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0000124029

1 Paul Winick (AZ SBN: 026146)
2 pwinick@lynncahill.com
3 LYNN & CAHILL LLP
4 9121 E. Tanque Verde Rd, Suite 105
5 Tucson, Arizona 85749
6 Tel. 520-762-4545
7 Fax. 866-929-6343

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ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

5 Edward Gartenberg (*Pro Hac Vice*)
6 egartenberg@ggwslaw.com
7 GARTENBERG GELFAND WASSON & SELDEN LLP
8 801 S. Figueroa Street, Suite 2170
9 Los Angeles, California 90017
10 Tel. 213-542-2100
11 Fax. 213-542-2101

Arizona Corporation Commission
DOCKETED

MAR 25 2011

9 Attorneys for Respondents Christopher A. Jensen,
10 Julie Shayne Jensen, Rodolfo Preciado and Linda Preciado

DOCKETED BY

11 **ARIZONA CORPORATION COMMISSION**

12 In the matter of:

DOCKET NO. S-20726A-10-0062

13 David E. Walsh and Lorene Walsh,
14 respondent and spouse, doing business as
15 New York Networks, Inc., a dissolved
16 Delaware corporation formerly known as
17 Jubilee Acquisition Corporation and as
18 Caliper Acquisition Corporation, the New
19 York Network, Inc., a revoked Nevada
20 Corporation, and the New York Networks,
21 Inc., an entity of unknown origin,

**JENSEN AND PRECIADO
RESPONDENTS' OPPOSITION TO THE
SECURITIES DIVISION'S MOTION FOR
LEAVE TO OFFER THE TELEPHONIC
TESTIMONY OF TONA BOWEN**

19 Christopher A. Jensen and Julie Shayne
20 Jensen, respondent and spouse,

20 Rodolfo Preciado and Jane Doe Preciado
21 respondent and spouse,

21 Respondents.

22
23 Respondents Christopher Jensen, Julie Shayne Jensen, Rodolfo Preciado, and Linda
24 Preciado (collectively "Respondents") hereby oppose the motion of the Securities Division of the
25 Arizona Corporation Commission (the "Government"), for leave to offer the telephonic testimony
26 of Tona Bowen at the hearing scheduled for April 4, 2011.
27

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 The Government is seeking \$610,000 in restitution and additional penalties from
4 Respondents as well as a cease and desist order preventing Respondents from continuing in their
5 current employment for alleged violations of securities laws. In short, the Government wants to
6 take Respondents' property and prevent them from earning a living in their chosen field by way of
7 a telephone call. The Government alleges that Respondents sold unregistered securities in
8 violation of A.R.S. § 44-1841, were unregistered securities salesmen in violation of A.R.S. § 44-
9 1842, and committed fraud in connection with the offer or sale of securities in violation of A.R.S.
10 § 44-1991. These are serious allegations. The Fourteenth Amended to the United States
11 Constitution requires due process of law prior to the deprivation of life, liberty, or property. At a
12 minimum, this requires that the Government afford Respondents with the opportunity to come
13 face-to-face with and cross-examine their accusers. Now, the Government, under the guise that
14 administrative proceedings are less formal, seeks to dispense with the United States Constitution
15 and the Rules of Evidence entirely. However, we cannot have come to such a degree of
16 informality that procedural due process and the Constitutional rights of individuals are
17 meaningless.

18 Where a government action may seriously injure the rights of an individual, procedural due
19 process requires that a defendant or respondent in a criminal or administrative action be given the
20 opportunity to confront and cross-examine adverse witnesses. In order to satisfy this fundamental
21 right, face to face cross-examination is the strongly preferred approach. In this instance, the
22 Government seeks to abrogate this fundamental right by having its witness, Tona Bowen, appear
23 telephonically to testify at the hearing in this action scheduled for April 4, 2011. Telephonic cross-
24 examination will not be sufficient where, as here, there is not a sufficient necessity for telephonic
25 testimony and witness credibility and memory is central to the determination of the facts at issue.
26 The only reason provided by the Government for the telephonic testimony is that as Ms. Bowen
27 lives in California, live testimony would be inconvenient. This is not a sufficient basis upon
28 which to curtail Respondents' rights to confrontation and cross-examination. In addition, the

1 Government recites that it must show that (1) personal attendance by a witness will present an
2 undue hardship; (2) telephonic testimony will not cause undue prejudice to any party; and (3) the
3 proponent of the telephonic testimony pays for the cost of obtaining the testimony telephonically.
4 A.A.C. R2-19-114. However, the Government thereafter fails to make any showing of either
5 undue hardship on the part of Ms. Bowen or the lack of undue prejudice on the part of
6 Respondents. Such a showing is insufficient to allow for telephonic testimony in this instance.

