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AZ CORP COMMISSION  
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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS:

MARC SPITZER, Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-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 MOTION TO  
PRECLUDE THE TESTIMONY OF  
ALAN WALKER AND OBJECTION

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

Arizona Corporation Commission  
DOCKETED

APR 12 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 file this, their Joint Motion to Preclude the Testimony of Alan Walker, and

Objection to the admission of any exhibits, transcripts and/or documentary evidence related to his illegal and tainted search. In support thereof, Respondents would respectfully show the Court the following:

**I.**  
**BACKGROUND FACTS**

Mr. Alan Walker is an employee of the Securities Division, and he has been identified as a potential witness in the Securities Division's new Proposed List of Witnesses. However, the Pennsylvania Securities Commission ("PSC") (not the Arizona Securities Commission) deputized Mr. Walker, and asked him to attend a privately-held meeting conducted in Scottsdale, Arizona on or about April 4, 2003 ("Scottsdale Meeting"). In fact, Mr. Richard Kiehl—who is an investigator with the PSC and a witness of the Securities Division in this case—and Mr. Walker plotted a scheme that included Mr. Walker's false identification as the brother-in-law of a Pennsylvania resident. Of course, Mr. Walker was not the brother-in-law of any "Pennsylvania resident;" rather, he was an undercover agent acting *on behalf of the PSC*.

The sole purpose for the PSC's scheme was to circumvent the laws of Pennsylvania by reaching beyond its jurisdictional boundaries and procuring another to do its "investigative" work – work that was clearly illegal. In fact, during Mr. Kiehl's testimony he admitted that, under Pennsylvania law, it is illegal to tape record a conversation unless the parties to the conversation know it is being taped. Thus, and as Mr. Kiehl further conceded, it is illegal under Pennsylvania law to secretly tape record a meeting or a presentation. Mr. Kiehl also admitted that he contacted Mr. Walker in order to have Mr. Walker assist him in the PSC's investigation. The PSC wanted to use Mr. Walker's tapes of the Scottsdale Meeting and any information related thereto in connection with an investigation and an eventual hearing related to alleged violations of the Pennsylvania Securities Act. The PSC's and Mr. Walker's conduct constituted

illegal interception, use, and disclosure of oral communications under the Pennsylvania Wiretapping and Electronic Surveillance Act, 18 Pa. Cons. Stat. 5701, *et seq.*, ("Pennsylvania Wiretap Act"). Mr. Walker's testimony is based solely upon the illegal interception of oral communications. Because the PSC and Mr. Walker violated the laws of the Commonwealth of Pennsylvania, all evidence arising out of or derived from such conduct is illegal and inadmissible under the doctrine of the "fruits of the poisonous tree." Therefore, Mr. Walker's testimony should be precluded and all exhibits, transcripts, and documents related thereto must be excluded.<sup>1</sup>

## II.

### ILLEGALITY AND INADMISSIBILITY OF TESTIMONY

The Pennsylvania Wiretap Act makes it unlawful for any person to intentionally intercept, or record, or make efforts to intercept or record, any oral communication. *See* 18 Pa. Cons. Stat. §5703. The same statutory provision makes it unlawful for any person to procure another person to intercept any oral communication. *See id.* Section 5703 of the Pennsylvania Wiretap Act provides, in relevant part:

A person is guilty of a felony of the third degree if he:

1. intentionally intercepts, endeavors to intercept, or *procures* any other person to intercept or endeavor to intercept any wire, electronic or oral communication;

\* \* \*

18 Pa. Cons. Stat. §5703(1) (emphasis added).

But for the deputization of Mr. Walker by the PSC (through Mr. Kiehl), Mr. Walker would not have appeared at the meeting nor would he have taped the conversation. Mr. Walker

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<sup>1</sup> In addition, the tapes and transcript about which Mr. Walker may attempt to testify are, in and of themselves, inadmissible hearsay. The tapes and transcript contain out-of-court statements which, by definition, are hearsay. The Respondents have previously filed a Brief on the hearsay issue, which is hereby incorporated by reference.

must be, under the circumstances, considered as either the PSC's agent for purposes of the PSC's investigation or one *procured* by the PSC for purposes of intercepting the communications in the Scottsdale Meeting. As the PSC's agent, or as an individual procured by the PSC, Mr. Walker was not endowed with greater rights than the PSC with respect to the attendance at the meeting or taping of the conversations. Thus, Mr. Walker clearly and directly violated the wiretapping laws of Pennsylvania, and his conduct is unlawful.

The Pennsylvania Wiretap Act also makes it unlawful for any person to intentionally disclose or use, or attempt to disclose or use, the contents of any intercepted oral communication or any evidence derived from such interception. *See* 18 Pa. Cons. Stat. §5703(2), (3). The Pennsylvania statute provides the following relevant language:

A person is guilty of a felony of the third degree if he:

\* \* \*

2. intentionally discloses or endeavors to disclose to any other person, the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or
3. intentionally uses or endeavors to use the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication.

