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ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

2010 MAY 20 P 12:09

COMMISSIONERS

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

AZ CORP COMMISSION  
DOCKET CONTROL

In the matter of: )  
 RADICAL BUNNY, L.L.C., an Arizona )  
 limited liability company, )  
 HORIZON PARTNERS, L.L.C., an Arizona )  
 limited liability company, )  
 TOM HIRSCH (aka THOMAS N. HIRSCH) )  
 and DIANE ROSE HIRSCH, husband and )  
 wife, )  
 BERTA FRIEDMAN. WALDER (aka )  
 BUNNY WALDER), a married person, )  
 HOWARD EVAN WALDER, a married )  
 person, )  
 HARISH PANNALAL SHAH and )  
 MADHAVI H. SHAH, husband and wife, )  
 Respondents. )

DOCKET NO. S-20660A-09-0107

SECURITIES DIVISION'S MOTION TO  
ALLOW TELEPHONIC TESTIMONY

(Assigned to the Hon. Lyn Farmer)

Arizona Corporation Commission

DOCKETED

MAY 20 2010

DOCKETED BY	<i>MM</i>
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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 June 2, 2010. The following out of town witnesses are expected to be called to provide testimony regarding the investment offer and/or sale and related documents: (1) Roberta Heneisen; and (2) Steven Friedberg. This request is submitted on the grounds that, although these individuals can provide testimony that will provide relevant information at this administrative hearing, special circumstances prevent their actual appearance in Phoenix, Arizona during the course of this proceeding.

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

3 Respectfully submitted this 20<sup>th</sup> day of May, 2010.

4  
5   
6 Julie Coleman  
7 Chief Counsel of Enforcement for the Securities  
8 Division of the Arizona Corporation Commission

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. INTRODUCTION**

11 The Division anticipates calling Roberta Heneisen and Steven Friedberg as central witnesses  
12 to this hearing. The witnesses can offer probative testimony as to this case. In so doing, they can  
13 provide evidence supporting a number of the allegations brought by the Division in this case. Ms.  
14 Heneisen lives in Georgia and Mr. Friedberg lives in New York. As such, the burdensome task of  
15 traveling down to Phoenix to provide testimony in person is impractical for these witnesses.

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

21 **II. ARGUMENT**

22 *A. Telephonic testimony in administrative hearings is supported both under applicable  
23 administrative rules and through court decisions.*

24 The purpose of administrative proceedings is to provide for the fair, speedy and cost  
25 effective resolution of administratively justiciable matters. To effectuate that purpose, the  
26 legislature provided for streamlined proceedings and relaxed application of the formal rules of  
evidence. Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of

1 contested administrative cases. The evidence submitted in an administrative hearing need not  
2 rise to the level of formality required in a judicial proceeding, as long as it is “substantial, reliable  
3 and probative.” In addition, the Commission promulgated rules of practice and procedure to  
4 ensure just and speedy determination of all matters presented to it for consideration. *See, e.g.,*  
5 A.A.C. R14-3-101(B); R14-3-109(K). Allowing Ms. Heneisen and Mr. Friedberg to testify by  
6 telephone retains all indicia of reliability and preserves Respondents’ right to cross-examination.

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

20 Other courts have reached similar conclusions with respect to the use of telephonic  
21 testimony in administrative and civil proceedings. In *C & C Partners, LTD. v. Dept. of*  
22 *Industrial Relations*, 82 Cal.Rptr.2d 783, 70 Cal.App.4th 603 (1999), an appellate court was  
23 asked to review a trial court’s determination that a hearing officer’s admittance of an inspector’s  
24 telephonic testimony violated C & C’s due process rights and prejudiced C & C by preventing it  
25 from cross-examining the inspector’s notes. The appellate court rejected the trial court’s  
26 conclusions, holding that 1) cross-examination was available to C & C; and 2) that administrative

1 hearing of this nature need not be conducted according to the technical rules relating to evidence  
2 and witnesses. *C & C Partners*, 70 Cal.App.4th at 612. In making this determination, the court  
3 in *C & C Partners* found particularly instructive a passage from *Slattery v. Unemployment Ins.*  
4 *Appeals Bd.*, 60 Cal.App.3rd 245, 131 Cal.Rptr. 422 (1976), another matter involving the  
5 utilization of telephonic testimony. In *Slattery*, the court described administrative hearings  
6 involving telephonic testimony as:

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

12          Based on similar reasoning, a number of other state courts have recognized that, in the  
13 case of administrative and sometimes civil proceedings, telephonic testimony is permissible and  
14 consistent with the requirements of procedural due process. *See, e.g., Babcock v. Employment*  
15 *Division*, 72 Or. App. 486, 696 P.2d 19 (1985) (court approved Oregon Employment Division’s  
16 procedure to conduct entire hearing telephonically); *W.J.C. v. County of Vilas*, 124 Wis. 2d 238,  
17 369 N.W. 2d 162 (1985) (court permitted telephonic expert testimony in commitment hearing).  
18 Ultimately, courts considering this issue have reached the conclusion that, at least in the case of  
19 administrative hearings, “fundamental fairness” is not compromised through the allowance of  
20 telephonic testimony.

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



1 ORIGINAL and 13 copies of the foregoing  
2 filed this 20<sup>th</sup> day of May, 2010 with:

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 W. Washington St.  
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered  
8 this 20<sup>th</sup> day of May, 2010 to:

9 Lyn Farmer  
10 Administrative Law Judge  
11 Arizona Corporation Commission  
12 1200 W. Washington St.  
13 Phoenix, AZ 85007

14 COPY of the foregoing sent by over-night mail via  
15 Federal Express this 20<sup>th</sup> day of May, 2010 to:

16 Michael J. LaVelle  
17 Matthew K. LaVelle  
18 LAVELLE & LAVELLE, PLC  
19 2525 E. Camelback Road, Suite 888  
20 Phoenix, AZ 85016  
21 Attorney for Respondents Horizon Partners, LLC, Tom Hirsch, Diane Hirsch, Berta Walder.  
22 Howard Walder, Harish Shah, and Madhavi Shah

23  
24  
25  
26  
By: 