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AZ CORP COMMISSION
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Arizona Corporation Commission
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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' MOTION TO STRIKE

AND

**MEMORANDUM OF LAW IN
SUPPORT OF EXCLUSION OF
HEARSAY TESTIMONY AND
DOCUMENTARY EVIDENCE**

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

NOW COME the Respondents, Resort Holdings International, Inc. ("RHI Inc."),
Resort Holdings International, S.A. ("RHI S.A."), Yucatan Resorts, Inc. ("Yucatan Inc."),
Yucatan Resorts, S.A. ("Yucatan S.A."), and Michael E. Kelly ("Kelly") (collectively,
the "Respondents") and file this, their Motion to Strike and Memorandum of Law in

**RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF EXCLUSION OF HEARSAY
TESTIMONY AND DOCUMENTARY EVIDENCE – Page 1**

Support of Exclusion of Hearsay Testimony and Documentary Evidence and, in support thereof, would respectfully show the Court as follows:

I.

PRELIMINARY STATEMENT

Section 41-1062(A)(1) of the Arizona Administrative Procedure Act (“APA”) provides that every person who is a party to an administrative proceeding in a contested case “shall have the right of cross-examination.” *See also* Arizona Administrative Code, § R2-19-115(A). The APA also provides that, although a hearing may be conducted without adherence to the rules of evidence, “the evidence supporting such decision or order [must be] substantial, reliable and probative.” APA, § 41-1062(A)(1). These provisions mandate the exclusion of hearsay testimony and hearsay documentary evidence.

II.

HEARSAY TESTIMONY SHOULD BE EXCLUDED BECAUSE SUCH TESTIMONY PRECLUDES RESPONDENTS’ RIGHT OF CROSS-EXAMINATION

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Ariz. R. Evid. 801(c). Accordingly statements made by witnesses in Examinations Under Oath (“EUO”) and statements made by individuals to investigators or others, offered to prove the truth of the matters asserted by said individuals, clearly constitute hearsay. “Hearsay evidence is excluded from trial because it cannot be subjected to cross-examination and cannot be probed for possible errors in perception,

memory, sincerity, or clarity.” *Larsen v. Decker*, 196 Ariz. 239, 242; 995 P.2d 281, 283 (Ariz. Ct. App. 2000).

In this case, to the extent the Staff of the Arizona Securities Commission (“Staff”) has proffered, and/or continues to proffer transcripts, or portions thereof, of EUOs that Respondents were prohibited from attending and/or prohibited from cross-examining the witness, such transcripts are clearly hearsay and their admittance would indisputably violate Respondents’ rights to cross-examination. More specifically, Respondents are precluded from cross-examining any witness whose testimony is merely submitted by transcript and who the Staff fails to bring to testify in person at the hearing of this matter. Because the Arizona Administrative Code and APA unquestionably entitle Respondents to the right to cross-examine any witness, the exclusion of such transcripts is mandatory. *See* APA § 41-1062(A)(1); AAC § R2-19-115(A).

Further, to the extent any witness has testified, or is proffered to testify about statements other persons made to him/her, either during investigations, inspections, or otherwise, those statements, likewise, must be excluded. Respondents are precluded from cross-examining any individuals who made statements to the proffered witness in order to test their memory, perception, sincerity or clarity unless the Staff brings those persons to this hearing to testify in person. *See generally, Larsen*, 196 Ariz. at 242, 995 P.2d at 283. Once again, because Respondents are precluded from cross-examining out-of-court statements made by persons not present at the hearing, exclusion of such statements is mandatory. *See* APA § 41-1062(A)(1); AAC § R2-19-115(A).

III.

