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Arizona Corporation Commission
DOCKETED

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS:

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

In the matter of:

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

**RESORT HOLDINGS
INTERNATIONAL, INC. d/b/a
RESORT HOLDINGS
INTERNATIONAL, S.A.,**

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

MICHAEL E. KELLY,

Respondents.

DOCKET NO. S-03539A-03-0000

**RESPONDENTS' JOINT BRIEF IN
OPPOSITION TO THE SECURITIES
DIVISION'S MOTION FOR
AUTHORITY TO SEEK
PRODUCTION OF DOCUMENTS**

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

1
2 On September 22, 2004, the Securities Division of the Arizona Corporation
3 Commission (hereinafter "Securities Division" or "Division") filed its Motion for
4 Authority to Issue an Administrative Subpoena for Production of Documents (hereinafter
5 "Motion for Production of Documents"). Respondents hereby file their Joint Brief in
6 Opposition to the Securities Division's Motion for Production of Documents (hereinafter
7 "Joint Opposition Brief"). In support of the Joint Opposition Brief, Respondents submit
8 the following:

9
10 **I.**
PROCEDURAL HISTORY

11 On January 23, 2004, Respondents Yucatan Resorts Inc., Yucatan Resorts S.A.,
12 RHI Inc., and RHI, S.A. filed their first "Request for Production of Documents." See
13 Request for Production of Documents. This initial production request was followed,
14 shortly thereafter, by non-uniform interrogatories from the above-referenced entities, as
15 well as production requests from Michael Kelly and World Phantasy Tours. The Securities
16 Division's argument against Respondents' discovery requests was that the Arizona Rules of
17 Civil Procedure do not apply and/or govern discovery in administrative proceedings and,
18 further, that, "only certain specified methods of discovery are sanctioned in administrative
19 proceedings before the Arizona Corporation Commission, and that such methods of
20 discovery are often both limited and discretionary."¹

21
22
23 On May 5, 2004, ALJ Marc Stern issued the "Sixth Procedural Order" in this action
24 and, *inter alia*, held:

25
26

¹ See Securities Division's Response to Respondents Yucatan Resorts, Inc., Yucatan Resorts, S.A., Resort Holdings International, Inc. and Resort Holdings International, S.A.'s Request for Production of Documents at p. 6, lines 1-5.

1 It is concluded that A.R.S. § 41-1062(a)(4) is controlling and as a
2 result, it is concluded that discovery is not a matter of right in an
3 administrative proceeding. Therefore, the use of discovery rules
4 pursuant to the ARCP [Arizona Rules of Civil Procedure] shall not
be followed unless an exception is granted by the presiding
Administrative Law Judge.

5 See Sixth Procedural Order, entered on May 5, 2004, at p. 10, lines 2-6.

6 Less than five (5) days after the Sixth Procedural Order denied Respondents'
7 requests for discovery, Respondents Yucatan Resorts Inc., Yucatan Resorts, S.A., RHI Inc.
8 and RHI S.A. filed a Request for Expedited Order. See Respondents Request for Expedited
9 Order, filed on May 10, 2004. The Request for Expedited Order contained: (1) a proposed
10 subpoena for the deposition testimony of Investigator Alan Walker of the Securities
11 Division; (2) a proposed subpoena for the deposition testimony of the Records Custodian
12 of the Securities Division; and (3) a proposed subpoena *duces tecum*, which sought basic
13 and narrowly tailored documentary evidence that allegedly supports the Securities
14 Division's claims. Importantly, the Request for Expedited Order was filed pursuant to
15 Arizona Administrative Rules pertaining to discovery. *Id.*

16
17
18 In response to the Respondents' Request for Expedited Order, the Securities
19 Division essentially argued that Respondents are not entitled to discovery because all of
20 the Division's documents fall under some alleged investigative privilege and/or the
21 Respondents do not have a "reasonable need" for the requested information. See Securities
22 Division's Objection to Respondents' Request for Expedited Order. Further, the Division
23 complained that the Respondents' Request was "nothing more than an attempt at side-
24 stepping the presiding administrative law judge's recent determination on the limits of
25 administrative discovery." *Id.* at p. 2, lines 15-19. Finally, the Securities Division
26 reiterated its long-standing position that:

1 remarkably, the Division argued that it was entitled to discovery. As ALJ Stern noted at the
2 outset of this entire administrative proceeding:

3 As I say, the Division brings the case. I don't tell you to bring this.
4 If you were short some evidence to back up the allegations, then
5 perhaps the case shouldn't have been brought

6 See July 17, 2003, Pre-Hearing Transcript at p. 23, lines 20-23.

7 To date, the Respondents have not been provided one item of discovery from the
8 Securities Division. The Division did not even produce to Respondents the proposed
9 exhibits it cited in its recently-filed Proposed Witness and Exhibit List. By contrast, the
10 Securities Division has admitted that, “[t]hrough interviews, subpoenas and other
11 investigative techniques, the Division has been able to assemble its own preliminary listing
12 of Arizona Universal Lease investors.” See Motion for Production of Documents at p. 4,
13 lines 20-21. While it is not clear what “other investigative techniques” entail, the import of
14 the admission is evident: The Division has been conducting testimonial and documentary
15 discovery for more than one year and, conversely, the Division asks the Respondents to
16 accept only its witness and exhibit list to prepare for Hearing. This double standard
17 violates Respondents’ Due Process right to a fair trial in a fair proceeding.²

18
19 Now, more than a year subsequent to the May 20, 2003, filing of the “Temporary”
20 Order to Cease and Desist, the Securities Division seeks leave to pursue discovery *from the*
21 *Respondents* for the first time. The Division’s Motion for Production of Documents, and
22 the Proposed Administrative Subpoena attached thereto, is not appropriate for discovery
23 under the Arizona Administrative Rules because the Division has no reasonable need for
24 the documents. Further the Division’s discovery requests are irrelevant, vague and
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26

² The “witness list” is merely a recitation of names with no contact information.

1 ambiguous, overly broad, and unduly burdensome. Equally important, due process
2 demands that the Division be held to the same standard as the Respondents. Therefore, the
3 Motion for Production of Documents should be, in all things, denied.

4 **1. The Division Failed to Establish a Reasonable Need for the Requested**
5 **Documents.**

6 In contesting Respondents' requests for discovery, the Securities Division has
7 repeatedly quoted and relied upon Arizona Revised Statute Section 41-1062. *See* Motion
8 for Production of Documents at p. 3, lines 3-15 (quoting A.R.S. § 41-1062). This Section
9 provides:

11 The officer presiding at the hearing may cause to be issued
12 subpoenas for the attendance of witnesses and for the production of
13 books, records, documents and other evidence and shall have the
14 power to administer oaths . . . Pre-hearing depositions and
15 subpoenas for the production of documents may be ordered by the
16 officer presiding at the hearing, *provided that the party seeking
such discovery demonstrates that the party has a reasonable need
of the deposition testimony or materials being sought*

16 A.R.S. § 41-1062 (emphasis supplied).

17 The Securities Division does not have a reasonable need for the materials being
18 sought. Therefore, because the Division cannot satisfy the express and unambiguous
19 requirements of A.R.S. § 41-1062, and the Division's Motion for Production of Documents
20 should be denied.

22 Indeed, the support that the Division offers to allegedly satisfy the "reasonable
23 need" requirement is that, "[t]he request for this administrative subpoena is based on the
24 fact that the sought-after documentation contains relevant information that will prove
25 essential in reaching a prompt and thorough adjudication of this matter." *Id.* at p. 2.
26 Blanket assertions such as this are not sufficient to prove reasonable need and, moreover,

1 the Division ignores: (1) that this proceeding has been ongoing for more than a year, and
2 the Division has never requested documents from Respondents; and (2) the reason the
3 Division has not requested documents is that it has been conducting discovery regarding
4 this action, *for more than one year*, while simultaneously denying the Respondents the
5 same documentary discovery opportunities.
6

7 In the Motion for Production of Documents, the Division for the first time in this
8 administrative action, claims that it “is having difficulty acquiring this documentation
9 through its own, unassisted efforts.” *Id.* at pp. 2, 3. The reality, however, is that over the
10 course of the last year the Division has conducted the EUOs of: (1) Roy D. Higgs, (2)
11 Phillip R. Ohst, (3) Janalee R. Sneeva, (4) John E. Tencza, (5) John J. Donovan and (6)
12 Tyson Hiland—all in connection with this pending proceeding. Importantly, each of these
13 individuals were required to produce all of their documents and information related to the
14 named Respondents or the subject matter of this proceeding. This is far more discovery
15 than the Respondents have been afforded by the Division and this tribunal.
16

