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AZ CORP COMMISSION  
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**BEFORE THE ARIZONA CORPORATION COMMISSION**

**COMMISSIONERS:**

**JEFF HATCH-MILLER, Chairman**  
**WILLIAM A. MUNDELL**  
**MARC SPITZER**  
**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 MOTION FOR**  
**MISTRIAL AS A RESULT OF**  
**DIVISION'S REFERENCE TO**  
**CRIMINAL CONDUCT DURING THE**  
**COURSE OF THIS ADMINISTRATIVE**  
**PROCEEDING**

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

Arizona Corporation Commission  
**DOCKETED**

APR 11 2005

DOCKETED BY 

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 submit this Joint Motion for Mistrial as a Result of Divisions Reference to Criminal Conduct During the Course of this Administrative Proceeding and,

in support thereof, would respectfully show the Court as follows:

### I. PRELIMINARY STATEMENT

During the direct testimony of Patrick Ballinger, Jamie Palfai, attorney for the Division, made repeated inquiry into areas covered by the attorney-client privilege. Respondents timely objected to the line of questioning and asked that the ALJ direct Mr. Palfai to respect the privilege.

In response to Respondent's objections, the Division first claimed that Mr. Ballinger could waive the privilege. After being reminded that the privilege belonged to the corporation and was not Mr. Ballinger's to waive, the Division asserted that the crime-fraud exception to the attorney-client privilege applied and the Division should be allowed to continue with its line of questioning. The Respondent's objections were overruled and Mr. Palfai, on behalf of the Division, continued to inquire into matters covered by the privilege.

Putting aside the obvious shortcomings with the Division's argument that Mr. Ballinger could waive the privilege,<sup>1</sup> the Division's assertion that the Respondents had engaged in criminal conduct, thus justifying invasion of the privilege, is grounds for an immediate mistrial. Reference to criminal conduct in a civil proceeding is highly prejudicial and warrants a mistrial. As a result, Respondents respectfully request that this tribunal enter an order declaring an immediate mistrial.

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<sup>1</sup> See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-49 (1985) ("the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors.")

## II. ARGUMENT

Putting aside the fact that the crime-fraud exception to the attorney-client privilege is inapplicable here, reference to criminal conduct during a civil proceeding is grounds for an immediate mistrial. Such references are highly prejudicial to the Respondents and are incurable.

Where reference to criminal conduct is made during a civil case the Court, in fairness to the parties and to the tribunal, should declare a mistrial:

The trial court should have declared a mistrial in justice to itself as well as to parties, so that a fair trial may result and the verdict when rendered may be entitled to the respect of both parties and the confidence of the court. We cannot be too strict in guarding trials by juries from improper influences. This strictness is necessary to give due confidence to parties in the results of their causes, and to enlighten the public who have recourse to our courts that any improper influence which has the natural tendency to prejudice the verdict is grounds for a mistrial.

*See State v. McMahon*, 271 Mont. 75, 79, 894 P.2d 313, 316 (1995), *see also, Wright v. Eastlick*, 125 Cal. 517, 58 P. 87 (1899), *Hayward v. Richardson Construction Co.*, 136 Mont. 241, 347 P.2d 475 (1959).

As a general rule, “any improper influence which has the natural tendency to prejudice the verdict is grounds for a mistrial.” *Putro v. Baker*, 147 Mont. 139, 410 P.2d 717 (1966). Reference to criminal conduct is prejudicial matter of the strongest sort. In fact, court’s considering the issue have held that curative instructions are insufficient to remedy a reference to criminal conduct. *See State v. Woodbury*, 124 N.H. 218, 221, 469 A.2d 1302, 1305 (1983) (curative instructions insufficient); *see also, State v. LaBranche*, 118 N.H. 176, 179, 385 A.2d 108, 110 (1978) (curative instructions, had they been given,

would have been insufficient.)

The assertions made by Mr. Palfai on behalf of the Division are similar to those made in *Border Brook Terrace Condominium Assoc. v. Gladstone*, 137 N.H. 11, 622 A.2d 1248 (1993). In *Gladstone*, the Plaintiff made allegations that the Defendant had set up sham enterprises in an attempt to pierce the corporate veil and hold him personally liable. During closing argument counsel for the Plaintiff stated:

Mr. Gladstone is not here on criminal charges, we are not accusing him of any crimes, although some of the evidence may suggest to you that his conduct was less than law abiding. . . . And I'll also submit to you that I believe there was probably another association down in Florida that is having the profits from their project skimmed off at this time . . .

*Gladstone*, 622 A.2d at 1251. In response to these comments the Defendants moved for an immediate mistrial. The trial court denied the request and the appellate court reversed. The appellate court noted that the statements were improper for a variety of reasons. First, they asserted facts not in evidence. Second, the attorney had offered his opinion on a material issue. Third, the remarks were likely interpreted as assertions of criminal conduct similar to the conduct alleged as grounds for "piercing the corporate veil." Citing the *Woodbury* and *LaBranche* cases, the appellate court noted that although those were criminal cases, the principles were equally applicable to assertions of criminal conduct in a civil case and reversed the trial court's denial of the motion for mistrial.

The Division's conduct here is more egregious than the conduct in *Gladstone*. Mr. Palfai repeatedly asserted facts not in evidence with respect to the conduct of Respondents, and other entities that are not even parties to this proceeding. In addition, Mr. Palfai's assertion of the crime-fraud exception to justify his line of questioning was a

clear expression of his opinion that Respondents have engaged in criminal activity. Finally, in *Gladstone*, the Court stated that the statements could be interpreted as assertions of criminal conduct. Here, no interpretation is necessary. The Division has accused Respondents of criminal conduct in a misguided attempt to justify questions invading the attorney-client privilege.

There is no question that under the circumstances, a mistrial is warranted. In order to preserve the integrity of this tribunal, and to afford Respondents a fair hearing and due process under the law, a mistrial should be granted.

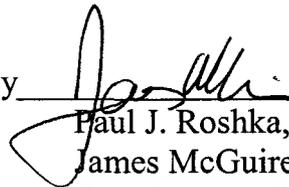
### III. CONCLUSION.

For all of the foregoing reasons, the Respondents' Motion should be granted and an order declaring an immediate mistrial should be entered.

Respectfully submitted this 14<sup>th</sup> day of April, 2005.

ROSHKA HEYMAN & DeWULF, PLC

By



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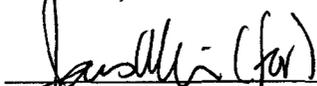
ORIGINAL and 13 copies of the foregoing  
hand-delivered this 11<sup>th</sup> day of April, 2005 to:

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

COPY of the foregoing hand-delivered  
this 11<sup>th</sup> day of April, 2005 to:

Honorable Marc Stern  
Administrative Law Judge  
Hearing Division  
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