7 Respondents also are willing to agree to a continuance of the hearing to ensure that the
8 Government can bring its witnesses to the hearing for live testimony or, in the alternative, to avoid
9 inconveniencing Ms. Bowen by agreeing that the Government can take the videotaped deposition
10 of Ms. Bowen in California and introduce the videotape instead. The Government's Motion for
11 Leave to Offer the Telephonic Testimony of Tona Bowen should be denied.

12 **II. PROCEDURAL DUE PROCESS REQUIRES THAT RESPONDENTS HAVE A**
13 **FULL AND FAIR OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE THE**
14 **ADVERSE WITNESSES**

15 The Fourteenth Amendment to the United States Constitution provides that a State shall
16 not "deprive any person of life, liberty, or property, without due process of law." In addition, the
17 Sixth Amendment to the United States Constitution requires that a criminal defendant "be
18 confronted with the witnesses against him." The policy that a criminal defendant must be granted
19 the opportunity to confront and cross-examine adverse witnesses is so strong that it is also
20 frequently applied outside the criminal context as well. *Green v. McElroy* (1959) 360 U.S. 474,
21 497. The United States Supreme Court has zealously protected the procedural due process rights
22 of individuals in administrative actions where governmental action could injure the individual. *Id.*

23 Where a government action may seriously injure an individual and the action depends on
24 factual findings, due process requires that the evidence must be disclosed so that the individual has
25 an opportunity to prove that it is not true. *Id.*; see also, *Goldberg v. Kelly* (1970) 397 U.S. 254,
26 270. In almost every case where an important decision turns on a question of fact, due process
27 requires the opportunity to confront and cross-examine adverse witnesses. *Goldberg, supra*, 397
28 U.S. at 269. The Court in *Green* noted that:

While this is important in the case of documentary evidence, it is even more

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important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.

Green, supra, 360 U.S. at 496. Where an administrative action raises serious constitutional problems, it is assumed that the traditional safeguards of due process apply. *Id* at 507.

Arizona courts have noted the importance of face to face cross examination as follows:

Face to face, in-court testimony serves several purposes: (1) it 'ensures the reliability of the evidence by allowing the trier of fact to observe the demeanor, nervousness, expressions, and other body language of the witness'; (2) it 'impresses upon the witness the seriousness of the matter and ensures that statements are given under oath'; and (3) it 'helps assure the identity of the witness, that the witness is not being coached or influenced during testimony, and that the witness is not improperly referring to documents.'

Arizona v. Moore (2002) 203 Ariz. 515, 517 (quoting *United States v. Hamilton* (7th Cir. 1997) 107 F.3d 499, 503). To comply with the requirements of due process, the United States Supreme Court also strongly favors in person confrontation and cross-examination. See, *Maryland v. Craig* (1990) 497 U.S. 836, 843. The personal testimony of a witness may only be dispensed with "where denial of such a confrontation is necessary to further an important public policy and only where the reasonability of the testimony is otherwise assured." *Maryland, supra*, 497 U.S. at 850; see also, *Moore, supra*, 203 Ariz. At 517-518. There is no such necessity here, but, rather, the Government seeks to prevent Respondents from exercising this important right merely to accommodate a witness who finds it inconvenient to travel.

The Government has not shown that an important public policy will be served by permitting Tona Bowen to testify through the telephone.

