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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

DOCKETED

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

ARIZONA CORP COMMISSION  
DOCKET CONTROL

OCT 06 2014

DOCKETED BY

In the matter of:  
Catharon Software Corporation, a  
Delaware corporation,  
Betsy A. Feinberg and Michael A.  
Feinberg, husband and wife,  
Respondents.

DOCKET NO. S-20905A-14-0061

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

ORIGINAL

The Securities Division ("Division") of the Arizona Corporation Commission ("Commission") respectfully requests leave to present the telephonic testimony of the following out-of-state witnesses during the hearing in the above-referenced matter:

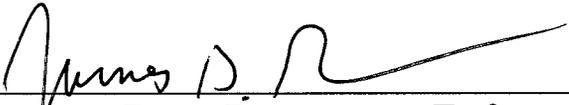
- Susan Beer (New York);
- De Lois Faulkner (California);
- James Hopson (California);
- Lindsay or Shawn Hull (Florida);
- Melissa Knox-Raab (Germany);
- Jack or Carol Steinbuhler (Pennsylvania);
- Charles Stubler (Pennsylvania);
- Susan Underwood (Oklahoma); and
- Peter M. Wolf (New York).

In addition, the Division respectfully requests leave to present the telephonic testimony of Ira Marx, who resides in Sedona; and James or

1 Patricia Briody, who reside in Prescott Valley, Arizona. Marxe is 91-  
2 years old, and his oxygen supply tank runs out after two hours.  
3 Consequently, he cannot make the more than two-hour drive from Sedona.  
4 Mr. and Mrs. Briody anticipate that they will be traveling out-of-state  
5 during the scheduled hearing.

6 Each prospective witness possesses knowledge relevant to matters in  
7 dispute. Requiring these witnesses to travel and appear in Phoenix,  
8 Arizona, would be prohibitively burdensome. Permitting these  
9 prospective witnesses to appear and give testimony telephonically solves  
10 this problem while facilitating the introduction of relevant evidence and a  
11 full opportunity for questioning by all parties. Accordingly, good cause  
12 exists for granting such leave and doing so would not infringe upon the  
13 Respondents' procedural due process rights. For these reasons, which are  
14 more thoroughly addressed in the following Memorandum of Points and  
15 Authorities, this motion should be granted.

16 RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of October, 2014.

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18 \_\_\_\_\_  
19 James D. Burgess, Enforcement  
20 Attorney for the Securities Division

21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. Introduction**

23 The Division anticipates calling the witnesses listed above as central  
24 witnesses during the hearing in this matter. They are all investors and  
25 shareholders in Respondent Catharon Software Corporation ("Catharon").  
26 They all had communications with Respondents Betsy A. Feinberg or

1 Michael A. Feinberg regarding their investments. They can provide  
2 probative testimony that supports a number of the allegations in the  
3 Notice, including Respondents' offer and sale of the securities at issue.

4 The burden of traveling to Phoenix to provide testimony in person,  
5 however, is impractical for these witnesses because nine (9) of them  
6 reside out of state. Two others, Mr. and Mrs. Briody, anticipate they will  
7 be traveling out of state. The other investor, Ira Marx, cannot drive from  
8 Sedona to Phoenix for health reasons. The simple and well-recognized  
9 solution to this problem is to permit them to testify telephonically.  
10 Through this manner, not only will relevant evidence be preserved and  
11 introduced, but all parties will have a full opportunity for questioning,  
12 whether by direct or cross-examination of these witnesses.

