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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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

**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

**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

**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  
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Mexico C.P. 77500

**DOCKET NO. S-03539A-03-0000**

**SECURITIES DIVISION'S RESPONSE  
TO RESPONDENTS' JOINT MOTION  
TO CONTINUE AND SUPPLEMENTAL  
JOINT MOTION FOR CONTINUANCE  
OF HEARING**

AZ CORP COMMISSION  
DOCUMENT CONTROL

2005 MAR 16 11: 26

RECEIVED

Arizona Corporation Commission

**DOCKETED**

**MAR 16 2005**

DOCKETED BY *KW*

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

**I. INTRODUCTION**

15 Almost two years after this case was filed, Respondents are still attempting to avoid having  
 16 to try the matter on its merits. They claim they are suffering the massive prejudice of having to  
 17 completely revamp their case strategy due to the recent supplementation of the Securities  
 18 Division's Exhibit and Witness List. However, what Respondents ignore in their pleadings is that  
 19 the new exhibits are mainly their own documents, and simply supplement or update the exhibits  
 20 already provided to Respondents. There is no reason to delay this proceeding. The Respondents  
 21 have been aware since Day 1 as to the issues in this case. The issues remain the same. It is time  
 22 for Respondents to cease their attempts at dodging a hearing on the merits.

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## II. DISCUSSION

### A. *There is no Prejudice to Respondents from the Securities Division's Amended Witness List*

Respondents first argue that the Securities Division has "incorporated significant changes" into its current witness list. *Respondents' Joint Motion for Continuance of Hearing ("Joint Motion")*, p. 7. This claim is spurious. Respondents fail to acknowledge that of the twenty-four witnesses the Securities Division included on its supplemental Witness List, twenty-one of these were already on the previous list. Just three witnesses were added and, as a convenience to the Respondents, three witnesses no longer being targeted for testimony were deleted. Such an amendment is hardly a whole scale change to the proposed witness list. Of the three additional witnesses, two of them are investors. Plainly no surprise is lurking with respect to the issues for which these investors will testify at hearing.

The only other witness addition is Patrick Ballinger, a former associate of Respondent Michael Kelly. Notably, he is a former associate of Gary Van Waeynburge, and has similar knowledge of the Universal Lease program. Accordingly, for the purpose of this hearing, the two are almost interchangeable; Ballinger's substitution for Van Waeynburge is thus hardly noteworthy. Moreover, Mr. Kelly must again be quite aware of the potential substance of Mr. Ballinger's testimony.

As a final point, it is worth noting that of the three witnesses who were deleted from the proposed witness list, two were investors while a third was a former associate of Mr. Kelly. These are precisely the profiles of the three new additions. In light of this, it is not surprising that Respondents make no attempt to claim that they will be in any way prejudiced by the new witnesses.<sup>1</sup>

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<sup>1</sup> Respondents do claim that the addition of new witnesses shows that the Securities Division has been engaged in a circuitous discovery campaign by deliberately not conducting Examinations Under Oath ("EUOs") of the witnesses. The Securities Division is unaware of any requirement that it must conduct EUOs of prospective witnesses, nor do Respondents cite any authority for such a claim. In fact, such a requirement would go against the reason for the administrative hearing process, namely to provide a forum for prompt resolution of claims.

1           Therefore, based upon the Joint Motion, there is simply no reasonable justification to  
2 continue the hearing due to the minor substitutions to the witness list. This is particularly so in light  
3 of the fact that the new additions are precisely offset by the witnesses that have been withdrawn.

4           ***B. There is no Prejudice Resulting from the Securities Division's***  
5           ***Amended Exhibit List***

6           Respondents do complain at greater length regarding the amended exhibit list that the  
7 Securities Division filed. However, the Administrative Law Judge will note that Respondents' list  
8 of changes and additions on the Securities Division's exhibits includes such minor modifications  
9 as the Securities Division correcting an investor name on the exhibit list (with the exhibit  
10 remaining exactly the same.) *See e.g., Joint Motion, Exhibit C, Exhibit S-17* (Correction of name  
11 from Thomas Newland to Robert N. Newland.) In actuality, many of the "new" exhibits are simply  
12 refined replacements to already-existing exhibits. For example, Exhibit S-30 simply updates the  
13 list of investors based upon the additional analysis of the Securities Division (of course, the need  
14 for the Securities Division to provide the list is based upon the refusal of Respondents to provide a  
15 list of their investors.) Exhibit S-31 updates the financial analysis of the Yucatan Resorts bank  
16 account based upon additional financial records obtained by the Securities Division since the initial  
17 exhibit production was delivered. Quite obviously, these supplements are not unfamiliar exhibits  
18 coming out of left field to surprise or confound the Respondents. Instead, they represent consistent  
19 expansions of exhibits already disclosed almost a half year prior.<sup>2</sup>

