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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

2014 APR -4 P 3:53

Arizona Corporation Commission

DOCKETED

BOB STUMP, Chairman
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SUSAN BITTER SMITH

ARIZONA CORPORATION COMMISSION
DOCKET CONTROL

APR 04 2014

DOCKETED BY

In the matter of:

OUT OF THE BLUE PROCESSORS, LLC,
an Arizona limited liability company, d/b/a
Out of the Blue Processors II, LLC,

MARK STEINER (CRD# 1834102) and
SHELLY STEINER, husband and wife,

Respondents.

DOCKET NO. S-20837A-12-0061

ORIGINAL

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

(Assigned to Hon. Marc E. Stern)

The Securities Division of the Arizona Corporation Commission requests leave to present the telephonic testimony of Henry Clay during the hearing in the above-referenced matter. This prospective witness possesses knowledge relevant to matters in dispute; however, he resides outside the state. Requiring him to appear in Phoenix, Arizona, would be prohibitively burdensome. Permitting this prospective witness 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: April 4, 2014.

Stephen V. Womack, Esq.
Securities Division
Arizona Corporation Commission

1 particularly relative the total amount of restitution, interest and penalties sought through this
2 matter.⁴ Moreover, it is anticipated that the Prospective Witness would testify under direct
3 examination for less than an hour. Given this amount of testimony, travelling from New Mexico
4 is all the more impractical. Permitting the Prospective Witness to appear telephonically would
5 greatly reduce the burden of presenting his testimony on both the witness and the Division.

6 Therefore, good cause exists for permitting the Prospective Witness to testify by
7 telephone.

8 **B. Permitting telephonic testimony does not infringe upon the Respondents' procedural**
9 **due process rights.**

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

17 The competing interests are protected by procedural safeguards inherent in telephonic
18 testimony. Individuals have an interest in due process, property and liberty. Government
19 interests typically include, among other things, protecting the public from harm⁸ and in
20 "conserving fiscal and administrative resources."⁹ A witness appearing by telephone is subject to
21 cross examination.¹⁰ Moreover, telephonic testimony "preserves paralinguistic features such as

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23 ⁴ The Division seeks in excess of \$1,773,000 in restitution plus interest and penalties. *See Amended Notice of*
24 *Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for*
Administrative Penalties, Order of Revocation, and Order for Other Affirmative Action ¶ 36, filed September 6, 2013.
The Division requests that judicial notice be taken of the pleadings on file herein.

25 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).

26 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.

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

1 pitch, intonation, and pauses that may assist an ALJ in making determinations of credibility.”¹¹

2 At the same time, appearing telephonically preserves state resources that would otherwise have to
3 be spent on travel and accommodations. Accordingly, telephonic testimony “does not
4 significantly increase the risks of an erroneous deprivation.”¹²

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

12 Therefore, permitting the Prospective Witness to testify by telephone does not infringe
13 upon the Respondents’ procedural due process rights

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

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

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

25 In light of the relaxed evidentiary and procedural rules governing administrative hearings
26 in this state, and because telephonic testimony does not jeopardize the fundamental fairness

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 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of
2 telephonic testimony in its administrative hearings to introduce probative evidence.¹⁵

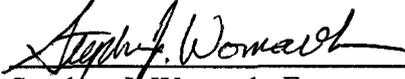
3 Therefore, permitting the Prospective Witness to testify by telephone is consistent with
4 the rules and customary practice in administrative hearings before the Commission.

5 **III. Conclusion**

6 Permitting Henry Clay to testify telephonically at the upcoming administrative hearing
7 allows the Division to present relevant witness evidence that is expected to be reliable and
8 probative, is fundamentally fair, and does not compromise Respondents' due process rights.

9 Therefore, the Division respectfully requests that its motion for leave to present such telephonic
10 testimony be granted.

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12 DATED: April 4, 2014.

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14 _____
15 Stephen J. Womack, Esq.
16 Securities Division
17 Arizona Corporation Commission
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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 April 4, 2014, with:

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

5 **COPY** of the foregoing delivered on April 4, 2014, to:

6 Administrative Law Judge Marc E. Stern
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10 **COPY** of the foregoing mailed on June 21, 2013, to:

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Karen Houde