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AZ CORP COMMISSION
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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS:

10 **MARC SPITZER, Chairman**
 11 **WILLIAM A. MUNDELL**
 12 **JEFF MATCH-MILLER**
 13 **MIKE GLEASON**
 14 **KRISTIN K. MAYES**

In the matter of:

15 **YUCATAN RESORTS, INC., d/b/a**
 16 **YUCATAN RESORTS, S.A.,**

17 **RESORT HOLDINGS INTERNATIONAL,**
 18 **INC. d/b/a**
 19 **RESORT HOLDINGS INTERNATIONAL,**
 20 **S.A.,**

21 **WORLD PHANTASY TOURS, INC.**
 22 **a/k/a MAJESTY TRAVEL**
 23 **a/k/a VIAJES MAJESTY**

MICHAEL E. KELLY,

Respondents.

DOCKET NO. S-03539A-03-0000

**RESPONDENTS' JOINT REPLY IN
SUPPORT OF JOINT MOTION TO
STRIKE**

**(ASSIGNED TO THE HONORABLE
MARC STERN, ADMINISTRATIVE
LAW JUDGE)**

Arizona Corporation Commission

DOCKETED

MAY - 4 2004

DOCKETED BY

1 Respondents hereby file their Joint Reply in Support of Joint Motion to Strike and, in
2 support thereof, submit the following:
3

4 **I.**
5 **INTRODUCTION**

6 During the March 4, 2004, Pre-Hearing Conference ALJ Stern provided the parties with a
7 strict, express and unambiguous schedule within which to file briefs regarding the Respondents'
8 outstanding discovery requests and interrogatories.¹ ALJ Stern's briefing schedule corresponded
9 to Arizona's Civil Litigation Timeframes, which generally provide five days to file a reply.
10 Specifically, ALJ Stern ordered that: (1) the Division file its answers or objections to
11 Respondents' discovery requests and interrogatories by Friday, March 5th; (2) Respondents file
12 their Response to the Division's objections within ten days; and, thereafter, (3) Division file its
13 Reply, if any, within five days of the Respondents' responsive filings.
14

15 Pursuant to ALJ Stern's briefing schedule the deadline for the Division to file its Reply
16 was Wednesday, March 24, 2004. The Division failed to file its Reply until April 5, 2004 – twelve
17 (12) days after the expiration of the Division's Reply deadline.²

18 The Division's failure to timely file their Reply prompted the Respondents' Joint Motion
19 to Strike. On April 26, 2004, the Division filed its Response to Respondents' Joint Motion to
20 Strike (hereinafter "Response"). Importantly, the Response did not deny that the Division's Reply
21 was untimely but, rather, provided numerous unsupportable excuses for why the Joint Motion to
22 Strike should be denied. *See* Response. For the reasons set forth below, the Joint Motion to Strike
23 should be granted.
24

25
26 ¹ *See* March 4, 2004, Pre-Hearing Transcript (hereinafter "Transcript") at p. 48, lines 3-10.

² *See* Division's Response [Effectively Reply] to Respondents' Joint Motion to Compel or, Alternatively, to Vacate the Temporary Order to Cease and Desist (hereinafter "Reply").

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II. ARGUMENT

At the March 4, 2004, Pre-Hearing Conference, ALJ Stern, consistent with Arizona's Civil Litigation Time Frames, expressly set forth an unambiguous briefing schedule with regard to discovery matters. *See* Transcript at p. 48, lines 3-10. As discussed above, and as fully set forth in the Joint Motion to Strike, the deadline for the Division to file its Reply was March 24, 2004. *Id.* The Division did not file any Reply until April 5, 2004 – twelve (12) days after the expiration of the deadline for filing the Reply.

The Division does not deny that the Reply was filed after the deadline imposed by ALJ Stern. *See* Response. However, the Division asserts, long after the fact and in complete contradiction to itself, that there was ambiguity surrounding the actual due date of the Reply. Amazingly, in asserting its ambiguity defense, the Division relies on the Arizona Rules of Civil Procedure (hereinafter "Civil Rules"). *See* Response at pp. 3-4.