17 The Division also argues that it needs the discovery because, “the acquisition of
18 this information would readily facilitate the Division’s ability to develop an accurate and
19 comprehensive restitution index—a central requirement for notifications, restitution,
20 calculations and/or distributions.” *Id.* However, the Division has neglected to address the
21 fact that there has been no hearing in this matter, no liability has been established and, thus
22 far, the Division has not satisfied its burden of proving the Universal Lease is a security.
23

24 If the Division has enough documents to compile “a preliminary listing of Arizona
25 Universal Lease investors” (which statement does not begin to reflect just how much
26 discovery the Division actually has conducted) certainly the Division can wait to complete

1 its “comprehensive restitution index” until it actually has satisfied its burden of proof and
2 prevailed. Until such time – if ever – there is no reasonable need for the requested
3 documents.

4 **2. The Division is Using Discovery as a Sword and a Shield.**

5 The Division has been permitted to conduct testimonial and documentary discovery
6 through EUOs, witness interviews, subpoenas and other “investigative techniques.” See
7 Motion for Production of Documents at p. 4, lines 21-22. The Division has taken at least
8 six (6) EUOs of individuals regarding information that is directly related to this
9 administrative proceeding, and conducted an unknown number of witness interviews.
10 Each of these individuals was also served with a subpoena for all of their files and
11 documents concerning the named respondents to this proceeding. Specifically, the
12 subpoenas sought “all documents, records, books, and any other papers . . . associated with
13 Michael E. Kelly, Resort Holdings International, Yucatan Resorts, Avalon Resorts, World
14 Phantasy Tours, Majesty Travel and/or Yucatan Investments.” See John Tencza Subpoena,
15 attached hereto as Exhibit “1.”

16 As evidence of the contradiction in the Division’s application of the discovery rules
17 and restrictions as applied to the Respondents, as compared to the Division itself, one need
18 only look to the discovery disputes in this case. For example, the documents that have
19 been produced to the Division by individuals subjected to EUOs included the “*names,*
20 *addresses, and telephone numbers of all individuals, sales agents or entities that have*
21 *been offered or sold timeshare interests* including the number of interests purchased, if
22 applicable, and the amount and date of each investment.” See Exhibit 1 hereto. Irrefutably,
23 the information gained from one EUO and document production lead to subsequent
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1 witness interviews, EUOs, subpoenas and/or informal requests for documents and
2 information and, thus, additional discovery from other individuals.

3 As proof of this discovery process, in the Division's Proposed Witness and Exhibit
4 List (filed on October 1, 2004), the Division lists, *inter alia*, Dwight and Marjorie
5 McKinnie, Thomas Crisp, Bettie Mazel, and Robert Newland as potential witnesses. *See*
6 Division's Witness and Exhibit List a p. 1. Further, for each of these individuals, the
7 Division disclosed that it has and is prepared to use as Exhibits for hearing, "investor
8 documents," including Universal Lease documents, Management agreements with World
9 Phantsay, correspondence and promotional materials. None of these individuals were
10 noticed for and/or subjected to an EUO (where the Respondents would have been
11 permitted to attend, but not participate), or upon information and belief, served with a
12 subpoena for documents. *Id.* at pp. 2-4.

15 Compared to the Division, which has been able to conduct unfettered "on the
16 record" discovery in the form of EUOs, and informal discovery of the above-referenced
17 individuals, the Respondents have been denied all requests for documentary discovery in
18 this matter. Moreover, the Division did not provide the Respondents with copies of the
19 proposed exhibits it lists on its recently filed Witness and Exhibit List.

21 Furthermore, at the July 29, 2004, Pre-Hearing Conference, when Attorney Held
22 asked that the Division's Proposed Witness and Exhibit List include the "*name of the*
23 *person, their address, telephone number, and even a sentence or two about what he*
24 *[Attorney Palfai] expects them to testify about . . .*," the Division adamantly objected and
25 argued that the Division should not have to produce *the exact same information* it sought
26 out and received from its enforcement subpoenas. *See* July 29, 2004, Pre-Hearing

1 Conference Transcript at p. 19, lines 4-14. Specifically, the Division attorney argued:

2 Just along those lines, Mr. Held mentioning that he would like the
3 names, addresses and phone numbers suggests to me that he may be
4 planning on trying to contact these individuals, maybe for some
5 interviews or something like that, and I just want to remind him that
6 that's not one of the prescribed types of discovery allowed under
7 this.

