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BEFORE THE ARIZONA CORPORATIO

COMMISSIONERS

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

Arizona Corporation Commission

DOCKETED

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AZ CORP COMMISSION  
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2016 AUG 12 P 35

Docket No. S-20906A-14-0053

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

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.

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 Number One ("Motion"), which objects to the Securities Division's Proposed Exhibits Nos. S-176(a) and S-176(b). These documents are out-of-state administrative orders, entered without notice, hearing or any participation by the ER Respondents. They are irrelevant and unduly prejudicial. The exhibits should not be admitted.

**I. These exhibits are not "adoptive admissions."**

For the first time in its Response, the Division argues that the orders are admissible as "admissions" of Mr. Bersch and Mr. Wanzek. The ER Respondents did not prepare the orders, nor have they ever agreed to the orders or said they were correct. The Division does not contend otherwise. Instead, the Division makes the Orwellian argument that Mr. Bersch's and Mr.

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

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1 Wanzek's *failure to respond* is an admission—that silence is speech, as opposed to its very  
2 opposite.

3 The Division relies on Rule 801(d)(2)(B) of the Arizona Rules of Evidence. The 800  
4 rules are the “hearsay” rules, and rule 801(d) covers “statements that are not hearsay”. Yet on  
5 the very same day, in its Response to the ER Respondents other motion in limine, the Division  
6 argued that the hearsay rules do not apply to Commission hearings. The Division can't have it  
7 both ways—the hearsay rules cannot apply only when it suits the Division.

8 To the extent the hearsay rules apply to this case, Rule 801(d)(2)(B) requires that a  
9 statement offered against a party be “one the party manifested that it adopted or believed to be  
10 true.” Here there is no manifestation that any of the ER Respondents adopted the statements in  
11 the administrative orders or believed them to be true.

12 The Division argues that Mr. Bersch and Mr. Wanzek's adoption of the statement can be  
13 shown by an “adoptive admission”. This exception treats silence as an admission, but only in  
14 extremely narrow circumstances. This kind of evidence is only to be used “with caution”, and  
15 with awareness that “[s]ilence may be motivated by many factors other than a sense of guilt or  
16 lack of an exculpatory story.” 2 *McCormick On Evidence* § 262 (7th ed.); *see also* 4 Mueller &  
17 Kirkpatrick, *Federal Evidence* § 8:47 (4th ed.)(noting that there “may be other factors at work  
18 that make the behavior of the silent party too ambiguous to interpret as an adoption”)

19 Procedurally, an adoptive admission can be employed only if the judge makes an express  
20 “determination that, under the circumstances, an innocent defendant normally would respond to  
21 the statement.” *United States v. Schaff*, 948 F.2d 501, 505 (9th Cir. 1991); *see also State v.*  
22 *Widenhofer*, 950 P.2d 1383, 1388 (Mont. 1997)(rejecting adoptive admission because there was  
23 no express determination by the trial court). Further, in “all cases, the burden is on the proponent  
24 to convince the judge that in the circumstances of the case a failure to respond is so unnatural  
25 that it supports the inference that the party acquiesced in the statement.” *Vazquez v. Lopez-*  
26 *Rosario*, 134 F.3d 28, 35 (1st Cir. 1998)(quoting *Ricciardi v. Children's Hosp. Med. Ctr.*, 811  
27 F.2d 18, 24 (1st Cir. 1987), which in turn quoted J. Weinstein & M. Berger, *Weinstein's*  
28 *Evidence* ¶ 801(d)(2)(B)[01], at 801–202 n.15 (1985) (internal quotation marks and alterations

1 omitted)); *see also* *Tober v. Graco Children's Products, Inc.*, 431 F.3d 572, 576 (7th Cir.  
2 2005)(also citing *Ricciardi*). Thus the Division has the burden of showing—and the ALJ must  
3 expressly find—that failing to respond to the California administrative orders was “so unnatural”  
4 that it should be deemed an agreement to each statement in the orders. The Division cannot  
5 make such a showing.

6 As explained at length in the Motion, the ER Respondents made a rational and very  
7 understandable decision to not respond to the California administrative orders. The California  
8 administrative orders were mere “desist and refrain” orders with no financial liability. Mr.  
9 Bersch and Mr. Wanzek were merely being told to stop selling Concordia’s truck financing  
10 contracts—something the Division’s own allegations claim they stopped doing long before the  
11 California orders. While the Division seeks over \$8 million in penalties, restitution and  
12 forfeiture in this case, the California orders imposed \$0 in liability. Thus, it makes sense to fight  
13 in Arizona but not in California. Fighting the charges in California would have been expensive,  
14 requiring an expert in California securities law. It would have made little sense to spend large  
15 sums to defend against \$0 in potential liability, or to preserve the right to sell contracts that even  
16 the Division says they haven’t sold in years.

