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BEFORE THE ARIZONA CORPORATION COMMISSION

SECURITIES DIVISION

COMMISSIONERS

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

In the matter of:  
 SECURE RESOLUTIONS, INC., an Arizona Corporation;  
 DOUGLAS COTTLE and KYLA COTTLE, husband and wife,  
 Respondents.

DOCKET NO. S-20677A-09-0256

SECURITIES DIVISION'S MOTION TO ALLOW TELEPHONIC TESTIMONY

Hearing Dates: February 8, 9, 10, 11, 16, 17, & 18, 2010

(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 a prospective Division witnesses during the hearing of the above-referenced matter beginning on February 8, 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. Wesley Kikuchi;
2. Dean Dorsey;
3. Thomas Adams;

Arizona Corporation Commission  
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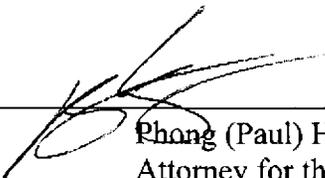
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1 This request is submitted on the grounds that, although these individuals can provide testimony  
2 that will provide relevant information at this administrative hearing, special circumstances  
3 prevent their actual appearance in Phoenix, Arizona 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 20<sup>th</sup> day of January, 2010.

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

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The Division anticipates calling Wesley Kikuchi ("Mr. Kikuchi"), Dean Dorsey ("Mr. Dorsey") and Thomas Adams, Sr. ("Mr. Adams") as central witnesses to this hearing. The witnesses can offer probative testimony as to this case. In so doing, they can provide evidence supporting a number of the allegations brought by the Division in this case. Mr. Kikuchi lives in Nevada, Mr. Dorsey lives in Nevada, and Mr. Adams lives in California. As such, the burdensome task of traveling down to Phoenix to provide testimony in person is impractical for these witnesses.

The prospective witnesses above can offer highly probative evidence in this matter, yet faces one or more obstacles that prevent their appearance at this hearing. The simple and well-recognized solution to this problem is to allow for telephonic testimony; through this manner, not only will relevant evidence be preserved and introduced, but all parties will have a full opportunity for questioning - whether by direct or cross-examination.

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2 **II. ARGUMENT**

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

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

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

1 citing A.R.S. § 23-941(F). Based on these observations, the Court held that the telephonic  
2 testimony offered in this case was fully consistent with the requirement of “substantial justice.”

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

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

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

1 369 N.W. 2d 162 (1985) (court permitted telephonic expert testimony in commitment hearing).  
2 Ultimately, courts considering this issue have reached the conclusion that, at least in the case of  
3 administrative hearings, "fundamental fairness" is not compromised through the allowance of  
4 telephonic testimony.

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

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

14 In light of the relaxed evidentiary and procedural rules governing administrative hearings  
15 in this state, and because telephonic testimony does not jeopardize the fundamental fairness  
16 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of  
17 telephonic testimony in their administrative hearings to introduce probative evidence. This  
18 position has been borne out in a number of previous hearings. *See, e.g., In the matter of Calumet*  
19 *Slag, et al.*, Docket No. S-03361A-00-0000; *In the matter of Chamber Group, et al.*, Docket No.  
20 03438A-00-0000; *In the matter of Joseph Michael Guess, Sr., et al.*, Docket No. S-03280A-00-  
21 0000; *In the matter of Forex Investment Services*, Docket No. S-03177A-98-000.

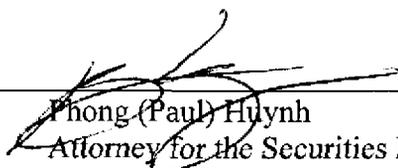
22 Where telephonic testimony is the best option available does the Division seek leave to  
23 offer this form of testimony. Consistent with past determinations in this forum, leave to  
24 introduce the telephonic testimony of this prospective witness is warranted. The witnesses will be  
25 requested to call into the participant line of 602-542-0659 or related number at their scheduled  
26 time of testimony.

1 **III. CONCLUSION**

2 Permitting Mr. Kikuchi, Mr. Dorsey and Mr. Adams to testify telephonically at the  
3 upcoming administrative hearing allows the Division to present relevant witness evidence that is  
4 expected to be reliable and probative, is fundamentally fair, and does not compromise  
5 Respondents' due process rights. Therefore, the Division respectfully requests that its motion for  
6 leave to present such telephonic testimony be granted.

7 RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of January, 2010.

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

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

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12 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
13 filed this 20<sup>th</sup> day of January, 2010, with

14 Docket Control  
15 Arizona Corporation Commission  
1200 West Washington  
Phoenix, AZ 85007

16 COPY of the foregoing hand-delivered this  
17 20<sup>th</sup> day of December, 2009, to:

18 ALJ Marc Stern  
19 Arizona Corporation Commission/Hearing Division  
1200 West Washington  
Phoenix, AZ 85007

20 3 COPIES of the foregoing mailed  
21 this 20<sup>th</sup> day of January, 2010, to:

22 The Baker Law Firm, L.L.C.  
23 Michael S. Baker, Esq.  
702 E. Coronado Rd.  
Phoenix, Arizona 85006

24 By: 