

ORIGINAL



0000145856

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

RECEIVED
AZ CORP COMMISSION
DOCKET CONTROL

2013 JUN 21 PM 1 16

In the matter of:

TV PRODUCTS, LLC (f/k/a US Loans
Negotiation, LLC), an Arizona limited
liability company, and

STEPHEN CHRISTOPHER DONOVAN,
a single man,

Respondents.

DOCKET NO. S-20873A-13-0010

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

(Assigned to the Honorable Marc E. Stern)

The Securities Division of the Arizona Corporation Commission requests leave to present the telephonic testimony of Nancy Clarke, Gary Suchorski and/or Richard Long during the hearing in the above-referenced matter. Each prospective witness possesses knowledge relevant to matters in dispute. All of the witnesses, though, reside outside the state. Requiring them to appear in Phoenix, Arizona, would be prohibitively burdensome. Permitting these prospective witnesses to appear and give testimony telephonically solves this problem while facilitating the preservation and introduction of relevant information and a full opportunity for questioning by all parties. Accordingly, good cause exists for granting such leave and doing so would not infringe upon the Respondents' procedural due process rights. For these reasons, which are more thoroughly addressed in the following Memorandum of Points and Authorities, this motion should be granted.

DATED: June 21, 2013
Arizona Corporation Commission

DOCKETED

JUN 21 2013

Stephen J. Wornack
Stephen J. Wornack, Esq.
Securities Division
Arizona Corporation Commission

DOCKETED BY *[Signature]*

1 Additionally, the cost of bringing the witnesses to Phoenix would be prohibitively expensive for
2 the Division, particularly relative the total amount of restitution, interest and penalties sought
3 through this matter.⁴ Moreover, it is anticipated that the Prospective Witnesses would testify
4 under direct examination for less than an hour each. Given this amount of testimony, travelling
5 from as far as Pennsylvania is all the more impractical. Permitting the witnesses to appear
6 telephonically would greatly reduce the burden of presenting their testimony on both the
7 witnesses and the Division.

8 Therefore, good cause exists for permitting the Prospective Witnesses to testify by
9 telephone.

10 **B. Permitting telephonic testimony does not infringe upon the Respondent's procedural**
11 **due process rights.**

12 Upon finding good cause for using telephonic testimony, consideration should be given to
13 "whether admission of telephonic testimony comported with due process."⁵ What constitutes due
14 process "is not a technical conception with a fixed content unrelated to time, place and
15 circumstances," but, rather, takes into account "such procedural protections as the particular
16 situation demands."⁶ In a civil administrative proceeding, procedural due process requires
17 balancing: (1) the individual's interests; (2) government's interests; and (3) the "likely impact of
18 telephonic testimony on the accuracy and fairness of the process."⁷

19 The competing interests are protected by procedural safeguards inherent in telephonic
20 testimony. Individuals have an interest in due process, property and liberty. Government
21 interests typically include, among other things, protecting the public from harm⁸ and in
22 "conserving fiscal and administrative resources."⁹ Witnesses appearing by telephone are subject

23 _____
24 ⁴ The Division seeks \$153,000 in restitution plus interest and penalties. See *Notice of Opportunity for Hearing*
25 *Regarding Proposed Order to Cease and Desist, Order for Restitution, and Order for Administrative Penalties*, ¶ 21,
filed January 22, 2013. The Division requests that judicial notice be taken of the pleadings on file herein.

26 ⁵ *In re HM-2008-000867*, 225 Ariz. at 182, 236 P.3d at 409.

⁶ *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal quotations omitted).

⁷ *In re HM-2008-000867*, 225 Ariz. at 182, 236 P.3d at 409.

⁸ *Id.*

⁹ *Mathews*, 424 U.S. at 347-48.

