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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

- MIKE GLEASON, Chairman
- WILLIAM A. MUNDELL
- JEFF HATCH-MILLER
- KRISTIN K. MAYES
- GARY PIERCE

In the matter of

JOHN EDWARD TENCZA and
 CHRISTINE M. TENCZA, husband and
 wife
 2741 West Piazza Drive
 Meridian, Idaho 83642

AMERICAN ELDER GROUP, L.L.C., an
 Arizona limited liability company
 7779 East Nestling Way
 Scottsdale, Arizona 85255

AMERICAN ELDER GROUP, INC., a
 Nevada corporation fka American
 Investment Management Group, Inc., a
 Nevada corporation
 2050 Russett Way
 Carson City, Nevada 89703

PHILLIP ROBERT OHST and MARY
 ELIZABETH OHST, husband and wife
 1837 West Claremont Street
 Phoenix, Arizona 85015

GREGORY GRANT GROH and GAIL A.
 GROH, husband and wife,
 5237 East Michelle Drive
 Scottsdale, Arizona 85254

Respondents.

DOCKET NO. S-20483A-06-0661

SECURITY DIVISION'S MOTION TO ALLOW TELEPHONIC TESTIMONY

Arizona Corporation Commission
DOCKETED

JUL 25 2007

DOCKETED BY

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The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective Division witness Mrs. Anna Tjaden ("Mrs. Tjaden") during the hearing of the above-referenced matter beginning on August 13,

1 2007. This request is made on the basis that, although this individual can provide testimony that
2 will provide key information at this administrative hearing, special circumstances prevent her
3 personal appearance in Phoenix, Arizona during the course of this proceeding.

4 For this reason and others more fully addressed in the following Memorandum of Points
5 and Authorities, the Division's Motion to Allow Telephonic Testimony should be granted.

6 MEMORANDUM OF POINTS AND AUTHORITIES

7 I. INTRODUCTION

8 The Division anticipates calling Mrs. Tjaden as a central witness to this hearing. Mrs.
9 Tjaden invested in the Universal lease timeshare program through Respondent John E. Tencza
10 ("Tencza"). She can provide relevant information concerning her investment in the Universal
11 lease and how she came to invest through Tencza. As an investor, she had communications with
12 Tencza. Various documents (Exhibits S-69 through S-75) received by the Division from Mrs.
13 Tjaden have been disclosed to opposing counsel in this proceeding. Her testimony will provide
14 evidence central to a number of the Division's allegations against the Respondents in this case.

15 The physical appearance of Mrs. Tjaden, however, is complicated by the fact that she is 93
16 years old, requires a wheelchair to ambulate and has recently relocated to another state to reside
17 with her daughter. Traveling to Phoenix to appear at the upcoming hearing would be a hardship
18 for her and her family. Due to her age, she cannot travel alone and at least one family member
19 would be required to travel with her. Accordingly, she and her family have requested that she be
20 allowed to testify telephonically.

21 Mrs. Tjaden can offer highly probative evidence in this matter, yet faces challenges due to
22 her age that prevent her from appearing in Phoenix to testify in this matter. Allowing her to testify
23 telephonically will permit relevant evidence to be preserved and introduced. In addition, all parties
24 will have a full opportunity for questioning without unduly burdening the witness.

25

26

1 **II. ARGUMENT**

2 **A. Telephonic Testimony in Administrative Hearings is Supported Both**
3 **Under Applicable Administrative Rules and through Court Decisions**

4 The purpose of administrative proceedings is to provide for the fair, speedy and cost
5 effective resolution of administratively justiciable matters. For that purpose, the legislature
6 provided for streamlined proceedings and relaxed application of the formal rules of evidence.
7 Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of contested
8 administrative cases. The evidence submitted in an administrative hearing need not rise to the
9 level of formality required in a judicial proceeding, as long as it is “substantial, reliable and
10 probative.” In addition, the Commission promulgated rules of practice and procedure to ensure
11 just and speedy determination of all matters presented to it for consideration. *See, e.g.*, A.A.C.
R14-3-101(B); R14-3-109(K). Allowing Mrs. Tjaden to testify by telephone will provide reliable
12 testimony and preserve Respondents’ right to cross-examination.

