathews*, 424 U.S. at 347-48. Witnesses appearing by telephone are subject to cross  
11 examination. *In re HM*, 225 Ariz. at 182, 236 P.3d at 409. Moreover, telephonic  
12 testimony “preserves paralinguistic features such as pitch, intonation, and pauses  
13 that may assist an ALJ in making determinations of credibility.” *T.W.M. Custom*  
14 *Framing v. Indus. Comm’n of Ariz.*, 198 Ariz. 41, 48, 6 P.3d 745, 752 (App. 2000).  
15 At the same time, appearing telephonically preserves state resources that would  
16 otherwise have to be spent on travel and accommodations. Accordingly, telephonic  
17 testimony “does not significantly increase the risks of an erroneous deprivation.” *In*  
18 *re HM*, 225 Ariz. at 182, 236 P.3d at 409 .

19 Permitting telephonic testimony would have minimal negative impact on the  
20 accuracy and fairness of the evidentiary process. The witnesses at issue, though  
21 appearing by telephone, would be still be subject to cross examination by the  
22 Respondents and the Administrative Law Judge could still make determinations of  
23 credibility based the manner in which the witnesses testify. Furthermore, permitting  
24 telephonic testimony would enable the Division to present evidence that furthers the  
25 Commission’s interests in protecting the public from the harm allegedly committed  
26 by the Respondents and in conserving its financial and administrative resources.

1 Therefore, permitting the above witnesses to testify by telephone does not infringe  
2 upon the Respondents' procedural due process rights.

3 In addition, the Commission's Rules of Practice and Procedure are intended to  
4 "be liberally construed to secure just and speedy determination of all matters  
5 presented to the Commission." *See* A.A.C. R14-3-101(B). They encompass the use  
6 of other forms of testimony during administrative hearings. More specifically, Rule  
7 R14-3-109 states, "In conducting any investigation, inquiry, or *hearing*, neither the  
8 Commission, nor any officer or employee thereof shall be bound by the technical  
9 rules of evidence, and no informality in any proceeding or *in the manner of taking of*  
10 *testimony* shall invalidate any order, decision, rule, or regulation made, approved, or  
11 confirmed by the Commission." *See* A.A.C. R14-3-109(K) (emphases added).

12 In light of the relaxed evidentiary and procedural rules governing  
13 administrative hearings in this state, and because telephonic testimony does not  
14 jeopardize the fundamental fairness underlying these proceedings, this Tribunal has  
15 repeatedly recognized and approved the use of telephonic testimony in its  
16 administrative hearings to introduce probative evidence. *See, e.g., In the matter of*  
17 *Theodore J. Hogan and Associates, et al.*, Docket No. S-20714A-09-0553, *In the*  
18 *matter of Edward A. Purvis, et al.*, Docket No. S-20482A-06-0631; *In the matter of*  
19 *Yucatan Resorts, Inc., et al.*, Docket No. S-03539A-03-0000; *In the matter of Forex*  
20 *Investment Services Corporation et al.*, Docket No. S-03177A-98-0000. Therefore,  
21 permitting the above witnesses to testify by telephone is consistent with the rules and  
22 customary practice in administrative hearings before the Commission.

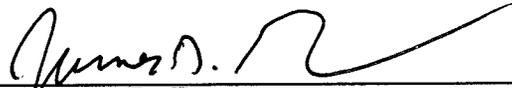
### 23 CONCLUSION

24 Permitting the witnesses identified above to testify telephonically at the  
25 upcoming administrative hearing allows the Division to present relevant witness  
26 evidence that is expected to be reliable and probative, is fundamentally fair, and does

1 not compromise Respondents' due process rights. Therefore, the Division  
2 respectfully requests that its motion for leave to present such telephonic testimony be  
3 granted.

4 RESPECTFULLY SUBMITTED 15<sup>th</sup> day of July, 2015.

5 ARIZONA CORPORATION  
6 COMMISSION

7 By   
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9 James D. Burgess  
10 Attorney for the Securities Division  
11 Arizona Corporation Commission  
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1 ORIGINAL and 8 copies of the foregoing  
2 Motion to Allow Telephonic Testimony  
3 filed this 15<sup>th</sup> 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 15<sup>th</sup> day of July, 2015, to:

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

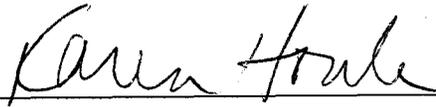
15 COPIES of the foregoing hand-delivered  
16 this 15<sup>th</sup> day of July, 2015, to

17 Alan S. Baskin  
18 David Wood  
19 Baskin Richards, PLC  
20 2901 N. Central Avenue, Suite 1150  
21 Phoenix, Arizona 85012  
22 Attorneys for Concordia Financing Company, Ltd.

23 Paul J. Roshka, Jr.  
24 Craig Waugh  
25 POLSINELLI  
26 One East Washington Suite 1200  
Phoenix, AZ 85004  
Attorneys for ER Financial & Advisory Services, LLC,  
Lance Michael Bersch, David John Wanzek, and Linda Wanzek

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.....

1 Timothy J. Sabo  
2 Snell & Wilmer,  
3 400 E. Van Buren St. #1900  
4 Phoenix, AZ 85004  
5 Attorneys for ER Financial & Advisory Services, LLC,  
6 Lance Michael Bersch, David John Wanzek, and Linda Wanzek

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