20           Looking at the "new" exhibits, there is again nothing to prejudice Respondents. S-42 is a  
21 transcript of proceedings that took place in Pennsylvania involving the same Respondents,  
22 representing by the same law firm, Baker & McKenzie. Since Respondents and their lawyer  
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24 <sup>2</sup> Because the arrival of additional records would render some of the original exhibits incomplete, the  
25 Division's initial exhibit production included explicit language advising that the current exhibit production,  
26 particularly the financial exhibits, would be subject to *supplementation* prior to hearing. Rather than  
objecting to this language, Respondents included the same "subject to supplementation" language in their  
own initial exhibit production.

1 participated in the proceedings, they certainly do not need four months to review that transcript. S-  
2 43 is promotional material created by Respondents. Again, they certainly were aware of it before  
3 receiving the exhibit list. S-44 is a transcript of testimony of one of the Yucatan sales agents,  
4 Michael Diaz. While there certainly is nothing surprising in the transcript as his testimony merely  
5 confirms the testimony of other sales agents as to how the product was sold, the Securities  
6 Division is willing to withdraw that exhibit if the tribunal believes its use at this time would be  
7 prejudicial to Respondents. S-45 is simply the investment materials of witness Raymond Huntley,  
8 created by Respondents and their sales agents. The materials are almost exactly the same as  
9 previous exhibits disclosed to Respondents, other than the different investor name and investment  
10 amount. Again, these are materials prepared by Respondents and in their own possession for years  
11 before the hearing date. Additionally, the Securities Division did not obtain the documents until a  
12 date after the initial exhibit list was produced. S-46 is simply a transcript of one of Respondents'  
13 sales agents selling the product. This is similar to other information provided to Respondents in  
14 the Pennsylvania hearing regarding this same sales agent. S-47 is just a printout of the material on  
15 a CD previously given to Respondents. The CD itself was created by Respondents and previously  
16 provided to Respondents. S-48 is material that Respondents sent to their sales agents. Once again,  
17 Respondent created it. Finally, in the interest of avoiding unnecessary disputes, the Securities  
18 Division will withdraw Exhibits S-49a and S-50. A separate letter confirming that fact is being  
19 sent to Respondents.

20 As to the exhibits that were supplemented with additional materials, such as Exhibits S-19  
21 and S-20, these additions consist of documentation and other materials that the Respondents had  
22 previously provided to either investors<sup>3</sup> or to their own sales agents. In other words, Respondents  
23 are already fully familiar with these exhibits. As such, there is simply no element of surprise to be  
24 found in these supplements.

25 \_\_\_\_\_  
26 <sup>3</sup> Additionally, the Securities Division did not obtain these documents until after the previous  
exhibit list was filed.

1 It is particularly telling that Respondents can cite to no specific example of prejudice  
2 resulting from the Division's supplemental exhibit production where they will suffer some form of  
3 harm if not given another four months to prepare. Respondents' inability to cite to one concrete  
4 example is not surprising in light of the fact that most of the supplemental documentation consists  
5 of their own records and documents. Respondents even concede to this familiarity. *See Joint*  
6 *Motion, p. 7.* Moreover, the supplemental exhibits effectively represent only extensions and  
7 copies of the documents previously disclosed to Respondents many months ago.

8 As a final point, it is worth noting that these supplemental exhibits (making up only a  
9 fraction of the original production) were actually delivered 19 days prior to this hearing. In light of  
10 the fact that exhibits are usually provided to opposing counsel two weeks prior to hearing in  
11 administrative matters such as this, even the Division's supplemental production was delivered  
12 early by traditional standards.

