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BEFORE THE ARIZONA CORPORATION COMMISSION

2010 SEP -7 A 9: 22

COMMISSIONERS

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

SECURITIES DIVISION
DOCKET CONTROL

In the matter of:
BARRON WILSON THOMAS, a single man,
BARRON THOMAS SCOTTSDALE, L.L.C., an
Arizona limited liability company,
BARRON THOMAS SCOTTSDALE, L.L.C., a
Delaware limited liability company,
BARRON THOMAS AVIATION, INC., a
Delaware corporation,
BARRON THOMAS AVIATION HOLDINGS,
INC., a Delaware corporation,
BARRON THOMAS SOUTHWEST, INC., a
Delaware corporation,
Respondents.

DOCKET NO. S-20720A-10-0001

SECURITIES DIVISION'S MOTION TO
ALLOW TELEPHONIC TESTIMONY

Administrative Law Judge Marc E. Stern

Arizona Corporation Commission
DOCKETED

SEP 7 2010

DOCKETED BY [Signature]

The Securities Division ("Division") of the Arizona Corporation Commission
("Commission") moves for leave to present the telephonic testimony of several prospective
investor and third-party witnesses during the evidentiary hearing to begin on October 4, 2010.

These witnesses can offer highly probative evidence in this matter, yet face one or more
financial and/or logistical 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.

1 **A. INTRODUCTION.**

2 This case involves investments purportedly secured by airplanes purchased by
3 respondents with investor money. In its list of witnesses and exhibits ("LWE"), the Division
4 identified 87 investors residing throughout Arizona, 27 other states and Canada.

5 The investor witnesses the Division expects to call at hearing reside in the following
6 distant locations: (1) Greg Bittner, Jr. resides in Missouri; (2) Greg Bittner, III resides in
7 Missouri; (3) Robert J. Donohue resides in California; (4) Mary Ann Gillis resides in Michigan;
8 (5) Everett McDonald resides in Minnesota; (6) James Spruill resides in Tennessee; (7) Elroy E.
9 "Buck" Hilbert resides in Illinois; (8) Eugene Green resides in Maine; (9) Sharon and Robert
10 Destefano reside in Mississippi; and (10) William C. Braman resides in far west Arizona. As
11 noted in the Division's investor list pre-marked as proposed exhibit S-199, the Division may also
12 call as witnesses those investors who reside in other states across the United States.

13 The Division also expects to call the following third-party witnesses to testify as to the
14 airplane collateral and investment advertisements: (1) Dan Gillespie resides in Virginia (airplane
15 collateral); (2) Rachel Hill resides in Tennessee (investment advertisements); and (3) Steve
16 Wentworth resides in Minnesota (airplane collateral sold to respondents).

17 These witnesses will offer relevant testimony supporting the Division's allegations. Their
18 testimony is anticipated to be neither complex nor lengthy. They will each be asked questions
19 regarding approximately 3 to 5 proposed Division exhibits. The investors identified in exhibit S-
20 199 not specifically mentioned above will testify without reference to any document. Telephonic
21 testimony is common, efficient and provides the parties full and fair opportunity for direct or
22 cross-examination questioning.

23 The facts they will testify to are not reasonably in dispute (*i.e.*, the purchase dates and
24 price of the investments, the number of discrete investment ads published by respondents, etc.).
25 Rather, the parties primarily disagree as to legal conclusions.¹ Under the circumstances, the

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¹ Respondents assert that this case does not involve securities, but rather loans.

1 substantial cost of providing transportation and lodging for these witnesses to make personal
2 appearances in Phoenix is impractical and unnecessary. Also, the Division believes the evidence
3 will demonstrate that respondents offered, sold and managed the vast majority of these
4 investments via the telephone. (*See e.g.*, First Amended Notice, ¶¶14-18, 20-21).

5 Importantly, the Division provided respondents with the vast majority of its proposed
6 documentary evidence relating to these witnesses on *May 14, 2010*. The Division provided
7 respondents with its remaining proposed exhibits as ordered by the ALJ on August 4, 2010, or 60
8 days prior to the October 4 hearing start date. These productions include all of the documents
9 provided to the Division by the above listed witnesses.

10 Respondent Barron Wilson Thomas has dealt with these witnesses for many years. The
11 Division's April 30, 2010, First Amended Notice, and its detailed August 4, 2010, LWE provides
12 the respondents with extraordinary detail regarding the anticipated testimony of these witnesses.
13 Thus, respondents have had ample opportunity to independently interview these witnesses such
14 that any alleged, undue prejudice to them in allowing their telephonic testimony has been
15 eliminated.

16 **B. ARGUMENT.**

17 **1. Telephonic testimony in administrative hearings is supported both under**
18 **applicable administrative rules and through court decisions.**

19 The purpose of administrative proceedings is to provide for the fair, speedy and cost
20 effective resolution of administratively justiciable matters. To effectuate that purpose, the
21 legislature provided for streamlined proceedings and relaxed application of the formal rules of
22 evidence. Specifically, A.R.S. § 41-1062(A)(1)² provides for informality in the conduct of
23 contested administrative cases. The evidence submitted in an administrative hearing need not
24 rise to the level of formality required in a judicial proceeding, as long as it is "substantial, reliable

25 ² A.R.S. § 41-1062(A)(1) states that "A hearing may be conducted in an informal manner and without adherence to the
26 rules of evidence required in judicial proceedings. Neither the manner of conducting the hearing nor the failure to
adhere to the rules of evidence required in judicial proceedings shall be grounds for reversing any administrative
decision or order providing the evidence supporting such decision or order is substantial, reliable and probative."