The Division's use of the Civil Rules in its Response once again highlights the fact that the Division has used the balance between the Civil Rules and the Arizona Administrative Rules as both a sword and a shield – availing itself of the Civil Rules when it suits Division interests, but rejecting the Civil Rules when it provides the Respondents with a modicum of due process. The Division's consistently inconsistent approach to the application of the Civil Rules throughout this action makes a mockery of the Respondents' due process rights, and supports not merely the granting of the Respondents' Joint Motion to Strike but, also, dismissal of this action.

1. **There Was No Ambiguity; the Division Untimely Filed its Reply.**

There was no ambiguity in the briefing schedule ordered by ALJ Stern at the Pre-Hearing Conference on March 4, 2004. *See* Transcript at p. 48, lines 3-10. The Division's assertions to the

1 contrary lack credibility, and contradict statements and positions previously taken by the Division
2 in this proceeding.

3 In particular, on April 9, 2004, the Division filed its Motion for Expedited Ruling on
4 Administrative Discovery Dispute (hereinafter "Motion for Expedited Ruling"). In that pleading,
5 the Division argued that the Respondents should not be allowed to make any additional filings
6 related to the discovery disputes because:

7
8 Any such action would be unwarranted and *would run counter to the*
9 *explicit directives of the ALJ*. Indeed, the parties to this administrative proceeding
10 have, *through ALJ-authorized briefs*, already fully argued this administrative
11 discovery matter. See Securities Division's Motion for Expedited Ruling at p. 2,
12 lines 15-18 (emphasis supplied).

13 Thus, in the very first paragraph of the Division's Motion for Expedited Ruling, written less than
14 one month ago, the Division twice acknowledged ALJ Stern's "explicit directives" regarding the
15 "ALJ-authorized" discovery briefing schedule. *Id.*

16 The Division, with regard to the "ALJ-authorized" briefing schedule, further
17 acknowledged:

18 During the course of the March 4, 2004, pre-hearing conference in this
19 matter, *the ALJ directed* that the Division file an answer or objection to the various
20 civil discovery demands of the Respondents *by the close of business on Friday*
21 *March 5, 2004. Respondents were then afforded ten days (plus five additional*
22 *mailing days) to submit a response to these Division challenges. In connection*
23 *with this briefing schedule*, the ALJ subsequently stated: "Then I guess *if [the*
24 *Division] wants to file a reply, you get another five*, but that will be it, no more."
25 *Id.*, at p. 2, lines 23-26, and p. 3, lines 1-4 (emphasis supplied).

26 This acknowledgement by the Division is important for a number of reasons. First, the Division,
once again, recognized that ALJ Stern "directed" a "briefing schedule." *Id.* Second, the "briefing
schedule" ordered by ALJ Stern clearly originated from the Civil Rules Civil Litigation Time
Frames because it provided the typical ten-day response and five-day reply deadlines, and

1 specifically addressed the five-day mailing rule that is set forth in the litigation time frames. *Id.*
2 Most importantly, the Division, by incorporating the briefing directives into the Motion for
3 Expedited Ruling, expressly acknowledged what briefs were to be filed by the parties, and when
4 such briefs were to be filed by the parties. *Id.* Thus, there was no ambiguity.

5 However, it is not just the Division's own express statements that impeach its latest
6 assertion that ambiguity caused the tardy filing of the Reply – the Division's own actions
7 contradict any such assertions of ambiguity. This fact is highlighted in the Motion for Expedited
8 Ruling, wherein the Division provided:
9

10 *In accordance with these directives*, the Division filed separate objections
11 to four separate civil discovery demands on March 5, 2004, the Respondents filed a
12 “response,” and *the Division ultimately filed its “reply”* entitled “Securities
13 Division’s Response [Effectively Reply] to Respondents’ Joint Motion to Compel
or, Alternatively, to Vacate the Temporary Order to Cease and Desist.” *See* Motion
for Expedited Ruling at p. 3, lines 5-9 (emphasis supplied).

14 The Division went on to state:

15 As evidenced by the ALJ quote reference above, *this Division “reply” was*
16 *the final authorized pleading on this particular discovery issue* and, as a
17 consequence, *the ALJ is currently in possession of all opposing parties’*
arguments on this matter. Id. at lines 10-12 (emphasis supplied).