## 13 **II. Argument**

### 14 **A. Good cause exists for permitting telephonic testimony.**

15 "When considering telephonic testimony, the initial inquiry should  
16 be whether good cause has been shown for its use." *In re HM-2008-*  
17 *000867*, 225 Ariz. 178, 182, 236 P.3d 405, 409 (2010). "In determining  
18 whether good cause has been demonstrated, the court may consider  
19 whether the hearing can conveniently be continued to allow in-person  
20 testimony." *In re HM*, 225 Ariz. at 181 n.4, 236 P.3d at 408 n.4. "It may  
21 also consider the costs of bringing experts or other witnesses to court...."  
22 *Id.* In the instant case, the witnesses listed above possess relevant  
23 knowledge of the offer and sale of the investments at issue, Respondents'  
24 communications with them about the investments, and related documents,  
25 but, because they reside in other states, or will be unable to be in Phoenix

26

1 during the scheduled hearing for other reasons, they are practically  
2 unavailable for in-person testimony.

3 The majority of the witnesses are not merely out of town on the  
4 dates set for hearing, but live out of state. They would be unavailable to  
5 testify in person even on a rescheduled hearing date. Although Mr. and  
6 Mrs. Briody may be available to testify in person on a rescheduled date, it  
7 is more practical to allow them to testify telephonically during the  
8 Division's case in chief given that the Division's other witnesses have  
9 made themselves available for the current hearing dates in November.  
10 Additionally, the cost of bringing the witnesses to Phoenix would be  
11 prohibitively expensive for the Division. Moreover, the Division  
12 anticipates they would testify under direct examination for less than one  
13 hour each. Permitting the witnesses to appear telephonically would  
14 greatly reduce the burden of presenting their testimony on both the  
15 witnesses and the Division.

16 Therefore, good cause exists for permitting the above-referenced  
17 witnesses to testify by telephone.

18  
19 **B. Permitting telephonic testimony does not infringe upon the**  
20 **Respondent's procedural due process rights and is within the**  
21 **Commission's administrative rules and practice.**

22 Upon finding good cause for using telephonic testimony,  
23 consideration should be given to "whether admission of telephonic  
24 testimony comported with due process." *In re HM*, 225 Ariz. at 182, 236  
25 P.3d at 409. What constitutes due process "is not a technical conception  
26 with a fixed content unrelated to time, place and circumstances," but,

1 rather, takes into account “such procedural protections as the particular  
2 situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)  
3 (internal quotations omitted). In a civil administrative proceeding,  
4 procedural due process requires balancing: (1) the individual’s interests;  
5 (2) government’s interests; and (3) the “likely impact of telephonic  
6 testimony on the accuracy and fairness of the process.” *In re HM*, 225  
7 Ariz. at 182, 236 P.3d at 409.

8 The competing interests are protected by procedural safeguards  
9 inherent in telephonic testimony. Individuals have an interest in due  
10 process, property and liberty. Government interests typically include,  
11 among other things, protecting the public from harm (*id.*) and in  
12 “conserving fiscal and administrative resources.” *Mathews*, 424 U.S. at  
13 347-48. Witnesses appearing by telephone are subject to cross  
14 examination. *In re HM*, 225 Ariz. at 182, 236 P.3d at 409. Moreover,  
15 telephonic testimony “preserves paralinguistic features such as pitch,  
16 intonation, and pauses that may assist an ALJ in making determinations of  
17 credibility.” *T.W.M. Custom Framing v. Indus. Comm’n of Ariz.*, 198  
18 Ariz. 41, 48, 6 P.3d 745, 752 (App. 2000). At the same time, appearing  
19 telephonically preserves state resources that would otherwise have to be  
20 spent on travel and accommodations. Accordingly, telephonic testimony  
21 “does not significantly increase the risks of an erroneous deprivation.” *In*  
22 *re HM*, 225 Ariz. at 182, 236 P.3d at 409 .

23 Permitting telephonic testimony would have minimal negative  
24 impact on the accuracy and fairness of the evidentiary process. The  
25 witnesses at issue, though appearing by telephone, would be still be  
26 subject to cross examination by the Respondents and the Tribunal could

1 still make determinations of credibility based the manner in which the  
2 witnesses testify. Furthermore, permitting telephonic testimony would  
3 enable the Division to present evidence that furthers the Commission's  
4 interests in protecting the public from the harm allegedly committed by  
5 the Respondents and in conserving its financial and administrative  
6 resources. Therefore, permitting the above witnesses to testify by  
7 telephone does not infringe upon the Respondents' procedural due  
8 process rights.

