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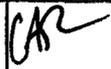
Arizona Corporation Commission

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JUL 30 2003

MARC SPITZER, Chairman
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In the matter of:

DOCKET NO. S-03539A-03-0000

YUCATAN RESORTS, INC., d/b/a
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

RESPONDENT LORY KELLY'S (1)
REPLY IN SUPPORT OF THE MOTION
TO DISMISS FOR LACK OF
PERSONAL JURISDICTION AND
INSUFFICIENCY OF SERVICE OF
PROCESS AND (2) JOINDER IN THE
REPLY FILED BY RESPONDENTS
YUCATAN RESORTS, INC. AND
RESORT HOLDINGS
INTERNATIONAL INC.

RESORT HOLDINGS INTERNATIONAL,
INC. d/b/a
RESORT HOLDINGS INTERNATIONAL,
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

WORLD PHANTASY TOURS, INC.
a/k/a MAJESTY TRAVEL
a/k/a VIAJES MAJESTY
Calle Eusebio A. Morales
Edificio Atlantida, P Baja
APDO, 8301 Zona 7 Panama

MICHAEL E. KELLY and LORI KELLY,
husband and wife,
3222 Mishawaka Avenue
South Bend, IN 46615;
P. O. Box 2661
South Bend, IN 46680;

Respondents.

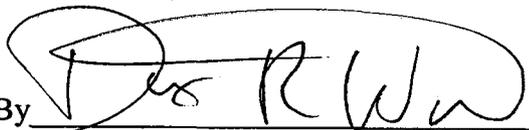
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1 Respondent Lory Kelly, ("Mrs. Kelly"), by and through undersigned counsel, hereby
2 submits her Reply in Support of the Motion to Dismiss for Lack of Personal Jurisdiction and
3 Insufficiency of Service of Process and hereby joins the Reply filed on behalf of Yucatan Resorts
4 Inc. This Reply is fully supported by the following Memorandum of Points and Authorities and
5 the entire record before the Commission.

6 RESPECTFULLY SUBMITTED this 30th day of July, 2003.

7
8 ROSHKA HEYMAN & DeWULF, PLC

9
10 By 

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18 Attorneys for Respondents
19 Michael E. Kelly and Lory Kelly

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MEMORANDUM OF POINTS AND AUTHORITIES

28 **I. INTRODUCTION.**

29 As the Commission is aware, this matter arises out of the sale of time shares, known as
30 Universal Leases, for vacation resorts in Mexico and Panama. The Division has named Mrs. Kelly
31 as a Respondent, together with her husband Michael E. Kelly and the following entities: Resort
32 Holdings International, Inc. ("RHI, Inc."), Resort Holdings International, S.A., Yucatan Resorts,
33 Inc., and Yucatan Resorts, S.A. (hereinafter, collectively, the "Respondent Entities"). Mrs. Kelly
34 has moved the Commission to dismiss her from this matter for lack of personal jurisdiction and for
35 insufficiency of service of process. Likewise, Mr. Kelly and Yucatan Resorts Inc. have also filed

1 Motions to Dismiss for lack of personal jurisdiction, both of which are incorporated herein by this
2 reference.

3 In its Response to Mrs. Kelly's Motion to Dismiss, the Division dedicates a total of two (2)
4 paragraphs to the jurisdiction issue, only one of which is even substantive. The Division claims:

5 Mrs. Kelly has been joined in this action solely to determine the liability of the
6 marital community. A.R.S. §44-2031(c) provides statutory jurisdiction to join the
7 spouse for the limited purpose of assessing the liability of the community property.
8 Due Process requires that Mrs. Kelly be given an opportunity to be heard at a
9 meaningful time and in a meaningful manner before she can be deprived of her
interest in the community property. See *National Union Fire Ins. Co. v. Greene*,
195 Ariz. 105, 110 (1999).

10 [Response at p. 5]. The Division's Response is self-serving and clearly flawed.¹

11 First, Mr. Kelly does not have sufficient "minimum contacts" with Arizona to convey
12 personal jurisdiction over him, making the attempted joinder of Mrs. Kelly futile. Mrs. Kelly
13 specifically refers the Commission to Mr. Kelly's Motion to Dismiss and Reply in Support of
14 Motion to Dismiss, previously incorporated herein.

