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ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS

10 IN THE MATTER OF

No. 14F-001-AAG

11 TOM HORNE, individually; Tom
12 Horne for Attorney General
13 Committee (SOS Filer 2010 00003);
14 KATHLEEN WINN, individually;
15 Business Leaders for Arizona (SOS
16 Filer 2010 00375).

**YAVAPAI COUNTY
ATTORNEY'S RESPONSE TO
MOTION TO STRIKE
TESTIMONY**

(The Honorable Tammy Eigenheer)

17 The Yavapai County Attorney's Office ("YCAO") hereby responds to
18 Appellants' Motion to Strike Testimony ("the Motion"). YCAO respectfully
19 requests that this tribunal deny the Motion.
20

21 **I. The Nature of the Dispute and Special Agent Grehoski's Testimony**

22 This entire dispute is about a peripheral part of a side issue to this case.
23 Exhibit YCA-34 is an FBI report which includes the statement "Tatham was not
24 aware of HORNE ever consulting with KATHLEEN WINN for real estate advise
25 [sic] on the sale of the property. WINN was not involved in the transaction of the
26

1 sale of 1515 N. 7th Ave., Phoenix, AZ.” Appellants now claim that Special Agent
2 Grehoski’s explanation of the source of that statement constitutes perjury.

3
4 None of the recorded conversations between Tatham, Special Agent
5 Grehoski and Special Agent Mason include those specific statements. But the
6 longer recording does include the following exchange:

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8 [Special Agent Mason]: Okay. Are you aware of him consulting with
anybody else? I guess he had a broker that helped him sell it.

9
10 [Tatham]: It was a retail guy from one of the commercial brokerage
houses and I don’t know who it was offhand. I mean I have his name
11 somewhere back in a file.

12
13 [Special Agent Mason]: Okay. Okay, but other than that guy, you’re
unaware of him consulting with anybody else.

14
15 [Tatham]: No.

16
17 [Special Agent Grehoski]: Was anybody giving him advice on the side
that was not officially involved in the sale?

18
19 [Tatham]: I have no idea. You would have to ask Tom Horne that. He
probably seeks advice from a lot of people, so I mean I -

20 (Horne-Winn-14 time 7:45–8:30, transcript¹ page 6, line 22 through page 7, line
21 11). Tatham then explained that Tom Horne often asked him for advice, including
22 about transactions on which he was not the official broker. (Horne-Winn-14 time
23 8:30–9:46, transcript page 7, line 12 through page 8, line 9).

24
25 Even though there is no evidence other than Special Agent Grehoski’s
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¹ The transcript was filed as Exhibit 5 to Appellants’ Motion to Strike. It is not in evidence, but appears to be a reasonably accurate transcription. It is cited for convenience.

1 testimony and Exhibit YCA-34 itself that he and Special Agent Mason asked
2 Tatham specifically about Winn, they *did* ask whether Horne consulted *anyone*
3 about the real estate deal. Tatham answered that he was not aware of Horne
4 consulting with anyone else. The entire alleged perjury concerns whether Special
5 Agents Grehoski and Mason asked the more specific question about Winn's
6 involvement.
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9 On the stand, Special Agent Grehoski was asked to describe the source of the
10 statement in exhibit YCA-34. He remembered asking the specific question in
11 another, unrecorded, conversation which he stated was on May 31, 2012. (Hearing
12 Transcript 135:24–138:10, 747:5–20). Based upon the cell phone records from
13 both Tatham and Special Agent Mason's cell phones, the following calls appear to
14 have been made during May 30-31, 2012:
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- 17 1. Special Agent Mason called Tatham at 1:03 p.m. on May 30, 2012.
18 This call lasted approximately two minutes and appears to have
19 gone to voicemail.
- 20 2. Tatham called Special Agent Mason at 3:47 p.m. on May 30, 2012.
21 This call lasted approximately two minutes and appears to be the
22 call recorded in exhibit Horne-Winn-25.
- 23 3. Tatham called Special Agent Mason at 1:03 p.m. on May 31, 2012.
24 This call lasted approximately fifteen minutes and appears to be the
25 call recorded in exhibit Horne-Winn-14.
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1 (YCA-39; Horne-Winn-27; Horne-Winn-28)².

