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ORIGINAL  
COMMISSIONERS

BEFORE THE ARIZONA CORPORATION COMMISSION

AZ CORP COMMISSION  
DOCKET CONTROL

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

Arizona Corporation Commission

DOCKETED

SEP 12 2016

2016 SEP 12 P 2:24

DOCKETED BY *ML*

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

**TWENTY-FIRST  
PROCEDURAL ORDER  
(Denies Motion in Limine Number  
One, Takes Motion in Limine Number  
Two Under Advisement, and  
Reschedules Hearing)**

BY THE COMMISSION:

On February 27, 2014, the Securities Division (“Division”) of the Arizona Corporation Commission (“Commission”) filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties, and Order for Other Affirmative Action (“Notice”) against Concordia Financing Company, Ltd, a/k/a Concordia Finance (“Concordia”), ER Financial & Advisory Services, LLC (“ER”), Lance Michael Bersch, and David John Wanzek and Linda Wanzek, husband and wife (collectively “Respondents”), in which the Division alleged multiple violations of the Arizona Securities Act (“Act”) in connection with the offer and sale of securities in the form of investment contracts and promissory notes within or from Arizona.

The spouse of David John Wanzek, Linda Wanzek (“Respondent Spouse”), is joined in the action pursuant to A.R.S. § 44-2031(C) solely for the purpose of determining the liability of the marital community.

The Respondents were duly served with copies of the Notice.

On March 6, 2014, Respondents ER, Lance Michael Bersch and David John Wanzek filed a Request for Hearing. On March 14, 2014, Respondent Linda Wanzek filed a Request for Hearing.

1 On March 17, 2014, by Procedural Order, a pre-hearing conference was scheduled for April 10,  
2 2014.

3 On March 26, 2014, Respondent Concordia filed a Request for Hearing.

4 On March 27, 2014, by Procedural Order, the pre-hearing conference scheduled for April 10,  
5 2014, was affirmed, with notice issued to Respondent Concordia.

6 On April 4, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda  
7 Wanzek (collectively the "ER Respondents") filed a Motion to Dismiss and Answer.

8 On April 9, 2014, Respondent Concordia filed an Answer.

9 On April 10, 2014, at the pre-hearing conference, the parties appeared through counsel and  
10 requested oral argument regarding the Motion to Dismiss. The parties further proposed a schedule for  
11 filing motions prior to oral argument.

12 On April 15, 2014, by Procedural Order, oral argument and a status conference were scheduled  
13 to commence on May 21, 2014. It was further ordered that Respondent Concordia shall file any Motion  
14 to Dismiss by April 25, 2014, the Division shall file its Response to the Motions to Dismiss by May 9,  
15 2014, and the Respondents shall file any Reply by May 16, 2014.

16 On April 25, 2014, Respondent Concordia filed its Joinder to Motion to Dismiss of Respondents  
17 ER Financial & Advisory Services, LLC, Lance Michael Bersh, David John Wanzek and Linda  
18 Wanzek.

19 On May 5, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda  
20 Wanzek filed Acknowledgments of Possible Conflicts.

21 On May 9, 2014, the Division filed its Response to Motion to Dismiss by All Respondents.

22 On May 16, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda  
23 Wanzek filed their Reply in Support of Motion to Dismiss.

24 On May 21, 2014, oral argument and a status conference were held. The parties appeared  
25 through counsel and oral argument was presented. The Motion was taken under advisement and a  
26 schedule was proposed for the parties to submit supplemental citations.

27 On May 22, 2014, the Division filed its Supplemental Citation of Authorities.

28 On May 29, 2014, Respondents Concordia, ER, Lance Michael Bersch, David John Wanzek,

1 and Linda Wanzek filed their Joint Supplemental Citation of Authorities.

2 On August 13, 2014, by Procedural Order, it was found that the Respondents had not established  
3 dismissal to be appropriate and that it was necessary and proper to proceed with the Respondents'  
4 request for a hearing. Accordingly, a prehearing conference was scheduled on September 2, 2014.

5 On September 2, 2014, a pre-hearing conference was held. The parties appeared through  
6 counsel. The scheduling of a hearing was discussed. Counsel for the ER Respondents stated they  
7 would be filing a special action regarding the motion to dismiss. Counsel for the ER Respondents  
8 requested that part of the hearing be held in the Lake Havasu area to accommodate witnesses for the  
9 ER Respondents. This request was denied. After much discussion, a commencement date for the  
10 hearing was agreed to by the parties.

11 On September 2, 2014, by Procedural Order, a hearing was scheduled to commence on May  
12 11, 2015.

13 On January 5, 2015, the Division filed a Motion to Quash Discovery Demands by the ER  
14 Respondents. The Division asserted that on November 24, 2014, the Division was served by the ER  
15 Respondents with a "First Request for Production of Documents," a "First Set of Non-Uniform  
16 Interrogatories," a "First Set of Requests for Admissions," a "Notice of 30(b)(6) Deposition," and a  
17 "Notice of Deposition of Gary R. Clapper." The Division contended that the discovery demands by  
18 the ER Respondents should be quashed because: discovery in this proceeding is governed by the  
19 Administrative Procedure Act and the Commission's Rules, not the Arizona Rules of Civil Procedure;  
20 the ER Respondents have not demonstrated a reasonable need for the information they demand; the  
21 discovery demands include information and documents that are privileged and/or made confidential by  
22 statute; and the discovery demands are unreasonably overbroad, unduly burdensome and oppressive.

23 On January 26, 2015, by Procedural Order, the Division's Motion to Quash Discovery Demands  
24 was granted. In light of the ER Respondents' efforts to obtain discovery, the parties' exchange of  
25 witness lists and copies of exhibits was accelerated.

26 Later that day, the ER Respondents filed a Response to the Division's Motion to Quash. The  
27 ER Respondents contended that: the Commission's Rules allow for broad discovery; discovery is not  
28 barred by either the Administrative Procedure Act or statutory confidentiality; the ER Respondents

1 have a reasonable need for, and a constitutional right to, discovery; the requested documents are not  
2 privileged or work product; and the discovery is not burdensome. The ER Respondents also requested  
3 oral argument on the matter.

4 On January 27, 2015, by Procedural Order, oral argument was scheduled to be held on February  
5 11, 2015. Later that day, the Division filed a Notice of Intent to File Reply in Support of Motion to  
6 Quash Discovery Demands by the ER Respondents.

7 On February 3, 2015, the Division filed its Reply in Support of Motion to Quash Discovery  
8 Demands by the ER Respondents. The Division argued that: the ER Respondents have not properly  
9 sought discovery as provided under the Administrative Procedure Act and the Commission's rules; the  
10 Arizona Rules of Civil Procedure do not apply to discovery in this proceeding; prior procedural orders  
11 and Commission decisions cited by the ER Respondents can be distinguished or otherwise fail to  
12 support ordering the discovery sought; the ER Respondents have not demonstrated a reasonable need  
13 for the discovery sought; many of the documents sought are protected work product; and the discovery  
14 sought is confidential under A.R.S. § 44-2042(A).

