

ORIGINAL



BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

DOCKET NO. S-20906A-14-0063

In the matter of:

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

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

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA  
WANZEK, husband and wife,

Respondents.

SECURITIES DIVISION'S RESPONSE  
TO THE ER RESPONDENTS'  
MOTION TO CONTINUE HEARING

Arizona Corporation Commission  
DOCKETED

SEP 20 2016

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The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") respectfully requests that this Tribunal deny the ER Respondents' Motion To Continue Hearing ("Motion").

The ER Respondents have been monitoring the docket of at least one other case the Division's undersigned counsel is prosecuting and that was set for a three-week hearing beginning on October 31, 2016. *See In the Matter of Robert J. Moss et al.*, A.C.C. Docket No. S-20953A-16-0061 (filed 2/23/2016). The original hearing

<sup>1</sup> This response refers to the following Respondents as "the ER Respondents": ER Financial & Advisory Services, LLC ("ERF"), Lance Michael Bersch ("Bersch"), David John Wanzek ("Wanzek") and Linda Wanzek ("Mrs. Wanzek").

1 date in the *Moss* case was September 19, 2016, which did not present a scheduling  
2 problem for the Division with respect to the hearing date in the instant case against  
3 the ER Respondents. The respondents in the *Moss* case, however, were recently  
4 granted a continuance, and that hearing was rescheduled to run from October 31 to  
5 November 15, 2016. That schedule in *Moss* would not allow the Division's counsel  
6 adequate time to prepare for the hearing in this case. Accordingly, the Division filed  
7 a Motion to Continue the *Moss* hearing to a date in early 2017.

8 Because the ER Respondents have been monitoring what the Division's  
9 undersigned counsel is doing in other cases, they saw the Motion to Continue the  
10 *Moss* case. They seek to use the *Moss* case as an opportunity to further delay this  
11 case.

12 Continuances require "a showing of good cause." R14-3-109(Q), Rules of  
13 Practice and Procedure Before the Corporation Commission. The Division's Motion  
14 to Continue in the *Moss* case does not provide any good cause to continue the hearing  
15 in this case, which is set to commence on November 30, 2016. The ER Respondents'  
16 Motion should be denied for the following reasons.

17 **I. The *Moss* Case Has Been Continued To February 2017.**

18 There is no reason to continue this case because the Division's counsel no  
19 longer has a scheduling problem. On September 16, 2016, Administrative Law  
20 Judge Marc Stern, who is presiding over *Moss*, granted the Division's Motion to  
21 Continue. The hearing in *Moss* has been reset to begin on February 21, 2017.<sup>2</sup>

22 **II. The Petition For Review Does Not Warrant Postponing The Hearing.**

23 The pending Petition for Review to the Arizona Supreme Court by Mr. Bersch  
24 and Mr. and Mrs. Wanzek does not warrant postponing the hearing in this case. After

25 \_\_\_\_\_  
26 <sup>2</sup> See Eleventh Procedural Order filed 9/16/2016 in *Moss*, A.C.C. Docket No. S-  
20953A-16-0061.

1 thorough briefing and oral arguments at every level, this Tribunal, the Superior  
2 Court, and Division One of the Court of Appeals have rejected the ER Respondents'  
3 statute of limitations and due process arguments.

4       Regardless of the Petition for Review's substance, statistically there is only a  
5 4.65 percent chance that the Arizona Supreme Court will grant review. "In 2015,  
6 parties filed petitions for review in the Arizona Supreme Court concerning 473  
7 decisions issued by Division One.... The Arizona Supreme Court in 2015 granted  
8 review in 22 cases issued by Division One...." 2015: The Year In Review, Arizona  
9 Court of Appeals Division One, at p. 17 (available at  
10 <http://www.azcourts.gov/coal/Annual-Report>). This case should not be further  
11 delayed when there is only a 4.65 percent chance that the Arizona Supreme Court  
12 will accept review, let alone reverse every judge who has considered and rejected  
13 Respondents' statute of limitations and due process arguments.

14       Moreover, the ER Respondents are wrong when they assert that the "Statute  
15 of Limitations and due process issues could be case dispositive, eliminating the need  
16 for a hearing." Motion at 2:8-9. Mr. Bersch and the Wanzeks assert that the statutes  
17 of limitation in A.R.S. § 44-2004 or A.R.S. § 13-107 should apply. Mr. Bersch and  
18 the Wanzeks are mistaken for the reasons detailed in the Fourth Procedural Order at  
19 pages 9 to 12, and in the Court of Appeals' Memorandum Decision. *See Bersch v.*  
20 *State of Arizona*, 2016 WL 3101789 at \*4, ¶¶ 14-16 (Ariz. App. 6/2/2016).

