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**ORIGINAL**  
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BEFORE THE ARIZONA CORPORATION COMMISSION

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3 Chairman

4 **JIM IRVIN**

5 Commissioner

6 **WILLIAM A. MUNDELL**

7 Commissioner

8 **JEFF MATCH-MILLER**

9 Commissioner

10 **MIKE GLEASON**

11 Commissioner

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AZ CORP COMMISSION  
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Arizona Corporation Commission

**DOCKETED**

AUG 08 2003

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12 In the matter of:

13 YUCATAN RESORTS, INC., d/b/a  
14 YUCATAN RESORTS, S.A., RESORT  
15 HOLDINGS INTERNATIONAL, INC., d/b/a/  
16 RESORT HOLDINGS INTERNATIONAL,  
17 S.A., WORLD PHANTASY TOURS, INC.,  
18 a/k/a MAJESTY TRAVEL a/k/a VIAJES  
19 MAJESTY, MICHAEL E. KELLY and LORI  
20 KELLY,

21 Respondents.

DOCKET NO. S-03539A-03-0000

RESPONDENT WORLD  
PHANTASY'S MOTION TO  
DISMISS

22 Respondent World Phantasy Tours, Inc. ("World Phantasy") brings this motion  
23 to dismiss the Temporary Cease and Desist Order ("Order") issued by the Arizona  
24 Corporation Commission ("Commission"). The Order should be dismissed as to  
25 World Phantasy for failure to plead essential elements of its claims for violation of  
26 Arizona securities laws—specifically A.R.S. §§ 44-1841, 1842 and 1991. In addition,  
the Order should be dismissed in its entirety for lack of subject matter jurisdiction  
because the Universal Lease—the subject of and basis for the Order—does not  
constitute a security. The following memorandum supports this motion.

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**MEMORANDUM**

The Order issued by the Commission claims that the respondents, as unregistered dealers or salesmen, offered and/or sold unregistered securities within the State of Arizona, and made misrepresentations and material omissions in connection with those sales or offers of sale. The centerpiece and jurisdictional hook for the Securities Division's action is the Universal Lease through which lessees lease vacation units for specific weeks during the year—timeshares. But the Order contains a fatal flaw with respect to World Phantasy: World Phantasy has nothing to do with the Universal Lease—including marketing the Universal Lease to potential timeshare lessees. Under the terms of the Universal Lease, lessees may choose to contract with an independent servicing agent, such as World Phantasy, but World Phantasy has no control over or participation in the marketing and leasing process related to the Universal Lease. The Order makes no assertions to the contrary. Because, the Order makes no claim that World Phantasy violated Arizona's securities laws, it must be dismissed with prejudice as to World Phantasy.

**1. The Order Fails To Allege Essential Elements Of Its Claims Against World Phantasy**

The sum total of the allegations against World Phantasy contained in the fourteen-page Order boil down to nothing more than statements that World Phantasy functioned as a third-party leasing agent for timeshare programs offered by the other responding entities. Excepting the preface and "Respondents" section, the Order mentions World Phantasy in only four paragraphs—paragraphs 27, 28, 31 and 35—setting forth World Phantasy's alleged role as the optional servicing agent for timeshare units. Even if true, the conduct attributed to World Phantasy in those paragraphs—indeed through the entire Order—in no way violates Arizona's securities laws including A.R.S. §§ 44-1841, 1842 and 1991, which provide the sole basis for the Order. The Order in no way suggests that the Management Agreements between

1 World Phantasy and timeshare purchasers constitute investment contracts, and  
2 therefore securities. This contractual relationship between timeshare Lessees and  
3 World Phantasy as servicing agent represents the sole alleged relationship between the  
4 purported “investors” and World Phantasy. Taking the allegations of the Order as  
5 true—for purposes of the motion to dismiss only—the allegations against World  
6 Phantasy provide no basis for relief under any legal theory. See State v. Superior  
7 Court of Maricopa County, 123 Ariz. 324, 329, 599 P.2d 777, 782 (1979).