15 On February 5, 2015, the Division filed a Notice of Errata Regarding its Reply in Support of  
16 Motion to Quash Discovery Demands by the ER Respondents.

17 On February 10, 2015, ER Respondents filed a Motion to Compel seeking discovery from  
18 Respondent Concordia and requesting oral argument. The ER Respondents contend that the  
19 Commission's rules allow broad discovery; their requests for production of documents are specific and  
20 not overbroad or burdensome; Concordia is the custodian of its own records; and a subpoena is not  
21 required as Concordia is a party to this proceeding. The ER Respondents further attached an affidavit  
22 from Respondent David John Wanzek responding to Concordia's communicated demand for a sworn  
23 statement as to the ER Respondents' claims that they returned files to Concordia and that Mr. Bersch  
24 and Mr. Wanzek were privy to attorney-client communications between Concordia and its counsel.

25 On that same day, counsel for ER Respondents filed a Notice of Change of Law Firm and  
26 Notice of Association with Counsel.

27 On February 11, 2015, oral argument was held. The parties appeared through counsel. The  
28 Division and the ER Respondents presented oral argument in favor of their respective positions on the

1 ER Respondents' requests for discovery. In light of the approaching commencement date of the  
2 hearing, the presiding Administrative Law Judge ruled from the bench, finding that while the  
3 Administrative Procedure Act applies, fairness dictates that in this case the Division more promptly  
4 provide the Respondents with certain documents in its possession. Though the prior order quashing  
5 the ER Respondents' discovery requests was affirmed, the Division was directed to disclose to the  
6 Respondents, by February 26, 2015, the contracts it intends to submit as evidence of the 446 alleged  
7 investments. The Division contended that it may not have contracts for all 446 of the alleged  
8 investments and that the time required for redaction of this many documents might make it difficult to  
9 meet the disclosure deadline. The Administrative Law Judge directed the Division to prioritize those  
10 contracts involving the ER Respondents and permitted the Division to disclose by March 12, 2015, any  
11 contracts which, after a good faith effort, are not ready by February 26, 2015. Additionally, the  
12 Division was directed to disclose the transcript from the examination under oath of Respondent Lance  
13 Michael Bersch, and the exhibits used therein, by February 26, 2015. The documents ordered to be  
14 disclosed by February 26, 2015, are all documents Division counsel stated he planned to use at hearing  
15 and, therefore, would have been subject to disclosure by the March 12, 2015 scheduled exchange of  
16 exhibits and witness lists.

17 On February 13, 2015, by Procedural Order, the Division was directed to disclose documents  
18 to the Respondents as set forth at by the Administrative Law Judge at oral argument on February 11,  
19 2015.

20 On February 17, 2015, the ER Respondents filed an Application for Administrative Subpoena  
21 requesting a subpoena for the deposition of anticipated Division witness Gary R. Clapper. The ER  
22 Respondents also filed an Application for Administrative Subpoena requesting a subpoena for the  
23 deposition of an Expert Accounting Witness to be designated by the Securities Division.

24 On March 6, 2015, the ER Respondents filed a Notice of Filing Affidavits of Service.

25 On March 9, 2015, by Procedural Order, a telephonic status conference was scheduled to  
26 convene on March 16, 2015. The purpose of the status conference was to address whether the ER  
27 Respondents continued to seek the production of further documents from Respondent Concordia in  
28 light of the upcoming deadline for disclosure of exhibits and witness lists.

1 On March 11, 2015, Respondent Concordia filed its Motion to Extend Time to Exchange List  
2 of Witnesses and Exhibits. Respondent Concordia requested an extension of the deadline to exchange  
3 its List of Witnesses and Exhibits to March 20, 2015, based upon counsel for Concordia's upcoming  
4 depositions and injunction hearings in matters unrelated to this case. In the motion, counsel for  
5 Concordia noted that counsel for the ER Respondents had been contacted and would not agree to an  
6 extension.

7 On March 12, 2015, the ER Respondents filed a Response in Opposition to Motion to Extend  
8 Time to Exchange List of Witnesses and Exhibits. The ER Respondents opposed the motion for the  
9 stated reasons that the hearing is imminent and the information is necessary for their defense.

10 Later on March 12, 2015, Respondent Concordia filed its List of Witnesses and Exhibits. The  
11 ER Respondents also filed a Notice of Service of List of Witnesses and Exhibits.

12 On March 16, 2015, a telephonic status conference was held. The parties appeared through  
13 counsel. The ER Respondents clarified which documents they continued to seek from Concordia.  
14 Counsel for Concordia indicated the Respondents may be able to resolve the issue among themselves  
15 within a couple weeks as Concordia needed time to prepare financial statements and ready board  
16 minutes for disclosure. The Respondents agreed to work toward resolving the discovery issues raised  
17 in the ER Respondents' Motion to Compel pending another status conference, and they further agreed  
18 to include the Division in the discovery process.

19 It was further determined at the status conference that Concordia's Motion to Extend Time to  
20 Exchange List of Witnesses and Exhibits had been rendered moot by Concordia's filing of a List of  
21 Witnesses and Exhibits, though Concordia may supplement its exhibits and witness lists based upon  
22 ongoing discovery. Also discussed was the Division's intent to amend the Notice of Opportunity to  
23 include Linda Wanzek as a participant, as opposed to being joined solely for determining the liability  
24 of the marital community. The Division agreed to file a motion to amend the Notice of Opportunity.  
25 The Division also stated its intent to file a motion to quash the scheduled depositions of Gary Clapper  
26 and an expert accounting witness. A schedule was determined for motion practice and oral argument  
27 on the motion to quash.

28 On March 18, 2015, by Procedural Order, oral argument was scheduled for April 2, 2015, to

1 address the issue of the Division's motion to quash. A status conference regarding Concordia's  
2 production of discovery was set for the same time.

3 On March 20, 2015, the Division filed a Motion to Quash Subpoenas, or in the Alternative,  
4 Motion for a Procedural Order Limiting the Scope of Subpoenas. The Division contended that the  
5 subpoenas should be quashed as they did not comply with the Administrative Procedure Act and the  
6 Respondents now have the documents and information they claim they needed. In the alternative, the  
7 Division argued that the scope of the depositions should be limited to only that information the ER  
8 Respondents specifically identified in their Applications for Subpoenas.

9 On March 27, 2015, the ER Respondents filed a Response to the Securities Division's Motion  
10 to Quash Subpoenas. The ER Respondents contended that the subpoenas complied with the  
11 Commission's rules and the Administrative Procedure Act, that the ER Respondents have a reasonable  
12 need for the depositions, and that the scope of the depositions should not be limited.

13 On that same day, the ER Respondents also filed a copy of a letter sent to counsel for the  
14 Division. The letter was identified as an objection to the Division's investigative subpoenas for  
15 Respondents David and Linda Wanzek. The ER Respondents noted that the Division has contended in  
16 the past that an Administrative Law Judge lacks the power to quash an investigative subpoena.  
17 However, the ER Respondents stated they filed a copy of the letter as a record of their objections.

