

ORIGINAL



0000141191

BEFORE THE ARIZONA CORPORATIONS COMMISSION

COMMISSIONERS

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

2012 DEC 21 P 3:09

SECURITIES COMMISSION  
DOCKET CONTROL

Arizona Corporations Commission

DOCKETED

DEC 21 2012

DOCKETED

In the matter of:

DOCKET NO. S-20839A-12-0083

ANDREW C. MENICHINO, an married individual,

RESPONDENTS' RESPONSE IN OPPOSITION TO THE SECURITIES DIVISION'S MOTION TO ALLOW TELEPHONIC TESTIMONY

INNOVATIVE CONSTRUCTION, INC., a Pennsylvania Corporation, and

ATLANTIC LEXUS, LTD, a Turks and Caicos Corporation,

Respondents.

Respondents Andrew C. Menichino; Innovative Construction, Inc.; and Atlantic Lexus, Ltd. (collectively "Respondents"), through undersigned counsel, hereby respectfully submit this response in opposition to the Securities Division's request to allow telephonic testimony of Lawrence Tucker. The Division has failed to present any reasonable justification to allow Mr. Tucker to testify telephonically.

This Response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Division alleges that Mr. Menichino offered or sold unregistered securities, that he engaged in transactions as an unregistered dealer, and that he committed securities fraud. As part of its complaint, the Division alleges that Mr. Menichino and/or Mr. Andre Forgues represented that UCC liens would be provided as collateral and that said UCC liens were worth millions of dollars. In an effort to support these allegations, the Division seeks to offer the testimony of Lawrence Tucker, a New Jersey attorney who issued a letter regarding the UCCs. The Division

1 has submitted an exhibit that is a sworn affidavit of Mr. Tucker. In that affidavit, Mr. Tucker  
2 alleges that a letter presented to him was “a complete fabrication, pasted on [his] letterhead.” It is  
3 unclear what letter was presented to Mr. Tucker, but it can reasonably be assumed it was a letter  
4 presented during the investigation leading to this action. Mr. Tucker further alleges that Mr.  
5 Menichino stole over \$700,000 from him. In fact, the majority of Mr. Tucker’s affidavit is  
6 unrelated to the transaction at issue and instead accuses Mr. Menichino of egregious misconduct  
7 wholly unrelated to the matter at hand.

8 Based on the exhibits submitted by the Division, it appears the Division relies heavily on  
9 Mr. Tucker’s statements so much so, it is reasonable to conclude that Mr. Tucker is one of the  
10 Division’s key witnesses. It is therefore imperative that Respondents be afforded an opportunity to  
11 cross-examine Mr. Tucker in-person. Further, in order to properly judge his credibility, live in-  
12 person testimony is necessary.

13 In an effort to persuade the Commission to allow telephonic testimony, the Division points  
14 out that, Respondents have already stipulated to another out-of-state witness. This witness,  
15 however, is not as critical as Mr. Tucker and will likely be used only to lay foundation. Further,  
16 this out-of-state witness is a regulator out of Pennsylvania and Respondents are aware that  
17 regulators frequently work together.

18 Respondents question whether Mr. Tucker can testify at all. By his own admission, Mr.  
19 Tucker was engaged by Mr. Menichino “to help him buy a Samson Street Property.” Having been  
20 retained as counsel, anything Mr. Menichino told Mr. Tucker is privileged and only Mr.  
21 Menichino can waive that privilege. Respondents therefore reserve the right to object to and to  
22 move to preclude Mr. Tucker’s testimony on the basis of the attorney-client privilege.

23 **II. LAW AND ARGUMENT**

24 Respondents do not dispute that the use of telephonic testimony is permissible in  
25 administrative proceedings. *T.W.M. Custom Framing v. Industrial Comm’n of Arizona*, 198 Ariz.  
26 41, 6 P.3d 745 (Ct. App. 2000). However, Respondents submit that telephonic testimony be  
27 allowed only when it is certain that the fundamental due process rights will be preserved. It can

1 hardly be argued that due process is preserved when a witness, who makes significant allegations  
2 of wrongdoing, is not called to testify in-person. Mr. Tucker alleges that Mr. Menichino stole a  
3 substantial sum of money from him. It can therefore be reasonably assumed that Mr. Tucker is  
4 biased and perhaps has a bone to pick with Mr. Menichino. Thus, it is entirely reasonable to allow  
5 Respondents to test Mr. Tucker's credibility. Live-in person testimony will allow the Commission  
6 to observe Mr. Tucker's demeanor on direct and cross-examination. Given Mr. Tucker's  
7 allegations, Respondents submit that the "tenor of his voice" over the phone will be insufficient to  
8 judge his credibility. Further, the Division's reliance on *Sabori* is misplaced. *Sabori* was an  
9 arbitration and Rule 74(a) of the Arizona Rules of Civil Procedure specifically allows telephonic  
10 motions and testimony.

11 The Division presents no justifiable reason to allow Mr. Tucker to testify telephonically.  
12 The Division says no more than "he would be required to travel about 2,300 miles and be away  
13 from his business." The Division does not say that such travel would impose a hardship, that Mr.  
14 Tucker cannot afford the expense, or anything else that would justify the request.

15 Contrary to the Divisions assertion, Respondents will not have an adequate opportunity to  
16 cross-examine Mr. Tucker by telephone. Mr. Tucker has made serious allegations against Mr.  
17 Menichino and several of the Divisions exhibits are relevant to Mr. Tucker's testimony.  
18 Respondents anticipate reviewing numerous documents with Mr. Tucker. It is impractical to  
19 review documents by telephone. Thus, Mr. Tucker's appearance is therefore necessary to afford  
20 Respondents their due process rights.

21 **III. CONCLUSION**

22 Mr. Tucker makes egregious allegations of wrong doing against Mr. Menichino. In order  
23 to preserve Respondents' due process rights, Mr. Tucker should be required to appear in person for  
24 the hearing so that his credibility may be properly judged, his testimony properly preserved and so  
25 that Respondents have an adequate opportunity to cross-examine him.

26 ///

27

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of December, 2012.

BADE BASKIN RICHARDS PLC

By 

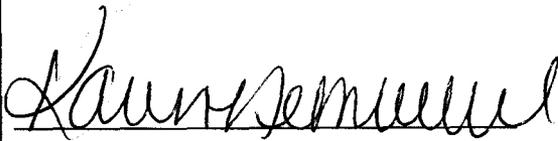
Alan S. Baskin  
Alexandra Mijares Nash  
Attorneys for Respondents

ORIGINAL and thirteen copies of the foregoing  
filed this 27<sup>th</sup> day of December, 2012 with:

Docket Control  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007

COPY of the foregoing hand-delivered  
this 27<sup>th</sup> day of December, 2012 to:

Matthew J. Neubert  
Paul Huynh  
Director of Securities  
Securities Division  
Arizona Corporation Commission  
1300 W. Washington Street, 3<sup>rd</sup> Floor  
Phoenix, AZ 85007



BADE BASKIN RICHARDS PLC  
80 EAST RIO SALADO PARKWAY  
SUITE 511  
TEMPE, ARIZONA 85281  
TELEPHONE NO 480-968-1225  
FACSIMILE 480-968-6255

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27