13 ***C. The Belated Public Records' Request is Simply an Excuse to Delay this Hearing***

14 Respondents spend a great deal of their Joint Motion describing the public records' request  
15 (erroneously described in the Joint Motion as an Open Record Request) made by one of their  
16 lawyers, Jeffrey Gardner, and how the Division's response to that request somehow serves to  
17 prejudice them in this hearing. What Respondents fail to state is that Mr. Gardner submitted this  
18 request well after the Administrative Law Judge had denied their various discovery requests in this  
19 proceeding. Ironically, Respondents are now arguing that their attempt to circumvent the  
20 Administrative Law Judge's discovery rulings should be rewarded with a four month continuance.

21 In practical terms, Mr. Gardner's request necessitated a review and production of  
22 documents from five separate Securities Division cases and two investigations, some of them still  
23 ongoing. At the same time, Mr. Gardner demanded that the Securities Division prepare an index  
24 of documents withheld as privileged. That demand, not surprisingly, led to a far longer public  
25 records review process than if Mr. Gardner had simply filed a request without the need for a  
26 privilege log. Respondents also fail to acknowledge the fact that the Division continually kept Mr.

1 Gardner apprised as to the progress of the records production. Consequently, Respondents'  
2 continuance request on the basis of surprise, or on the basis that Mr. Gardner has yet to review the  
3 demanded public records, is entirely without merit; the length of this process was their own doing,  
4 and Respondents showed no interest in reviewing the documents when the process was finally  
5 complete.

6 As Respondents' own documents show, on January 21, 2005, the Securities Division  
7 offered to Mr. Gardner the option of reviewing those documents that had already been located by  
8 the Securities Division. *See Exhibit F to Joint Motion, letter of January 21, 2005, from Jamie*  
9 *Palfai to Jeffrey Gardner.* In that same letter, the Securities Division offered to provide the index  
10 of documents withheld from that file to Mr. Gardner. Mr. Gardner never took the Securities  
11 Division up on either offer.

12 What Respondents again fail to inform the tribunal, is that the Securities Division informed  
13 Mr. Gardner on March 3, 2005, that all documents were ready for review. *See attached Exhibit A.*  
14 The Securities Division did not hear from Mr. Gardner until March 15, 2005, two weeks later, the  
15 date Respondents filed the Joint Motion, that he wished to schedule a time for review of the  
16 documents. If Respondents take almost two months after the Securities Division first offered to  
17 make documents available, or two weeks after the last offer before bothering to schedule a time for  
18 review of the responsive documents, they should not be able to complain to the tribunal about any  
19 prejudice from delay.<sup>4</sup> Plainly Mr. Gardner's public records request is simply being used by  
20 Respondents as a red herring to delay the hearing.

21 Finally, Respondents complain about delays in obtaining documents from the state of  
22 Pennsylvania. However, they have made no showing nor presented any evidence that Pennsylvania  
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24 <sup>4</sup> Also in that communication, the Securities Division informed Mr. Gardner that an index of documents  
25 withheld would be provided at the review. Mr. Gardner actually asked that the index be provided for the  
26 very first time on March 15, 2000. The Securities Division promptly provided it to him. For Respondents  
to complain they have not received the index is simply specious. If they wanted the index at an earlier or  
different time, they could have asked. They did not.

1 has not followed its laws with respect to the request. Quite plainly, they have no basis to claim a  
2 continuance in this forum based upon that issue.<sup>5</sup> Moreover, Respondents have failed to show  
3 how a public access request from Pennsylvania is in any way relevant to the conduct of an  
4 administrative proceeding in Arizona.<sup>6</sup>

5 **III. CONCLUSION**

6 The supplemental witness and exhibit list simply contains no element of surprise.  
7 Moreover, Respondents cannot, and indeed have not, shown any prejudice from this production.<sup>7</sup>  
8 By contrast, the Securities Division is in the final stages of trial preparation. Witnesses have been  
9 asked to block out time for their testimony. Travel arrangements have been made for out-of-state  
10 witnesses. All of these people will suffer inconvenience if Respondents' spurious motion is  
11 granted. It is time for this hearing to be held. The Securities Division respectfully requests that  
12 Respondents' Joint Motion be denied.