18 On April 1, 2015, the Division filed its Reply in Support of Motion to Quash Subpoenas, or in  
19 the Alternative, Motion for a Procedural Order Limiting the Scope of Subpoenas. The Division argued  
20 that the subpoenas should be quashed because there is no finding in the record that the ER Respondents  
21 have demonstrated a reasonable need for the deposition testimony, the applications for subpoena were  
22 deficient and misleading as the ER Respondents have now identified additional matters for discovery  
23 beyond those stated in the applications, and the ER Respondents have received all the documents and  
24 information they claimed to need. In the alternative, the Division argued that the scope of the  
25 subpoenas should be limited based upon: the matters for which the ER Respondents have established  
26 a reasonable need pursuant to the Administrative Procedure Act; the Division's deliberative process  
27 and attorney-client privileges; and the Securities Act's confidentiality statute, A.R.S. § 44-2042(A).

28 On April 2, 2015, a status conference and oral argument were held. The parties appeared

1 through counsel. Counsel for the Respondents stated that Respondent Concordia is in the process of  
2 preparing requested documents for disclosure to the ER Respondents. Respondent Concordia asserted  
3 that some documents are likely in the possession of the Division, having been obtained from the State  
4 of California following proceedings conducted there, and could be more easily obtained from the  
5 Division. The Division asserted that the Securities Act's confidentiality statute applied, but noted that  
6 it would make available supporting documentation used by the Division's accountant in creating his  
7 Financial Data Summary.

8         The Division and the ER Respondents presented oral argument in favor of their respective  
9 positions on the Division's Motion to Quash Subpoenas, or in the Alternative, Motion for a Procedural  
10 Order Limiting the Scope of Subpoenas. Having considered the written and oral arguments presented  
11 by the parties, as well as the statutes, rules and other authority cited therein, the presiding  
12 Administrative Law Judge ruled from the bench and quashed the two subpoenas pursuant to A.A.C.  
13 R14-3-109(O). The Administrative Law Judge found that the Administrative Procedure Act applies  
14 and therefore, the ER Respondents must establish reasonable need for the information sought in the  
15 depositions. In finding that the ER Respondents did not have reasonable need to proceed with the  
16 depositions, the Administrative Law Judge noted: the numerous documents disclosed by the Division  
17 as exhibits subsequent to the issuance of the subpoenas; the forthcoming disclosure by the Division of  
18 the documents used by the accountant; the effect of these disclosed documents upon any current  
19 reasonable need for the depositions regarding those six areas specifically identified in the ER  
20 Respondents' Application for Subpoenas; and the schedule of the hearing, which will allow the ER  
21 Respondents additional time before presenting their case, thereby overcoming any surprise that may  
22 arise during the Division's presentation of its case in chief.

23         On April 3, 2015, by Procedural Order, the two subpoenas commanding attendance of the  
24 Division witnesses for depositions were quashed, as decided at the April 2, 2015 status conference.  
25 The Division was ordered to disclose by April 15, 2015, the supporting documentation relied upon by  
26 the Division's accountant in creating his Financial Data Summary. The Respondents were further  
27 ordered to continue to work toward resolving outstanding discovery issues arising from the ER  
28 Respondents' Motion to Compel.

1 On April 17, 2015, the ER Respondents filed a Motion to Continue Hearing. The reason for  
2 seeking a continuance was due to health conditions of Respondent Lance Michael Bersch. The ER  
3 Respondents requested that a status conference be set in about six months with the ER Respondents to  
4 file a status report at least 21 days before the status conference.

5 On April 22, 2015, by Procedural Order, a status conference was scheduled for April 28, 2015,  
6 to address the ER Respondents' Motion to Continue Hearing.

7 On April 24, 2015, Respondent Concordia filed its Response to Motion to Continue.  
8 Respondent Concordia had no objection to the continuance requested by the ER Respondents.

9 On April 24, 2015, the Division filed a Motion for Leave to File Amended Notice of  
10 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order  
11 for Administrative Penalties, and Order for Other Affirmative Action. The Division sought leave to  
12 amend its Notice of Opportunity for Hearing to provide greater detailed factual allegations and to  
13 expound upon the fraud allegations from the original Notice.

14 Also on April 24, 2015, the Division filed its Response to the Motion to Continue Hearing. The  
15 Division contended that the ER Respondents' Motion to Continue should be denied as the ER  
16 Respondents have failed to provide sufficient information to justify a postponement due to illness.  
17 However, the Division proposed a three month continuance of the hearing if leave is granted to amend  
18 the Notice of Opportunity.

19 On April 28, 2015, a telephonic status conference was held. The parties appeared through  
20 counsel. The ER Respondents' Motion to Continue and the Division's Motion for Leave to File  
21 Amended Notice were both discussed. It was also noted that a hearing was scheduled to convene in  
22 Superior Court on April 29, 2015, regarding a Motion to Stay Administrative Hearing filed by  
23 Respondents Bersch, Wanzek and Mrs. Wanzek, pursuant to their Notice of Appeal of the final  
24 judgment in the special action. A schedule was set for the filing of motions which would be addressed  
25 at a future status conference. The parties also agreed to vacate the scheduled hearing commencing on  
26 May 11, 2015.

27 On April 28, 2015, by Procedural Order, a status conference was scheduled to be held on May  
28 7, 2015, to address the pending motions and schedule a hearing date. The Procedural Order further set

1 deadlines for the filing of responses and replies regarding the pending motions. The Procedural Order  
2 also vacated the hearing scheduled to commence on May 11, 2015.

3 On April 29, 2015, the Division filed a Status Report Regarding the Superior Court Hearing on  
4 Motion to Stay Administrative Case Pending Appeal. The Division reported that the Superior Court  
5 hearing on the Motion to Stay Administrative Hearing did not occur as scheduled on April 29, 2015.  
6 The Division stated that the hearing was rescheduled for May 4, 2015.

7 On May 4, 2015, the ER Respondents filed a Reply in Support of Motion to Continue Hearing.  
8 The ER Respondents provided additional information regarding the medical condition of Respondent  
9 Bersch. Included as an exhibit to the reply was a letter from Mr. Bersch's doctor, who projected a  
10 recovery date for Mr. Bersch of July 15, 2015.

11 On that same date, the ER Respondents also filed a Response to Securities Division's Motion  
12 for Leave to File Amended Notice of Opportunity. The ER Respondents stated no objection to granting  
13 the Division leave to amend the Notice. The ER Respondents noted they would need additional time  
14 to address the new allegations. The ER Respondents further stated that they would reserve: the right  
15 to challenge the sufficiency of the new allegations by motion to dismiss; the right to include affirmative  
16 defenses, cross-claims, counterclaims or third party claims with their answer to the amended notice;  
17 and the right to review discovery related to the new allegations.

18 Also on May 4, 2015, the Division filed a Status Report Regarding the Superior Court Hearing  
19 on Motion to Stay Administrative Case Pending Appeal. The Division noted that the Court ruled from  
20 the bench and denied the Motion to Stay Administrative Hearing Pending Appeal. The Division stated,  
21 however, that the Court issued a temporary 30-day stay that would apply only to an evidentiary hearing  
22 before the Commission and not to the procedural conference set for May 7, 2015.

