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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

BOB STUMP, Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

2013 MAY 23 A 10:46

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

In the matter of:

DONNA KAY BEERS, CRD# 1172038,
and JAMES BEERS, wife and husband,

Respondents.

DOCKET NO. S-20856A-12-0409

**SECURITIES DIVISION'S MOTION TO
ALLOW TELEPHONIC TESTIMONY**

Arizona Corporation Commission

DOCKET

MAY 23 2013

DOCKETED BY

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The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective witnesses Aliece Kronawetter and Hans Kronawetter (hereinafter collectively "Kronawetters") during the administrative hearing regarding the above-referenced matter.

The Kronawetters were both clients of Respondent Donna Beers. They are both located in Nevada. The direct examination of the Kronawetters should about an hour each.

The Kronawetters can offer highly probative evidence in this matter, yet face one or more obstacles that prevent their personal appearance at the hearing, such as the time and cost to appear in Arizona for the short amount of testimony. The simple and well-recognized solution to this problem is to allow for telephonic testimony. By allowing the telephonic testimony of the Kronawetters, 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.

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

The Division anticipates calling the Kronawetters as relevant witnesses to this hearing since they can offer probative testimony as to this case. In so doing, they can provide evidence supporting a number of the allegations brought by the Division. The Kronawetters are expected to testify briefly about Respondent Donna Beers and regarding key documents given them by the Respondent Donna Beers; however, the burdensome task of traveling from Nevada to Phoenix to provide testimony in person is impractical for these witnesses.

The Kronawetters can offer highly probative evidence in this matter, yet faces one or more obstacles that prevent their personal appearance at the hearing, such as the time and cost to appear in Arizona for his short amount of testimony. It is anticipated that the Kronawetters testimony will require approximately one hour of the Division's time on direct; however, they would be required to travel about 721 miles or approximately 13 hours of driving time, plus the additional time for rest during the long drive. The simple and well-recognized solution to this problem is to allow for telephonic testimony.

II. ARGUMENT**A. *The use of telephonic testimony in administrative hearings is supported by administrative rules and court decisions.***

In administrative cases like this one, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965). Procedural due process requires confrontation and cross-examination. The courts have acknowledged that telephonic testimony in administrative proceedings is permissible and consistent with the requirements of procedural due process. See e.g., *T.W.M. Custom Framing v. Industrial Comm'n of Arizona*, 198 Ariz. 41, 6 P.3d 745 (App. 2000).

The courts have also held that the Arizona Rules of Civil Procedure do not necessarily

1 preclude telephonic testimony. See *In re MH 2004-001987*, 211 Ariz. 255, 258-59, 120 P.3d
2 210, 213-14 (App. 2005); *Arizona Dep't of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d
3 828, 831 (App. 1997) (citing *Murray v. Murray*, 894 P.2d, 607, 608 (Wyo. 1995) (holding an
4 appearance by conference call meets the constitutional requirement of a meaningful opportunity
5 to be heard)). In a civil case, "appearance by telephone is an appropriate alternative to personal
6 appearance." *Valentine*, 190 Ariz. at 110, 945 P.2d at 831.

7 While the fact-finder's ability to observe the demeanor of the witness is limited, "the fact-
8 finder can at least consider the pacing of the witness's responses and the tenor of his voice" to
9 determine the credibility of the witness. *Sabori v. Kuhn*, 199 Ariz. 330, 332-33, 18 P.3d 124,
10 126-27 (App. 2001); see also *T.W.M. Custom Framing*, 198 Ariz. at 48, 6 P.3d at 752 (noting
11 "the telephonic medium preserves the paralinguistic features such as pitch, intonation, and pauses
12 that may assist [the fact-finder] in making determinations of credibility").

13 The Arizona Corporation Commission promulgated Rules of Practice and Procedure that
14 were intended to "be liberally construed to secure just and speedy determination of all matters
15 presented to the Commission." See A.A.C. R14-3-101(B). The rules encompass the use of other
16 forms of testimony during administrative hearings: "In conducting any investigation, inquiry, or
17 hearing, neither the Commission, nor any officer or employee thereof shall be bound by the
18 technical rules of evidence, and no informality in any proceeding or in the manner of taking of
19 testimony shall invalidate any order, decision, rule, or regulation made, approved, or confirmed
20 by the Commission." See A.A.C. R14-3-109(K).

21 Permitting the telephonic testimony of these witnesses at the administrative hearing will
22 meet the constitutional requirement of providing Respondents Donna and James Beers with a
23 meaningful opportunity to be heard. Evidence bearing on the outcome of this hearing will not be
24 barred, and they will still have every opportunity to question the witnesses about their testimony
25 and/or about any exhibits discussed.

B. *The Arizona Corporation Commission has a well-recognized history of permitting telephonic testimony during the course of administrative hearings.*

In light of the relaxed evidentiary and procedural rules governing administrative hearings in this state, and because telephonic testimony does not jeopardize the fundamental fairness underlying these proceedings, this tribunal has repeatedly recognized and approved the use of telephonic testimony in their administrative hearings to introduce probative evidence. *See, e.g., In the matter of Theodore J. Hogan and Associates, et al.*, Docket No. S-20714A-09-0553, *In the matter of Edward A. Purvis, et al.*, Docket No. S-20482A-06-0631; *In the matter of Yucatan Resorts, Inc., et al.*, Docket No. S-03539A-03-0000; *In the matter of Forex Investment Services Corporation et al.*, Docket No. S-03177A-98-0000.

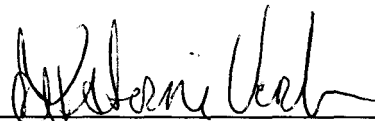
Accordingly, granting leave to introduce the telephonic testimony of the Division's prospective witnesses is consistent with past determinations in administrative hearings before the Commission.

III. CONCLUSION

By allowing the telephonic testimony of the Kronawetters, 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. Telephonic testimony will also enable the Division to present relevant evidence that is expected to be reliable and probative, and does not compromise Respondents' due process rights. Therefore, the Division respectfully requests that its motion for leave to present such telephonic testimony be granted.

RESPECTFULLY SUBMITTED this 23rd day of May, 2013.

By



Aikaterine Vervilos
Registration & Compliance Enforcement
Attorney for the Securities Division of the
Arizona Corporation Commission

1 ORIGINAL and 8 copies of the foregoing
filed this 23 day of May, 2013, with:

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5 COPY of the foregoing hand-delivered
this 23 day of May 2013, to:

6 Administrative Law Judge Marc Stern
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9 COPY of the foregoing mailed and e-mailed
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