18 Importantly, in the Motion for Expedited Ruling the Division did not assert that it was
19 confused by ALJ Stern’s directives, or that it was confused by the Respondents’ filings. *Id.* In
20 fact, the Division was so certain of the briefing directives and the parties’ follow-through with the
21 briefing directives that it actually argued that the Respondents should not be afforded the
22 opportunity to further brief the actual discovery dispute because it, the Division, was to be the last
23 party to brief on this issue. *Id.* Thus, as far as the Division was concerned, there was no ambiguity
24 with regard to the briefing schedule, or the briefs that were subsequently filed. *Id.*
25
26

1 Contrary to the Division’s assertions and actions, discussed above, the Division now
2 argues that ALJ Stern’s directives were ambiguous, and that somehow it is the Respondents’ fault
3 that the Division failed to file its Reply by the deadline. *See* Response pp. 3-4.

4 For example, in the Response, the Division argued that, “[t]he Division’s Response/Reply
5 should be judged on its content, not some ambiguous and innocuous filing date.” *Id.* at p. 4, lines
6 14-15. This argument is not credible in light of the Division’s argument in the Motion for
7 Expedited Ruling, where the Division argued that, “This Division ‘reply’ was the final authorized
8 pleading on this particular discovery issue and, as a consequence, the ALJ is currently in
9 possession of all the opposing parties’ arguments on this matter.” *See* Motion for Expedited
10 Ruling at p. 3, lines 10-12. The Division also argued that Respondents’ interests are unaffected by
11 the filing date of the Division’s Response/Reply, especially “in light of the ambiguity surrounding
12 the actual due date.” *See* Response at p. 3, lines 20-21.

13
14 The Division cannot have it both ways; it cannot have its “reply” unambiguously serve as
15 the final pleading for the purposes of its Motion for Expedited Ruling³ and, thereafter, claim to be
16 confused as to what pleading it was responsible for filing, and when that pleading was due – for
17 the purpose of explaining its failure to timely file in the Response.⁴

18
19 ALJ Stern expressly and unambiguously directed the parties to what briefs they would be
20 responsible for filing, and when those briefs would be due.⁵ The Division acknowledged the
21 briefing schedule time and time again, and even followed the directives.⁶ Then, the Division
22 missed the deadline for filing its Reply by twelve (12) days, thus failing to follow an express order
23

24
25 ³ *See* Motion for Expedited Ruling at p. 3, lines 10-12.

26 ⁴ *See* Response at p. 4, lines 14-15, and p. 3, lines 20-21.

⁵ *See* Transcript at p. 48, lines 3-10.

⁶ *See* Motion for Expedited Ruling at p. 3, lines 5-12.

1 of ALJ Stern. *See Reply*. After the Division was caught filing its Reply after the deadline had
2 expired, the Division changed its story, and now claims the briefing responsibilities and deadlines
3 were ambiguous. *See Response*. The Division’s strategy of constantly changing its arguments to
4 suit its immediate needs undermines its credibility. For these reasons, the Joint Motion to Strike
5 should be granted.

6
7 **2. The Division Uses the Civil Rules as a Sword and a Shield.**

8 As support for its argument that the Joint Motion to Strike should be denied, the Division
9 cites to the Arizona Civil Rules and cases that interpret and apply the Civil Rules. *See Response* at
10 p. 3, lines 13-14, and lines 22-24. Specifically, the Division indicated that Rule 12(f) is designed
11 for pleadings, not motions. *Id.* While the Division does not go on to analyze or conclude how this
12 point is relevant as to the issue of whether the Reply should be stricken, the Division’s defense
13 nonetheless relies on the Arizona Civil Rules. *Id.*

14
15 Additionally, the Division cites to *Martinez v. Binsfield*, 195 Ariz. 446, 451 at n. 5 (App.
16 1999), as support for this Tribunal applying a liberal construction to the procedural rules. The
17 Division argued that the court in *Martinez* “recognized that a liberal construction of the civil rules
18 governing motions is appropriate and that, ‘in the absence of a showing of prejudice, the substance
19 of a motion rather than its form will usually be considered.’” *See Response* at p. 3, lines 22-24,
20 and p. 4, lines 1-4 (quoting, in part, *Martinez*, 195 Ariz, at 451, n. 5).