23 On May 5, 2015, Respondent Concordia filed its Response to Motion for Leave to File  
24 Amended Notice of Opportunity. Respondent Concordia stated that it had no objection to the  
25 Division's motion.

26 On May 6, 2015, the Division filed a Motion to Take Official Notice of the Superior Court's  
27 Minute Entry Denying Motion to Stay Administrative Case Pending Appeal. The Division attached as  
28 an exhibit a copy of the Superior Court's May 4, 2015 minute entry in Maricopa County Superior Court

1 Case No. LC2014-000415-001. In denying the request for stay, the Court found that the Plaintiffs had  
2 failed to demonstrate: (1) a likelihood of success on the merits, (2) that they would be irreparably  
3 harmed if a stay is not granted, (3) that a stay would not injure the opposing party, and (4) that a stay  
4 furthers the public interest. The Court did order a temporary stay of thirty days, or until June 3, 2015,  
5 to apply to the Court of Appeals for a stay of the administrative hearing.

6 On May 7, 2015, a telephonic status conference was held as scheduled. The parties appeared  
7 through counsel. Without objection by the Respondents, the Administrative Law Judge took official  
8 notice of the May 4, 2015 minute entry in Maricopa County Superior Court Case No. LC2014-000415-  
9 001. The parties agreed that the temporary stay ordered by the Court did not preclude present action  
10 on the pending motions and the scheduling of a hearing date after June 3, 2015. Without objection, the  
11 Division's Motion for Leave to File Amended Notice of Opportunity was granted. Discussion was  
12 held regarding the scheduling of the hearing and a new hearing date was agreed upon. Based upon the  
13 new hearing date and the projected recovery time for Mr. Bersch, the ER Respondents acknowledged  
14 that their April 17, 2015 Motion to Continue Hearing was now moot. The ER Respondents also  
15 acknowledged that they no longer had any discovery issues with regard to Respondent Concordia, as  
16 raised originally in the ER Respondents Motion to Compel filed on February 10, 2015. The parties  
17 acknowledged that, in light of the soon to be filed amended Notice, the ER Respondents would reserve  
18 their prior arguments as set forth in their April 4, 2014 Motion to Dismiss and Answer.

19 On May 7, 2015, by Procedural Order, a hearing was scheduled to commence on August 5,  
20 2015.

21 On May 7, 2015, the Division filed an Amended Notice of Opportunity for Hearing Regarding  
22 Proposed Order to Cease, and Desist, Order for Restitution, Order for Administrative Penalties and  
23 Order for Other Affirmative Action ("Amended Notice").

24 On May 19, 2015, the ER Respondents filed Requests for Hearing. Each of the four ER  
25 Respondents filed a separate Request for Hearing.

26 On May 21, 2015, Concordia filed a Request for Hearing.

27 On June 8, 2015, the ER Respondents filed a Motion to Dismiss and Answer to Amended Notice  
28 of Opportunity ("Motion and Amended Answer"). The ER Respondents sought dismissal of the

1 Division's fraud allegation that the ER Respondents failed to disclose to offerees and investors they  
2 were engaging in the conduct of an unlicensed escrow business by serving as a Custodian. The ER  
3 Respondents argued dismissal was appropriate because the Commission has no jurisdiction to enforce  
4 escrow laws and the alleged violation does not constitute securities fraud.

5 Also on June 8, 2015, Respondent Concordia filed its Answer to Amended Notice of  
6 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order  
7 for Administrative Penalties, and Order for Other Affirmative Action.

8 On June 16, 2015, the ER Respondents filed a Status Report regarding their Motion to Stay  
9 filed with the Arizona Court of Appeals.

10 On June 22, 2015, the Division filed its Response to Motion to Dismiss by the ER Respondents  
11 ("Response"). The Division argued that jurisdiction was proper because they are seeking to enforce  
12 anti-fraud provisions of the Securities Act. The Division cited *S.E.C. v. Levine*, 671 F. Supp. 2d 14,  
13 28-29 (D.D.C. 2009), as precedent for finding securities fraud in an investment promoter's non-  
14 disclosure of acting as an unlicensed escrow agent. The Division further asserted that the failure of the  
15 ER Respondents to disclose their acting as an unlicensed escrow business constituted a material  
16 omission.

17 On June 30, 2015, the ER Respondents filed their Reply in Support of Motion to Dismiss  
18 ("Reply"). The ER Respondents argued that *Levine* is non-controlling authority and factually  
19 distinguishable. The ER Respondents further contended that materiality is a legal conclusion and that  
20 the Division has failed to set forth factual allegations to support its theory.

21 On July 2, 2015, the Division filed a Motion for Order Requiring Respondent Concordia to file  
22 an Amended Answer that Complies with R14-4-305. The Division contended that Concordia's June  
23 8, 2015 Answer fails to specifically admit or deny several of the allegations made in the Amended  
24 Notice.

25 On July 6, 2015, Respondent Concordia filed a Stipulated Motion to Extend Time to Exchange  
26 Supplemental List of Witnesses and Exhibits ("Stipulated Motion"). The Stipulated Motion stated that  
27 counsel for the Division and counsel for the Respondents have conferred and agreed to extend the time  
28 to exchange their Supplemental List of Witnesses and Exhibits to July 15, 2015.

1           On July 7, 2015, by Procedural Order, the ER Respondents' Motion to Dismiss was denied  
2 because the Commission has jurisdiction over an allegation of fraud in connection with the offer or  
3 sale of securities and the ER Respondents failed to establish that the Division would be entitled to no  
4 relief under any state of facts susceptible of proof as to that portion of the Amended Notice for which  
5 dismissal was sought.

6           On July 15, 2015, the ER Respondents filed a Notice of Service of Updated List of Witnesses  
7 and Exhibits.

8           On that same date, Respondent Concordia filed a Motion for Settlement Conference.  
9 Respondent Concordia asserts its belief that the allegations against it can be resolved short of  
10 proceeding with a hearing.

11           Also on July 15, 2015, the Division filed a Motion for Leave to Present Telephonic Testimony.  
12 The Division contends that good cause exists to allow the use of telephonic testimony at the hearing as  
13 eleven of its witnesses are located in Tucson, Lake Havasu City, or outside Arizona. The Division  
14 contends that telephonic testimony is permitted under the Commission's Rules of Practice and  
15 Procedure and its use would not abridge the Respondents' due process rights.

16           On July 16, 2015, a telephonic procedural conference was held as scheduled. The parties  
17 appeared through counsel. The ER Respondents provided a status report on their pending Motion to  
18 Stay filed with the Arizona Court of Appeals. The parties discussed the merits of holding a settlement  
19 conference and agreed upon a date. The parties discussed the Division's Motion for Leave to Present  
20 Telephonic Testimony and a schedule was set for responses to the motion. Respondent Concordia  
21 stated its intent to file an amended answer.

22           Also on July 16, 2015, by Procedural Order, Respondent Concordia's Motion for Settlement  
23 Conference was granted. The Division's Motion for an Order Requiring Respondent Concordia to file  
24 an Amended Answer was also granted. A settlement conference was set for July 23, 2015. Filing dates  
25 were scheduled for Concordia's Amended Answer and for motions regarding requests for telephonic  
26 testimony at the hearing.