9 In addition, the Commission's Rules of Practice and Procedure are  
10 intended to "be liberally construed to secure just and speedy  
11 determination of all matters presented to the Commission." *See* A.A.C.  
12 R14-3-101(B). They encompass the use of other forms of testimony  
13 during administrative hearings. More specifically, Rule R14-3-109 states,  
14 "In conducting any investigation, inquiry, or *hearing*, neither the  
15 Commission, nor any officer or employee thereof shall be bound by the  
16 technical rules of evidence, and no informality in any proceeding or *in the*  
17 *manner of taking of testimony* shall invalidate any order, decision, rule, or  
18 regulation made, approved, or confirmed by the Commission." *See*  
19 A.A.C. R14-3-109(K) (emphases added).

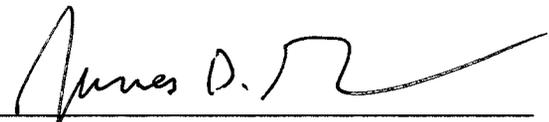
20 In light of the relaxed evidentiary and procedural rules governing  
21 administrative hearings in this state, and because telephonic testimony  
22 does not jeopardize the fundamental fairness underlying these  
23 proceedings, this Tribunal has repeatedly recognized and approved the use  
24 of telephonic testimony in its administrative hearings to introduce  
25 probative evidence. *See, e.g., In the matter of Theodore J. Hogan and*  
26 *Associates, et al.,* Docket No. S-20714A-09-0553, *In the matter of*

1 *Edward A. Purvis, et al.*, Docket No. S-20482A-06-0631; *In the matter of*  
2 *Yucatan Resorts, Inc., et al.*, Docket No. S-03539A-03-0000; *In the matter*  
3 *of Forex Investment Services Corporation et al.*, Docket No. S-03177A-  
4 98-0000. Therefore, permitting the above witnesses to testify by  
5 telephone is consistent with the rules and customary practice in  
6 administrative hearings before the Commission.

7 **CONCLUSION**

8 Permitting the witnesses identified on page one to testify  
9 telephonically at the upcoming administrative hearing allows the Division  
10 to present relevant witness evidence that is expected to be reliable and  
11 probative, is fundamentally fair, and does not compromise Respondents'  
12 due process rights. Therefore, the Division respectfully requests that its  
13 motion for leave to present such telephonic testimony be granted.

14 Respectfully submitted this 3<sup>rd</sup> day of October, 2014.

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18 \_\_\_\_\_  
19 James D. Burgess  
20 Counsel for the Securities Division  
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26

1 ORIGINAL and 8 copies of the foregoing  
2 Motion To Allow Telephonic Testimony filed  
3 this 6th day of October, 2014, with:

4 Docket Control  
5 Arizona Corporation Commission  
6 1200 W. Washington St.  
7 Phoenix, AZ 85007

8 COPY of the foregoing hand-delivered  
9 this 6th day of October, 2014, to:

10 The Honorable Mark H. Preny  
11 Administrative Law Judge  
12 Arizona Corporation Commission  
13 1200 W. Washington St.  
14 Phoenix, AZ 85007

15 COPIES of the foregoing sent via  
16 Email and U.S. Mail this  
17 this 6th day of October, 2014, to:

18 Bruce R. Heurlin  
19 Thomas C. Piccioli  
20 Heurlin Sherlock  
21 1636 N. Swan Road, Suite 200  
22 Tucson, AZ 85712  
23 [bheurlin@aztopl原因y.com](mailto:bheurlin@aztopl原因y.com)  
24 [tpiccioli@aztopl原因y.com](mailto:tpiccioli@aztopl原因y.com)  
25 Attorneys for Catharon Software Corporation,  
26 Betsy A. Feinberg and Michael A. Feinberg

  
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