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BEFORE THE ARIZONA CORPORATION COMMISSION

AZ CORP COMMISSION  
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COMMISSIONERS

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

In the matter of:	)	DOCKET NO. S-20669A-09-0187
Robert W. Mangold and Michelle M. Mangold, husband and wife;	)	<b>SECURITIES DIVISION'S MOTION TO ALLOW TELEPHONIC TESTIMONY</b>
One Source Mortgage & Investments, Inc., an Arizona corporation;	)	
Strategic Equity Investments, LLC, an Arizona limited liability company;	)	<b>Hearing Dates: January 25, 26, 27, and 28, 2010</b>
Respondents.	)	<b>(Assigned to the Hon. Marc E. Stern)</b>

The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of a prospective Division witness during the hearing of the above-referenced matter beginning on January 25, 2010. The following out of town witness is expected to be called to provide testimony regarding the investment offer and/or sale and related documents:

1. Russell Palmer

Arizona Corporation Commission  
**DOCKETED**

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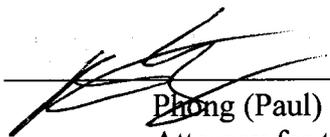
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1 This request is submitted on the grounds that, although this individual can provide testimony that  
2 will provide relevant information at this administrative hearing, special circumstances prevent his  
3 actual appearance in Phoenix, Arizona during 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 18th day of December, 2009.

7  
8  
9 By \_\_\_\_\_



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

10  
11  
12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 The Division anticipates calling Russell Palmer ("Mr. Palmer") as a central witness to this  
15 hearing. Mr. Palmer can offer probative testimony as to this case. In so doing, he can provide  
16 evidence supporting a number of the allegations brought by the Division in this case. Mr. Palmer  
17 lives outside of Phoenix and is a small business owner. As such, the burdensome task of traveling  
18 down to Phoenix to provide testimony in person is impractical for this witness.

19 The prospective witness 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.  
24  
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. 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. Palmer to testify by telephone retains all  
13 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.

9  
10 **B. *The Arizona Corporation Commission has a well-recognized History of***  
11 ***Permitting Telephonic Testimony during the Course of Administrative Hearings***

12 In light of the relaxed evidentiary and procedural rules governing administrative hearings  
13 in this state, 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 Calumet*  
17 *Slag, et al.*, Docket No. S-03361A-00-0000; *In the matter of Chamber Group, et al.*, Docket No.  
18 03438A-00-0000; *In the matter of Joseph Michael Guess, Sr., et al.*, Docket No. S-03280A-00-  
19 0000; *In the matter of Forex Investment Services*, Docket No. S-03177A-98-000.

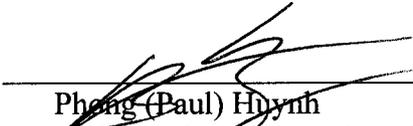
20 Where telephonic testimony is the best option available does the Division seek leave to  
21 offer this form of testimony. Consistent with past determinations in this forum, leave to  
22 introduce the telephonic testimony of this prospective witness is warranted.

23 **III. CONCLUSION**

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

1 Therefore, the Division respectfully requests that its motion for leave to present such telephonic  
2 testimony be granted.

3 RESPECTFULLY SUBMITTED this 18th day of December, 2009.

4  
5 By   
6 Phong (Paul) Huynh  
7 Attorney for the Securities Division of the  
8 Arizona Corporation Commission

8 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
9 filed this 18th day of December, 2009, with

10 Docket Control  
11 Arizona Corporation Commission  
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14 COPY of the foregoing hand-delivered this  
15 18th day of December, 2009, to:

16 ALJ Marc Stern  
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19 Phoenix, AZ 85007

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By: 