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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission CONTROL
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COMMISSIONERS

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

DOCKETED IN [Signature]

In the matter of:
ARIZONA GOLD PROCESSING, LLC, an
Arizona limited liability company,
AZGO, LLC, an Arizona limited liability
company,
and
CHARLES L. ROBERTSON, a married man
Respondents.

DOCKET NO. S-20846A-12-0135
**SECURITIES DIVISION'S MOTION TO
ALLOW TELEPHONIC TESTIMONY**
Hearing Dates: October 9 – 15, 2012
(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 October 9, 2012. 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. Mark E. Dorman, Examiner, Bureau of Enforcement, Division of Securities Wisconsin Department of Financial Institutions, Madison, Wisconsin.
2. John Stockwell, Omaha, NE
3. Jonnye Derrick, Pleasant Hill, CA
4. Patrick Arnold, Albuquerque, NM
5. Peter Harold Berg, Avon, CO

1 This request is submitted on the grounds that, although these individuals can provide
2 testimony that will provide relevant information at this administrative hearing, special
3 circumstances prevent their actual appearance in Phoenix, Arizona during the course of this
4 proceeding.

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

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. INTRODUCTION**

9 The Division anticipates calling Mark E. Dorman ("Mr. Dorman"), John Stockwell ("Mr.
10 Stockwell"), Jonnye Derrick ("Ms. Derrick"), Peter Harold Berg ("Mr. Berg") and Patrick Arnold
11 ("Mr. Arnold") as central witnesses to this hearing. The witnesses can offer probative testimony as to
12 this case. In so doing, they can provide evidence supporting a number of the allegations brought by
13 the Division in this case. Mr. Dorman's offices are located in Madison, Wisconsin. Mr. Dorman will
14 be in China on vacation during the hearing and is willing to participate in the hearing while on
15 vacation. Mr. Stockwell resides in Omaha, Nebraska, Ms. Derrick resides in Pleasant Hills,
16 California, Mr. Berg resides in Albuquerque, New Mexico and Mr. Arnold resides in Avon, Colorado.
17 As such, the burdensome task of traveling down to Phoenix to provide testimony in person is
18 impractical for these witnesses.

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

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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 rise
9 to the level of formality required in a judicial proceeding, as long as it is “substantial, reliable and
10 probative.” In addition, the Commission promulgated rules of practice and procedure to ensure
11 just and speedy determination of all matters presented to it for consideration. *See, e.g.,* A.A.C.
12 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 Dorman, Mr. Stockwell, Ms. Derrick, Mr. Berg, and Mr. Arnold to testify by telephone does not
18 provide any undue prejudice to any party and retains all indicia of reliability and preserves
19 Respondents’ right 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

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

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

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

24 Based on similar reasoning, a number of other state courts have recognized that, in the case
25 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,

1 369 N.W. 2d 162 (1985) (court permitted telephonic expert testimony in commitment hearing).
2 Ultimately, courts considering this issue have reached the conclusion that, at least in the case of
3 administrative hearings, “fundamental fairness” is not compromised through the allowance of
4 telephonic testimony.

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

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

14 In light of the relaxed evidentiary and procedural rules governing administrative hearings
15 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
16 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
17 telephonic testimony in their administrative hearings to introduce probative evidence. This
18 position has been borne out in a number of previous hearings. *See, e.g., In the matter of Calumet*
19 *Slag, et al.*, Docket No. S-03361A-00-0000; *In the matter of Chamber Group, et al.*, Docket No.
20 03438A-00-0000; *In the matter of Joseph Michael Guess, Sr., et al.*, Docket No. S-03280A-00-
21 0000; *In the matter of Forex Investment Services*, Docket No. S-03177A-98-000.

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

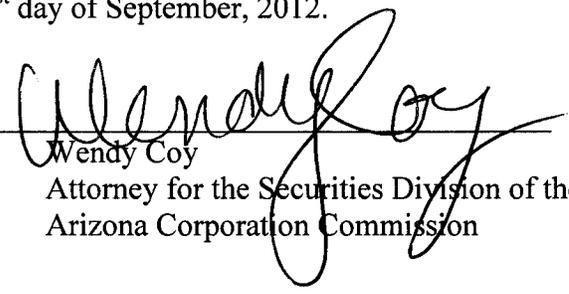
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1 **III. CONCLUSION**

2 Permitting Mr. Dorman, Mr. Stockwell, Ms. Derrick, Mr. Berg, and Mr. Arnold to testify
3 telephonically at the upcoming administrative hearing allows the Division to present relevant
4 witness evidence that is expected to be reliable and probative, is fundamentally fair, and does not
5 compromise Respondents' due process rights. Therefore, the Division respectfully requests that its
6 motion for leave to present such telephonic testimony be granted.

7 RESPECTFULLY SUBMITTED this 21st day of September, 2012.

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By 
Wendy Coy
Attorney for the Securities Division of the
Arizona Corporation Commission

1 SERVICE LIST FOR: ARIZONA GOLD PROCESSING, LLC, AZGO, LLC and CHARLES
2 L. ROBERTSON

3 **ORIGINAL** and **13 COPIES** of the foregoing filed
4 this 21st day of September, 2012with:

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7 1200 W. Washington St.
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9 **COPY** of the foregoing hand delivered
10 this 21st day of September, 2012 to:

11 The Honorable Marc E. Stern
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