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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission  
DOCKETED  
SEP 9 2011

COMMISSIONERS

GARY PIERCE, Chairman  
BOB STUMP  
SANDRA D. KENNEDY  
PAUL NEWMAN  
BRENDA BURNS

DOCKETED BY

In the matter of:  
ULF OLOF HOLGERSSON and LAVERNE J. ABE, formerly husband and wife, doing business as Viking Asset Management, an Arizona registered trade name,  
Respondents.

DOCKET NO. S-20762A-10-0416  
**MOTION TO ALLOW TELEPHONIC TESTIMONY**

The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective Division witness Barbara Curry during the hearing of the above-referenced matter scheduled to begin on September 21, 2011. This request is submitted on the grounds that, although this individual can provide testimony that will provide relevant information at this administrative hearing, special circumstances prevent her actual appearance in Phoenix, Arizona during the course of this proceeding. Ms. Curry is a practicing dental hygienist who resides in Nevada.

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

MEMORANDUM OF POINTS AND AUTHORITIES

**I. INTRODUCTION**

The Division anticipates calling Barbara Curry as a central witness to this hearing. She can offer probative testimony to this case. In so doing, she can provide evidence supporting a number of the allegations brought by the Division in this case. Ms. Curry a practicing dental hygienist who

1 resides in Nevada. As such, the burdensome task of taking time off of work to travel down to  
2 Phoenix to provide testimony in person is impractical for this witness.

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

## 8 **II. ARGUMENT**

### 9 **A. *Telephonic Testimony in Administrative Hearings is Supported Both*** 10 ***Under Applicable Administrative Rules and through Court Decisions***

11 The purpose of administrative proceedings is to provide for the fair, speedy and cost  
12 effective resolution of administratively justiciable matters. To effectuate that purpose, the  
13 legislature provided for streamlined proceedings and relaxed application of the formal rules of  
14 evidence. Specifically, A.R.S. § 41-1062(A)(1) provides for informality in the conduct of  
15 contested administrative cases. The evidence submitted in an administrative hearing need not  
16 rise to the level of formality required in a judicial proceeding, as long as it is “substantial, reliable  
17 and probative.” In addition, the Commission promulgated rules of practice and procedure to  
18 ensure just and speedy determination of all matters presented to it for consideration. *See, e.g.,*  
19 A.A.C. R14-3-101(B); R14-3-109(K).

20 Pursuant to A.A.C. R2-19-114, an administrative law judge (“ALJ”) may grant a motion  
21 for telephonic testimony if 1) personal attendance by a witness will present an undue hardship; 2)  
22 telephonic testimony will not cause undue prejudice to any party; and 3) the proponent of the  
23 telephonic testimony pays for the cost of obtaining the testimony telephonically. Allowing Ms.  
24 Curry to testify by telephone does not provide any undue prejudice to any party and retains all  
25 indicia of reliability and preserves Respondent’s right to cross-examination.

26 Consistent with these administrative rules, courts have routinely acknowledged that

1 telephonic testimony in administrative proceedings is permissible and consistent with the  
2 requirements of procedural due process. *See* A.A.C. R2-19-114. In *T.W.M. Custom Framing v.*  
3 *Industrial Commission of Arizona*, 198 Ariz. 41 (2000), the appellant challenged an validity of an  
4 ALJ's judgment, partly on the fact that the ALJ had allowed two of the Industrial Commission's  
5 witnesses to appear telephonically. The Court initially noted that telephonic testimony was  
6 superior to a mere transcription of testimony because the telephonic medium "preserves  
7 paralinguistic features such as pitch, intonation, and pauses that may assist the ALJ in making  
8 determinations of credibility." *See T.M.W. Custom Framing*, 198 Ariz. at 48. The court then  
9 went on to recognize that "ALJs are not bound by formal rules of evidence or procedure and are  
10 charged with conducting the hearing in a manner that achieves substantial justice." *Id.* at 48,  
11 *citing* A.R.S. § 23-941(F). Based on these observations, the Court held that the telephonic  
12 testimony offered in this case was fully consistent with the requirement of "substantial justice."  
13 *Id.*

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

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

4            Based on similar reasoning, a number of other state courts have recognized that, in the  
5            case of administrative and sometimes civil proceedings, telephonic testimony is permissible and  
6            consistent with the requirements of procedural due process. *See, e.g., Babcock v. Employment*  
7            *Division, 72 Or. App. 486, 696 P.2d 19 (1985)* (court approved Oregon Employment Division’s  
8            procedure to conduct entire hearing telephonically); *W.J.C. v. County of Vilas, 124 Wis. 2d 238,*  
9            *369 N.W. 2d 162 (1985)* (court permitted telephonic expert testimony in commitment hearing).  
10            Ultimately, courts considering this issue have reached the conclusion that, at least in the case of  
11            administrative hearings, “fundamental fairness” is not compromised through the allowance of  
12            telephonic testimony.

13            The telephonic testimony request in the present case fits squarely within the tenor of these  
14            holdings. The Division is seeking to introduce the telephonic testimony of witnesses that could  
15            not otherwise appear in a Phoenix hearing room without causing undue hardship to the witnesses;  
16            the prospective testimony of these witnesses will be “substantial, reliable and probative,” and  
17            will meet all requirements of substantial justice. In other words, evidence bearing on the  
18            outcome of this hearing will not be barred, and respondents will still have every opportunity to  
19            question the witnesses about their testimony and/or about any exhibits discussed.

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

22            In light of the relaxed evidentiary and procedural rules governing administrative hearings  
23            in this state, and because telephonic testimony does not jeopardize the fundamental fairness  
24            underlying these proceedings, this tribunal has repeatedly recognized and approved the use of  
25            telephonic testimony in their administrative hearings to introduce probative evidence. *See, e.g.,*  
26            *In the matter of Jere Parkhurst et al., Docket No. S-20761A-10-0409; In the matter of Edward A.*

1 *Purvis et al.*, Docket No. S-20482A-06-0631; *In the matter of Yucatan Resorts, Inc. et al.*,  
2 Docket No. S-03539A-03-0000; *In the matter of Forex Investment Services Corporation et al.*,  
3 Docket No. S-03177A-98-000.

4 **III. CONCLUSION**

5 Permitting Ms. Curry to testify telephonically at the upcoming administrative hearing  
6 allows the Division to present relevant witness evidence that is expected to be reliable and  
7 probative, is fundamentally fair, and does not compromise the Respondent's due process rights.  
8 Therefore, the Division respectfully requests that its motion for leave to present such telephonic  
9 testimony be granted.

10 RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of September, 2011.

11  
12 By   
13 William Black  
14 Assistant Chief Counsel of Enforcement,  
15 Securities Division of the  
16 Arizona Corporation Commission

16 ORIGINAL AND EIGHT (8) COPIES  
17 of the foregoing filed this 9<sup>th</sup> day of  
18 September, 2011, with

19 Docket Control  
20 Arizona Corporation Commission  
21 1200 W. Washington St.  
22 Phoenix, AZ 85007

23 COPY of the foregoing hand-delivered  
24 this 9<sup>th</sup> day of September, 2011, to:

25 Administrative Law Judge Marc Stern  
26 Arizona Corporation Commission  
1200 W. Washington St.  
Phoenix, AZ 85007

1 COPY of the foregoing mailed and e-mailed  
this 9<sup>th</sup> day of September, 2011, to

2 Gregory A. Larson  
3 RUCHTMAN WILENCHIK & LARSON, PLLC  
4 7373 E. Doubletree Ranch Road  
5 Scottsdale, AZ 85258  
6 Counsel for Respondent Laverne J. Abe

By: Karen Howle

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