13 Consistent with these administrative rules, courts have routinely acknowledged that
14 telephonic testimony in administrative proceedings is permissible and meets the requirements of
15 procedural due process. In *T.W.M. Custom Framing v. Industrial Commission of Arizona*, 198
16 Ariz. 41 (2000), for instance, the appellant challenged the validity of an ALJ’s judgment, partly
17 on the fact that the ALJ had allowed two of the Industrial Commission’s witnesses to appear
18 telephonically. The Court initially noted that telephonic testimony was superior to a mere
19 transcription of testimony because the telephonic medium “preserves paralinguistic features such
20 as pitch, intonation, and pauses that may assist the ALJ in making determinations of credibility.”
21 *See T.M.W. Custom Framing*, 198 Ariz. at 48. The court then went on to recognize that “ALJs
22 are not bound by formal rules of evidence or procedure and are charged with conducting the
23 hearing in a manner that achieves substantial justice.” *Id.* at 48, *citing* A.R.S. § 23-941(F).
24 Based on these observations, the Court held that the telephonic testimony offered in this case was
25 fully consistent with the requirement of “substantial justice.”

26 A number of other state courts have recognized that, in the case of administrative and
sometimes civil proceedings, telephonic testimony is permissible and consistent with the
requirements of procedural due process. *See, e.g.*, *Babcock v. Employment Division*, 72 Or. App.
486, 696 P.2d 19 (1985) (court approved Oregon Employment Division’s procedure to conduct
entire hearing telephonically); *W.J.C. v. County of Vilas*, 124 Wis. 2d 238, 369 N.W. 2d 162
(1985), *review denied by* 125 Wis.2d 583, 375 N.W.2d 215 (1985) (court permitted telephonic

1 expert testimony in commitment hearing). Ultimately, courts considering this issue have reached
2 the conclusion that, at least in the case of administrative hearings, "fundamental fairness" is not
3 compromised through the allowance of telephonic testimony.

4 The telephonic testimony requested in the present case fits squarely within the intent of
5 these holdings. The prospective testimony of Mrs. Tjaden will be reliable and probative and will
6 meet all requirements of "substantial justice." In other words, evidence bearing on the outcome
7 of this trial will not be barred, and Respondents will still have every opportunity to question the
8 witness about her testimony and about any exhibits discussed.

9 **B. The Arizona Corporation Commission has a well-recognized history**
10 **of permitting telephonic testimony during the course of**
11 **administrative hearings**

12 In light of the relaxed evidentiary and procedural rules governing administrative hearings
13 in Arizona, and because telephonic testimony does not jeopardize the fundamental fairness
14 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
15 telephonic testimony in their administrative hearings to introduce probative evidence. This
16 position has been borne out in a number of previous hearings. *See, e.g., In the matter of Yucatan*
17 *Resorts, Inc. et al.*, Docket No. S-03539A-03-0000; *In the matter of Chamber Group, et al.*,
18 Docket No. 03438A-00-0000; *In the matter of Joseph Michael Guess, Sr., et al.*, Docket No.
19 *S-03280A-00-0000*; *In the matter of Forex Investment Services*, Docket No. S-03177A-98-000.

20 The Division is seeking permission to introduce the telephonic testimony of only one
21 witness, on whom it would create a substantial burden to appear in person. Consistent with past
22 determinations in this forum, leave to introduce the telephonic testimony of this prospective
23 witness is warranted.

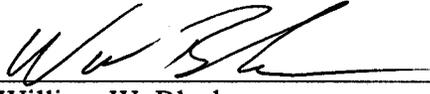
24 **III. CONCLUSION**

25 Permitting Mrs. Tjaden to testify telephonically at the upcoming administrative hearing
26 allows the Division to present relevant witness evidence that is substantial, reliable and probative,
fundamentally fair to the witness, and does not compromise Respondents' due process rights.

1 Therefore, the Division respectfully requests that its motion to allow telephonic testimony
2 be granted.

3 RESPECTFULLY SUBMITTED this 25th day of July, 2007.

4
5 By


6 William W. Black
7 Staff Attorney, Arizona Corporation
8 Commission Securities Division

9 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
10 filed this 25th day of July, 2007, with

11 Docket Control
12 Arizona Corporation Commission
13 1200 West Washington
14 Phoenix, AZ 85007

15 COPY of the foregoing hand-delivered this
16 25th day of July, 2007, to:

17 Marc Stern, Administrative Law Judge
18 Arizona Corporation Commission/Hearing Division
19 1200 West Washington
20 Phoenix, AZ 85007

21 COPY of the foregoing faxed/mailed
22 this 25th day of July, 2007 to:

23 Brian W. Hendrickson, Esq.
24 THE HENDRICKSON LAW FIRM, PLLC.
25 2133 E. Warner Road, Suite 106
26 Tempe, Arizona 85284
Attorneys for Tencza Respondents

Lindsay Brew, Esq.
HARALSON, MILLER, PITT, FELDMAN & McANALLY, P.L.C.
One South Church Avenue, Suite 900
Tucson, Arizona 85701-1620
Attorneys for Groh Respondents

