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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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In the matter of:

JAMES F. LIEBES, CRD #2332174, a single man, and

LANESBOROUGH FINANCIAL GROUP LLC, an Arizona limited liability company,

Respondents.

DOCKET NO. S-20876A-13-0014

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 William Harris 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: May 8, 2014.

Ryan J. Millecam
Attorney for the Securities Division of the Arizona Corporation Commission

Arizona Corporation Commission
DOCKETED

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction**

3 The Securities Division (“Division”) of the Arizona Corporation Commission
4 (“Commission”) anticipates calling William Harris as a central witness during the hearing in this
5 matter. As a client of the Respondents, Harris can provide probative testimony that supports a
6 number of the allegations brought by the Division. The burden of traveling to Phoenix to provide
7 testimony in person, however, is impractical for Harris because he resides in California. The
8 simple and well-recognized solution to this problem is to permit Harris to testify telephonically.
9 Through this manner, not only will relevant evidence be preserved and may be introduced, but all
10 parties will have a full opportunity for questioning, whether by direct or cross-examination of
11 this witness.

12 **II. Argument**

13 **A. Good cause exists for permitting telephonic testimony.**

14 “When considering telephonic testimony, the initial inquiry should be whether good cause
15 has been shown for its use.”¹ “In determining whether good cause has been demonstrated, the
16 court may consider whether the hearing can conveniently be continued to allow in-person
17 testimony.”² “It may also consider the costs of bringing experts or other witnesses to court....”³

18 In the instant case, Harris possesses relevant knowledge of the subject investment offer
19 and sale, the Respondents’ business practices, and related documents, but, because he resides in
20 another state, he is practically unavailable for in-person testimony. He is not merely out of town
21 on the dates set for hearing. He lives hundreds of miles away. So, continuing the hearing to
22 another date would have no impact on his availability. Additionally, the cost of bringing this
23 witness to Phoenix would be prohibitively expensive for the Division, particularly relative the
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25

26 ¹ *In re HM-2008-000867*, 225 Ariz. 178, 182, 236 P.3d 405, 409 (2010).

² *Id.*, 225 Ariz. at 181 n.4, 236 P.3d at 408 n.4.

³ *Id.*

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

6 Therefore, good cause exists for permitting Harris to testify by telephone.

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

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

16 The competing interests are protected by procedural safeguards inherent in telephonic
 17 testimony. Individuals have an interest in due process, property and liberty. Government
 18 interests typically include, among other things, protecting the public from harm⁸ and in
 19 "conserving fiscal and administrative resources."⁹ A witness appearing by telephone is subject to
 20 cross examination.¹⁰ Moreover, telephonic testimony "preserves paralinguistic features such as
 21 pitch, intonation, and pauses that may assist an ALJ in making determinations of credibility."¹¹

23 ⁴ The Division seeks maximum penalties of \$5,000 for each of the 21 offers and 21 sales described in this case's *Notice*
 24 *of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for*
Administrative Penalties, and Order for Other Affirmative Action, filed January 28, 2013.

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

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

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

26 ⁸ *Id.*

26 ⁹ *Mathews*, 424 U.S. at 347-48.

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

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

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

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

11 Therefore, permitting Harris to testify by telephone does not infringe upon the
12 Respondents’ procedural due process rights

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

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

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

24 In light of the relaxed evidentiary and procedural rules governing administrative hearings
25 in this state, and because telephonic testimony does not jeopardize the fundamental fairness
26 underlying these proceedings, this tribunal has repeatedly recognized and approved the use of

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 telephonic testimony in its administrative hearings to introduce probative evidence.¹⁵

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

4 **III. Conclusion**

5 Permitting William Harris to testify telephonically at the upcoming administrative hearing
6 allows the Division to present relevant witness evidence that is expected to be reliable and
7 probative, is fundamentally fair, and does not compromise Respondents' due process rights.
8 Therefore, the Division respectfully requests that its motion for leave to present such telephonic
9 testimony be granted.

10 DATED: May 8, 2014.

11 

12 Ryan J. Millecam
13 Attorney for the Securities Division of the
14 Arizona Corporation Commission

15 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 AND EIGHT COPIES of the foregoing
2 filed on May 8, 2014, with

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