15 Second, the Division has not and cannot point to a single contact between Mrs. Kelly, a
16 housewife and resident of Mexico, and the State of Arizona. As such, the only Due Process
17 violation that could or will occur here, is if Mrs. Kelly is forced to remain as a Respondent under
18 the guise of a joinder provision.

19 Third, because the Kellys are full time residents of Mexico, there is no "marital
20 community" subject to Arizona law or, in particular, A.R.S. § 44-2031(C). And, in any event,
21 A.R.S. § 44-2031(C) merely permits the joinder of a spouse, it does not expressly convey
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26 ¹ The Division's contention that "Due Process requires that Mrs. Kelly be given an opportunity to be heard at a
27 meaningful time and in a meaningful manner before she can be deprived of her interest in the community property,"
presupposes, incorrectly, that Mrs. Kelly, and/or the marital community, is properly before the tribunal.

1 jurisdiction over a non-resident. As addressed in the Motion and herein, the statute itself is also
2 unconstitutional.

3 With regard to service of the Temporary Order to Cease and Desist ("C&D"), the Arizona
4 Administrative Code ("A.A.C.") provides specific rules for service of process in foreign countries.
5 See A.A.C. R14-4-303(F). The Division, however, ignored those rules and, instead, attempted to
6 effectuate "personal service" on Mrs. Kelly in Indiana, at the offices of Respondent RHI Inc.

7 In its Response, the Division claims it properly effectuated service through "substituted"
8 means. [Response at p. 3]. However, there is no record that the Commission approved the use of
9 alternative or substitute service. *See* Ariz. R. Civ. P. 4.1(m). The Division also argues that the
10 substitute service was adequate because it was reasonably calculated to give Mrs. Kelly actual
11 notice of the proceedings. However, without proper service, the Commission does not have
12 jurisdiction over Mrs. Kelly as a matter of law.

13
14 **II. THE COMMISSION CANNOT EXERCISE PERSONAL JURISDICTION OVER**
15 **MRS. KELLY.**

16 **A. Mrs. Kelly Should Not Be Forced To Remain A Respondent Under The Guise**
17 **Of A.R.S. § 44-2031(C).**

18 The statutory basis for conveying jurisdiction over a non-resident is found in Arizona's
19 Long Arm statute. *See* Ariz. R. Civ P. 4.2(s). The Long Arm statute conveys jurisdiction "to the
20 maximum extent permitted by the Constitution of this State and the Constitution of the United
21 States." Ariz. R. Civ. P. 4.2(a). Foremost, the tribunal must determine that jurisdiction is
22 consistent with the Due Process Clause of the Fourteenth Amendment to the United States
23 Constitution. *See* *Batton v. Tennessee Farmers Mutual Ins. Co.*, 153 Ariz. 268, 270, 736 P.2d 2, 4
24 (1987).
25
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1 A state may assert either "general" or "specific" jurisdiction over a non-resident
2 respondent, depending on the nature and the extent of contacts between that non-resident
3 respondent and the forum. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408,
4 414-15 (1984); *Armstrong v. Aramco Serv. Co.*, 155 Ariz. 345, 348, 746 P.2d 917, 920 (Ct. App.
5 1987). Under either standard, "the constitutional touchstone remains whether the [respondent]
6 purposefully established 'minimum contacts' in the forum State," *Burger King Corp. v. Rudzewicz*,
7 471 U.S. 462, 474 (1985).