27           On July 17, 2015, Respondent Concordia filed an Amended Answer to Amended Notice of  
28 Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order

1 for Administrative Penalties, and Order for Other Affirmative Action.

2 On July 20, 2015, the ER Respondents filed a Motion to Allow Telephonic Testimony of  
3 Witnesses. The ER Respondents requested that 67 of their listed witnesses be permitted to testify  
4 telephonically as these witnesses live outside of the Phoenix area.

5 Also on July 20, 2015, the ER Respondents filed a Response to the Division's Motion for Leave  
6 to Present Telephonic Testimony. The ER Respondents stated no objection to the telephonic testimony  
7 of the Division's investor witnesses and no objection to the Division's witness from the California  
8 Department of Business Oversight, who will be testifying to only the authentication of documents. The  
9 ER Respondents specifically objected to the telephonic testimony of A. Craig Mason, Jr., a non-  
10 investor expected to be subject to "substantial" cross-examination.

11 On July 21, 2015, Respondent Concordia filed its Response to the Division's Motion for Leave  
12 to Present Telephonic Testimony, stating no objection to the motion.

13 Also on that day, Respondent Concordia Filed an Updated List of Witnesses and Exhibits.

14 On July 23, 2015, a settlement conference was held.

15 On July 24, 2015, the Division filed its Response/Non-Opposition to the ER Respondents'  
16 Motion to Allow Telephonic Testimony of Witnesses, and Reply in Support of Motion for Leave to  
17 Present Telephonic Testimony. The Division contended that: good cause exists to allow the out-of-  
18 state Mr. Mason to testify telephonically, the Commission cannot subpoena him under A.A.C. R14-3-  
19 109(O), it would be cost prohibitive to bring him in for an anticipated direct testimony of less than  
20 fifteen minutes, and permitting him to testify telephonically comports with procedural due process.

21 On July 27, 2015, by Procedural Order, the Division's Motion for Leave to Present Telephonic  
22 Testimony and the ER Respondents' Motion to Allow Telephonic Testimony of Witnesses were  
23 granted. A telephonic procedural conference was scheduled to commence on July 29, 2015, at 10:00  
24 a.m.

25 Also on that day, the ER Respondents filed a Motion in Limine Number One: Objection to  
26 Proposed Exhibits S-176(a) and S-176(b), a Motion in Limine Number Two: Objection to Proposed  
27 Exhibit S-177, a Request for Public Broadcast of the Hearing, and a Motion for Clarification.

28 On July 28, 2015, the Division filed a Response to Motion for Settlement Conference and

1 Objection to Counsel's Unannounced Departure from Settlement Conference.

2 Also on July 28, 2015, the ER Respondents filed a Notice of Court of Appeals Order Staying  
3 Proceedings in this Docket. The ER Respondents included a copy of the Order Granting Stay of  
4 Administrative Hearing Pending Appeal, filed July 28, 2015, in Court of Appeals Division One No. 1  
5 CA-CV 15-0340 (Maricopa County Superior Court No. LC2014-000415-001).

6 On July 29, 2015, by Procedural Order, the stay of administrative proceedings ordered by the  
7 Arizona Court of Appeals was acknowledged. The telephonic procedural conference, scheduled to  
8 commence on July 29, 2015, and the hearing, scheduled to commence on August 5, 2015, were both  
9 vacated. The parties were ordered to file a joint written report regarding the status of the proceedings  
10 in Court of Appeals Division One No. 1 CA-CV 15-0340 on November 2, 2015, and every ninety days  
11 thereafter. The parties were further ordered to file a joint status report within five days upon a change  
12 in status of the stay or a disposition of the appeal having been made by the Court of Appeals.

13 On November 2, 2015, the parties filed a Joint Status Report regarding the Status of the  
14 Proceedings in the Arizona Court of Appeals. The parties asserted that the appeal filed by Mr. Bersch  
15 and Mr. and Mrs. Wanzek of the entry of final judgment entered in Maricopa County Superior Court  
16 No. LC2014-000415-001 had been fully briefed and that the parties had requested oral argument before  
17 the Arizona Court of Appeals.

18 On February 1, 2016, the parties filed a Second Joint Status Report regarding the Status of the  
19 Proceedings in the Arizona Court of Appeals. The parties asserted that the Arizona Court of Appeals  
20 had granted the requests for oral argument but no date had been scheduled. The parties also asserted  
21 further briefs were submitted to the Arizona Court of Appeals after the Arizona Attorney General was  
22 permitted to file a brief as Amicus Curiae.

23 On April 29, 2016, the parties filed a Third Joint Status Report regarding the Status of the  
24 Proceedings in the Arizona Court of Appeals. The parties stated that the matter had been fully briefed  
25 and oral argument set for May 10, 2016.

26 On June 3, 2016, the Division filed a Notice of Lodging of Court of Appeals Decision. The  
27 Division asserted that the Arizona Court of Appeals decision affirmed the judgment of the Superior  
28 Court and vacated the Court of Appeals' stay of the proceedings.

1 Also on June 3, 2016, the Division filed a Motion for Status Conference to Schedule Hearing.  
2 The Division contended that since the Arizona Court of Appeals has vacated its stay of these  
3 proceedings, the proceedings should promptly resume.

4 On June 13, 2016, by Procedural Order, a status conference was scheduled to commence on  
5 June 29, 2016.

6 On June 29, 2016, the status conference was held as scheduled. The parties appeared through  
7 counsel. The scheduling of a hearing date was discussed. Also discussed were the status of pending  
8 motions filed by the ER Respondents. Counsel for the ER Respondents acknowledged that the July  
9 27, 2015 Motion for Clarification no longer needed to be addressed due to the prior stay of these  
10 proceedings. The Administrative Law Judge stated that the July 27, 2015 Request for Public Broadcast  
11 of the Hearing could not be acted upon as decisions regarding broadcasting are beyond the scope of his  
12 authority. A deadline date for the Division to respond to the two July 27, 2015 motions in limine was  
13 discussed. Counsel for the ER Respondents stated his intent to file a petition for review of the  
14 Memorandum Decision in Arizona Court of Appeals Division One No. 1 CA-CV 15-0340.

15 On June 30, 2016, by Procedural Order, a hearing was scheduled to commence on November  
16 28, 2016.

17 On August 1, 2016, the Division filed its Response to Motion in Limine Number One: Objection  
18 to Proposed Exhibit 176(a) and Exhibit 176(b).

19 Also on August 1, 2016, the Division filed its Response to Motion in Limine Number Two:  
20 Objection to Proposed Exhibit 177.

21 On August 12, 2016, the ER Respondents filed a Reply in Support of Motion in Limine Number  
22 One.

23 Also on August 12, 2016, the ER Respondents filed a Reply in Support of Motion in Limine  
24 Number Two.

25 On September 7, 2016, the ER Respondents filed a Motion to Continue Hearing.<sup>1</sup>  
26

27 \_\_\_\_\_  
28 <sup>1</sup> The Motion to Continue Hearing is not considered in this Procedural Order as the other parties have not yet had an opportunity to respond.

