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COMMISSIONERS

2004 MAY 24 P 3: 54

MARC SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

AZ CORP COMMISSION
DOCUMENT CONTROL

In the matter of:

YUCATAN RESORTS, INC.,
3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

DOCKET NO. S-03539A-03-0000

YUCATAN RESORTS, S.A.,
3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

**SECURITIES DIVISION'S OBJECTION
TO RESPONDENTS' REQUEST FOR
EXPEDITED ORDER**

**RESORT HOLDINGS INTERNATIONAL,
INC.,**
3222 Mishawaka Avenue
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
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Arizona Corporation Commission

DOCKETED

MAY 24 2004

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**RESORT HOLDINGS INTERNATIONAL,
S.A.,**
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1 **WORLD PHANTASY TOURS, INC.,**)
)
 a/k/a **MAJESTY TRAVEL**)
 2 a/k/a **VIAJES MAJESTY**)
)
 Calle Eusebio A. Morales)
 3 Edificio Atlantida, P Baja)
)
 APDO, 8301 Zona 7 Panama,)
 4)
AVALON RESORTS, S.A.)
 5 Av. Coba #82 Lote 10, 3er. Piso)
)
 Cancun, Q. Roo)
 6 Mexico C.P. 77500)
)
 7 **MICHAEL E. KELLY and LORY KELLY,**)
)
 husband and wife,)
 8 29294 Quinn Road)
)
 North Liberty, IN 46554;)
 9 3222 Mishawaka Avenue)
)
 South Bend, IN 46615;)
 10 P.O. Box 2661)
)
 South Bend, IN 46680,)
 11)
 Respondents.)
 12)

13 The Securities Division of the Arizona Corporation Commission (“Division”) hereby objects
 14 to Respondents’ Yucatan Resorts, Inc., Yucatan Resorts, S.A., Resort Holdings International, Inc.,
 15 and Resort Holdings S.A.’s Request for Expedited Order (“Request”). This Request, which rehashes
 16 sweeping civil discovery demands under the guise of administrative discovery process, is nothing
 17 more than an attempt at side-stepping the presiding administrative law judge’s recent determination
 18 on the limits of administrative discovery.

19 The tenuous nature of this Request is undermined by both procedural and substantive defects.
 20 Instantly, the Request fails to offer the requisite showing of “reasonable need” required to justify the
 21 issuance of subpoenas for both documents and depositions. Moreover, Respondents’ Request
 22 disregards discovery restrictions imposed by the Division’s confidentiality statute. Still further,
 23 Respondents’ Request demands a production that is vague, ambiguous, irrelevant, and/or overbroad.
 24 In short, this Request represents an unwarranted fishing expedition into the entire investigative files
 25
 26

1 of the Division. Under the rules for administrative discovery, such a request is neither contemplated
2 nor authorized. It follows that Respondents' Request be denied.

3 **DISCUSSION**

4 The Division has no objection to producing the information and materials Respondents need
5 to develop and present their defense. The Division will, at the time and place designated by the
6 administrative law judge, readily disclose witness lists and proposed exhibits for hearing.
7 Respondents' current administrative discovery demands, however, seek a level of production that is
8 plainly unnecessary, unwarranted, and untenable.

9 **I. Administrative Discovery Requires a Showing of "Reasonable Need"**

10 As discussed in the Division's responses to various of the Respondents' prior discovery
11 requests,¹ the authority to pursue discovery during the course of an administrative proceeding is
12 authorized only to the extent that it is explicitly covered in a specific statute or rule. Under the
13 chapter covering administrative procedure, Arizona law provides as follows:

14
15 *A.R.S. § 41-1062: Hearings; evidence; official notice; power to require testimony
and records; Rehearing*

16 A. Unless otherwise provided by law, in contested cases the following shall apply:

17 ...

18 4. The officer presiding at the hearing may cause to be issued
19 subpoenas for the attendance of witnesses and for the production of
20 books, records, documents and other evidence and shall have the
21 power to administer oaths. . . . Pre-hearing depositions and
22 subpoenas for the production of documents may be ordered by the
23 officer presiding at the hearing, *provided that the party seeking
such discovery demonstrates that the party has reasonable need
of the deposition testimony or materials being sought....*

24
25 ¹ The Division challenged Respondents' multiple attempts to invoke the Rules of Civil Procedure as a
26 means of pursuing discovery by submitting four separate (but similar) responses, including, e.g., "*Securities
Division's Response to Yucatan Resorts, Inc., Yucatan Resorts, S.A., Resort Holdings, Inc., and Resort
Holdings, S.A.'s First Set of Non-Uniform Interrogatories.*" These responses, and the discovery limitations
discussed therein, are hereby incorporated by reference.