8
9 The Division does not argue that it can avail itself of the Long Arm statute as a means of
10 establishing jurisdiction. This is not unexpected as Mrs. Kelly has not had any contact, let alone
11 "minimum contacts," with Arizona. [See Declaration of Mrs. Kelly, hereinafter "Lory Kelly
12 Dec.," attached as an exhibit to the Motion to Dismiss.] Rather, the Division relies solely on the
13 joinder provision in A.R.S. § 44-2031(C) as a purported basis for jurisdiction. This provision,
14 however, does not convey jurisdiction and it certainly does not supersede or otherwise supplant the
15 Long Arm statute. Indeed, before the Division can even address the applicability of § 44-2031(C),
16 it must establish that it has an independent basis for jurisdiction under the Long Arm statute.
17 Because the Division cannot do so, the Commission cannot exercise jurisdiction over Mrs. Kelly
18 without violating her Due Process rights.

19
20 **B. The Kellys Are Residents Of Mexico And Do Not Have A Marital Community**
21 **Subject To Arizona Law.**

22 A.R.S. § 44-2031 provides that "the commission may join the spouse in any action
23 authorized by this chapter [sales of securities] to determine the liability of the marital community."
24 Explicit in this statute is the requirement that the husband and wife have a "marital community"
25 subject to Arizona law. Indeed, the statute itself is clearly geared towards Arizona residents and
26 the application of Arizona's community property laws. *See e.g. Nationwide Resources Corp. v.*
27

1 *Massabni*, 143 Ariz. 460, 463, 694 P.2d 290, 293 (Ariz.App. 1984) (property rights, if any, are
2 governed by the law of the marital domicile at the time of the property's acquisition). Here, it is
3 futile to join Mrs. Kelly as a Respondent in this matter as she is not an Arizona resident and does
4 not have an Arizona "marital community."

5 C. A.R.S. § 44-2031(C) Does Not Provide Statutory Jurisdiction To Join
6 Mrs. Kelly As A Respondent.

7 The Division wrongly claims that "A.R.S. § 44-2031(C) provides statutory jurisdiction to
8 join the spouse for the limited purpose of assessing liability of the community property."
9 (emphasis added). [Response at p.5] On its face, A.R.S. § 44-2031(C) merely allows the
10 Commission to "join" the spouse in an authorized action, nothing more. Again, jurisdiction over a
11 Mrs. Kelly, if obtainable at all, is established solely through the Long Arm statute.

12 D. A.R.S. § 44-2031(C) Is Unconstitutional Because It Attempts To Impermissibly
13 Enlarge the Commission's Authority Beyond That Granted in the Arizona
14 Constitution.

15 Finally, A.R.S. § 44-2031 is unconstitutional. It impermissibly enlarges the Commission's
16 powers beyond its Constitutional grant. *See* Article 15, § 14. In particular, A.R.S. § 44-2031(C)
17 allows the Commission to bring before it individuals who are not involved in the offer or sale of
18 securities and/or who are not affiliated in any way with the corporation under investigation. It also
19 subjects these spouses to potential penalties (through the marital community). [*See* Motion to
20 Dismiss at p.8 for the entirety of this argument.]
21

22 The Division has offered a muddled and disjointed response to the constitutionality
23 argument. It appears that the Division's response is two-fold. First, the Division seems to suggest
24 that the Commission derives its regulatory authority from the Arizona Constitution and the
25 implementing statutes, including A.R.S. § 44-2031(C). Second, the Division appears to argue that,
26 because A.R.S. § 44-2031(C) does not create community liability, but only establishes a procedure
27

1 to exercise jurisdiction to determine liability, it is merely a procedural rule that does not exceed
 2 any Constitutional grant. Both arguments are equally flawed.

3 First, the Commission derives its regulatory authority solely from the Arizona Constitution.
 4 See Ariz. Const. Art. 15, § 4; see also *State v. Goodrich*, 151 Ariz. 118, 121, 726 P.2d 215, 218
 5 (Ct. App. 1986). The implementing statutes are just that, statutes enacted to implement the
 6 Constitutional grant. See e.g. *Tonto Creek Estates Homeowners Ass'n v. Arizona Corp. Comm'n*,
 7 177 Ariz. 49, 55, 864 P.2d 1081, 1087 (Ct. App. 1993); *Commercial Life Ins. Co. v. Wright*, 64
 8 Ariz. 129,139, 166 P.2d 943, 949 (1946). [Response at p.5.] These statutes do not convey
 9 additional authority beyond what is contemplated in the Constitution. See *Id.*
 10