1 **Motions in Limine**

2       The ER Respondents have filed two motions in limine seeking a prehearing ruling on their  
3 objections to the admissibility of three of the Division's proposed exhibits. The Commission's Rules  
4 of Practice and Procedure ("Rules of Practice and Procedure"), contained in Title 14, Chapter 3 of the  
5 Arizona Administrative Code ("A.A.C."), govern actions that are within the jurisdiction of the  
6 Commission. Under A.A.C. R14-3-109(L), documentary evidence offered in the form of an exhibit at  
7 hearing shall be subject to timely and appropriate objection. The Administrative Law Judge has the  
8 duty, under A.A.C. R14-3-109(X), to rule on the admissibility of evidence following an objection.  
9 Pursuant to A.A.C. R14-3-109(K), hearings before the Commission will generally follow the rules of  
10 evidence before the Superior Court of the State of Arizona, but those rules may be relaxed in the  
11 discretion of the presiding officer when deviation from the technical rules will aid in ascertaining the  
12 facts.

13       Under A.A.C. R14-3-106(K), motion practice before the Commission is to conform insofar as  
14 practicable with the Rules of Civil Procedure for the Superior Court of the state of Arizona. Pursuant  
15 to Ariz. R. Civ. P. Rule 7.2(c), a moving party shall not file a reply in support of its motion in limine.  
16 At the Status Conference on June 29, 2016, the Division was given a deadline of August 1, 2016, by  
17 which to file its responses to the ER Respondents' two motions in limine. The ER Respondents neither  
18 stated an intention to file replies, nor argued why replies should be permitted over Ariz. R. Civ. P. Rule  
19 7.2(c). The ER Respondents have presented no argument for disregarding Ariz. R. Civ. P. Rule 7.2(c)  
20 within the replies themselves. Accordingly, the replies filed by the ER Respondents shall not be  
21 considered in ruling upon the motions in limine.

22       I. **Motion in Limine Number One: Objection to Proposed Exhibits S-176(a) and S-176(b)**

23               Argument

24       The Division's Proposed Exhibit S-176(a) is a copy of a State of California Desist and Refrain  
25 Order ("California Order"), a cover letter accompanying the order addressed to Mr. Wanzek, dated  
26 December 13, 2013, a copy of California Corporations Code Section 25532, and proof of service by  
27 certified mail. Proposed Exhibit S-176(b) contains the same order and code section with a  
28 corresponding cover letter and proof of service for Mr. Bersch. The California Order contains factual

1 allegations asserting that Mr. Bersch and Mr. Wanzek, among others, offered and sold unqualified,  
 2 non-exempt securities. The California Order further alleges that in the course of these offers and sales,  
 3 Mr. Bersch and Mr. Wanzek made material misrepresentations of facts and omitted to state material  
 4 facts necessary to make statements that were not misleading. The accompanying letters advised Mr.  
 5 Bersch and Mr. Wanzek that they have a right to an administrative hearing if they challenge the  
 6 California Order. The copy of California Corporations Code Section 25532 states that failure to request  
 7 a hearing within 30 days from the date of service will result in the California Order being deemed a  
 8 final order. The ER Respondents contend that the California Order contained in proposed Exhibits S-  
 9 176(a) and (b) “is irrelevant, unduly prejudicial, and violates the rule of completeness.”

10 The ER Respondents contend that the California Order is not relevant as the issue before the  
 11 Commission is whether Arizona law was violated, not California law. The ER Respondents further  
 12 argue that the California Order was entered without a hearing and that Mr. Bersch and Mr. Wanzek did  
 13 not request a hearing as the order contained no financial consequences and would have little impact  
 14 upon them, as opposed to the present proceeding, in which the Division seeks over \$8 million in  
 15 penalties and restitution against them. The ER Respondents posit that the only possible relevancy the  
 16 California Order may have is if the Division sought to use it for collateral estoppel, the elements of  
 17 which are not met here.

18 The ER Respondents further contend that even if Exhibits S-176(a) and (b) are found relevant,  
 19 they pose a danger of being unduly prejudicial and confusing the issues, and therefore they should not  
 20 be admitted pursuant to Rule 403 of the Arizona Rules of Evidence.<sup>2</sup> The ER Respondents also argue  
 21 that the proposed exhibits violate the rule of completeness as codified under Rule 106 of the Arizona  
 22 Rules of Evidence.<sup>3</sup> The ER Respondents note that a subsequent California order eliminated many of  
 23 the findings against Concordia and argue that the same modifications would likely have been made for  
 24 Mr. Bersch and Mr. Wanzek if they had challenged the California Order. Mr. Bersch and Mr. Wanzek

25 <sup>2</sup> **Ariz. R. Evid. 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons**

26 The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of  
 27 the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly  
 28 presenting cumulative evidence.

<sup>3</sup> **Ariz. R. Evid. 106. Remainder of or Related Writings or Recorded Statements**

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that  
 time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time.

1 assert they decided not to challenge the California Order as the order to desist would not affect any  
 2 action they were engaging in and they believed the order was not a threat to their licenses or livelihoods  
 3 because they did not need to report it to the Arizona Board of Accountancy.

4 The Division states that proposed Exhibits S-176(a) and (b) are not intended to be used for  
 5 purposes of collateral estoppel or issue preclusion. Rather, the Division contends that the California  
 6 Order contains factual allegations of fraudulent conduct against Mr. Bersch and Mr. Wanzek. The  
 7 Division argues that the ER Respondents' silence in response to these fraud accusations make the  
 8 California Order admissible as adoptive admissions of an opposing party, under Rule 801(d)(2)(B) of  
 9 the Arizona Rules of Evidence.<sup>4</sup> The Division argues that though Mr. Bersch and Mr. Wanzek were  
 10 not subject to restitution or penalties by the California Order, they still had an interest in denying the  
 11 accusations contained therein, because while the California Order need not have been self-reported, it  
 12 still opened them up to potential professional discipline before the Arizona State Board of Accountancy  
 13 and damaged their reputations with its allegations of fraud.<sup>5</sup>

14 The Division further argues that the California Order is relevant, under Rule 401 of the Arizona  
 15 Rules of Evidence,<sup>6</sup> and admissible, under Rule 402 of the Arizona Rules of Evidence,<sup>7</sup> as the

16 \_\_\_\_\_  
 17 <sup>4</sup> Ariz. R. Evid. 801 provides, in pertinent part:

18 (a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended  
 it as an assertion.

\* \* \*

19 (c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

20 (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

\* \* \*

21 (2) An Opposing Party's Statement. The statement is offered against an opposing party and:

\* \* \*

(B) is one the party manifested that it adopted or believed to be true...

22 <sup>5</sup> A.R.S. § 32-741 provides, in pertinent part:

23 A. After notice and an opportunity for a hearing, the board may revoke or suspend any certificate granted under this chapter  
 and may take disciplinary action concerning the holder of any certificate for any of the following causes:

\* \* \*

24 8. Final judgment or order in a civil action or administrative proceeding if the court or agency makes findings of violations  
 25 of any fraud provisions of the laws of any jurisdiction or federal securities laws.

<sup>6</sup> Ariz. R. Evid. 401. Test for Relevant Evidence

Evidence is relevant if:

26 (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

27 (b) the fact is of consequence in determining the action.