8 **1.1. The Order Fails to Allege That World Phantasy Sold or Offered for**  
9 **Sale Unregistered Securities as Required for Liability Under A.R.S.**  
10 **§§ 44-1841 and 1842.**

11 A.R.S. § 44-1841(A) provides:

12 It is unlawful to sell or offer for sale within or from this state any  
13 securities unless the securities have been registered pursuant to  
14 article 6 or 7 of this chapter or are federal covered securities if the  
15 securities comply with § 44-1843.02 or chapter 13, article 12 of  
16 this title.

17 (emphasis added). Liability under A.R.S. § 44-1842 prohibiting unlicensed dealers or  
18 salesmen to sell or offer for sale any securities within the state is similarly predicated  
19 upon the sale or offer of sale of securities. The Order nowhere alleges that World  
20 Phantasy sold or offered to sell anything, let alone securities.

21 For purposes of determining who is an offeror or seller of securities within the  
22 meaning of A.R.S. § 44-1841, the Commission utilizes standards set forth in federal  
23 authority construing Section 5 of the 1933 Securities Act. See e.g. Matter of Offering  
24 of Securities by: Lost Dutchman Investments, Inc., Arizona Corp. Comm’n Decision  
25 No. 58259 (Apr. 8, 1993) (citing S.E.C. v. Rogers, 790 F.2d 1450, 1456 (9<sup>th</sup> Cir.  
26 1986); Matter of Offering of Securities by: American Microtel, Inc., Arizona Corp.  
Comm’n Decision No. 58088 (Dec. 9, 1992) (declining to hold liable as participants or  
aiders and abettors respondents having no involvement in solicitation activities and no  
decisional authority or oversight responsibilities regarding the content or use of

1 promotional literature). Participant liability, such as that alleged here, attaches only to  
2 persons directly responsible for the distribution of unregistered securities through  
3 conduct that is both “necessary to,” and a “substantial factor in,” the unlawful  
4 transaction. Microtel at 12 (citing Rogers, 790 F.2d at 1456). This two-part test  
5 requires a respondent’s participation to qualify both as a but-for cause of the unlawful  
6 sale, and more than “de minimis” participation. Microtel at 12 (citing Rogers, *supra*).  
7 Although the test is subjective, the level of the respondent’s participation in the  
8 scheme at issue is an important consideration.

9 While “substantial participation” is a concept without precise  
10 bounds, previous cases suggest that one who plans a scheme, or,  
11 at least, is a substantial motivating factor behind it, will be held  
12 liable as a seller. Fringe participants, although possibly liable as  
aiders and a bettors, are not liable as sellers under section 5.

13 Rogers, 790 F.2d at 1456. Rogers further notes that a “proximate cause analysis seems  
14 a reasonable approach to determining substantial participation.” Id. n. 10.

15 In Rogers, key findings supported the conclusion that no participant liability  
16 attached.

17 Rogers did not: (1) act as a sales manager or salesman for GFTD  
18 [the investment program at issue] nor control investor funds in the  
19 GFTD programs; (2) organize the [] sales task force, seek out  
20 investors, or make any representations to investors; (3) manage or  
supervise [] operations in Panama City or elsewhere; (4) prepare  
21 GFTD offering materials; or (5) participate in researching,  
writing, or editing the [] tax or securities opinions . . . .

22 Id. at 1457. Although some witnesses testified that they remembered Rogers  
23 participating in sales of the GFTD investments, those witnesses could not recall any  
24 specific attempts by Rogers to sell or promote the GFTD scheme to investors.  
25 Ultimately, the district court simply was not persuaded “that Rogers had played a  
26 significant role in the sales of the GFTD programs.” Id.

1 In this case, the Order makes only three substantive allegations directed to  
2 World Phantasy: 1) World Phantasy is a resort management and travel agency  
3 operating as the designated servicing agent for the timeshare program at issue (Order,  
4 ¶ 4); 2) World Phantasy is identified in the timeshare materials and functions as the  
5 designated, but non-exclusive management company (Order ¶ 27-28, 31); and 3) all  
6 known time-share purchasers chose World Phantasy as their third-party servicing  
7 agent (Order ¶ 35). None of these allegations in any way suggests participation by  
8 World Phantasy in the sale of the timeshare leases, let alone a role in the development  
9 of the sales and marketing strategy. Indeed all of World Phantasy's involvement  
10 allegedly occurs after the transactions at issue have been executed. World Phantasy  
11 never acted as a sales manager or agent, never sought out potential Universal Lessors,  
12 never made representations to potential Universal Lessors, never managed or  
13 supervised the operations of the other respondents, and never prepared Universal  
14 Lease promotional materials—nor does the Order allege any such conduct. But even  
15 assuming that simply acting as a servicing agent suffices for participation, the role of  
16 World Phantasy as servicing agent has nothing to do with any alleged injury to  
17 Universal Leaseholders. Therefore, World Phantasy's conduct—as alleged—cannot be  
18 a proximate cause of injury to putative “investors” in the Universal Lease program. In  
19 short, the Order simply fails to allege violations of A.R.S. § 44-1841 or 1842.