1 Notwithstanding the provisions of section 12-2212, no subpoenas,
2 depositions or other discovery shall be permitted in contested cases
except as provided by agency rule or this paragraph.

3 (Emphasis added). The plain import of this provision is that, in Arizona, the only forms of pre-trial
4 discovery permitted in administrative proceedings are i) subpoenas based on a showing of need and
5 authorized by the administrative hearing officer; ii) depositions based on a showing of need and
6 authorized by the hearing officer; and iii) other limited forms of discovery specifically prescribed
7 under the individual agency’s rules of practice and procedure.

8 In the present instance, Respondents disregard these discovery limitations by treating the
9 “reasonable need” requirement for administrative depositions and subpoenas as a token restraint
10 against boundless discovery. Indeed, Respondents’ justification for demanding boxes of investigative
11 files and seeking the depositions of two Division employees is ultimately premised on a declaration
12 that the requested documents and information are “reasonable and absolutely necessary.” This bald
13 conclusion hardly equates to a *showing* of “reasonable need.”

14 As support for their “reasonable and absolutely necessary” assertion, Respondents cite only to
15 their prior “Motion to Compel or, Alternatively, to Vacate the Temporary Order to Cease and Desist.”
16 A review of this document, however, offers nothing to suggest that either the specific deposition
17 requests or the subpoena for investigative files are in any way reasonable or necessary to
18 Respondents’ defense. Quite to the contrary, the cited motion merely argued, unsuccessfully, that the
19 civil discovery rules and procedures are applicable in this administrative forum. These generic
20 arguments add nothing to the contention that Respondents’ specific subpoena requests are, in any
21 way, required for Respondents to defend against to the current action. In sum, Respondents’ Request
22 thoroughly fails in making the requisite showing of need in connection with their subpoena and
23 deposition demands.

24 ...

25 ...

1 **A. Respondents plainly do not “need” their own records and documents**

2 The actual types of documentation and information sought by Respondents in their Request
3 only serves to highlight the lack of need associated with their discovery demands. In their Request,
4 for example, Respondents seek “any and all documents evidencing, relating to or concerning the bank
5 accounts of any of the Respondents to this Proceeding.” *Respondents’ Proposed Subpoena Duces*
6 *Tecum, Exhibit 1, ¶14.* This is a puzzling request for Respondents’ own records that Respondents
7 could easily access from their own bank accounts (in the unlikely event these records are not already
8 within the Respondents’ possession). A similar example is found under paragraph 15 of
9 Respondents’ document request. In this paragraph, Respondents demand “[a]ny and all documents
10 evidencing, analyzing, reviewing, relating to or concerning training materials allegedly provided to
11 Universal Lease Sales Agents.” Again, Respondents are clearly in a position to access all of their own
12 training materials.

13 These and other document requests demonstrate that, far from being a request *based on*
14 *reasonable need*, Respondents’ Request is in fact simply designed to probe for all information that the
15 Division currently controls (and, by extension, does not control). This fishing expedition, submitted
16 under the guise of “absolutely necessary” discovery, is precisely the type of pre-trial abuse precluded
17 under the administrative discovery rules.

18 **B. Irrelevant documents and premature depositions are, by definition,**
19 **unnecessary to Respondents’ defense.**

20 Respondents’ Request includes a proposed subpoena for documents “evidencing, relating to,
21 or concerning” almost every allegation made in the Division’s Amended Temporary Order to Cease
22 and Desist. This request effectively encompasses boxes of investigative documents, often containing
23 privileged or confidential information, that are simply not in issue in this case. Moreover, many of
24 these same materials will never be referenced, invoked or introduced at the hearing. As such, these
25 documents are irrelevant with respect to the administrative proceeding itself and useless with respect
26

1 to the preparation of the Respondents' defense. It follows that there is no demonstrable need for these
2 materials.

3 Respondents' deposition requests are equally unnecessary to their defense. Respondents seek
4 to depose Division investigator Alan Walker even though Respondents have offered no reason for his
5 examination. Moreover, Walker's inclusion as a witness in this matter has yet to be determined.
6 Along similar lines, Respondents have provided no reason why there would be any value, let alone a
7 need, for Respondents to examine the Division's custodian of records. Foundation concerns for any
8 of the exhibits the Division wishes to introduce will naturally be subject to challenge at hearing.

9 **II. Respondents' Discovery Demand Seeks Confidential and**
10 **Privileged Investigative Files**

11 Respondents' Request is inappropriate on still another level. In their request for materials and
12 documentation, Respondents make repeated demands for Division information developed or
13 otherwise obtained through investigative leads, investigative operations, undercover work and/or
14 cooperative inter-agency efforts. Due to the confidential and privileged nature of these materials, this
15 information falls beyond the acceptable limits of administrative discovery. The few circumstances
16 under which such investigative information may be disclosed are governed by specific statutes and
17 rules.