<sup>7</sup> Ariz. R. Evid. 402 provides, in pertinent part:

28 Relevant evidence is admissible unless any of the following provides otherwise:

- the United States or Arizona Constitution;

1 California Order's allegations of misrepresentations and omissions, and the failure of Mr. Bersch and  
 2 Mr. Wanzek to respond to it, tend to make more probable that they violated A.R.S. § 44-1991(A)(2),  
 3 as alleged by the Division.

4 The Division further contends that the substantial similarity of A.R.S. § 44-1991(A)(2) and  
 5 California Corporations Code § 25401 disposes of the ER Respondents' argument of confusing the  
 6 issues as both statutes address fraudulent misconduct in nearly identical terms. Further, the Division  
 7 contends that the California Order, though adverse to Mr. Bersch and Mr. Wanzek, is not unfairly  
 8 prejudicial.

9 The Division further argues that Ariz. R. Evid. 106 does not allow for the exclusion of evidence.  
 10 The Division contends that it has no objection should the ER Respondents seek to introduce the  
 11 Amended Desist and Refrain Order against Concordia, a copy of which the Division has included as  
 12 an attachment to its response.

### 13 Analysis

14 As noted by the Division, the Supreme Court of Arizona has set forth the adoptive admissions  
 15 rule: "When a statement adverse to a defendant's interests is made in his presence and he fails to  
 16 respond, evidence of the statement and the defendant's subsequent silence may be admissible as a 'tacit  
 17 admission of the facts stated.'"<sup>8</sup> For the rule to apply, "The defendant must have been able to clearly  
 18 hear the statement and the circumstances must have been 'such as naturally call for a reply if [the  
 19 defendant] did not intend to admit such facts.'"<sup>9</sup>

20 Here, the ER Respondents do not deny that Mr. Bersch and Mr. Wanzek had knowledge of the  
 21 California Order, and they made a "rational decision to not challenge it."<sup>10</sup> However, the California  
 22 Order accused Mr. Bersch and Mr. Wanzek of committing fraudulent or misleading actions and could  
 23 have jeopardized their licenses with the Arizona State Board of Accountancy under A.R.S. § 32-  
 24 741(A)(8) should that agency have learned of it. Under the circumstances, a natural response would

- 
- 25 • an applicable statute;
  - 26 • these rules; or
  - 27 • other rules prescribed by the Supreme Court.

28 <sup>8</sup> *State v. VanWinkle*, 229 Ariz. 233, 235, 273 P.3d 1148, 1150 (2012) quoting *State v. Saiz*, 103 Ariz. 567, 569, 447 P.2d 541, 543 (1968).

<sup>9</sup> *Id.*

<sup>10</sup> Motion in Limine Number One at 3.

1 have been to deny or attempt to clarify the allegations set forth in the California Order by exercising  
 2 their right to request a hearing. Instead, Mr. Bersch and Mr. Wanzek made no challenge to the  
 3 allegations in the California Order. Accordingly, the California Order may be considered as adoptive  
 4 admissions by Mr. Bersch and Mr. Wanzek under Ariz. R. Evid. 801(d)(2)(B).

5 As adoptive admissions of having made material misrepresentations and omissions of facts in  
 6 the offer and sale of truck financing contracts, Exhibits 176(a) and (b) are relevant under Ariz. R. Evid.  
 7 401 since the Division has alleged fraud, under A.R.S. § 44-1991(A)(2),<sup>11</sup> in the Amended Notice.  
 8 Though relevant, Exhibits 176(a) and (b) could still be excluded under Ariz. R. Evid. 403 if, as the ER  
 9 Respondents argue, they pose a danger of confusing the issues or unfair prejudice. The ER  
 10 Respondents do not specify how they believe the admission of Exhibits 176(a) and (b) may confuse  
 11 the issues or cause unfair prejudice. As the Division asserts, California Corporation Code § 25401<sup>12</sup>  
 12 sets forth fraudulent misconduct in substantially similar terms to A.R.S. § 44-1991(A)(2). Therefore,  
 13 Exhibits 176(a) and (b) do not pose a threat of confusing the issues.

14 Relevant and material evidence will generally be adverse to the opponent, but that does not  
 15 mean the evidence is unfairly prejudicial.<sup>13</sup> Unfair prejudice, under Ariz. R. Evid. 403, means an  
 16 undue tendency to suggest decision on an improper basis such as emotion, sympathy or horror.<sup>14</sup> The  
 17 admission of Exhibits 176(a) and (b) may be adverse to the positions of Mr. Bersch and Mr. Wanzek,  
 18 however, these exhibits are not unfairly prejudicial. Moreover, it is worth noting that there is no jury  
 19 in this proceeding and the Administrative Law Judge, and the Commissioners, may give the evidence  
 20 its appropriate weight considering all relevant facts and circumstances.

21 \_\_\_\_\_  
 22 <sup>11</sup> A.R.S. § 44-1991 provides, in pertinent part:

23 A. It is a fraudulent practice and unlawful for a person, in connection with a transaction or transactions within or from this  
 24 state involving an offer to sell or buy securities, or a sale or purchase of securities, including securities exempted under  
 section 44-1843 or 44-1843.01 and including transactions exempted under section 44-1844, 44-1845 or 44-1850, directly  
 or indirectly to do any of the following:

\* \* \*

25 2. Make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements  
 26 made, in the light of the circumstances under which they were made, not misleading.

<sup>12</sup> Cal. Corp. Code § 25401. Offer, sale, or purchase of securities; fraudulent or misleading actions

27 It is unlawful for any person to offer or sell a security in this state, or to buy or offer to buy a security in this state, by means  
 28 of any written or oral communication that includes an untrue statement of a material fact or omits to state a material fact  
 necessary to make the statements made, in the light of the circumstances under which the statements were made, not  
 misleading.

<sup>13</sup> *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993).

<sup>14</sup> *State v. Hardy*, 230 Ariz. 281, 290, 283 P.3d 12, 21 (2012), cert. denied, 133 S.Ct. 935, 184 L.Ed.2d 732 (2013).

1 As noted by the Division, Ariz. R. Evid. 106 does not provide for the exclusion of otherwise  
 2 admissible evidence, and therefore would not act to exclude Exhibit S-177. The ER Respondents may  
 3 offer the Amended Desist and Refrain Order as evidence at hearing.

4 Accordingly, the ER Respondents' Motion in Limine Number One should properly be denied.

5 **II. Motion in Limine Number Two: Objection to Proposed Exhibit S-177**

6 **Argument**

7 The Division's proposed Exhibit S-177 "is a chart that the Division's Chief Investigator, Gary  
 8 Clapper, prepared to summarize the Division's March 2015 telephonic interviews of dozens of  
 9 investors."<sup>15</sup>

10 The ER Respondents contend that Exhibit S-177 is an unfair compilation of "hearsay upon  
 11 hearsay."<sup>16</sup> While the ER Respondents concede that the Administrative Law Judge may deviate from  
 12 the technical rules of evidence, they argue that here the objections go directly to the fairness of the  
 13 exhibit as many of the investors will not be testifying and several investigators conducted the interviews  
 14 but only Mr. Clapper will testify.