21       But even if the ER Respondents were correct, applying A.R.S. § 44-2004 or  
22 A.R.S. § 13-107 would not entitle them to an order prohibiting the Commission from  
23 continuing with this enforcement action. Rather, the Arizona Supreme Court would  
24 need to remand the case for a determination of when the limitations period began  
25 running under one of those statutes.

26

1 A.R.S. § 44-2004(b) and A.R.S. § 13-107 are both discovery rule-based  
2 limitations periods. They do not begin to run “until the discovery of the fraudulent  
3 practice on which the liability is based, or after the discovery should have been made  
4 by the exercise of reasonable diligence.” A.R.S. § 44-2004(b); A.R.S. § 13-107  
5 (“[P]rosecutions for ... offenses must be commenced within the following periods  
6 after actual discovery by the state ... or discovery by the state ... that should have  
7 occurred with the exercise of reasonable diligence, whichever first occurs....”).

8 There is no evidence in the record on appeal concerning when the Commission  
9 discovered Mr. Bersch’s and Mr. Wanzek’s violations of the Securities Act’s  
10 antifraud provisions. Nor is there any evidence as to when the Commission should  
11 have discovered their violations by the exercise of reasonable diligence. There is no  
12 evidence on these factual issues because the administrative hearing has not been held  
13 yet. Mr. Bersch and the Wanzeks prematurely filed their special action and appeal  
14 before developing a factual record on these issues.

15 Thus, even if the Supreme Court were to rule that A.R.S. § 44-2004 or A.R.S.  
16 § 13-107 somehow applied, this case would have to be remanded to determine the  
17 date when the limitation period began running, i.e. the date when the Commission  
18 discovered or reasonably should have discovered Mr. Bersch’s and Mr. Wanzek’s  
19 violations.

20 A similar factual deficit undermines Mr. Bersch’s and the Wanzeks’ appeal  
21 regarding the alleged due process violation. A litigant claiming a due process  
22 violation based on the government’s alleged delay in bringing a case against him  
23 must show that (1) the government intentionally delayed bringing proceedings to  
24 gain a tactical advantage or to harass him, and (2) the delay actually and substantially  
25 prejudiced him. *See State v. Broughton*, 156 Ariz. 394, 397-98, 752 P.2d 483, 486-  
26 87 (1988).

1 In the record on appeal, there is no evidence that the Commission delayed  
2 bringing this enforcement action. There is certainly no evidence that the  
3 Commission intentionally did so to gain some tactical advantage or to harass the  
4 Respondents.

5 To make a showing of actual and substantial prejudice, 'it is not enough to  
6 show the mere passage of time nor to offer some suggestion of speculative harm;  
7 rather the defendant must present concrete evidence showing material harm.'" *State*  
8 *v. Dunlap*, 187 Ariz. 441, 450, 930 P.2d 518, 527 (App. 1996) (quoting *United States*  
9 *v. Anagnostou*, 974 F.2d 939, 942 (7th Cir.1992), *cert. denied*, 507 U.S. 1050  
10 (1993)). The death or unavailability of a witness is insufficient to show prejudice.  
11 *Dunlap*, 187 Ariz. at 451, 930 P.2d at 528; *State v. Lemming*, 188 Ariz. 459, 462-63,  
12 937 P.2d 381, 384-85 (App. 1997) ("[T]he unavailability of a witness, without more,  
13 is not enough to establish prejudice."). Prejudice requires a showing that the witness  
14 would have testified, that the testimony would have been credible, and that the  
15 testimony would affect the outcome. *Dunlap*, 187 Ariz. at 451, 930 P.2d at 528.  
16 "The detail provided by the defendant must be sufficient for a court to determine  
17 whether the missing witness is material to the defense." *Lemming*, 188 Ariz. at 462-  
18 63, 937 P.2d at 384-85. The simple statement that memories have faded is "nothing  
19 more than an assertion that some of the witnesses may have had diminished  
20 recollections by reason of the passage of time." *Broughton*, 156 Ariz. at 398, 752  
21 P.2d at 487 (finding no actual prejudice).

