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BEFORE THE ARIZONA CORPORATION COMMISSION

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2010 MAY 24 A 11:42

- KRISTIN K. MAYES, Chairman
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ARIZONA CORP COMMISSION  
DOCKET CONTROL

In the matter of:

THEODORE J. HOGAN & ASSOCIATES, LLC a.k.a. TED HOGAN AND ASSOCIATES, an Arizona limited liability company,

THEODORE J. HOGAN a.k.a. TED KILLS IN THE FOG, a married man

and

CHRISTINA L. DAMITIO a.k.a. CHRISTINA HOGAN, a married woman

Respondents.

DOCKET NO. S-20714A-09-0553

**SECURITIES DIVISION'S MOTION TO ALLOW TELEPHONIC TESTIMONY**

**Hearing Dates: June 15 - 17, 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 prospective Division witnesses during the hearing of the above-referenced matter beginning on June 15, 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. Joseph Waller, Billings, Montana
2. John Bradshaw, Sedona, Arizona
3. Lyle Rogers, Sedona Arizona
4. Melissa Deegan, Aloha, Oregon

Arizona Corporation Commission  
**DOCKETED**

MAY 24 2010

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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 24<sup>th</sup> day of May, 2010.

7  
8 By Wendy Coy  
9 Wendy Coy  
10 Attorney for the Securities Division of the  
Arizona Corporation Commission

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. INTRODUCTION**

13 The Division anticipates calling Joseph Waller ("Mr. Waller"), John Bradshaw ("Mr.  
14 Bradshaw"), Lyle Rogers ("Mr. Rogers") and Melissa Deegan ("Ms. Deegan") as central witnesses  
15 to this hearing. The witnesses can offer probative testimony as to this case. In so doing, they can  
16 provide evidence supporting a number of the allegations brought by the Division in this case. Mr.  
17 Waller's offices are located in Billings Montana, Mr. Bradshaw and Mr. Rogers reside in Sedona,  
18 Arizona and Ms. Deegan resides in Aloha, Oregon. As such, the burdensome task of traveling down  
19 to Phoenix to provide testimony in person is impractical for these witnesses.

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

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).

13 Pursuant to A.A.C. R2-19-114, an administrative law judge (“ALJ”) may grant a motion  
14 for telephonic testimony if 1) personal attendance by a witness will present an undue hardship; 2)  
15 telephonic testimony will not cause undue prejudice to any party; and 3) the proponent of the  
16 telephonic testimony pays for the cost of obtaining the testimony telephonically. Allowing Mr.  
17 Waller, Mr. Bradshaw, Mr. Rogers and Ms. Deegan to testify by telephone does not provide any  
18 undue prejudice to any party and retains all indicia of reliability and preserves Respondents’ right  
19 to cross-examination.

20 Consistent with these administrative rules, courts have routinely acknowledged that  
21 telephonic testimony in administrative proceedings is permissible and consistent with the  
22 requirements of procedural due process. *See* A.A.C. R2-19-114. In *T.W.M. Custom Framing v.*  
23 *Industrial Commission of Arizona*, 198 Ariz. 41 (2000), for instance, the appellant challenged an  
24 validity of an ALJ’s judgment, partly on the fact that the ALJ had allowed two of the Industrial  
25 Commission’s witnesses to appear telephonically. The Court initially noted that telephonic  
26 testimony was superior to a mere transcription of testimony because the telephonic medium  
“preserves paralinguistic features such as pitch, intonation, and pauses that may assist the ALJ in

1 making determinations of credibility.” See *T.M.W. Custom Framing*, 198 Ariz. at 48. The court  
2 then went on to recognize that “ALJs are not bound by formal rules of evidence or procedure and  
3 are charged with conducting the hearing in a manner that achieves substantial justice.” *Id.* at 48,  
4 citing A.R.S. § 23-941(F). Based on these observations, the Court held that the telephonic  
5 testimony offered in this case was fully consistent with the requirement of “substantial justice.”

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

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

24 Based on similar reasoning, a number of other state courts have recognized that, in the  
25 case of administrative and sometimes civil proceedings, telephonic testimony is permissible and  
26 consistent with the requirements of procedural due process. See, e.g., *Babcock v. Employment*  
*Division*, 72 Or. App. 486, 696 P.2d 19 (1985) (court approved Oregon Employment Division’s  
procedure to conduct entire hearing telephonically); *W.J.C. v. County of Vilas*, 124 Wis. 2d 238,  
369 N.W. 2d 162 (1985) (court permitted telephonic expert testimony in commitment hearing).

1 Ultimately, courts considering this issue have reached the conclusion that, at least in the case of  
2 administrative hearings, "fundamental fairness" is not compromised through the allowance of  
3 telephonic testimony.

4 The telephonic testimony request in the present case fits squarely within the tenor of these  
5 holdings. The Division is seeking to introduce the telephonic testimony of witnesses that could  
6 otherwise appear in a Phoenix hearing room without causing undue hardship to the witnesses; the  
7 prospective testimony of these witnesses will be "substantial, reliable and probative," and will  
8 meet all requirements of substantial justice. In other words, evidence bearing on the outcome of  
9 this trial will not be barred, and respondents will still have every opportunity to question the  
10 witnesses about their testimony and/or about any exhibits discussed.

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

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

21 Consistent with past determinations in this forum, leave to introduce the telephonic  
22 testimony of this prospective witness is warranted.

23 **III. CONCLUSION**

24 Permitting Mr. Waller, Mr. Bradshaw, Mr. Rogers and Ms. Deegan to testify telephonically  
25 at the upcoming administrative hearing allows the Division to present relevant witness evidence  
26 that is expected to be reliable and probative, is fundamentally fair, and does not compromise

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

3 RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of May, 2010.

4  
5 By Wendy Coy  
6 Wendy Coy  
7 Attorney for the Securities Division of the  
Arizona Corporation Commission

8 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
9 filed this 24<sup>th</sup> day of May, 2010, with

10 Docket Control  
11 Arizona Corporation Commission  
12 1200 West Washington  
13 Phoenix, AZ 85007

14 COPY of the foregoing hand-delivered this  
15 24<sup>th</sup> day of May, 2010, to:

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

20 3 COPIES of the foregoing mailed  
21 this 24<sup>th</sup> day of May, 2010, to:

22 THEODORE J. HOGAN & ASSOCIATES  
23 THEODORE J. HOGAN, and  
24 CHRISTINA L. DAMITIO  
25 460 Andante  
26 Sedona, Arizona 86336

By: Veronica Sandoval