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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

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

Arizona Corporation Commission  
**DOCKETED**

MAY 05 2005

DOCKETED BY *KS*

**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**

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South Bend, IN 46615;  
P.O. Box 2661  
South Bend, IN 46680;  
Av. Coba #82 Lote 10, 3er. Piso  
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**SECURITIES DIVISION'S RESPONSE  
TO RESPONDENTS' JOINT MOTION  
FOR SUMMARY DISPOSITION**

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

12  
 13 The Securities Division of the Arizona Corporation Commission (“Division”) hereby  
 14 responds to Respondents’ Joint Motion for Summary Disposition of Respondents’ (i) Motion to  
 15 Strike and Memorandum of Law in Support of Exclusion of Hearsay Testimony and Documentary  
 16 Evidence, (ii) Joint Motion and Memorandum of Law in Support of Exclusion of Roy Higgs’  
 17 Testimony and Documents, and (iii) Joint Motion to Dismiss or Stay Proceedings (“Motion for  
 18 Summary Disposition”). Based on the instructions, determinations, and rulings made by the  
 19 Administrative Law Judge during the course of this proceeding, and in accordance with the rules of  
 20 civil procedure for motions brought in open court, Respondents’ Motion for Summary Disposition is  
 21 entirely without merit. It follows that the Respondents’ Motion for Summary Disposition be denied.

22 **MEMORANDUM OF POINTS & AUTHORITIES**

23 ***Introductory Background***

24 On Monday, April 4, 2005, just as the second week of the administrative hearing in this  
 25 matter was commencing, Respondents submitted four separate motions in open court demanding,  
 26 *inter alia*, that sales agent Roy Higgs be precluded from testifying that day, that all hearsay evidence

1 be excluded, and that the current administrative proceeding be dismissed and/or stayed. As the  
2 Division had not been afforded a chance to either read or respond to these motions, the presiding  
3 Administrative Law Judge (“ALJ”) reserved any immediate rulings and took the motions under  
4 advisement.

5 Over the next several days, all three of the motions that are the subject of the Motion for  
6 Summary Disposition were addressed by the ALJ. After acceding to Respondents’ demand for  
7 Higgs documentation, an opportunity to depose Mr. Higgs, and the postponement of their cross-  
8 examination, the ALJ denied Respondents’ motion to exclude Higgs’s testimony from the bench on  
9 April 4, 2005. With respect to the Respondents’ motion to exclude all hearsay evidence, the ALJ  
10 initially granted the Division’s request to respond orally to the motion at a later date. The ALJ  
11 nevertheless rejected the merits of Respondents’ motion to exclude Hearsay evidence on multiple  
12 occasions, including several times on April 14, 2005. As for Respondents’ third motion to dismiss  
13 and/or stay the proceedings, this matter was initially taken under advisement. Recognizing the lack  
14 of authority vested in the ALJ to grant such a dismissal, however, the ALJ ultimately rejected this  
15 motion during the third week of this proceeding on April 14, 2005. In sum, all three motions that  
16 are the subject of Respondents’ Motion for Summary Disposition have already been considered,  
17 discussed and disposed of during the course of the first three weeks of this hearing.

18 *Discussion*

19 **I. The Issues Making Up Respondents’ Motion for Summary Disposition**  
20 **Have Already Been Disposed of, Remedied, Ruled Upon, and/or Rejected**

21 Respondents’ Motion for Summary Disposition ignores prior directives and decisions of this  
22 tribunal, argues points of contention long since rendered moot, demands rulings untenable as a  
23 matter of law, and requests the disposition of motions already decided. Respondents’ current  
24 demand for a summarily disposition of these issues is thus entirely inappropriate; a call for summary  
25 disposition is not necessary for matters already resolved.

26 ...

1  
2           **A.       *Respondents' motion to exclude Higgs's testimony was denied  
                  on April 4, 2005***

3           Respondents' motion to exclude the testimony of Roy Higgs was specifically denied by the  
4           presiding ALJ in this matter on Monday, April 4, 2005. *See Hearing Transcript Volume IV, pp. 697-*  
5           *698, lines 19-25 & 1-10, respectively.* This issue having already been ruled upon, it is readily  
6           apparent that a subsequent motion for its summary disposition is unwarranted.

