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BEFORE THE Arizona Corporation Commission CORPORATION COMMISSION

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AUG 12 2002

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AZ CORP COMMISSION
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IN THE MATTER OF

DOCKET NO. S-03450A-02-0000

Philip William Merrill
3788 N. 156th Drive
Goodyear, AZ 85338
CRD#2436444

Respondent

)
) **OBJECTION TO MOTION TO**
) **TO ALLOW TELEPHONIC**
) **TESTIMONY**

The Respondent hereby objects to the Division's motion to allow telephonic testimony during the scheduled hearing in this matter. This objection is supported by the accompanying Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The Division seeks to prove its case in this matter through testimony of three witnesses two of whom are former customers named in the notice and the third a daughter of another customer named in the notice who will not be present at the hearing. The Division states "All three of these witnesses will provide factual testimony probative of the allegations against Respondent in the notice". The Respondent objects.

Anthony Bingham, attorney for the Division, has advised counsel for the Respondent that he does not intend to call Janet Mayfield, the mother of Lori Mayfield as a witness in this matter.¹ Instead, Mr. Bingham has advised, the testimony of

¹ respondent has asked that a subpoena be issued for Janet Mayfield to compel her appearance. However, at this time she has not been served and it

Janet Mayfield will be offered by hearsay testimony of what she told her daughter. Respondent objects to this hearsay testimony being presented by telephone under circumstances where cross-examination will be seriously hampered and the trier of facts will not be able to assess the demeanor of the witness.

Respondent does not agree that testimony that may go to the heart of this matter should be allowed as hearsay, especially where the witness is easily available to the division. Allowing hearsay telephonically compounds the problem and unfairness significantly.

The other two witnesses sought to be offered telephonically are former customers of the Respondent whose accounts are directly involved in the charges against Respondent. There will be significant disputed issues with these witnesses concerning the handling of their accounts and there is little doubt that the testimony of these witnesses and Respondent will vary significantly on a number of critical issues. Cross examination will severely hampered if the witnesses are not present. The only reason given for their non-appearance is that travel would be burdensome and impractical for the amount of time they might testify. The amount of time they testify is really irrelevant to the issue. As the Division claims these witnesses will provide factual testimony probative of the allegations against Respondent. The Division wishes to deny the Respondent the ability to defend himself fully because it is inconvenient for

is not known whether she will appear. Mr. Bingham has refused to tell counsel for respondent why he is not calling Janet Mayfield to be present in person and testify.

the witnesses who will testify against him. One of the witnesses, Sylvia Hayes, lives in the Phoenix area and is unavailable because, the Division states, she is on a vacation. The Division has known of the hearing date in this matter for months. No effort was made to advise counsel for Respondent that Ms. Hays would not be available in person at the hearing to give Respondent's counsel an opportunity to take her deposition. Although this would not have solved the problem of the trier of facts not seeing the demeanor of the witness, unless the deposition was done by video, it would have solved the problem of providing the Respondent's counsel with an opportunity for effective cross-examination.

There is another significant problem that the Division has not addresses. Rule 14-3-109 F. requires all testimony to be under oath. The purpose of the oath is to make the witness subject to the penalties of perjury if they violate the oath. There is no provision in the Arizona Rules of Civil Procedure or the Arizona Revised Statutes that allows an oath to be administered by a person in Arizona to a person not in Arizona. Additionally, a person not in Arizona would not be subject to the penalties of perjury in Arizona based upon an attempt to administer an oath by a person in Arizona. When this was called to Mr. Bingham's attention his response was that telephonic testimony has been taken in other ACC hearings. However, he could not advise that any attorney representing a Respondent had ever objected to such a procedure. The fact that it may have

been done in the past without objection does not make it proper in the face of a valid objection.

The Division also suggests that the testimony of an attorney for Morgan Stanley Dean Witter (Keith Guilfoyle) may be offered telephonically. The Division states that this testimony would deal with documents produced and general questions about the documents and the operation of the firm. This testimony is also objectionable because of the oath problem. However, since Mr. Guilfoyle is an attorney and supposedly bound not to mislead a tribunal by ethical rules, Respondent might be willing to agree to not object to his testimony telephonically if more detail was given as to what the Division intends to prove by the testimony of this witness.

Dated this 12th day of August, 2002



Frank Lewis (SB # 000909)
Begam Lewis Marks & Wolfe
Attorney for Respondent
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Phoenix, AZ 85003 (602-254-6071)

Original and ten copies
of the foregoing hand-delivered
this 12 day of August, 2002

to

Docket Control
Arizona Corporation Commission
1200 W. Washington, Phoenix,
Arizona, 85007

and

copy of the foregoing
delivered this 12th day of August, 2002 along with
a copy of the proposed subpoena to Anthony Bingham
1300 West Washington, Phoenix, Arizona



Frank Lewis