

ORIGINAL



0000172577

BEFORE THE ARIZONA CORPORATION COMMISSION

AZ CORP COMMISSION
DOCKET CONTROL

COMMISSIONERS

2016 AUG 12 PM 2 15

DOUG LITTLE - Chairman
BOB STUMP
BOB BURNS
TOM FORESE
ANDY TOBIN

SECURITIES DIVISION'S MOTION TO
ALLOW TELEPHONIC TESTIMONY

In the matter of:)
BART J. ELLIS and COLLEEN ELLIS, husband)
and wife,)
OAK CAPITAL PARTNERS, LLC, an Arizona)
limited liability company,)
Respondents.)

DOCKET NO. S S-20949A-16-0002

(Assigned to the Hon. Mark Preny)

The Securities Division of the Arizona Corporation Commission requests leave to present the telephonic testimony of J. Barbara Miller, Steve Stone, and Candace Salazar (together, the "Prospective Witnesses") during the hearing in the above-referenced matter. These prospective witnesses possesses knowledge relevant to matters in dispute; however, Mr. Stone works outside of Arizona for much of the year, and the remaining witnesses reside outside of Arizona. Requiring them to appear in Phoenix, Arizona would be prohibitively burdensome. Permitting the 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: August 12, 2016

Arizona Corporation Commission

DOCKETED

AUG 12 2016

Ryan J. Millecam

Attorney for the Securities Division of the Arizona Corporation Commission

DOCKETED BY

1
2

MEMORANDUM OF POINTS AND AUTHORITIES

3

I. Introduction

4 The Securities Division (“Division”) of the Arizona Corporation Commission
5 (“Commission”) anticipates calling the Prospective Witnesses as a central witness during the
6 hearing in this matter. As clients of the Respondents, Miller can provide probative testimony that
7 supports a number of the allegations brought by the Division. The burden of traveling to Phoenix
8 to provide testimony in person, however, is impractical because Miller resides in Illinois, Salazar
9 resides in Ohio, and Stone who works for a company in the Midwest, where he spends most of the
10 summer; he will be in Detroit during the hearing. The simple and well-recognized solution to this
11 problem is to permit the Prospective Witnesses to testify telephonically. Through this manner, not
12 only will relevant evidence be preserved and may be introduced, but all parties will have a full
13 opportunity for questioning, whether by direct or cross-examination of this witness.

14

II. Argument

15

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

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

20 In the instant case, the Prospective Witnesses possesses relevant knowledge of the subject
21 investment offer and sale, the Respondents’ business practices, and related documents, but,
22 because they reside or are located in other states, they are practically unavailable for in-person
23 testimony. They are not merely out of town on the dates set for hearing. Each Prospective Witness
24 is located hundreds of miles away. So, continuing the hearing to another date would have no impact

25

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

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

³ *Id.*

1 on their availability. Additionally, the cost of bringing each witness to Phoenix would be
2 prohibitively expensive for the Division, particularly relative the total amount of penalties sought
3 through this matter.⁴ Moreover, it is anticipated that each Prospective Witnesses would testify
4 under direct examination for less than an hour. Given this amount of testimony, travelling from
5 Illinois, Ohio or Michigan is all the more impractical. Permitting the Prospective Witnesses to
6 appear telephonically would greatly reduce the burden of presenting their testimony on both the
7 witness 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 Respondents' procedural**
11 **due process rights.**

12 When 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 interests
21 typically include, among other things, protecting the public from harm⁸ and in "conserving fiscal
22

23
24 ⁴ The Division seeks maximum penalties of \$5,000 for each of the 21 offers and 21 sales described in this case's *Notice 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.

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

26 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.*

1 and administrative resources.”⁹ A witness appearing by telephone is subject to cross examination.¹⁰
2 Moreover, telephonic testimony “preserves paralinguistic features such as pitch, intonation, and
3 pauses that may assist an ALJ in making determinations of credibility.”¹¹ At the same time,
4 appearing telephonically preserves state resources that would otherwise have to be spent on travel
5 and accommodations. Accordingly, telephonic testimony “does not significantly increase the risks
6 of an erroneous deprivation.”¹²

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

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

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

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

22 In conducting any investigation, inquiry, or *hearing*, neither the Commission, nor any
23 officer or employee thereof shall be bound by the technical rules of evidence, and no
24 informality in any proceeding or *in the manner of taking of testimony* shall invalidate

25 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).

¹² 225 Ariz. at 182, 236 P.3d at 409

¹³ See A.A.C. R14-3-101(B).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

any order, decision, rule, or regulation made, approved, or confirmed by the Commission.¹⁴

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

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

III. Conclusion

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

DATED: August 12, 2016


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

25
26

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

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
2 On this 12th day of August, 2016, the foregoing document was filed with Docket Control as a
3 Securities Division Motion – Miscellaneous, and copies of the foregoing were mailed on behalf of
4 the Securities Division to the following who have not consented to email service. On this date or as
5 soon as possible thereafter, the Commission’s eDocket program will automatically email a link to
6 the foregoing to the following who have consented to email service.

7 Bart J. Ellis
8 10888 N. 70th St. Apt. 141,
9 Scottsdale, AZ 85254
Respondent and Manager of Respondent Oak Capital Partners, LLC

10 Lawrence I. Kazan
11 Debus, Kazan & Westerhausen, Ltd.
12 335 East Palm Lane
13 Phoenix, AZ 85004
lik@dkwlawyers.com
Attorneys for Colleen Ellis

14
15
16 By: 