8 *Id.* at p. 21, lines 17-23. Additionally, the Division attorney argued:

9 Well, my point is that under the administrative rules, the two types
10 of discovery that are allowed are depositions and subpoenas for
11 documents; and any other form of discovery is not allowed, and I
12 don't want him [Attorney Held] to go beyond the rules and contact
13 these people and perhaps inappropriately either harass and/or
14 intimidate them.

15 *Id.* at p. 22, lines 10-16.

16 The Respondents submit that the Division should not be allowed to use
17 Administrative Rules as both a sword and a shield in this action—permitting the Division
18 the power to conduct discovery, while denying Respondents anything other than the
19 Division's witness and exhibit list. Due Process demands that the parties be held to the
20 same standards, and either both parties should be permitted to conduct documentary
21 discovery, or both parties should be confined only to the respective witness and exhibit
22 lists.

23 Courts have expressly rejected unfair administrative proceedings where the
24 government was permitted the opportunity to conduct discovery while respondents were
25 denied the same discovery opportunities. *See Standard Oil Co. v. Federal Trade*
26 *Commission*, No. 78-483, 1980 U.S. Dist. Lexis 9442, at *8 (N.D. Ind. September 26,
1980); see also *Cooper v. Salazar*, No. 98C2930, 2001 U.S. Dist. Lexis 17952, at *21-25
(N.D. Ill. November 1, 2001).

1 In *Standard Oil*, administrative proceedings were brought against respondent oil
2 companies. *Id.* at *2-3. Counsel for the government was permitted extensive discovery. *Id.*
3 at *8. However, when the respondent oil companies sought discovery, the administrative
4 law judge denied respondents' request. *Id.* at *2-3. The respondents sought judicial relief
5 from the United States District Court for the Northern District of Indiana. *Id.* The district
6 court ruled that the denial of discovery was a denial of the respondents' due process rights,
7 and remanded the matter back to the administrative law judge. *Id.* The respondents
8 immediately re-issued their respective discovery requests to the FTC and other
9 governmental agencies, and the administrative law judge issued the subpoenas. *Id.* at *3-4.

11 Thereafter, the FTC issued an Interlocutory Order and quashed all of the subpoenas
12 that the administrative law judge issued. *Id.* at *4-5. The FTC's position was that it did not
13 have jurisdiction to issue subpoenas to other government agencies. *Id.* The respondents
14 returned to the district court to seek enforcement of the district court's prior order directing
15 discovery. *Id.* at *6-7.

17 The district court stated, "as a result of the above-described actions of the FTC over
18 the past year, the Court believes that plaintiffs [respondent oil companies] are not being
19 accorded due process of law." *Id.* Further, the district court noted that the proceeding was
20 fundamentally unfair because the government "received extensive discovery," and the
21 government has "not had roadblocks placed in their way, and they have had . . . years to
22 conduct their discovery." *Id.* at *8. The Court stated that it "finds it difficult to understand
23 why complaint counsel [the government] are permitted broad discovery while plaintiffs'
24 [oil companies] similar requests are denied" *Id.*
25

26 The court went on to state that, "it facially appears that plaintiffs are entitled to the

1 information and documents they have requested.” *Id.* at *9. Importantly, the court also
2 indicated that, “even if the plaintiffs are granted discovery from governmental agencies to
3 which they are entitled, the Court remains concerned about the loss of evidence that has
4 already occurred because of the FTC’s delay in granting the plaintiffs’ discovery.” *Id.* at
5 *10-11. Thus, because the government had a significant running start at discovery, while
6 the oil companies’ discovery requests were road-blocked, the court noted that even if
7 discovery were granted the oil companies still may not receive a fair trial. *Id.* The court
8 gave the government ninety (90) days “to grant the discovery which to which the plaintiffs
9 are entitled.” *Id.* at *12.

11 Similarly, in *Cooper*, a class action was brought against the State of Illinois
12 Department of Human Rights. 2001 U.S. Dist. LEXIS at *1-2. The court recognized that
13 the denial of pretrial discovery in administrative proceedings is not necessarily a violation
14 of due process, however, “that does not itself end the constitutional inquiry . . . [d]ue
15 process implicates fundamental fairness, a basic tenant of which is ‘the opportunity to be
16 heard at a meaningful time and in a meaningful manner.’” *Id.* at *21-22; see also *Society of*
17 *Lloyd’s v. Ashenden*, 233 F.3d 473, 480 (7th Cir. 2000). The court held that, “[w]ithout
18 access to the information in their [the government] investigative files, complainants’
19 opportunity to respond is less than meaningful” *Id.* The court arrived at this
20 conclusion because without access to the government files, the complainants “have no way
21 of knowing what underlying evidence not mentioned in the [government] Report will
22 potentially be used against them by Counsel, and they certainly have no meaningful
23 opportunity to oppose that evidence effectively.” *Id.* at *24-25.

