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BEFORE THE ARIZONA CORPORATION

**COMMISSIONERS**

DOUG LITTLE, Chairman  
BOB STUMP  
BOB BURNS  
TOM FORESE  
ANDY TOBIN

Arizona Corporation Commission

**DOCKETED**

AUG 12 2016

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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-14-0003

**ER RESPONDENTS' REPLY IN  
SUPPORT OF MOTION IN LIMINE  
NUMBER TWO**

Respondents ER Financial & Advisory Services, LLC<sup>1</sup>, Lance Michael Bersch, David John Wanzek, and Linda Wanzek (the "ER Respondents") reply in support of their Motion in Limine No. 2. This Motion objects to the Securities Division's proposed Exhibit S-177. This exhibit piles hearsay upon hearsay and summary upon summary. It should not be admitted.

The Division argues that the Exhibit is admissible as a summary under Rule 1006 of the Arizona Rules of Evidence. But Rule 1006 applies only to summaries of "voluminous writings, recordings, or photographs." The telephonic interviews are not "writings, recordings, or photographs", and thus they do not fall within Rule 1006. Nor has the Division shown that the interviews were "voluminous". Further, each interview was summarized on a form, which was then summarized on the exhibit. Thus, the exhibit is a summary of a summary. For all these reasons, the exhibit is not admissible under Rule 1006.

<sup>1</sup> To the extent it has continued existence and the capacity to be sued.

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1           Next, the Division argues that the exhibit is admissible under A.R.S. § 41-1062(A)(1),  
2 part of the Administrative Procedure Act (“APA”), contending that the exhibit may be admitted  
3 despite it being hearsay. But the Division has already invoked the hearsay rules in its Response  
4 to Motion in Limine No. 1. The hearsay rules cannot be applicable only when it suits the  
5 Division.

6           To the extent the hearsay rules do not apply, the ER Respondents note that rather than the  
7 general APA statute, the Commission has adopted a specific rule regarding evidence, A.A.C.  
8 R14-3-109(K). This rule provides that “Rules of evidence before the Superior Court of the state  
9 of Arizona will be generally followed but may be relaxed in the discretion of the Commission or  
10 presiding officer when deviation from the technical rules of evidence will aid in ascertaining the  
11 facts.” Thus, the Arizona Rules of Evidence still “generally” apply, but the ALJ has discretion to  
12 deviate from the “technical” parts of the rules where it would “aid in ascertaining the facts.” The  
13 ALJ should not deviate from the Rules of Evidence here. The exhibit is not just first level  
14 hearsay, it piles hearsay upon hearsay. Its inadmissibility in a civil action would not be on a  
15 mere technicality. *See State v. Montano*, 136 Ariz. 605, 607, 667 P.2d 1320, 1323  
16 (1983)(upholding order in limine excluding Crime Stop call that constituted “three levels of  
17 hearsay:” (1) the alleged statement; (2) its recounting to a police department; and (3) the  
18 department’s record of it.); *English-Clark v. City of Tucson*, 142 Ariz. 522, 526, 690 P.2d 1235,  
19 1239 (App. 1984)(excluding summary compilation of complaints to police department where the  
20 reliability of the compilation was not established, and “the list amounted to hearsay within  
21 hearsay”).

22           The Division cites *Wieseler v. Prins*, 167 Ariz. 223, 227, 805 P.2d 1044, 1048 (App.  
23 1990). But *Wieseler* and the cases it cites were decided under the APA, not this Commission’s  
24 evidence rule. Further, *Wieseler* did not involve multiple levels of hearsay or compilations of  
25 hearsay. In addition, even under *Wieseler*, hearsay can be admitted only if it is evidence “of the  
26 type” that “reasonable men are accustomed to rely [on] in serious affairs.” *Id.* (citations  
27 omitted). Here, reasonable people would not in a serious matter rely on summaries of summaries  
28 of secondhand communications prepared by agents of an interested party. Further, the

1 questionnaire forms filed out by the investigators, which the exhibit purports to summarize, are  
2 self-contradictory. The example attached to the Division's response states that the investor was  
3 not shown the referenced presentation, yet form also reports that the investor relied on statements  
4 in the unseen presentation in investing.

5 The person who compiled the Division's exhibit, and who will testify, Chief Investigator  
6 Clapper, did not conduct many of the interviews. Further, the Division has refused to allow  
7 Chief Investigator Clapper to be deposed, and has successfully moved to quash the subpoena for  
8 his deposition. Further, the investigators had no incentive to write down statements favorable to  
9 the ER Respondents. The Division could have recorded the interviews, as is becoming common  
10 practice with investigating agencies, but it chose not to. Further, the Division is free to call any  
11 of the interview participants if it so desires. Thus, this Exhibit does not "aid in ascertaining the  
12 facts" and it should not be admitted.

13 The Division states that the "ER Respondents do not contend in their Motion that the  
14 proposed Exhibit S-177 is inaccurate." (Division Response at 3:9-10). To the contrary, the  
15 Motion specifically stated that the "proposed exhibit consists of cryptic and at times misleading  
16 labels" and that it was "incomplete". (Motion at 3:7-10). Further, the Motion explained that the  
17 Exhibit was illegible. The Division has not responded to these points.

18 For these reasons, the exhibit should not be admitted.  
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1 RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of August 2016.

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21 Original + 13 copies of the foregoing  
22 filed this 12<sup>th</sup> day of August 2016, with:

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27 Copies of the foregoing hand-delivered/mailed  
28 this 12<sup>th</sup> day of August 2016, to:

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