13 RESPECTFULLY SUBMITTED this 16th day of March, 2005

14  
15 By 

16 Jamie B. Palfai  
17 Mark Dinell  
18 Attorneys for the Securities Division of the  
19 Arizona Corporation Commission

20 <sup>5</sup> It is interesting that Respondents argue that the Securities Division has conducted circuitous discovery in  
21 this matter at the same time that they themselves are filing public records requests with other states, without  
22 providing any notice to the Securities Division. It would appear that Respondents believe that one standard  
23 applies to the Securities Division while another standard applies to them.

24 <sup>6</sup> Respondents filed a supplemental motion late yesterday, arguing that the Securities Division's request  
25 to take telephonic testimony at the hearing is another reason for a continuance, as they would like time to  
26 interview and depose the witnesses, in order to exercise their rights to cross examination. What  
27 Respondents continue to ignore, however, is they have that opportunity at hearing. The case law is clear  
28 that telephonic testimony is entire proper at an administrative hearing and does allow Respondents ample  
29 opportunity to exercise their rights. Respondents cite no authority to the contrary. Therefore, the request  
30 for telephonic testimony provides no reason to continue the hearing.

31 <sup>7</sup> Respondents also make the toss away contention that the parties are in settlement discussions which  
32 might bear fruit. *Joint Motion, P. 6*. At this time, unless Respondents significantly change their settlement  
33 posture, there is certainly no basis to continue the hearing.

1 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
2 filed this 16th day of March, 2005, with

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 West Washington  
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered this  
8 16th day of March, 2005, to:

9 Mr. Marc Stern  
10 Administrative Law Judge  
11 Arizona Corporation Commission/Hearing Division  
12 1200 West Washington  
13 Phoenix, AZ 85007

14 COPY of the foregoing faxed and mailed  
15 this 16th day of March, 2005, to:

16 Martin R. Galbut, Esq.  
17 Jeana R. Webster, Esq.  
18 GALBUT & HUNTER, P.C.  
19 Camelback Esplanade, Suite 1020  
20 2425 East Camelback Road  
21 Phoenix, Arizona 85016  
22 Attorneys for Respondents Yucatan Resorts, Inc.,  
23 Yucatan Resorts S.A., RHI, Inc., and RHI, S.A.

24 Paul J. Roshka, Jr., Esq.  
25 James McGuire, Esq.  
26 ROSHKA HEYMAN & DEWULF, P.L.C.  
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9 Yucatan Resorts S.A., RHI, Inc., and RHI, S.A.

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By: *Karen Houde*

**EXHIBIT A**

**COMMISSIONERS**  
JEFF HATCH-MILLER - Chairman  
WILLIAM A. MUNDELL  
MARC SPITZER  
MIKE GLEASON  
KRISTIN K. MAYES  
  
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**ARIZONA CORPORATION COMMISSION**

March 3, 2005

Via Facsimile (214) 978-3099  
& First Class Mail

Jeffrey Gardner, Esq.  
Baker & McKenzie, LLP  
2300 Trammell Crow Center  
2001 Ross Avenue  
Dallas, TX 75201

Re: **Public Record Request**

Dear Mr. Gardner:

The Division has conducted a thorough search of our records for documents responsive to your public records request dated November 10, 2004, and later clarified on December 2, 2004. The responsive documents are now available for copying and inspection pursuant to your request. Please let me know if you would like to make an appointment to inspect the documents or designate an agent to do so on your behalf.

As you are aware, the Division charges 50 cents per page for any copies you may request. The enclosed Public Record Reproduction Request form must be filled out and copy requests valued over \$10.00 need to be paid for in advance of copying.

I apologize for the length of time it has taken to respond to your request. Records referencing the entities listed on your request are contained in five separate Division case files and two separate investigative information files. An index of the records being withheld as confidential or privileged will be provided at the time of your review. If you have any further questions, you can reach me by phone at (602) 542-0706 or Jamie Palfai at (602) 542-0179.

Sincerely,

A handwritten signature in cursive script that reads "Karen Houle".

Karen Houle, CLA  
Legal Assistant

1200 WEST WASHINGTON, PHOENIX, ARIZONA 85007 / 400 WEST CONGRESS STREET, TUCSON, ARIZONA 85701

[www.cc.state.az.us](http://www.cc.state.az.us)

Gardner March 3 2005.doc