1 to cross examination.¹⁰ Moreover, telephonic testimony “preserves paralinguistic features such
2 as pitch, intonation, and pauses that may assist an ALJ in making determinations of credibility.”¹¹
3 At the same time, appearing telephonically preserves state resources that would otherwise have to
4 be spent on travel and accommodations. Accordingly, telephonic testimony “does not
5 significantly increase the risks of an erroneous deprivation.”¹²

6 In this case, permitting telephonic testimony would have minimal negative impact on the
7 accuracy and fairness of the evidentiary process. The Prospective Witnesses, though appearing
8 by telephone, would be still be subject to cross examination and the Court could still make
9 determinations of credibility based the manner in which the witnesses testify. Furthermore,
10 permitting telephonic testimony would enable the Division to present evidence that furthers the
11 Commission’s interests in protecting the public from the harm allegedly committed by the
12 Respondents and in conserving its financial and administrative resources.

13 Therefore, permitting the Prospective Witnesses to testify by telephone does not infringe
14 upon the Respondent’s procedural due process rights

15 **C. Permitting telephonic testimony falls well within the Commission’s administrative**
16 **rules and practice.**

17 The Arizona Corporation Commission promulgated the Commission’s Rules of Practice
18 and Procedure that are intended to “be liberally construed to secure just and speedy determination
19 of all matters presented to the Commission.”¹³ These rules encompass the use of other forms of
20 testimony during administrative hearings. More specifically, Rule R14-3-109 states:

21 In conducting any investigation, inquiry, or *hearing*, neither the Commission, nor
22 any officer or employee thereof shall be bound by the technical rules of evidence,
23 and no informality in any proceeding or *in the manner of taking of testimony* shall
24 invalidate any order, decision, rule, or regulation made, approved, or confirmed by
the Commission.¹⁴

25 ¹⁰ *In re HM-2008-000867*, 225 Ariz. at 182, 236 P.3d at 409.

26 ¹¹ *T.W.M. Custom Framing v. Indus. Comm’n of Ariz.*, 198 Ariz. 41, 48, 6 P.3d 745, 752 (App. 2000).

¹² 225 Ariz. at 182, 236 P.3d at 409

¹³ See A.A.C. R14-3-101(B).

¹⁴ See A.A.C. R14-3-109(K)(emphases added).

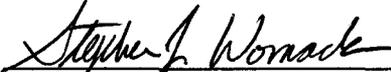
1 In light of the relaxed evidentiary and procedural rules governing administrative hearings
2 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
3 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
4 telephonic testimony in its administrative hearings to introduce probative evidence.¹⁵

5 Therefore, permitting the Prospective Witnesses to testify by telephone is consistent with
6 the rules and customary practice in administrative hearings before the Commission.

7 **III. Conclusion**

8 Permitting Nancy Clarke, Gary Suchorski and/or Richard Long to testify telephonically at
9 the upcoming administrative hearing allows the Division to present relevant witness evidence that
10 is expected to be reliable and probative, is fundamentally fair, and does not compromise
11 Respondents' due process rights. Therefore, the Division respectfully requests that its motion for
12 leave to present such telephonic testimony be granted.

13
14 DATED: June 21, 2013.

15 
16 _____
17 Stephen J. Womack, Esq.
18 Securities Division
19 Arizona Corporation Commission
20
21
22
23
24
25

26 ¹⁵ 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.

1 **ORIGINAL** of the foregoing and 8 copies delivered on June 21, 2013, with:

2 Docket Control
3 Arizona Corporation Commission
4 1200 W. Washington St.
5 Phoenix, AZ 85007

6 **COPY** of the foregoing delivered on June 21, 2013, to:

7 Administrative Law Judge Marc E. Stern
8 Hearing Division
9 Arizona Corporation Commission
10 1200 W. Washington St.
11 Phoenix, AZ 85007

12 **COPY** of the foregoing mailed on June 21, 2013, to:

13 Mark D. Chester, Esq.
14 Chester & Shein, P.C.
15 8777 N. Gainey Center Dr., Suite 191
16 Scottsdale, AZ 85258

17 *Counsel to Respondents*

18
19
20
21
22
23
24
25
26
By: Karen Hrub