1 and probative.” In addition, the Commission promulgated rules of practice and procedure to
2 ensure just and speedy determination of all matters presented to it for consideration. *See, e.g.*,
3 A.A.C. R14-3-101(B)³; *also*, R14-3-109(K)⁴.

4 Applied here, allowing the above listed witnesses to testify by telephone retains all indicia
5 of reliability and preserves respondents’ right to cross-examination. Further consistent with these
6 administrative rules, courts have routinely acknowledged that telephonic testimony in
7 administrative proceedings is permissible and consistent with the requirements of procedural due
8 process.

9 In *T.W.M. Custom Framing v. Industrial Commission of Arizona*, 198 Ariz. 41, 6 P.3d
10 745 (2000), for instance, the appellant challenged an validity of an ALJ’s judgment, partly on the
11 fact that the ALJ had allowed two of the Industrial Commission’s witnesses to appear
12 telephonically. The Court initially noted that telephonic testimony was superior to a mere
13 transcription of testimony because the telephonic medium “preserves paralinguistic features such
14 as pitch, intonation, and pauses that may assist the ALJ in making determinations of credibility.”
15 *See T.M.W. Custom Framing*, 198 Ariz. at 48, 66 P.3d at 752. The court then went on to
16 recognize that “ALJs are not bound by formal rules of evidence or procedure and are charged
17 with conducting the hearing in a manner that achieves substantial justice.” *Id.* at 48, 752 *citing*
18 A.R.S. § 23-941(F). Based on these observations, the *T.W.M. Custom Framing* Court held that
19 the telephonic testimony offered in this case was fully consistent with the requirement of
20 “substantial justice.”⁵

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22 ³ A.A.C. R14-3-101(B) states that the applicable rules “shall be liberally construed” to secure the “just and speedy”
determination of this matter.

23 ⁴ A.A.C. R14-3-109(K) states, in part, that “In conducting any...hearing, neither the Commission nor any officer or
24 employee thereof shall be bound by the technical rules of evidence, and no informality in any proceeding or in the
manner of taking testimony shall invalidate any order, decision, rule or regulation made, approved or confirmed by the
Commission.” The rule further states that adherence to the civil rules of evidence “may be relaxed in the discretion of
the Commission or presiding officer when deviation from the technical rules of evidence will aid in ascertaining the
facts.”

25 ⁵ The Arizona Supreme Court also recently held that telephonic testimony of an evaluating physician in an involuntary
26 mental health commitment proceeding did not violate the patient's due process rights despite the fact such testimony
resulted in a “massive curtailment” of the patient's liberty. *See, In re MH-2008-000867*, ___ P.3d ___, 2010 WL
3034499, at *4 (Ariz. 2010)(reasoning that 6th Amendment “confrontation clause” applied only to criminal prosecution

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

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

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

25 cases, not to civil or even mental health commitment proceedings; "Involuntary commitment involves a significant
26 curtailment of individual liberty. In circumstances like those presented here, however, allowing telephonic testimony
serves important governmental interests and does not significantly increase the risks of an erroneous deprivation.
Although Dr. F was not physically present in the courtroom, he was subject to full cross-examination.")

1 administrative hearings, “fundamental fairness” is not compromised through the allowance of
2 telephonic testimony.

3 The telephonic testimony requested in this case fits squarely within the tenor of the plain
4 language of the applicable administrative statutes, rules and case holdings discussed above. The
5 Division is seeking to introduce the telephonic testimony of witnesses that could otherwise not
6 testify for financial and/or logistical reasons. The prospective testimony of these witnesses will
7 be “substantial, reliable and probative,” and will meet all requirements of substantial justice.
8 Thus, if the instant Motion is granted, direct, first-person evidence bearing on the outcome of this
9 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 **2. 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. Consistent
21 with past determinations in this forum, leave to introduce the telephonic testimony of these
22 prospective witnesses is warranted.

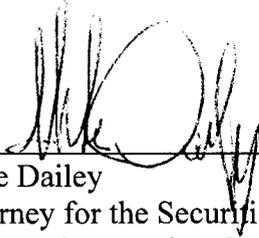
23 Finally, the witnesses will be simply requested to call into the participant line of 602-542-
24 0659 or related number at their scheduled time of testimony.

1 **C. CONCLUSION.**

2 The above listed witnesses can provide relevant testimony during the evidentiary hearing.
3 Requiring their physical presence as a condition of obtaining their important testimony is not
4 speedy, cost effective, necessary or practical. Such a requirement is also contrary to the policy
5 purpose underlying the Arizona Securities Act, the plain language of the applicable evidentiary
6 rules and statutes, and case law interpreting the same. Based on the foregoing, the Division
7 respectfully requests that its motion for leave to present telephonic testimony of the above listed
8 witnesses be granted.

9 RESPECTFULLY SUBMITTED this 7th day of September, 2010.

10 ARIZONA CORPORATION COMMISSION

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12 
13 By _____
14 Mike Dailey
15 Attorney for the Securities Division of the
16 Arizona Corporation Commission

17 ORIGINAL AND EIGHT (8) COPIES of the foregoing
18 filed this 7th day of September, 2010, with:

19 Docket Control
20 Arizona Corporation Commission
1200 W. Washington St.
Phoenix, AZ 85007

21 COPY of the foregoing hand-delivered this
22 7th day of September, 2010, to:

23 Mr. Marc E. Stern
24 Administrative Law Judge
25 Arizona Corporation Commission/Hearing Division
1200 W. Washington St.
Phoenix, AZ 85007

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1 COPY of the foregoing mailed this
2 7th day of September, 2010, to:

3 Brian Schulman, Esq.
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By: _____ 