15 The ER Respondents further contend that the summary is not permissible under Ariz. R. Evid.  
 16 1006,<sup>17</sup> as the summary "is being offered to prove the content of unrecorded hearsay conversations,"  
 17 not the voluminous writings, recordings or photographs expressed by the rule.<sup>18</sup> The ER Respondents  
 18 also argue further issues with the exhibit: that it is incomplete because it omits some investors, that it  
 19 contains "cryptic and at times misleading labels," and that it is written in a small and illegible font.

20 The Division states that copies of the questionnaires, upon which Exhibit S-177 is based, have  
 21 previously been produced to the Respondents, and argues that the summary is admissible under Ariz.  
 22 R. Evid. 1006. The Division argues that while Exhibit S-177 summarizes hearsay evidence, reliable  
 23 hearsay is admissible and may provide the only grounds for an administrative decision.

24 \_\_\_\_\_  
 25 <sup>15</sup> Division's Response to Motion in Limine Number Two at 1.

26 <sup>16</sup> Motion in Limine Number Two at 2.

27 <sup>17</sup> **Ariz. R. Evid. 1006. Summaries to Prove Content**

28 The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or  
 photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available  
 for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent  
 to produce them in court.

<sup>18</sup> Motion in Limine Number Two at 3.

1                    Analysis

2                    The chart prepared by Mr. Clapper is a summary of the questionnaires written by Commission  
3 investigators. Though the investigators' interviews of investors were not recorded, the questionnaires  
4 themselves may be considered "writings" under Ariz. R. Evid. 1006. A witness may summarize  
5 information contained in voluminous reports or records as long as the information contained in the  
6 documents would be admissible and the documents are made available for inspection by the opposing  
7 party.<sup>19</sup>

8                    Under A.A.C. R14-3-109(K), the Arizona Rules of Evidence will generally be followed in  
9 Commission hearings, but may be relaxed in the discretion of the presiding officer when deviation from  
10 the technical rules of evidence will aid in ascertaining the facts. Hearsay may be considered in an  
11 administrative hearing, may be given probative weight, and, in some circumstances, may be the sole  
12 support of an administrative decision.<sup>20</sup> The standard for admissibility of hearsay is whether it is  
13 reliable.<sup>21</sup> Generally, hearsay will be unreliable if: the speaker is not identified; no foundation is given  
14 for the speaker's knowledge; or the place, date and time, and identity of others present is unknown or  
15 not disclosed.<sup>22</sup>

16                    Pursuant to Ariz. R. Civ. P. Rule 7.2(b), timely submitted motions in limine shall be ruled upon  
17 before trial unless the court determines the particular issue of admissibility is better considered at trial.  
18 In considering the question of reliability of the underlying hearsay evidence, the Administrative Law  
19 Judge finds that it would be better to make this determination at the hearing, where Mr. Clapper may  
20 testify as to foundation for Exhibit S-177, and the ER Respondents may have an opportunity for cross-  
21 examination of the witness. The hearing will also provide an opportunity to further explore the ER  
22 Respondents' contentions that the chart contains "cryptic" and "misleading" labels.<sup>23</sup>

23                    Accordingly, the ER Respondents' Motion in Limine Number Two should properly be taken  
24 under advisement.

25                    <sup>19</sup> *Rayner v. Stauffer Chem. Co.*, 120 Ariz. 328, 333-334, 585 P.2d 1240, 1245-46 (App. 1978).

26                    <sup>20</sup> *Brown v. Arizona Dep't of Real Estate*, 181 Ariz. 320, 328, 890 P.2d 615, 623 (App. 1995).

27                    <sup>21</sup> *Wieseler v. Prins*, 167 Ariz. 223, 227, 805 P.2d 1044, 1048 (App. 1990).

28                    <sup>22</sup> *Id.*

<sup>23</sup> The ER Respondents also contend that the font for Exhibit S-177 is tiny and illegible. While the font is small, the Administrative Law Judge notes that he is capable of reading a printed copy with a naked eye. Additionally, the electronic copy disclosed by the Division is capable of being magnified to a larger size.

1 IT IS THEREFORE ORDERED that **the ER Respondents' Motion in Limine Number One:**  
2 **Objection to Proposed Exhibits S-176(a) and S-176(b), is denied.** Exhibits S-176(a) and S-176(b)  
3 may be offered as evidence at the hearing.

4 IT IS FURTHER ORDERED that **the ER Respondents' Motion in Limine Number Two:**  
5 **Objection to Proposed Exhibit S-177 shall be taken under advisement.**

6 IT IS FURTHER ORDERED that, due to a change in the date of the Commission's November  
7 Open Meeting, the **hearing shall be scheduled to commence on November 30, 2016, at 10:00 a.m.,**  
8 **at the Commission's offices, 1200 West Washington Street, Hearing Room No. 1, Phoenix,**  
9 **Arizona.**

10 IT IS FURTHER ORDERED that **the parties shall also set aside December 1-2, 5-9, 12, 15,**  
11 **16, and 19-23, 2016, for additional days of hearing,** if necessary.

12 IT IS FURTHER ORDERED that, **if necessary, the Division and Respondents shall**  
13 **exchange supplemental or amended copies of their Witness Lists and any additional Exhibits by**  
14 **September 29, 2016,** with courtesy copies provided to the presiding Administrative Law Judge.

15 IT IS FURTHER ORDERED that **if the parties reach a resolution of the issues raised in the**  
16 **Notice prior to the hearing, the Division shall file a Motion to Vacate the Proceeding.**

17 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized  
18 Communications) is in effect and shall remain in effect until the Commission's Decision in this matter  
19 is final and non-appealable.

20 IT IS FURTHER ORDERED that all parties must comply with Arizona Supreme Court Rules  
21 31, 38, 39, and 42, and A.R.S. § 40-243 with respect to the practice of law and admission *pro hac vice*.

22 IT IS FURTHER ORDERED that withdrawal or representation must be made in compliance  
23 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the  
24 Rules of the Arizona Supreme Court). Representation before the Commission includes appearances at  
25 all hearings and procedural conferences, as well as all Open Meetings for which the matter is scheduled  
26 for discussion, unless counsel has previously been granted permission to withdraw by the  
27 Administrative Law Judge or the Commission.

28 ...

1 IT IS FURTHER ORDERED that the Presiding Administrative Law Judge may rescind, alter,  
2 amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by  
3 ruling at hearing.

4 DATED this 12<sup>TH</sup> day of September, 2016.

5   
6 \_\_\_\_\_  
7 MARK PRENY  
8 ADMINISTRATIVE LAW JUDGE  
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1 On this 12<sup>th</sup> day of September 2016, the foregoing document was filed with Docket Control as a  
2 Procedural Order- Denies Miscellaneous Motion/Request, and copies of the foregoing were mailed on  
3 behalf of the Hearing Division to the following who have not consented to email service. On this date  
or as soon as possible thereafter, the Commission's eDocket program will automatically email a link  
to the foregoing to the following who have consented to email service.

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23 By: Rebecca Tallman  
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