26 The court pronouncements in both the *Standard Oil* and *Cooper* cases are

1 applicable in this case. Here, Respondents have been road-blocked from all attempts to
2 conduct documentary discovery in this action. Conversely, for more than one year, the
3 Securities Division has been conducting *ex parte* witness interviews, securing documents
4 from the witnesses, conducting EUOs and subpoenaing the documents from each
5 individuals subjected to EUOs. Similar to the class plaintiffs in *Cooper*, Respondents
6 herein are being denied the opportunity to discover exculpatory information in the
7 Division's possession. Rather, the Respondents are forced to accept the Division's witness
8 and exhibit list, which contains no contact information of any proposed Division witness
9 and no statement about which the proposed witnesses are being called to testify. Further,
10 the Division did not even produce the documents it allegedly intends to introduce as
11 exhibits to this administrative hearing. See Division's Proposed Witness and Exhibit List.
12

13
14 The United States Supreme Court has held that, "a fair trial in a fair tribunal is a
15 basic requirement of due process." *Withrow et al., v. Larkin*, 421 U.S. 35, 46
16 (1975)(quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). "This applies to administrative
17 agencies which adjudicate as well as to courts." *Id.* (citing *Gibson v. Berryhill*, 411 U.S.
18 564, 579 (1973); see also *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(procedural due
19 process is applicable and mandatory to the adjudicative administrative proceeding)).
20

21 Thus, irrespective of whether litigation is being conducted in a federal courthouse
22 or in the context of an administrative proceeding, Due Process demands that the all parties
23 be held to the same standards and rules. If the Division's Motion for Production of
24 Documents is granted, but the Respondents are forced to go to hearing having been
25 repeatedly denied documentary discovery and armed only with the Division's inadequate
26 witness and exhibit list, this proceeding could not be construed as "a fair trial in a fair

1 tribunal,” and the Respondents’ due process rights, as recognized by the Supreme Court of
2 the United States, will have been violated.

3 **3. The Division Seeks Documents that are Irrelevant, Vague and**
4 **Ambiguous, Overbroad and Unduly Burdensome.**

5 In addition to the fact that the Division has not established a reasonable need for
6 any of the requested documents, the Division’s Motion for Production of Documents seeks
7 irrelevant information. Moreover, the requests are vague and ambiguous, overly broad and
8 unduly burdensome. Thus, the Motion for Production of Documents should be denied.

9
10 The Division is requesting all documents, lists, books, correspondence, financial
11 information and other papers relating to: (1) the contact information of all Arizona
12 residents that have purchased timeshare interests in the Universal Lease concerning both
13 named respondents and unnamed entities; (2) all corporate organizational documentation
14 and reports concerning numerous named respondents and a entities; and (3) all contractual
15 agreements, correspondence and financial information regarding any transfer of funds
16 between RHI and numerous entities that are not even a party to this administrative action.
17 See Exhibit 1 to the Division’s Proposed Administrative Subpoena.

18
19 Specifically, request “1” deals with the number of people or entities who purchased
20 the Universal Lease in Arizona, and demands all purchasers contact information. *Id.*
21 Respondents do not contest that there were Arizona residents that purchased the Universal
22 Lease. This is not the issue. Rather, the issue that must be addressed is whether the
23 Universal Lease is a security. The identities of the purchasers of the Universal Lease has
24 no bearing on this determination and, therefore, request “1” is irrelevant.

25
26 Request “2” of the Division’s Proposed Administrative Subpoena (that
accompanied the Division’s Motion for Production of Documents) contained a request for

1 “the Articles of Incorporation or organization, the Bylaws, and all annual reports, including
2 any amendments, for each of the following entities: Yucatan Resorts, Inc; Yucatan
3 Resorts, S.A. and/or Yucatan Resorts S.A. de C.V.; Resort Holdings International, Inc.;
4 Resort Holdings International, S.A. and/or Resort Holdings International, S.A. de C.V.;
5 World Phantasy Tours, Inc., a/k/a/ Majesty Travel and Viajes Majesty; Avalon Resorts;
6 and Galaxy Properties Management, S.A.” *See* Proposed Administrative Subpoena at
7 Exhibit 1, ¶ 2.