HEARSAY DOCUMENTARY EVIDENCE SHOULD BE EXCLUDED BECAUSE SUCH EVIDENCE PRECLUDES RESPONDENTS' RIGHT OF CROSS-EXAMINATION

Likewise, documents contain statements, "other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). To the extent the Staff has proffered, or continues to proffer documents not authored by a testifying witness and proffered for the truth of the matters asserted, said documents are indisputably hearsay. Further, because the author(s) of said document(s) is not presented by the Staff to testify live at the hearing of this matter, Respondents are precluded from cross-examining the author(s) in direct violation of APA § 41-1062(A)(1); AAC § R2-19-115(A). Therefore, such documents must be excluded.

IV.

IN THE ALTERNATIVE, THE TESTIMONY/DOCUMENTS MUST BE EXCLUDED UNLESS THE STAFF CAN ESTABLISH THE RELIABILITY AND PROBATIVE VALUE OF THE EVIDENCE

In addition to Respondents' right to cross-examination, the APA also requires that any evidence used to support an administrative decision or order be "reliable and probative." APA § 41-1062(A)(1). In Arizona, in determining whether to admit hearsay evidence in an administrative proceeding, the ALJ must determine whether the "hearsay sought to be introduced is reliable." *Wieseler v. Prins*, 167 Ariz. 223, 227, 805 P.2d 1044, 1048 (Ariz. Ct. App. 1990). "Hearsay evidence is considered reliable where the circumstances tend to establish that the evidence offered is trustworthy." *Id.* However,

"hearsay is unreliable when: '[T]he speaker is not identified, when no foundation for the

RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF EXCLUSION OF HEARSAY TESTIMONY AND DOCUMENTARY EVIDENCE – Page 4

speaker's knowledge is given, or when the place, date and time, and identity of others present is unknown or not disclosed.” *Id.* (quoting *Plowman v. Arizona State Liquor Bd.*, 152 Ariz. 331, 337, 732 P.2d 222, 228 (Ariz. Ct. App. 1986)). Accordingly, unless the Staff can establish each of the foregoing, Arizona law precludes the admission of the hearsay evidence.

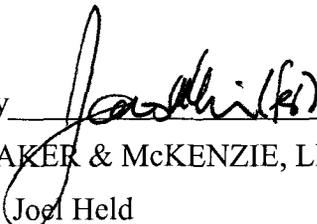
V.

CONCLUSION

The Staff purposefully and willfully precluded Respondents from conducting any discovery. By contrast, the Staff, acting under the guise that they were continuing their “investigation,” conducted EUOs, many without any notice to Respondents, conducted witness interviews, inspections and other forms of discovery to the exclusion of Respondents. Now, in a further effort to trample upon the Due Process rights of Respondents – and the right to cross-examination afforded to Respondents under the APA – the Staff has been allowed to admit evidence, over Respondents’ objections, that is clearly hearsay. This evidence should be stricken from the record. Unless this Motion is granted, the Staff will continue to seek to admit evidence of which Respondents have no ability to test the accuracy or credibility. Even in administrative proceedings, the Staff’s actions are improper.

For each of the foregoing reasons, Respondents respectfully request that all hearsay testimony and hearsay documentary evidence previously admitted over Respondents objections be stricken from the record and any further proffer of such hearsay be excluded from the hearing in this matter.

Respectfully submitted this 4th day of April, 2005.

By 
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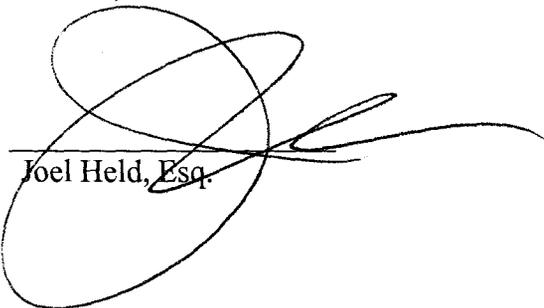
ORIGINAL and 13 copies of the foregoing
hand-delivered this ~~4~~¹⁵ day of April, 2005 to:

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

COPY of the foregoing hand-delivered
this 15th day of April, 2005 to:

Honorable Marc Stern
Administrative Law Judge
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