2 From that inconsistency, and the opinion that “the actual 15 minute call does
3 not sound at all like a call that followed up a call of substance from earlier that
4 day,” Appellants take the position that Special Agent Grehoski has committed
5 *perjury*. There are many other alternative possibilities, however.
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7
8 There could have been another call from an FBI land line to Tatham’s land
9 line that would not show up on any cell phone records. Special Agents Grehoski
10 and Mason could have asked the specific question about Kathleen Winn during the
11 initial voicemail, and inferred the answer from Tatham’s later responses. Indeed,
12 Special Agent Grehoski could have simply misremembered the precise sequencing
13 of telephone calls, questions and answers. He was called to reconstruct the
14 sequence of events nearly two years later, with only Special Agent Mason’s notes
15 to guide him.³ Mistakes are possible under those circumstances.
16
17

18 None of those explanations constitute perjury. Fundamentally, Special Agent
19 Grehoski had no reason to commit perjury. By the third day of the hearing, he
20 knew that two of the calls were recorded. He knew that phone records would likely
21
22

23 ² Exhibits YCA-39 and Horne-Winn-27 are identical copies of Special Agent Mason’s cell phone
24 records. YCAO does not object to their admission. Exhibit Horne-Winn-28 is Tatham’s phone
25 records. YCAO had not seen those records prior to Appellants filing their Motion to Strike, but
26 does not object to their admission.

³ Those notes (Horne-Winn-26) are logically the reason why Special Agent Grehoski thought
there was another telephone call at 2:39 p.m. on May 31, 2012. For whatever reason, that date
and time was recorded on the notes, and it would make sense for him to assume they were
accurate.

1 show the sequencing of calls. As an experienced law enforcement officer, he knew
2 how serious a charge perjury is. It would have made no sense for him to lie about
3 those events. Yet appellants reject that weight of logic and assume that he
4 committed perjury. The evidence does not support them.

6 **II. Striking Special Agent Grehoski’s Testimony Would Be**
7 **Inappropriate**

8 Appellants provide no authority whatsoever for the proposition that *striking*
9 Special Agent Grehoski’s testimony is an appropriate remedy in this case. The two
10 secondary sources they do cite both contemplate a trier of fact “disregarding” or
11 “distrusting” a witness’s testimony. That is a far cry from *striking* that witness’s
12 testimony. There is no jury in this case. The tribunal is more than capable of
13 assigning the appropriate weight to Special Agent Grehoski’s testimony.

14 Further, even if there were a basis to strike some portion of Special Agent
15 Grehoski’s testimony that was provably untrue, there would be no basis to strike his
16 *entire* testimony. The authorities that appellants cite note that the trier of fact
17 “may” disregard the witness’s testimony and “[has] a right to distrust the testimony
18 of such an individual concerning other matters.” Motion at 15:19–16:3; *see also*,
19 *e.g. Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 24. 790 N.W.2d 52, 61 (S.D. 2010)
20 (“While a finder of fact may reject a witness's testimony when that witness has
21 testified falsely, *it is not required to do so.*”) (emphasis added). That discretion
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1 means that striking portions of testimony that are not in dispute would be
2 nonsensical.

3
4 For example, Special Agent Grehoski testified about what various documents
5 said. The fact that those documents say what he testified they say is not in dispute,
6 yet Appellants apparently move to strike even those portions of his testimony.
7
8 Special Agent Grehoski also testified about the basic investigatory activities and the
9 source of the evidence in this case. There is no serious argument that his testimony
10 providing foundation for the admission of the telephone records in this case was in
11 any way tainted. Even if the tribunal is inclined to strike Special Agent Grehoski's
12 testimony about his interactions with Greg Tatham, the remaining portions of his
13 testimony should stand.
14

15
16 In this administrative hearing, even more so than in court litigation, striking
17 testimony is rarely required or appropriate. There is no jury to prejudice or
18 confuse. The tribunal is capable of weighing the evidence and assigning it the
19 appropriate importance based on the totality of the case.
20

21 **III. Conclusion**

22
23 YCAO respectfully requests that this tribunal deny Appellants' Motion to
24 Strike Testimony. There is insufficient evidence that Special Agent Grehoski gave
25 false testimony. Further, striking his entire testimony would be a massively
26 overbroad remedy even if some portion of his testimony could be proved to be

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untrue.

RESPECTFULLY SUBMITTED this 14th day of March, 2014.

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1 ORIGINAL OF THE foregoing was
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