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BEFORE THE ARIZONA CORPORATION

AZ CORP COMMISSION
DOCKET CONTROL

2013 MAY 31 PM 2 28

COMMISSIONERS

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

In the matter of:
PATRICK LEONARD SHUDAK, a single man,
PROMISE LAND PROPERTIES, LLC, an Arizona limited liability company,
and
PARKER SKYLAR & ASSOCIATES, LLC, an Arizona limited liability company,
Respondents.

DOCKET NO. S-20859A-12-0413
SECURITIES DIVISION'S MOTION
TO ALLOW TELEPHONIC TESTIMONY

Arizona Corporation Commission
DOCKETED
MAY 8 1 2013

DOCKETED BY *JM*

The Securities Division ("Division") of the Arizona Corporation Commission hereby moves for leave to present the telephonic testimony of prospective witnesses Steve Berendes, Tim Olp and Craig Swandal during the administrative hearing regarding the above-referenced matter.

This request is submitted on the grounds that, although these witnesses can provide testimony that will provide key information at this administrative hearing, special circumstances prevent their actual appearance in Phoenix, Arizona during this proceeding. All three witnesses are expected to be called to provide relevant testimony regarding Respondents and key documents utilized by the Respondents. 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 granted.

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1 **II. ARGUMENT**

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

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

11 The courts have also held that the Arizona Rules of Civil Procedure do not necessarily
12 preclude telephonic testimony. *See In re MH 2004-001987*, 211 Ariz. 255, 258-59, 120 P.3d
13 210, 213-14 (App. 2005); *Arizona Dep’t of Econ. Sec. v. Valentine*, 190 Ariz. 107, 110, 945 P.2d
14 828, 831 (App. 1997) (citing *Murray v. Murray*, 894 P.2d, 607, 608 (Wyo. 1995) (holding an
15 appearance by conference call meets the constitutional requirement of a meaningful opportunity
16 to be heard)). In a civil case, “appearance by telephone is an appropriate alternative to personal
17 appearance.” *Valentine*, 190 Ariz. at 110, 945 P.2d at 831.

18 While the fact-finder’s ability to observe the demeanor of the witness is limited, “the fact-
19 finder can at least consider the pacing of the witness’s responses and the tenor of his voice” to
20 determine the credibility of the witness. *Sabori v. Kuhn*, 199 Ariz. 330, 332-33, 18 P.3d 124,
21 126-27 (App. 2001); *see also T.W.M. Custom Framing*, 198 Ariz. at 48, 6 P.3d at 752 (noting
22 “the telephonic medium preserves the paralinguistic features such as pitch, intonation, and pauses
23 that may assist [the fact-finder] in making determinations of credibility”).

24 The Arizona Corporation Commission promulgated Rules of Practice and Procedure that
25 were intended to “be liberally construed to secure just and speedy determination of all matters
26 presented to the Commission.” *See A.A.C. R14-3-101(B)*. The rules encompass the use of other

1 forms of testimony during administrative hearings: "In conducting any investigation, inquiry, or
2 hearing, neither the Commission, nor any officer or employee thereof shall be bound by the
3 technical rules of evidence, and no informality in any proceeding or in the manner of taking of
4 testimony shall invalidate any order, decision, rule, or regulation made, approved, or confirmed
5 by the Commission." *See* A.A.C. R14-3-109(K).

6 Permitting the telephonic testimony of these witnesses at the administrative hearing will
7 meet the constitutional requirement of providing Respondents with a meaningful opportunity to
8 be heard. Evidence bearing on the outcome of this hearing will not be barred, and Respondents
9 will have every opportunity to question the witnesses about their testimony and any exhibits
10 discussed.

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

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

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

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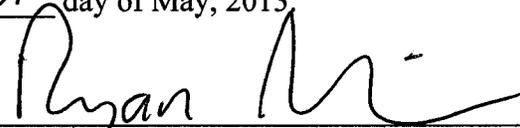
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1 **III. CONCLUSION**

2 By allowing the telephonic testimony of Mr. Berendes, Mr. Olp and Mr. Swandal, not only
3 will relevant evidence be preserved and introduced, but all parties will have a full opportunity for
4 questioning, whether by direct or cross-examination. Telephonic testimony will also enable the
5 Division to present relevant evidence that is expected to be reliable and probative, and does not
6 compromise Respondents' due process rights. Therefore, the Division respectfully requests that its
7 motion for leave to present such telephonic testimony be granted.

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RESPECTFULLY SUBMITTED this 31st day of May, 2013.

By 
Ryan M. Mecam
Attorney for the Securities Division of the
Arizona Corporation Commission

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ORIGINAL and 8 copies of the foregoing
filed this 31 day of May, 2013, with:

Docket Control
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COPY of the foregoing hand-delivered
this 31 day of May, 2013, to:

Administrative Law Judge Marc Stern
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