7           Moreover, the essence of Respondents' motion to exclude the testimony of Roy Higgs was  
8           predicated on the fact that the Respondents had not had an opportunity to depose this individual prior  
9           to the hearing, and that the Respondents had not obtained all the documents Mr. Higgs had provided  
10          to the Division. Despite the fact that the Respondents had over a year to schedule Higgs's  
11          deposition, and despite the fact that Respondents' discovery demands were both untimely and  
12          unsupportable in this administrative proceeding, the presiding ALJ 1) ordered that the Division  
13          provide all sought-after Higgs documents to the Respondents, and 2) granted the Respondents an  
14          opportunity to depose Higgs prior to their cross-examination of this witness.

15          The Division subsequently provided Respondents with all ordered documentation, and the  
16          Respondents were able to depose Higgs on April 29, 2005, weeks prior to their scheduled time for  
17          cross-examination. In other words, Respondents received everything they demanded concerning  
18          witness Higgs. It follows that Respondents' motion to exclude the testimony of Higgs on discovery  
19          grounds has now been rendered moot.

20          Not only was Respondents' motion to exclude Higgs's testimony denied, but the issues raised  
21          in their motion were resolved. Consequently, Respondents' demand for a summary disposition on  
22          the motion to exclude Higgs's testimony is presently baseless.

23                   **B.       *Respondents' motion to exclude hearsay testimony is groundless  
                  as a matter of law, and has been repeatedly rejected by the  
                  ALJ in this proceeding***

24           Because Respondents' demand to exclude all hearsay testimony in this administrative  
25           proceeding was so frivolous, the Division requested that it be allowed to respond to this motion  
26

1 orally during the course of this administrative proceeding. *See Hearing Transcript Volume V, pp.*  
2 *858-859, lines 20-25 & 1-18, respectively.* Although this tribunal granted the Division's request for  
3 an oral response at a future date, it now seems appropriate to respond to the merits of Respondents'  
4 hearsay demand in writing.

5 Respondents suggest that because hearsay evidence will infringe on their right to cross-  
6 examine, all hearsay in this administrative matter should be excluded. To support their position,  
7 Respondents curiously cite to *Wieseler v. Prins*, 167 Ariz. 223, 805 P.2d 1044 (App. 1990), in  
8 which the court notes "hearsay is admissible in administrative proceedings and may even be the  
9 only support for an administrative decision." *Id at 227.* This decision hardly provides  
10 overwhelming support for Respondents' position.

11 In fact, administrative hearings are quasi-judicial proceedings - not judicial proceedings.  
12 These two proceedings serve two entirely different purposes and derive from two wholly different  
13 historic origins. Judicial proceedings are governed by the technical rules of evidence that were the  
14 outgrowth of a legal tradition hundreds of years old. These proceedings are based on the premise  
15 that in most civil and criminal trials, the defendant has the option of a jury trial and thus, because  
16 the jury is a lay body, the technical rules of evidence are important in serving to filter out certain  
17 kinds of information that are going to influence the jury in their efforts to evaluate a case.

18 Quasi-judicial proceedings have an entirely different historical purpose and origin. They  
19 are creatures of the 20<sup>th</sup> century with their own independent body of case law. The quasi-judicial  
20 proceeding is based on an independent set of procedural rules, specifically with regard to the  
21 admissibility of evidence question and to the technical rules of evidence. Under the State  
22 Administrative Procedures Act, specifically A.R.S. § 41-1062(A)(1), the law provides that during  
23 an administrative proceeding, the hearing may be conducted in an informal manner without strict  
24 adherence to the rules of evidence as required in judicial proceedings. Neither the manner of  
25 conducting the hearing nor the failure to adhere to the rules of evidence required in judicial  
26 proceedings shall be the grounds for reversing any administrative decision or order providing that

1 the evidence supporting such a decision or order is substantial, reliable and probative. The section  
2 continues that the agency's experience, technical competence and specialized knowledge may be  
3 utilized in the evaluation of evidence.