18 Arizona Revised Statutes § 44-2042 allows for the disclosure of information or documents
19 obtained during a Division investigation *only* if such information is either (1) made a matter of
20 public record; (2) disclosed to certain specified regulatory officials; (3) disclosed pursuant to a
21 specific Commission rule; or (4) authorized for disclosure as "not contrary to the public interest" by
22 the Commission or Division director.² Similar limitations have naturally impacted administrative
23 discovery disputes. In *Motorola, Inc. v. Equal Employment Opportunity Commission*, 317 F. Supp.

24
25 ² Section 44-2042, the recently enacted "confidentiality" statute, applies to all investigative files of the
26 Division and operates in concert with the Administrative discovery provisions of A.R.S. § 44-1062.
Accordingly, prior to any discovery order issued pursuant to A.R.S. 44-1062(A)(4), the presiding
administrative law judge must take into consideration the disclosure limitations prescribed under § 44-2042.

1 282 (D.Ariz. 1968), for instance, the court granted the Commission's motion to vacate a notice of
2 an EEOC commissioner's deposition, determining that "Commission regulations ... prohibit a
3 disclosure of the desired information." The court went on to state that allowing the deposition
4 would reveal sources of information and deter individuals from making complaints in fear of
5 retaliation. The court concluded by noting that "at some point prior to the evidentiary hearing," the
6 Commission would provide the witnesses and exhibits intended to be used to present the case.

7 By adopting the confidentiality provisions of A.R.S. § 44-2042, the Arizona legislature has
8 balanced the "inherent conflict between the necessity of keeping some official governmental
9 records confidential and the intense desire that justice be done between litigants." *Starr v. CIR*, 226
10 F.2d 721 (7th Cir. 1955). This principle of protecting sensitive investigative materials has been
11 routinely applied. For example, in *People v. Superior Court (Lyons Buick-Opel-GMAC, Inc.)*, 138
12 Cal. Rptr. 791 (Cal. App. 2 Dist. 1977), the court noted that the disclosure of official investigative
13 material is against the public interest, absent some substantial and credible showing that the
14 material is relevant to the defense. Similarly, in *People by Lefkowitz v. Volkswagen of America,*
15 *Inc.*, 342 N.Y.S.2d 749 (N.Y. Sup. Ct. 1973), the names and addresses of victims obtained as a
16 result of the attorney general's investigation were characterized as work product, to which
17 defendants were not entitled.

18 Notably, statutory provisions that close investigative files to pre-trial discovery do not
19 violate due process. In *Starr*, 226 F.2d at 724, the court specifically recognized that denying
20 discovery regarding the activities of two investigative agents did not deny due process and was
21 appropriate to protect manner of government investigation, particularly where the manner of
22 investigation was immaterial to the issues of the case. A similar conclusion was reached in
23 *National Labor Relations Board v. Vapor Blast Manufacturing Company*, 287 F.2d 402 (7th Cir.
24 1961). In this case, the court ruled that "The [National Labor Relations] Board possesses the broad
25
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1 power to make rules to guide the internal administration of the agency.³ It has determined that it is
2 necessary to proper administration to stamp as confidential all documents in its possession. ... The
3 Board's practice does not, per se, preclude respondent's right to a fair hearing." *Vapor Blast*
4 *Manufacturing Company*, 287 F.2d at 407.

5 In their Request, Respondents repeatedly demand access to precisely this type of privileged
6 and confidential investigative information. Such information is not necessary for Respondents'
7 defense, and the disclosure of investigative techniques and operations, confidential inter-agency
8 communications and other sensitive information is certainly not in the public interest. As such,
9 there is no justification, under any applicable rule or statute, to authorize the discovery of such
10 information.

11 **III. Respondents' Expansive Discovery Requests are at once Vague,**
12 **Ambiguous and Overbroad**

13 As previously discussed, Respondents' Request effectively demands the Division's entire
14 investigative file in this matter. Under the administrative rules for discovery, this approach is plainly
15 misplaced; Respondents did not (and for that matter, could not) demonstrate the requisite *reasonable*
16 *need* for such unrestrained discovery, and the Request disregards the implications of the Division's
17 confidentiality statute. Yet the Request suffers on still other grounds. Even without an evaluation as
18 to "reasonable need" and "confidentiality," Respondents' administrative discovery request is vague,
19 ambiguous and overbroad.

20 Respondents' Request lays out 21 separate document requests from the Division, beginning
21 with "any and all documents relied upon by the Division in bringing and pursuing this proceeding,
22 including, but not limited to...(b) any documents the Division has obtained, whether by subpoena
23 or otherwise, in connection with its investigation of Respondents; ..." *See Respondents' Proposed*

24
25 ³ The Board's rule provided that after a witness testified, any witness statements would be disclosed to the
26 respondent for use in cross examination. All other investigative information was confidential absent
management approval. The court stated that the Board was responsible for determining its own rules for
hearings before it and that the Board had not abused its discretion.