9 Similarly, request “3” of the Proposed Administrative Subpoena demanded, “all
10 contractual agreements, correspondence and financial information regarding the transfer of
11 funds between respondent Resort Holdings International . . . and . . . the following
12 companies listed below: Paraiso Del Pacifico S.A. de C.V.; Avanti Motor Corporation;
13 Operadora Hoteles Grand, S.A. de C.V.; Yucatan Investments, S.A., Resort Holdings
14 International, S.A. de C.V.; [and] Corporativo Nola.” *Id.* at Exhibit 1, ¶ 3.

16 The corporate documents described in request “2” and the contractual agreements
17 and/or other documents described in request “3” are not relevant to the evaluation of
18 whether the Universal Lease is a “security” which, again, is the issue in this administrative
19 action. Further, the following entities are not named Respondents in this administrative
20 action: Yucatan Resorts, S.A. de C.V.; Resort Holdings International, S.A. de C.V.;
21 Galaxy Properties Management, S.A.; Paraiso Del Pacifico, S.A. de C.V.; Avanti Motor
22 Corporation; Operadora Hoteles Grand, S.A. de C.V. and Corporativo Nola. Therefore,
23 any discovery request related to any of these entities is irrelevant and not properly
24 propounded on the named Respondents to this proceeding.

26 The Division also argued that it needed the corporate governance documents of the

1 above-referenced entities because various respondents, including Michael Kelly, submitted
2 motions to dismiss arguing that Arizona did not have personal jurisdiction. *See* Motion for
3 Production of Documents at p. 5. Moreover, the Division submitted that, “despite the
4 seemingly public nature of this information [corporate information] and after national
5 searches and computer inquiries, *the Division has been unable to identify the state or*
6 *states of incorporation for various of the respondent entities.*” *Id.* (emphasis supplied).
7

8 First, the Division’s recent filing of its Proposed Witness and Exhibit List directly
9 contradicts its statement that it is having difficulties finding and/or cannot find the
10 corporate information of the Respondent entities. Specifically, proposed Division Exhibit
11 “S-1” lists a “Certified copy of Resort Holdings International, Inc.” documents filed with
12 the ACC, including a corporate application to transact business and Annual Reports from
13 2002 through 2004. *See* Division’s Witness and Exhibit List, proposed Exhibit S-1. The
14 Division also has in its possession certificates evidencing corporate registration with the
15 Republic of Panama, for RHI S.A., Yucatan Resorts S.A., and World Phantasy Tours. *Id.*
16 p. 5, proposed Exhibits S-35 through S-37. Thus, the Division’s request for corporate
17 records is disingenuous.
18

19 Second, even if the Division’s Proposed Witness and Exhibit List did not directly
20 refute its statement that it cannot obtain the Respondents’ respective corporate filings, the
21 corporate records of all of the above-named entities have absolutely no relation to the issue
22 of whether the Universal Lease is a security. Thus, the Division’s second and third
23 discovery requests are totally irrelevant to this entire administrative proceeding.
24

25 Third, the Division’s argument that it should be entitled to all of the Respondents’
26 respective corporate documents because various Respondents have challenged jurisdiction

1 is without merit. Importantly, none of this information is relevant to the issue of whether,
2 legally, Arizona and/or the Arizona Corporation Commission properly has jurisdiction
3 over the respective Respondents and/or whether service was properly effectuated in this
4 case. The Division either properly effectuated service, or it did not, further discovery into
5 the Respondents' corporate organizational files will not change the analysis of proper
6 service.
7

8 A state may assert either "general" or "specific" personal jurisdiction over a non-
9 resident respondent, depending on the nature and the extent of contacts between that non-
10 resident respondent and the forum. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*,
11 466 U.S. 408, 414-15 (1984). In Arizona, a tribunal may exercise "specific" jurisdiction
12 over a non-resident respondents only if (1) the respondent "purposefully avails" himself of
13 the privilege of conducting business in the forum; (2) the claim arises out of or relates to
14 the respondent's contacts with Arizona; and (3) the exercise of personal jurisdiction over
15 the non-resident respondent is reasonable under the circumstances. *See Williams v.*
16 *Lakeview Co.*, 199 Ariz. 1, 3 (2000); citing *Shute v. Carnival Cruise Lines*, 897 F.2d 377,
17 381 (9th Cir. 1990). Requesting corporate organizational documentation is simply not
18 relevant, in any regard, to the issue of whether the test for "specific" personal jurisdiction
19 has been satisfied. Thus, the argument that the Division should be granted discovery
20 because various Respondents have submitted motions to dismiss based on jurisdictional
21 arguments should be rejected.
22