4       There is a consistent line of Arizona cases addressing the question of the validity and effect  
5 of hearsay objections in quasi-judicial administrative proceedings. In *Begay v. Arizona Dept. of*  
6 *Economic Security*, 128 Ariz. 407, 626 P.2d 137 (1981), the Court of Appeals stated in that it was  
7 clear that hearsay was admissible in administrative hearings in Arizona, and that such evidence  
8 may, in proper circumstances, be given probative weight. Further, the court clarified that in certain  
9 circumstances, hearsay may be the sole support of an administrative decision.

10       This decision was affirmed more recently in *Brown v. Arizona Dept. of Real Estate*, 181  
11 Ariz. 320; 890 P.2d 615. (App. 1995). In *Brown*, the court held that section ARS §41-1062(A)(1)  
12 clearly stated that the rules of evidence required at judicial proceedings are not applicable in an  
13 administrative proceeding. The court concluded that hearsay evidence could be considered and  
14 given probative weight. The court continued that Arizona cases addressing the use of hearsay  
15 evidence in administrative hearings focus only on the reliability of the evidence, and that hearsay  
16 evidence is considered reliable when circumstances establish that it is trustworthy. The court  
17 concluded by allowing the admissibility of the hearsay evidence. *See also In re Frank*, 20  
18 Ariz.App. 539, 514 P.2d 292 (1973) (administrative board could accept hearsay petitions into  
19 evidence within its discretion); *Kelsey v. Industrial Commission*, 79 Ariz. 191, 286 P.2d 195 (1955)  
20 ("It is well settled that the Commission... has wide latitude in the admission of evidence, including  
21 hearsay.")

22       The policy with respect to hearsay evidence is again addressed in the Corporation  
23 Commission Rules of Practice and Procedure. Under R14-3-109(K), the procedural rules state that  
24 in conducting any hearing, neither the commission nor any officer or employee thereof shall be  
25 bound by the technical rules of evidence, and no informality in any proceeding or in the manner of  
26

1 taking testimony shall invalidate any order, decision, rule or regulation made, approved, or  
2 confirmed by the commission.

3 In short, the principal reason for disregarding hearsay objections in administrative  
4 proceedings is the simple fact that the primary function of administrative proceedings is to assess  
5 probative value, not admissibility. This is particularly true in light of the fact that the trier of fact in  
6 an administrative hearing is presumed to have a specialized knowledge and expertise of the subject  
7 matter that underlies the actions that come before that body. As such, these administrative law  
8 judges are not going to be influenced by the kinds of evidence that might otherwise be barred from  
9 a judicial proceeding for fear of improperly swaying a lay jury. A quasi-judicial proceeding is  
10 designed to allow in as much evidence as possible, which then allows the Administrative law judge  
11 to focus on an evaluation of the evidence and the probative weight of such evidence.

12 Accordingly, Respondents' demand to exclude all hearsay testimony in this administrative  
13 decision is unsupportable as a matter of law. Surely aware of this fact, the ALJ repeatedly rejected  
14 Respondents' demands to exclude hearsay. *See, e.g., Hearing Transcript Volume XI, pp. 2180 -*  
15 *2181, lines 23-25 & 1-9, respectively; Volume XI, pp. 2185, lines 6-11 & 16-23.* Respondents'  
16 motion to exclude all hearsay evidence was without merit, and thus summarily denied on countless  
17 occasions during the course of this hearing. There is no need for a summary disposition of this  
18 issue at this point.

19 **C. Respondents' motion to dismiss and/or stay was denied on April 14, 2005**

20 Respondents' motion to dismiss and/or stay was denied by the presiding ALJ in this matter on  
21 Thursday, April 14, 2005. *Hearing Transcript Volume XI, p. 2113, lines 8-10.* In making this  
22 determination, the ALJ specifically stated "As far as the motion to dismiss, again, that too is a  
23 Commission function. It's not my function to dismiss something." *Id.*; *See also Hearing Transcript*  
24 *Volume XI, pp. 2112-2113, lines 25 & 1-2 respectively ("The motion for mistrial, I have no authority*  
25 *to grant [Respondents' motion] for a mistrial, and as far as I'm concerned it's denied").* This issue  
26

1 having already been addressed, it is readily apparent that a subsequent motion for its summary  
2 disposition is again pointless.

