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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

COMMISSIONERS

DOCKETED

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

MAY - 4 2009

DOCKETED BY [Signature]

In the matter of
JEROME WILLIAM CARTER,
individually and doing business as GOOD
ONLY DONE PRODUCTIONS, L.L.C., a
defunct Colorado limited liability company,
and JANE DOE CARTER, husband and
wife,
THE GREATEST ONLY DIVINE
PRODUCTIONS, L.L.C., a Nevada limited
liability company,
Respondents.

DOCKET NO. S-20625A-08-0481

SECURITIES DIVISION'S MOTION TO
ALLOW FOR TELEPHONIC TESTIMONY

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 May 11, 2009. This request is made on the
basis that, although the witnesses can provide testimony that will provide key information at this
administrative hearing, circumstances prevent personal appearance in Phoenix, Arizona during the
course of this proceeding.

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Division anticipates calling Elizabeth Brown, Lindiwe T. Saunders, Scott Bischoff and
Natasha Ali (the "witnesses") as central witnesses to this hearing. The witnesses invested with

1 Respondents in what was represented to be the purchase of copper futures by Jerome Carter
2 (“Carter”). The witnesses can provide relevant information concerning their investments and how
3 they came to invest. As investors, they had communications with Carter. Various documents
4 (Exhibits S-13, S-16, S-22, S-24-26) received by the Division from the witnesses have been
5 disclosed to Carter in this proceeding. The testimony of these witnesses will provide evidence
6 central to a number of the Division’s allegations against the Respondents in this case.

7 The physical appearance of these witnesses, however, is complicated by the fact that they
8 reside out of state in Maryland, North Carolina, Illinois and the District of Columbia. Traveling to
9 Phoenix to appear at the upcoming hearing and provide what is expected to be no more than one
10 half an hour of testimony, would be a hardship for these witnesses.

11 The witnesses can offer highly probative evidence in this matter, yet face challenges due to
12 the time and expense associated with long distance travel. Allowing them to testify telephonically
13 will permit relevant evidence to be preserved and introduced. In addition, all parties will have a
14 full opportunity for questioning without unduly burdening the witnesses.

15 **II. ARGUMENT**

16 **A. Telephonic Testimony in Administrative Hearings is Supported Both** 17 **Under Applicable Administrative Rules and through Court Decisions**

18 The purpose of administrative proceedings is to provide for the fair, speedy and cost
19 effective resolution of administratively justiciable matters. For that purpose, the legislature
20 provided for streamlined proceedings and relaxed application of the formal rules of evidence.
21 Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of contested
22 administrative cases. The evidence submitted in an administrative hearing need not rise to the
23 level of formality required in a judicial proceeding, as long as it is “substantial, reliable and
24 probative.” In addition, the Commission promulgated rules of practice and procedure to ensure
25 just and speedy determination of all matters presented to it for consideration. *See, e.g.,* A.A.C.
26 R14-3-101(B); R14-3-109(K). Allowing the witnesses to testify by telephone will provide

1 reliable testimony and preserve Respondents' right to cross-examination.

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

15 A number of other state courts have recognized that, in the case of administrative and
16 sometimes civil proceedings, telephonic testimony is permissible and consistent with the
17 requirements of procedural due process. See, e.g., *Babcock v. Employment Division*, 72 Or. App.
18 486, 696 P.2d 19 (1985) (court approved Oregon Employment Division's procedure to conduct
19 entire hearing telephonically); *W.J.C. v. County of Vilas*, 124 Wis. 2d 238, 369 N.W. 2d 162
20 (1985), review denied by 125 Wis.2d 583, 375 N.W.2d 215 (1985) (court permitted telephonic
21 expert testimony in commitment hearing). Ultimately, courts considering this issue have reached
22 the conclusion that, at least in the case of administrative hearings, "fundamental fairness" is not
23 compromised through the allowance of telephonic testimony.

24 The telephonic testimony requested in the present case fits squarely within the intent of
25 these holdings. The prospective testimony of the witnesses will be reliable and probative and
26 will meet all requirements of "substantial justice." In other words, evidence bearing on the

1 outcome of this trial will not be barred, and Respondents will still have every opportunity to
2 question the witnesses about their testimony and about any exhibits discussed.

3
4 **B. The Arizona Corporation Commission has a well-recognized history**
5 **of permitting telephonic testimony during the course of**
6 **administrative hearings**

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

15 The Division is seeking permission to introduce the telephonic testimony of four
16 witnesses, on whom it would create a substantial burden to appear in person. Consistent with
17 past determinations in this forum, leave to introduce the telephonic testimony of these
18 prospective witnesses is warranted.

19 **III. CONCLUSION**

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

23 ...

24 ...

25 ...

26 ...