1 **III. TELEPHONIC TESTIMONY BY TONA BOWEN WILL NOT PROVIDE**
2 **RESPONDENTS AN ADEQUATE OPPORTUNITY TO CROSS-EXAMINE HER**
3 **AND IS NOT JUSTIFIED**

4 **A. The Mere Convenience of a Witness Is Not Sufficient To Justify Imposition On**
5 **Respondents' Right to Cross-Examination**

6 The Government would like leave to have Ms. Bowen testify telephonically solely because
7 she resides in California. The Government is required to show that personal appearance would
8 cause *undue* hardship for Ms. Bowen, and they have failed to make *any* showing that the travel
9 would create an undue burden on Ms. Bowen. A.A.C. R14-3-114. Mere inconvenience of a
10 witness is an insufficient basis to forego the protections afforded by due process and allow the
11 admission of telephonic testimony. *Moore, supra*, 203 Ariz. at 518. In *Moore*, where the state
12 wanted to call another judge telephonically due to his busy schedule, the proper remedy was to
13 continue the trial until a time that the judge would be able to testify in person. *Id.* at 519. The
14 telephonic appearance of a witness has only been found appropriate where there is an out of state
15 witness coupled with an expedited hearing. *In Re MH2004-001987* (2005) 211 Ariz. 255, 260-
16 261. Even then, the court cautioned that a telephonic appearance was not always permissible. *Id.*

17 The Government has given no reason, other than the fact that Ms. Bowen resides in
18 California, that she must testify telephonically. This is particularly egregious here when
19 Respondents—and virtually all of their witnesses—are flying in from California as well.¹ This
20 hearing was scheduled several months ago, and the Government has had ample time to coordinate
21 its witnesses. For this reason, the Government is unable to state an important public policy served
22 by permitting Ms. Bowen to testify by telephone.

23 **B. The Division Has Failed to Show Adequate Indicia of Reliability For the**
24 **Testimony of Tona Bowen**

25 In addition to its failure to justify the need for a telephonic witness, the Government fails to
26 show sufficient indicia of reliability. Where a judge was unable to testify live due to his schedule,
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28 ¹ A flight from California to Arizona for the dates of the hearing costs less than \$300 on Southwest Airlines.

1 the court determined that his telephonic testimony was improperly used in lieu of live testimony
2 because the trial court inappropriately accepted his testimony without independent indicia of
3 reliability. *In Re MH-2008-000867* (2010) 236 P.3d 405, 409. There, the truthfulness of the judge
4 was essential information because he contradicted the testimony of the defendant, and the case
5 hinged on whether the jury believed the judge or the defendant. *Id.* This case is very similar. It is
6 expected from her investor complaint that Ms. Bowen's testimony will be markedly different from
7 that of Respondents, and it will result in a case that is largely determined based upon witness
8 credibility. For this reason, without being able to see Ms. Bowen's demeanor, it will be
9 impossible for Respondents to adequately cross-examine Ms. Bowen. Finally, the meeting about
10 which Ms. Bowen is scheduled to testify occurred five years ago in 2006. This makes it all the
11 more important that Respondents be able to adequately cross-examine Ms. Bowen—and
12 particularly to see her face and whether she is looking at notes—because it is likely that her
13 memory is considerably faded. Ms. Bowen's telephonic testimony violates Respondents due
14 process rights to cross-examine their adverse witnesses.

15 The trier of fact will also be unable to adequately perform its role because the issues in this
16 case turn almost exclusively on witness credibility. This is not a case with physical evidence.
17 There is no DNA, no weapon, and no stock certificates signed by Respondents. In fact, the
18 Government's exhibits consist largely of other testimony rather than actual documentary evidence.
19 The trier of fact will be relying solely on its ability to determine witness credibility in this case,
20 and it will be unable to determine credibility when a key witness is testifying telephonically. A
21 trier of fact is require to assess a "witness' ability to see or hear or know the things to which [she]
22 testified; the quality of [her] memory; the witness' manner while testifying; whether [she] has any
23 motive, bias, or prejudice; and the reasonableness of the testimony when considered in light of the
24 other evidence." RAJI Civil 4th Preliminary 5. If Ms. Bowen testifies telephonically, the trier of
25 fact will be completely unable to observe her manner and will also be less able to determine the
26 quality of her memory or her potential motives, biases, or prejudices. The Government has shown
27 insufficient indicia of reliability to show that Ms. Bowen's telephonic testimony would meet the
28 standards necessary to be appropriate. Respondents will consequently, be unduly prejudiced by

1 admission of the telephonic testimony of Ms. Bowen.

2 Because the Government did not show any undue hardship on the part of Ms. Bowen for
3 traveling and Respondents will suffer undue prejudice upon admission of Ms. Bowen's telephonic
4 testimony, the Government's motion should be denied.