17 In response, the Division suggests that Bersch and Wanzek should have fought the  
18 California orders to preserve their reputations, or to avoid potential discipline by the Board of  
19 Accountancy. But fighting may just have drawn further public attention, and any potential  
20 discipline is speculative. In fact, the Board has not acted, and given the age of the allegations  
21 and the fact that Concordia paid out more than it paid in, it is unlikely that they would act.  
22 Further, if Bersch and Wanzek were truly concerned about an issue with the Board, they would  
23 have conserved their resources for a battle there, rather than fighting an order with no financial  
24 consequences.

25 In any event, the ER Respondents do not have to demonstrate that their decision to not  
26 litigate in California was wise or strategically sound. Rather, the Division bears the heavy  
27 burden of showing that under these circumstances “a failure to respond is so unnatural” that it  
28 should be treated as an admission. *Vazquez, supra*. They have not done so.

1 A few federal cases allow for adoptive admissions in response to writings, such as letters.  
2 *McCormick On Evidence* § 262 (7th ed.)(but noting that “[c]ertainly such a failure to reply will  
3 often be less convincing than silence in the face of an oral charge”). But Arizona has a different  
4 rule—to qualify as an adoptive admission in Arizona, the statement must be made in the  
5 defendant’s “presence” *State v. VanWinkle*, 229 Ariz. 233, 235, ¶ 7, 273 P.3d 1148, 1150  
6 (2012); *State v. Saiz*, 103 Ariz. 567, 569, 447 P.2d 541, 543 (1968). The Division does not make  
7 such an allegation here. And even under the Federal rule, silence-in-response-to-writings is  
8 rarely treated as an admission. A good example is *Tober v. Graco Children's Products, Inc.*, 431  
9 F.3d 572, 576 (7th Cir. 2005). In that case, the Consumer Product Safety Commission sent a  
10 letter regarding an allegedly defective child swing. In a subsequent wrongful death case, the  
11 letter was not admissible. The Court noted that failing to respond to the letter was not “so  
12 unnatural” that it should be treated as an admission, noting in particular that “the letter does not  
13 mandate any corrective action beyond that already voluntarily underway.” *Id.* Like the CPSC’s  
14 letter in *Tober*, the California administrative orders required no action other than a cessation,  
15 which had already occurred years before. Thus, even under the Federal version of the rule, the  
16 orders would not be admissible. Nor are they admissible in Arizona.

17 **II. The exhibits are not otherwise admissible.**

18 The Division argues that the orders are admissible as relevant evidence under Rules of  
19 Evidence 402 and 403. But the Division has affirmatively invoked Rule 801 about hearsay.  
20 Because the orders do not qualify as “non-hearsay” admissions, they are hearsay and must not be  
21 admitted even if they are relevant.

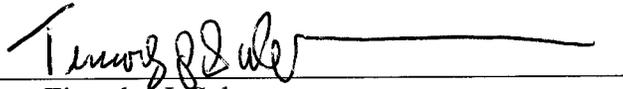
22 But they are not relevant. The orders were adopted without notice or hearing. They  
23 concern California law as applied to acts in California. This case concerns Arizona law and acts  
24 within or from Arizona. Further, even if the administrative orders were relevant and not hearsay,  
25 they would be inadmissible because “their probative value is substantially outweighed by a  
26 danger of... unfair prejudice, [or] confusing the issues.” Arizona Rules of Evidence, Rule 403.  
27 Here the danger of confusion and prejudice is substantial. The existence of these out-of-state  
28 orders may unduly sway the Commission. Indeed, evidence of prior proceedings is often

1 excluded as unduly prejudicial. *See e.g. Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 266-67, ¶¶  
2 46-54, 92 P.3d 882, 896-97 (App. 2004)(affirming exclusion of prior proceeding evidence due to  
3 prejudicial effect). This case should be decided by the facts and evidence presented to this  
4 Commission. The Division has submitted extensive lists of witnesses and exhibits. These  
5 exhibits have little if any value; weighed against the risks of prejudice and confusion they should  
6 not be admitted.

7 **III. Conclusion.**

8 The ER Respondents' Motion argued that the orders may not be used for issue  
9 preclusion.<sup>2</sup> The Division has not disputed this point. While the Division argues that these  
10 California administrative orders are "adoptive admissions", the Division has not met the heavy  
11 burden required to show an adoptive admission. The California orders are irrelevant hearsay,  
12 and even if relevant, their limited value is far outweighed by the risks of prejudice and confusion.  
13 Accordingly, the exhibits should not be admitted.

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15  
16 RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of August 2016.

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<sup>2</sup> The Motion also made an argument under Rule 106, the Rule of Completeness. The ER Respondents concede that the subsequent Arizona Supreme Court case cited by the Division controls and the Rule 106 argument is no longer viable.

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

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

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