24 Additionally, the production sought by the Division is overly broad, seeking
25 documents that have no bearing on this proceeding. To use the Division's own words, in
26 response to the Respondents' discovery requests: "[t]his demand is remarkable in its

1 ambiguity and contemplates a documents production entirely out of proportion to the
2 materials necessary to both present a defense in this matter and meet requirements of due
3 process.” See Division’s Objection to Respondents’ Request for Expedited Order at p. 8,
4 lines 3-5.

5
6 Finally, the Division’s discovery requests collectively seek documents from named
7 Respondents and non-party entities from the United States, Mexico and Panama. *Id.* The
8 time and cost associated with reviewing the thousands of pages of documents for privilege
9 or disclosure, copying and/or responding to these sweeping requests, in three different
10 countries, subjects each of the Respondents to an undue burden. These requests are
11 particularly egregious in light of the fact that the Respondents have been repeatedly shut
12 out of any form of documentary discovery in this administrative action.

13
14 **III.**
15 **CONCLUSION**

16 For the foregoing reasons, the Securities Division’s Motion for Production of
17 Documents should, in all things, be denied.

18 Respectfully submitted this 4th day of October, 2004.

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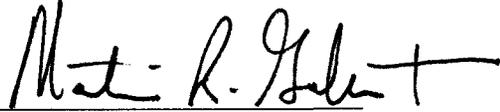
ORIGINAL and 13 copies of the foregoing
hand-delivered this 4th day of October, 2004 to:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

1 COPY of the foregoing hand-delivered
2 this 4th day of October, 2004 to:

3 Honorable Marc Stern
4 Administrative Law Judge
5 Hearing Division
6 Arizona Corporation Commission
7 1200 West Washington Street
8 Phoenix, Arizona 85007

9 Jaime Palfai, Esq.
10 Matthew J. Neubert, Esq.
11 Securities Division
12 Arizona Corporation Commission
13 1300 West Washington Street, 3rd Floor
14 Phoenix, Arizona 85007

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16 Martin R. Galbut
17 Martin R. Galbut

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EXHIBIT "1"

SUBPOENA
SECURITIES DIVISION
ARIZONA CORPORATION COMMISSION

TO: John E. TENCZA
American Elder Group L.L.C.
7779 E.Nestling Way
Scottsdale, Arizona 85255

In the Matter of
American Elder Group, et al.

**involving possible violations of the Securities Act
and/or Investment Management Act of Arizona.**

YOU ARE HEREBY REQUIRED to appear before Jamie PALFAI of the SECURITIES DIVISION of the ARIZONA CORPORATION COMMISSION at 1300 WEST WASHINGTON, THIRD FLOOR, PHOENIX, ARIZONA 85007, on the 5th day of September, 2003, at 10:00 o'clock a.m., to PROVIDE TESTIMONY AND PRODUCE THE DOCUMENTS LISTED IN EXHIBIT "A" WHICH IS ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE.



The seal of the Arizona Corporation Commission is affixed hereto, and the undersigned, a member of said Arizona Corporation Commission, or an officer designated by it, has set his hand at Phoenix, Arizona this 25th day of August, 2003.



LeRoy Johnson
Director of Enforcement
Securities Division

Persons with a disability may request a reasonable accommodation such as a sign language interpreter, as well as request this document in an alternative format, by contacting Shelly M. Hood, Executive Assistant to the Executive Secretary, voice phone number 602/542-3931, e-mail shood@cc.state.az.us. Requests should be made as early as possible to allow time to arrange the accommodation.

Pursuant to A.A.C. R14-4-305, any person required to appear at a formal interview may be represented by legal counsel.