22 Nowhere in the record on appeal have Mr. Bersch and the Wanzeks alleged  
23 who the witnesses are who are now purportedly unavailable to them, what those  
24 witnesses would have testified to, whether and why their testimony would be  
25 credible, and how it would affect the outcome of this enforcement proceeding.  
26 Likewise, nowhere in the record on appeal have Mr. Bersch and the Wanzeks alleged

1 what, if any, other evidence has been lost, what that evidence would state, or whether  
2 it would be helpful to their case rather than harmful. *See Broughton*, 156 Ariz. at  
3 398 (finding no prejudice from lost forensic evidence with no showing what the  
4 forensic evidence was or how it would be exculpatory).

5 Without a factual record and evidence on these issues, Mr. Bersch and the  
6 Wanzeks cannot establish intentional delay or actual prejudice such that the Arizona  
7 Supreme Court could find a due process violation as a matter of law and prohibit the  
8 Commission from continuing with this enforcement action. *See Zavala v. Ariz. State*  
9 *Personnel Board*, 159 Ariz. 256, 267, 766 P.2d 608, 619 (App. 1987) (“[W]e  
10 overstepped our bounds in resolving as a matter of law that the recommencement of  
11 dismissal proceedings in this case would be inconsistent with due process;” noting  
12 that whether State should be barred from pursuing employee’s termination involved  
13 “factual determinations, and it should be presented, at least initially, at the  
14 administrative level.”).

15 **III. A Non-Existent, Speculative Motion to Stay Does Not Warrant A**  
16 **Continuance.**

17 The ER Respondents argue to continue the hearing in this case because they  
18 “may” move the Arizona Supreme Court for a stay. Motion at 2:13-14. They do not  
19 explain why they have not yet moved for a stay if they believe one is warranted.  
20 Whether the ER Respondents will actually file a motion to stay is speculative at this  
21 point. Whether the Supreme Court would grant a stay, which is an “extraordinary  
22 remedy,”<sup>3</sup> is even more speculative. Speculation about a non-existent motion is not  
23 good cause for a continuance under R14-3-109(Q).

24 \_\_\_\_\_  
25 <sup>3</sup> *United States v. Judicial Watch, Inc.*, 241 F. Supp.2d 15, 16 (D.D.C. 2003) (denying  
26 stay because litigant offered no new arguments but merely rehashed arguments  
rejected in multiple forums).

1 **IV. The ER Respondents' Remaining Arguments For A Continuance Are Ill-**  
2 **Conceived And Moot.**

3 The ER Respondents also argue for a continuance by attempting to minimize  
4 their alleged violations of the Securities Act relative to the violations at issue in the  
5 *Moss* case. They argue that it is "more pressing" to get restitution obligations in  
6 place against the *Moss* respondents *Moss* than it is against them. The fifty-eight (58)  
7 investor-victims who lost \$3,078,909 while the ER Respondents raked in \$3,094,761  
8 in "custodial fees" and undisclosed finders' fees likely disagree.<sup>4</sup> The ER  
9 Respondents are in no position to argue about how the Commission should prioritize  
10 its securities enforcement caseload.

11 The ER Respondents also argue that the *Moss* case, which was filed in  
12 February 2016, should be heard before this case, which was filed two years earlier  
13 in February 2014. That is non-sensical from a judicial administration point of view.  
14 Delaying this case more than the ER Respondents already have would only aggravate  
15 any problems of fading memories by witnesses.

16 In any event, the *Moss* hearing has been rescheduled to begin on February 21,  
17 2017. That scheduling change moots the ER Respondents' arguments about which  
18 case should go to hearing first.

19 **Conclusion**

20 The Division respectfully requests that this Tribunal deny the ER  
21 Respondents' Motion to Continue Hearing.

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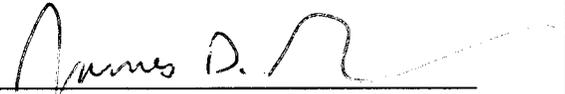
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<sup>4</sup> Amended Notice at ¶¶ 66, 72-73.

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RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of September, 2016.

ARIZONA CORPORATION COMMISSION

By:   
James D. Burgess  
Attorney for the Securities Division of  
the Arizona Corporation Commission

1 On this 20<sup>th</sup> day of September, 2016, the foregoing document was filed with Docket  
2 Control as a Securities Division Response to Motion, and copies of the foregoing were  
3 mailed on behalf of the Securities Division to the following who have not consented  
4 to email service. On this date or as soon as possible thereafter, the Commission's  
5 eDocket program will automatically email a link to the foregoing to the following who  
6 have consented to email service. On this date, an e-mail was also sent by the  
7 undersigned to any of the following who have consented to email service.

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