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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

In the matter of:
Trademark Capital Management, LLC, an
Arizona limited liability company;
Blue Investments, LLC, an Arizona limited
liability company;
Travis Richey and Melissa Boyd, Husband and
Wife;
Respondents.

DOCKET NO. S-20603A-08-0370

**SECURITIES DIVISION'S MOTION TO
ALLOW TELEPHONIC TESTIMONY**

**Hearing Dates: February 2, 5, 9, 10, & 11,
2009**

(Assigned to the Hon. Marc E. Stern)

The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective Division witnesses during the hearing of the above-referenced matter beginning on February 2, 2009. The following out of town witnesses are expected to be called to provide testimony regarding the investment(s) offer and/or sale and related documents:

- 1. Nathan Leung
- 2. Glenda Hill

Arizona Corporation Commission
DOCKETED

DEC 30 2008

DOCKETED BY *nr*

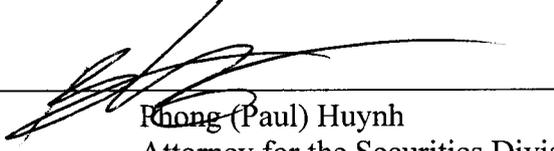
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1 This request is submitted on the grounds that, although this individual can provide testimony that
2 will provide relevant information at this administrative hearing, special circumstances prevent
3 their actual appearance in Phoenix, Arizona during the course of this proceeding.

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

6 Respectfully submitted this 30th day of December, 2008.

7
8 By _____


Phong (Paul) Huynh
Attorney for the Securities Division of the
Arizona Corporation Commission

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11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. INTRODUCTION**

13 The Division anticipates calling Nathan Leung ("Mr. Leung") and Glenda Hill ("Mrs. Hill")
14 as central witnesses to this hearing. Mr. Leung and Mrs. Hill can offer probative testimony as to this
15 case. In so doing, they can provide evidence supporting a number of the allegations brought by the
16 Division in this case. Mr. Leung lives in the State of Nevada and is a businessman. Mrs. Hill is an 82
17 years old widow and lives in Idaho. As such, the burdensome task of traveling down to Phoenix to
18 provide testimony in person is impractical for these witnesses.

19 The prospective witnesses above can offer highly probative evidence in this matter, yet
20 faces one or more obstacles that prevent his appearance at this hearing. The simple and well-
21 recognized solution to this problem is to allow for telephonic testimony; through this manner, not
22 only will relevant evidence be preserved and introduced, but all parties will have a full
23 opportunity for questioning - whether by direct or cross-examination.
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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. To effectuate that purpose, the
6 legislature provided for streamlined proceedings and relaxed application of the formal rules of
7 evidence. Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of
8 contested administrative cases. The evidence submitted in an administrative hearing need not
9 rise to the level of formality required in a judicial proceeding, as long as it is “substantial, reliable
10 and probative.” In addition, the Commission promulgated rules of practice and procedure to
11 ensure just and speedy determination of all matters presented to it for consideration. *See, e.g.,*
12 A.A.C. R14-3-101(B); R14-3-109(K). Allowing Mr. Leung and Mrs. Hill to testify by telephone
13 retains all indicia of reliability and preserves Respondents’ right to cross-examination.

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

1 Other courts have reached similar conclusions with respect to the use of telephonic
2 testimony in administrative and civil proceedings. In *C & C Partners, LTD. v. Dept. of*
3 *Industrial Relations*, 82 Cal.Rptr.2d 783, 70 Cal.App.4th 603 (1999), an appellate court was
4 asked to review a trial court's determination that a hearing officer's admittance of an inspector's
5 telephonic testimony violated C & C's due process rights and prejudiced C & C by preventing it
6 from cross-examining the inspector's notes. The appellate court rejected the trial court's
7 conclusions, holding that 1) cross-examination was available to C & C; and 2) that administrative
8 hearing of this nature need not be conducted according to the technical rules relating to evidence
9 and witnesses. *C & C Partners*, 70 Cal.App.4th at 612. In making this determination, the court
10 in *C & C Partners* found particularly instructive a passage from *Slattery v. Unemployment Ins.*
11 *Appeals Bd.*, 60 Cal.App.3rd 245, 131 Cal.Rptr. 422 (1976), another matter involving the
12 utilization of telephonic testimony. In *Slattery*, the court described administrative hearings
13 involving telephonic testimony as:

14
15 "a pragmatic solution, made possible by modern technology, which
16 attempts to reconcile the problem of geographically separated adversaries
17 with the core elements of a fair adversary hearing: the opportunity to
18 cross-examine adverse witnesses and to rebut or explain unfavorable
19 evidence." *Id.* at 251, 131 Cal.Rptr. at 422.

20 Based on similar reasoning, a number of other state courts have recognized that, in the
21 case of administrative and sometimes civil proceedings, telephonic testimony is permissible and
22 consistent with the requirements of procedural due process. *See, e.g., Babcock v. Employment*
23 *Division*, 72 Or. App. 486, 696 P.2d 19 (1985) (court approved Oregon Employment Division's
24 procedure to conduct entire hearing telephonically); *W.J.C. v. County of Vilas*, 124 Wis. 2d 238,
25 369 N.W. 2d 162 (1985) (court permitted telephonic expert testimony in commitment hearing).
26 Ultimately, courts considering this issue have reached the conclusion that, at least in the case of

1 administrative hearings, “fundamental fairness” is not compromised through the allowance of
2 telephonic testimony.

3 The telephonic testimony request in the present case fits squarely within the tenor of these
4 holdings. The Division is seeking to introduce the telephonic testimony of witnesses that could
5 otherwise not testify; the prospective testimony of these witnesses will be “substantial, reliable
6 and probative,” and will meet all requirements of substantial justice. In other words, evidence
7 bearing on the outcome of this trial will not be barred, and respondents will still have every
8 opportunity to question the witnesses about their testimony and/or about any exhibits discussed.

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10 **B. *The Arizona Corporation Commission has a well-recognized History of***
11 ***Permitting Telephonic Testimony during the Course of Administrative Hearings***

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13 In light of the relaxed evidentiary and procedural rules governing administrative hearings
14 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
15 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
16 telephonic testimony in their administrative hearings to introduce probative evidence. This
17 position has been borne out in a number of previous hearings. *See, e.g., In the matter of Calumet*
18 *Slag, et al.*, Docket No. S-03361A-00-0000; *In the matter of Chamber Group, et al.*, Docket No.
19 03438A-00-0000; *In the matter of Joseph Michael Guess, Sr., et al.*, Docket No. S-03280A-00-
20 0000; *In the matter of Forex Investment Services*, Docket No. S-03177A-98-000.

21 Only where telephonic testimony is the only option available does the Division seek leave
22 to offer this form of testimony. Consistent with past determinations in this forum, leave to
23 introduce the telephonic testimony of this prospective witness is warranted.

24 **III. CONCLUSION**

25 Permitting Mr. Leung and Mrs. Hill to testify telephonically at the upcoming administrative
26 hearing allows the Division to present relevant witness evidence that is expected to be reliable and

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
2 filed this 30th day of December, 2008, with

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered this
8 30th day of December, 2008, to:

9 ALJ Marc Stern
10 Arizona Corporation Commission/Hearing Division
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12 Phoenix, AZ 85007

13 COPY of the foregoing mailed
14 this 30th day of December, 2008, to:

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20 By: *Veronica Sandora*

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