1 *Subpoena Duces Tecum, Exhibit 1, ¶1.* This one single paragraph could arguably entail the
2 production of the entire investigative file of the Division in this matter, and perhaps other case files.
3 This demand is remarkable in its ambiguity and contemplates a documents production entirely out
4 of proportion to the materials necessary to both present a defense in this matter and to meet
5 requirements of due process.⁴

6 CONCLUSION

7 The Division will readily participate in all appropriate forms of administrative discovery. The
8 Arizona Rules of Practice and Procedure before the Corporation Commission, *R14-3-101, et seq.*,
9 authorize the presiding administrative law judge to direct a pre-hearing conference wherein an
10 arrangement is made for the exchange of proposed exhibits, witness lists, or prepared expert
11 testimony. *See Arizona Administrative Code, Title 14, R-14-3-108(A).* These rules also provide that a
12 party may gain access to additional pre-hearing materials by way of a discretionary administrative law
13 judge order requiring that the parties interchange copies of exhibits prior to hearing. *See Arizona*
14 *Administrative Code, Title 14, R-14-3-109(L).* These procedures are specifically available, and the
15 Division will, of course, comply with all aspects of these discovery procedures in a timeframe deemed
16 appropriate by the presiding administrative law judge.

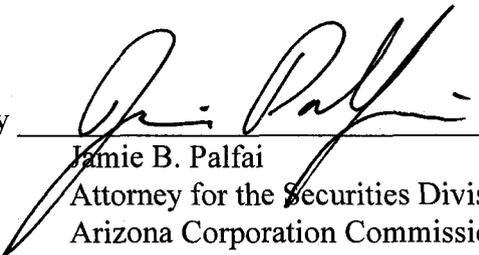
17 ...

19 ⁴ Although administrative discovery procedures within this state may not be as expansive as those for civil
20 discovery, these procedures nevertheless comport with the demands of due process for administrative
21 proceedings. *Compare, e.g., Cimarusti v. Superior Court*, 79 Cal.App.4th 799, 94 Cal.Rptr.2d 336
22 (2000)(pre-hearing discovery and hearing procedures as provided under the state's Administrative
23 Procedures Act fully satisfied the petitioner's due process rights; *Silverman v. Commodity Futures Trading*
24 *Commission*, 549 F.2d 28 (7th Cir. 1997)(provision of witness lists, identification of investigators, and
25 copies of memoranda reflecting petitioner's own statements satisfied due process in administrative
26 proceeding); *Huntsville Mem. Hospital v. Ernst*, 763 S.W.2d 856, 859 (Tex.App. 1988)(due process in
administrative proceedings mandates notice, a hearing, and an impartial trier of facts, but not various
methods of discovery); *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380
U.S. 545, 552 (1965)("the fundamental requirement of due process is the opportunity to be heard at a
meaningful time and in a meaningful manner"); *Swift & Co. v. U.S.*, 308 F.2d 849, 851 (7th Cir. 1962)("due
process in an administrative proceeding, of course, includes a fair trial, conducted in accordance with
fundamental principles of fair play and applicable procedural standards established by law").

1 Similarly, if Respondents can demonstrate reasonable need to the administrative law judge for
2 a specific document or deposition (e.g., a document is shown to be specifically germane to
3 Respondents' defense, the document is not one of Respondents' own papers, etc.), and where the
4 production of the document (or scheduling of the deposition) would not be against the public interest
5 (e.g., the request is not a waste of resources, there are no investigative privilege or confidentiality
6 issues, etc.), then the Division would not be forced to challenge the Respondents' request to order the
7 disclosure of such information.

8 Unfortunately, Respondents' present Request falls well outside these parameters.
9 Respondents' Request is remarkably ambiguous and overbroad, makes no distinction in demanding
10 confidential and privileged information, and fails to make the requisite showing of reasonable need.
11 Under these circumstances, Respondents' administrative discovery attempt, their "Request for
12 Expedited Order," is unsound. Accordingly, the Division respectfully asks that the Respondents'
13 Request be denied.

14 RESPECTFULLY SUBMITTED this 24th day of May, 2004.

15
16
17 By 
18 Jamie B. Palfai
19 Attorney for the Securities Division of the
20 Arizona Corporation Commission

21
22 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
23 filed this ____ day of May, 2004, with
24 Docket Control
25 Arizona Corporation Commission
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Phoenix, AZ 85007

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COPY of the foregoing hand-delivered this
24th day of May, 2004, to:

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