20 **1.2. The Order Fails to Allege Any Duty to Disclose, Much Less Any**  
21 **Misrepresentations or Material Omissions by World Phantasy as**  
22 **Required for Liability Under A.R.S. § 44-1991.**

23 To establish primary liability under A.R.S. § 44-1991—patterned after the  
24 antifraud provisions of Section 17(a) of the 1933 Securities Act—the Commission  
25 “must establish that a defendant intentionally or recklessly misrepresented or failed to  
26 disclose a material fact in connection with the purchase or sale of securities.” Rogers,  
27 790 F.2d at 1458; see also State v. Superior Court, 123 Ariz. at 331, 599 P.2d at 784

1 (“The provisions of A.R.S. s 44-1991 are almost identical to the antifraud provisions  
2 of the 1933 Securities Act, 15 U.S.C. s 77q (1970).”) But a party must have a duty to  
3 disclose the information before failure to do so will support liability. Rogers, 790 F.2d  
4 at 1459. Absent a finding of substantial participation in the sale of unregistered  
5 securities, no such duty exists. Rogers, 790 F.2d at 1459; see also IIT, An  
6 International Investment Trust v. Cornfeld, 619 F.2d 909, 927 (2<sup>nd</sup> Cir. 1980) (“Mere  
7 bystanders, even if aware of the fraud, cannot be held liable for inaction since they do  
8 not. . . associate themselves with the venture or participate in it as something they wish  
9 to bring about.”)

10 The Order gives no indication that World Phantasy 1) participated in any way  
11 in the solicitation of potential investors, or 2) made any representations whatsoever to  
12 potential purchasers of the alleged securities. As noted in Rogers, liability for failure  
13 to disclose material information is predicated upon the assumption that the respondent  
14 played a significant role in the transaction or series of transactions at issue. 790 F.2d  
15 at 1459. Accordingly, absent participant liability, no liability attaches for  
16 misrepresentations or material omissions. But even if, for arguments sake, World  
17 Phantasy had a duty to disclose material information, the Order simply fails to allege  
18 any misrepresentations or material omissions on the part of World Phantasy. Hence,  
19 A.R.S. § 44-1991 provides no basis for liability as to World Phantasy.

20 **2. The Corporation Commission Lacks Subject Matter Jurisdiction Because**  
21 **The Timeshare Sales Are Not Subject To Arizona’s Securities Laws**

22 Respondent World Phantasy joins in Respondents Resort Holdings  
23 International, Inc., Resort Holdings International, S.A., Yucatan Resorts, Inc., and  
24 Yucatan Resorts, S.A.’s Motion to Dismiss.

25 **3. Conclusion**

26 The Order makes no allegation that World Phantasy sold or offered for sale  
anything other than its services as a servicing agent for the Universal Leaseholders’

1 timeshare units. It makes no allegation that World Phantasy participated in the  
2 promotion of the Universal Lease agreements, and makes no allegation that World  
3 Phantasy made any misrepresentations or material omissions to anyone, including  
4 potential Universal Lessees. Taking the allegations of the Order as true for purposes  
5 of this motion, the Order provides absolutely no basis for alleging violations of  
6 Arizona's securities laws, or any other laws. Therefore, the claims against World  
7 Phantasy should be dismissed for failure to state a claim upon which relief can be  
8 granted.

9 RESPECTFULLY SUBMITTED this 8th day of August, 2003.

10 MEYER, HENDRICKS & BIVENS, P.A.

11  
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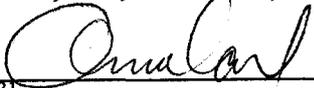
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