3 On a substantive level, Respondents demand to dismiss and/or stay these proceedings is  
4 equally specious. Throughout this administrative matter, the Division has complied with all orders of  
5 the presiding ALJ. This includes compliance on a wide variety of matters, including *all production*  
6 *and discovery-related directives*. It follows that the Division cannot be assailed for alleged due  
7 process deprivations when it comported with all rulings of this tribunal. Rather, Respondents are  
8 effectively demanding that the ALJ dismiss and/or stay these proceedings based on the ALJ's own  
9 past rulings. Naturally, such a demand is ill-considered.

10 **II. The Arizona Rules of Civil Procedure Allow a Court to Suspend Technical**  
11 **Filing Requirements to Motions Made in Open Court**

12 Ignoring the fact that the issues making up their Motion for Summary Disposition have  
13 already been addressed, ruled upon, or otherwise disposed of during this hearing, Respondents cite to  
14 the Arizona Rules of Civil Procedure to suggest that, without receiving any written Division  
15 response, they are now entitled to summary disposition in their favor on all three motions. This  
16 claim is spurious on multiple levels. A court *may* deem the failure to file a response a consent to the  
17 granting of a motion, and a court *may* dispose of a motion summarily if a response is not filed on  
18 time. *Ariz.R.Civ.P., Rule 7(b) (emphasis added)*. In other words, it is in the discretion of the court to  
19 summarily dispose of a motion if an expected response is not filed. *Cf. Tomar Electronics, Inc. v.*  
20 *Whelen Technologies, Inc.*, 819 F.Supp. 871 (D.Ariz 1992) (summary disposition to motion without  
21 response memoranda was discretionary, not mandatory). Of course, such discretion is inapplicable in  
22 this instance: written responses from the Division to Respondents' three subject motions were, in  
23 accordance with the instructions and rulings of the presiding ALJ, never required.

24 Moreover, the Arizona Rules of Civil Procedure specifically allow a court to waive formal  
25 response requirements to motions made in open court. See *Ariz.R.Civ.P., Rule 7(a)*. This is  
26 precisely what transpired in the present action: the ALJ imposed a response deadline on the Division

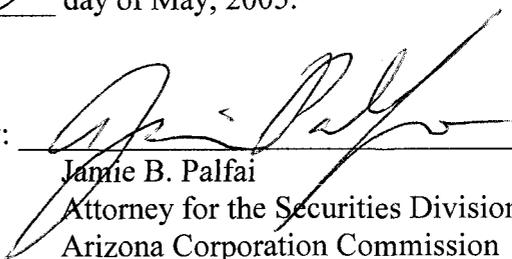
1 to Respondents' Joint Motion to Preclude the Testimony of Gary Kirst (*see Hearing transcript*  
2 *Volume V, pp. 857-858, lines 17-25 & 1-8, respectively*), but took under advisement three remaining  
3 motions making up Respondents' Motion for Summary Disposition. In so doing, the Division was  
4 no longer bound by the technical timing rules for responding to three of Respondents' open court  
5 motions. When the ALJ ultimately ruled on these three matters from the bench during the course of  
6 this hearing, the necessity for a Division response to these motions no longer existed.

7 ***Conclusion***

8 Respondents' Motion for Summary Disposition requests rulings for motions already  
9 addressed, rejected or otherwise resolved. Moreover, the Arizona Rules of Civil Procedure do not  
10 mandate specific timetables for responses to motions made in open court. It follows that  
11 Respondents' Motion for Summary Disposition be summarily denied.

12 RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of May, 2005.

13  
14 By: \_\_\_\_\_

  
15 Jamie B. Palfai

16 Attorney for the Securities Division of the  
17 Arizona Corporation Commission  
18  
19  
20

21 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
22 filed this 5<sup>th</sup> day of May, 2005, with

23 Docket Control  
24 Arizona Corporation Commission  
25 1200 West Washington  
26 Phoenix, AZ 85007

1 COPY of the foregoing hand-delivered this  
2 5<sup>th</sup> day of May, 2005, to:

3 Mr. Marc Stern  
4 Administrative Law Judge  
5 Arizona Corporation Commission/Hearing Division  
6 1200 West Washington  
7 Phoenix, AZ 85007

8 COPY of the foregoing mailed  
9 this 6<sup>th</sup> day of May, 2005, to:

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