18 Pa. Cons. Stat. §5703(2), (3). Accordingly, the very use and disclosure of any tapes from the Scottsdale Meeting and or any transcripts of said tapes are illegal and inadmissible. *See Lee v. Florida*, 392 U.S. 378, 386 (1968) (Illegally-obtained wiretap evidence cannot be used in any court.). Therefore, Mr. Walker should be precluded from testifying.

Furthermore, the illegal conduct tainting Mr. Walker's testimony is inadmissible under the doctrine of the "fruits of the poisonous tree," an exclusionary rule aimed at excluding

unlawfully obtained evidence and depriving the wrongdoer of the benefits derived from using information that was illegally obtained. *See Arizona v. Hackman*, 189 Ariz. 505, 508 (1997). “The exclusionary rule applies to the states through the due process clause of the Fourteenth Amendment.” *Id.* The fruit of the poisonous tree exclusionary rule provides that all evidence directly obtained through governmental misconduct will not be admissible including, but not limited to, unlawful government procedures or seizures. *Id.*; *see also United States v. Kimball*, 884 F.2d 1274, 1278-79 (9<sup>th</sup> Cir. 1989); *State v. Bravo*, 158 Ariz. 364, 374-76 (1988).

For a party to assert the poisonous-tree doctrine, he must first point to some government misconduct *Id.* As demonstrated above, the interception, use, and disclosure of the oral communication (the Scottsdale Meeting) is clearly illegal. *See* 18 Pa. Const. Stat. §5703(2), (3). Therefore, all evidence derived from the illegal interception, specifically including Mr. Walker’s testimony, the audiotapes, the transcript, and any documents obtained at the Scottsdale meeting, are deemed fruits of the poisonous tree, and inadmissible. *Walker*, 189 Ariz. at 508.

It appears that the Securities Division seeks to introduce Mr. Walker to testify about the oral communications that he illegally intercepted at the Scottsdale Meeting. Mr. Walker’s testimony in this proceeding would be based solely upon, and tainted with, illegality. Accordingly, under the Pennsylvania Wiretap Act and the fruit of the poisonous tree exclusionary rule (as well as hearsay and violations of the Pennsylvania Securities Act discussed in Respondents Hearsay brief), Mr. Walker's testimony must be precluded, and any exhibits or documentary evidence directly obtained through his governmental misconduct must be excluded.

### III.

#### **THE AUDIO TAPES CONSTITUTE HEARSAY AND WERE NOT PROPERLY AUTHENTICATED**

The Audio Tapes and Transcript are out-of-court statements offered for the purpose of

proving the truth of the matters asserted therein and, thus, constitute hearsay. Further, there is no indication that any independent third party listened to the Tapes, ensured that they were not edited or certified that they were true and correct copies of the original tapes. A comparison of the Tapes to the Transcript indicates that the Transcript has in fact been edited, contains information that is not readily discernable from the Tapes, and evidences the fact that the Tapes themselves are not a complete recording of the events which they purport to describe. Under those circumstances alone, Mr. Walker's testimony should be precluded and any exhibits, transcripts and/or documents related thereto should be excluded.

#### IV.

#### THE TAPES ARE INCOMPLETE

A review of the Audio Tapes and the Transcript indicates that there are many inaudible passages and certain breaks. As an example, every time the person taping the conversation was required to change tapes, portions of conversations were missed. Thus, the Audio Tapes do not contain a continuous recording of the entirety of the meeting at which Mr. Walker was present. As a result, the Audio Tapes are nothing more than a tape of some the conversation between the people in Scottsdale, Arizona and not a complete tape of everything that went on. Thus, they should not be admissible for any purpose.

#### V.

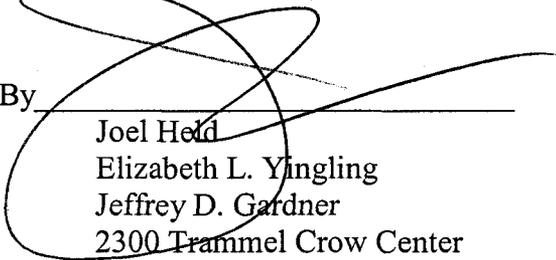
#### CONCLUSION

ALJ Stern must preclude Mr. Walker's testimony because such testimony is based upon illegal procedure, substance, and evidence. Accordingly, Respondents respectfully request that ALJ Stern preclude Mr. Walker from testifying in the Hearing to be held on March 29, 2005, or otherwise.

Respectfully submitted this 12 day of April, 2005.

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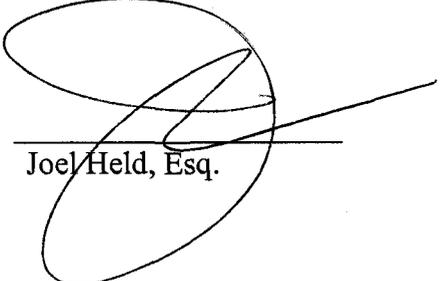
ORIGINAL and 13 copies of the foregoing  
hand-delivered this 12<sup>th</sup> day of April, 2005 to:

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

COPY of the foregoing hand-delivered  
this 12<sup>th</sup> day of March, 2005 to:

Honorable Marc Stern  
Administrative Law Judge  
Hearing Division  
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