21
22 The *Martinez* court was confronted with a situation where it had to determine whether
23 Civil Rule 60, which deals with vacating orders of dismissal, should be applied. *Id.* The plaintiff’s
24 motion to vacate in that matter did not cite to Civil Rule 60, and the court indicated that the
25 nomenclature and/or description that a party puts on its motion does not control whether a party
26 should be granted or denied relief. *Id.* Here, the Division misconstrues and misapplies the

1 *Martinez* case to the facts in the present action. The fact is the Division failed to timely file its
2 Reply in direct violation of the unambiguous directive at the March 14, 2004 Pre-Hearing
3 Conference. *See* Transcript at p. 48, lines 3-10. The Division's failure to timely file a Reply has
4 nothing to do with form, substance or liberal construction of procedural rules but, rather, failure to
5 adhere to procedural mechanisms and an express order.

6
7 Equally important, the Division's use of the Civil Rules, and cases applying the Civil
8 Rules, to support its Response to Motion to Strike is but another example of the Division using the
9 Civil Rules as both a sword and a shield. When the use of the Civil Rules helps the Division, the
10 Civil Rules apply to this action; when the Civil Rules provide the Respondents with a sliver of due
11 process, the Civil Rules suddenly do not apply. This constant contradiction makes a mockery of
12 any notion of fair play, substantial justice and/or due process.

13
14 The Division's strategy of flipping on the application of the Civil Rules has been
15 highlighted a number of times by the Respondents, but just one example of this strategy is related
16 to the discovery dispute. Just a few months ago, the Division was, pursuant to the Arizona Rules
17 of Civil Procedure, representing to this Tribunal and to the parties that it would pursue formal
18 discovery, and it even threatened the Respondents with a battle in Superior Court if the
19 Respondents would not comply with the requests.⁷ Indeed, lead counsel for the Division in this
20 case, stated at the January 14, 2004 Pre-Hearing Conference:

21
22 Since the case is going to be extended for some time, *we would like to do*
23 *some type of formal discovery requests*. I know they've [the Respondents] been
24 saying we've [the Division] been indicating we're going to do this for some time,
25 but we will try to get this out before March, and *hopefully they'll comply*. *See*
26 January 14, 2004, Pre-Hearing Conference transcript, at p. 28, lines 1-6 (emphasis
supplied).

The Division's counsel further stated:

⁷ *See* January 14, 2004, Pre-Hearing Conference Transcript, at p. 28, lines 1-6.

1 . . . Well, our proposal is that *the respondents produce all sale records*
2 involving Arizona investors of the universal lease through the year 2003 . . . *If the*
3 *respondents refuse to produce the records of 2003 showing the sales to Arizona,*
4 *then we will be forced to go to the next level and, obviously, take the legal*
5 *remedies of the Superior Court* that we need to take. *Id.* at p. 29, lines 7-10, and
6 16-20 (emphasis supplied).

7 The Division's flip came during the March 4th Pre-Hearing Conference, when the Division
8 stated:

9 The problem with the discovery that the respondents in this matter have attempted
10 to file with us is that they are following the civil rules of discovery, rules that do
11 not apply in this administrative forum. *See* March 4, 2004, Pre-Hearing transcript
12 at p. 10, lines 19-22.

13 Thus, when the Civil Rules provided the Division with the vehicle through which to obtain
14 the documents and information is wanted, the Civil Rules were said to apply. However, when the
15 Respondents requested reasonable discovery pursuant to the Civil Rules and the Administrative
16 Rules, the Division used the Civil Rules as a shield to prevent the Respondents from obtaining the
17 exculpatory documents and information that they would never obtain if only witness and exhibit
18 lists were exchanged. The Division's inconsistent use of the Civil Rules in this action violates the
19 Respondents due process rights, and supports dismissal of this action. Furthermore, the Division's
20 use of the Civil Rules and cases does not rebut the fact that it failed to timely file the Reply. Thus,
21 the Joint Motion to Strike should be granted.

22 **III.** 23 **CONCLUSION**

24 For the foregoing reasons, the Respondents' Joint Motion to Strike the Securities
25 Division's Response (effectively, Reply) to Respondents' Joint Motion to Compel or,
26 Alternatively, to Vacate the Temporary Order to Cease and Desist, as untimely, should be granted.

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Dated this 4th day of May, 2004.

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1 ORIGINAL and 13 copies of the foregoing
hand-delivered this 4th day of May, 2004 to:

2 Docket Control
3 Arizona Corporation Commission
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5 COPY of the foregoing hand-delivered
6 this 4th day of May, 2004 to:

7 Honorable Marc Stern
8 Administrative Law Judge
9 Hearing Division
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