Exhibit A

From the period beginning January 1999 to the present, all documents, records, books, and any other papers, whether stored on electronic media or otherwise, incident or relating to the offer and sale of Universal Leases or any related Timeshare programs associated with Michael E. Kelly, Resort Holdings International, Yucatan Resorts, Avalon Resorts, World Phantasy Tours, Majesty Travel, and/or Yucatan Investments including, but not limited to:

1. Names, addresses, and telephone numbers of all individuals, sales agents or entities that have been offered or sold timeshare interests including the number of interests purchased, if applicable, and the amount and date of each investment;
2. Documents relating to each individual or entity listed in paragraph [1] including any contracts, forms, subscriptions, agreements, notes, questionnaires, reports, records of investment status, checks, wire transfers, receipts, account statements, tax information, correspondence, updates, or other communications;
3. Records of all meetings and/or training sessions related to solicitations and sales including all information used or presented at these meetings;
4. The names, addresses, amounts, and dates of any rescission, refund, or any other form of return to timeshare purchasers;
5. All state and federal tax returns, including any applications, forms, or correspondence;
6. All bank or other depository institution accounts whether open or closed, including the name of the bank or depository institution, number of each account, and the names of all signatories on each account;
7. All advertisements, correspondence, circulars, offering memoranda, newsletters, prospectuses, tax opinions, legal opinions, reports, brochures, flyers, handouts, or any other records made available to potential or actual timeshare purchasers;

8. Contracts with agents or others for solicitations or sales of timeshare interests including but not limited to employment contracts, independent contractor agreements, and any communications with such person or entity;
9. Names, addresses and telephone numbers of all affiliated sales agents, co-workers, telephone solicitors, independent contractors, or sub-contractors, both past and present;
10. Records of all salaries, bonuses, reimbursement, distributions, draws, overrides, loans, or any other compensation, whether monetary or otherwise, paid to you, any related person/entity, or any individual falling within the scope of paragraphs [8] or [9] above;
11. Records of all salaries, bonuses or other consideration received or distributed by you and/or your firm.

R14-4-304. Rights of witnesses; formal interview; procedures

A. Any person required or requested to appear as a witness at a formal interview may be accompanied, represented, and advised by a lawyer. The lawyer's roll during the formal interview shall be limited to the following activities:

1. Giving legal advice to the witness before, during, and after the formal interview;
2. Questioning the witness briefly at the conclusion of the formal interview for the purpose of clarifying any testimony the witness has given; and
3. Making summary notes during the formal interview solely for the use of the witness and the lawyer.

B. Notwithstanding Subsection (A), the following lawyers may not represent witnesses:

1. Any lawyer who has represented another witness who has testified at a formal interview in the examination or investigation,
2. Any lawyer who has represented another person who is a subject of the examination or investigation,
3. Any lawyer who may be a material witness in the examination or investigation,
4. Any lawyer who is subject of the examination or investigation.

C. The Director may permit a lawyer to represent a witness in those situations described in subsections (B)(1) through (B)(4) upon a showing that such representation should be permitted in the interest of justice and will not obstruct the examination or investigation. If a lawyer is not permitted to represent a witness under Subsection (B), that lawyer's partners or associates of the lawyer's law firm are also precluded from representing the witness.

D. All formal interviews may be recorded by the Division either mechanically or by a shorthand reporter employed by the Division. No other recording of the formal interview will be permitted, except summary note taking.

E. In addition to the persons identified in subsections (A), (C), and (D), the following individuals may attend a formal interview:

1. Individuals employed by the Commission or the office of the attorney general.
2. Members of law enforcement or other state, federal, or self-regulatory agencies authorized by the Division.
3. Translators authorized by the Division.

F. The Division may exclude from a formal interview any person previously permitted to attend the formal interview, including a lawyer, whose conduct is dilatory, obstructionist, or contumacious. In addition, the members of the staff of the Division conducting the formal interview may report the conduct to the Director for appropriate action. The Director may thereupon take such further action as circumstances may warrant, including, but not limited to, exclusion from further participation in the examination or investigation.

G. A person who has submitted documentary evidence or testimony in connection with a formal interview shall be entitled, upon written request, and upon proper identification, to inspect the witness' own testimony on a date to be set by the Director. The Director may delay the inspection of the record until the conclusion of the examination or investigation if, in the Director's discretion, the Director determines that earlier inspection may obstruct or delay the examination or investigation.

H. In connection with an examination or investigation, the Director may delegate authority to members of the staff to administer oaths and affirmations, sign subpoenas, take evidence, and receive books, papers, contracts, agreements or other documents, records, or information, whether filed or kept in original or copied form or electronically stored or recorded.

I. During a formal interview, a witness shall not knowingly make any untrue statements of material fact or omit to state any material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.