5 **IV. RESPONDENTS ARE WILLING TO AGREE TO A CONTINUANCE TO**
6 **AFFORD THE COMMISSION THE OPPORTUNITY TO HAVE ITS WITNESSES**
7 **APPEAR LIVE AT THE HEARING**

8 If the Government is unable to bring in their witnesses to testify live and in person, then a
9 brief continuance to accommodate the schedules of the Division's witnesses is appropriate. See,
10 *Moore, supra*, 203 Ariz. at 519; *In Re MH-2008-000867* (2010) 236 P.3d 405, 409. Respondents
11 are amenable to a continuance to accommodate Ms. Bowen's schedule and to ensure that the
12 Division is able to coordinate the live testimony of its witnesses. A continuance is therefore the
13 appropriate method of accommodating the schedule of Ms. Bowen.

14 In the alternative, the Respondents will be satisfied if the Government set a videotaped
15 deposition in California to prevent Ms. Bowen from having to travel while preserving both her
16 testimony, including her demeanor, and Respondents' right to cross-examination.

17 **V. CONCLUSION**

18 For the foregoing reasons, Respondents respectfully request that the Government's Motion
19 for Leave to Offer the Telephonic Testimony of Tona Bowen be denied.

21 Respectfully Submitted,

22 Dated: March 25, 2011 GARTENBERG GELFAND WASSON & SELDEN LLP

25 By: Carolyn A. Jensen for Edward Gartenberg
26 Edward Gartenberg
27 Attorneys for Respondents Christopher A. Jensen,
28 Julie Shayne Jensen, Rodolfo Preciado and
Linda Marie Preciado

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 801 South Figueroa Street, Suite 2170, Los Angeles, CA 90017.

On March 25, 2011, I caused the service of a copy of **JENSEN AND PRECIADO RESPONDENTS' OPPOSITION TO THE SECURITIES DIVISION'S MOTION FOR LEAVE TO OFFER THE TELEPHONIC TESTIMONY OF TONA BOWEN** on the interested parties in this action to the addressee as follows:

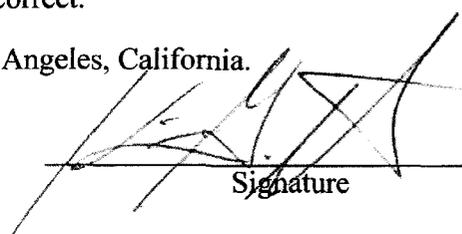
See attached List

<input checked="" type="checkbox"/> BY MAIL I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.	<input type="checkbox"/> BY FACSIMILE TRANSMISSION I caused said document(s) to be transmitted by facsimile transmission to the name(s) and facsimile telephone number(s) of the person(s) set forth on the attached service list. The facsimile machine telephone number of the sending facsimile machine was (213) 542-2101. A transmission report was issued by the sending facsimile machine confirming that the transmission was completed without error. A true and correct copy of said transmission report is attached hereto.
<input type="checkbox"/> BY OVERNIGHT DELIVERY Said document was placed in an envelope designated by the express service center and placed for collection in a box regularly maintained by said carrier with whom we have a direct billing account, to be delivered to the office of the addressee listed above on the next business day.	<input checked="" type="checkbox"/> BY ELECTRONIC TRANSMISSION I caused said PDF document(s) to be transmitted by electronic mail to the name(s) and e-mail address(s) of the person(s) set forth on the attached service list. A true and correct copy of the confirmation of receipt of email in attached hereto.

STATE I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

EXECUTED on March 25, 2011 at Los Angeles, California.

Kevin G. Acosta
Type or Print Name



Signature

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Paul Winick
LYNN & CAHILL, LLP
9121 East Tanque Verde Road, Suite 105
Tucson, AZ 85749
Attorney for Respondents Jensen and Preciado

David E. Walsh
540 Brickell Key Drive, Unit 1024
Miami, FL 33131

Matt Neubert, Director
Securities Division
1300 West Washington Street
Phoenix, AZ 85007

William W. Black
Assistant Chief Counsel of Enforcement
Securities Division
1300 West Washington Street
Phoenix, AZ 85007
Via e-mail and U.S. Mail