11 Second, it is immaterial whether A.R.S. § 44-2031(C) is procedural or substantive in
 12 nature. The Commission only has the authority to regulate the offer and sale of securities. See
 13 *Goodrich*, 151 Ariz. at 121, 726 P.2d at 218; *Commercial Life Ins.*, 64 Ariz. At 139, 166 P.2d at
 14 950. This necessarily includes regulating the companies and individuals that transact in securities.
 15 See *Id.* However, as stated, A.R.S. § 44-2031(C) purports to allow the Commission to bring before
 16 it individuals who are not involved in the offer or sale of securities and/or who are not affiliated in
 17 any way with the corporation under scrutiny. It also impermissibly subjects these spouses to
 18 potential penalties even if those penalties are derived from another statutory scheme. As such, the
 19 statute is overreaching, its implementation exceeds the Commission's express authority under
 20 Article 15, § 4, and it is unconstitutional.
 21

22 **III. MRS. KELLY SHOULD BE DISMISSED FROM THIS ACTION BECAUSE THE**
 23 **DIVISION FAILED TO SERVE THE C&D ON HER.**

24 The Division attempted to serve Mrs. Kelly by leaving a copy of the C&D, through a
 25 process server, with a "woman by the name of Erin," at Respondent RHI Inc.'s business address in
 26 Indiana. [Response at p.3.] The Division claims that the Indiana address was the only address
 27

1 known that was reasonably calculated to give Mrs. Kelly actual notice of the C&D. [*Id.* at p.4].
2 Further, the Division contends that this was acceptable “substitute” service. [*Id.*] As set forth
3 below, Mrs. Kelly is not an employee of RHI Inc., or affiliated with RHI Inc. in any manner, and
4 service on RHI Inc. was improper. [Lory Kelly Dec. at ¶ 9.]

5 The Rules of Procedure for Investigations, Examinations, and Administrative Proceedings
6 establish the service requirements for a C&D issued by the Division. R14-4-307 applies to
7 “Temporary Orders” and provides that “[t]emporary cease-and-desist orders shall be served
8 pursuant to the provisions of R14-4-303.” R14-4-303, in turn, contains various provisions for
9 service upon individuals, service upon corporations or other entities, and service in a foreign
10 country.

11
12 With regard to service in a foreign country, R14-4-303(F) provides in pertinent part:

13 F. Service in a foreign country. When serving a subpoena, notice or temporary
14 cease-and-desist order in a foreign country, service shall be by any internationally
15 agreed means.

16 Here, Mexico is a signatory to the Hague Convention (as of June 1, 2000) and service must
17 be accomplished as provided for under that treaty. *See NSM Music, Inc. v. Villa Alvarez*, No. 02 C
18 6842, 2003 WL 685338, at *1 (N.D. Ill. Feb. 25, 2003). The Hague Convention does not permit,
19 as attempted here, personal service through a privately-retained process server. *Id.* “Rather, the
20 Hague Convention contemplates personal service via the authorities of the country of destination
21 [i.e., Mexico], or through the originating country’s [i.e., the United States’] consular officials in the
22 country of destination.” *Id.*

23
24 Notwithstanding this, the Division contends that “Mrs. Kelly was served in the United
25 States” and that the “requirements for service of process in a foreign country do not apply where
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service is made in the United States.” [Response at p. 3]. The Division cites, as an “example,”

Volkswagenwrek Akteingesellschaft v. Shlunk, 108 S.Ct. 2104, 2112 (1988)

[The *Volkswagenwrek* Court held] that the Hague Convention does not apply to service on a foreign corporation through its domestic subsidiary irregardless [sic] of whether the subsidiary later forwards the documents abroad to its foreign principal.

First, contrary to the Division’s self-serving proclamation, Mrs. Kelly was not served in the United States. The C&D was left with “Erin,” at RHI Inc. Second, there is nothing in the express language of R14-4-303, or the *Volkswagenwrek* decision, that supports the Division’s strained position that it can circumvent the Hague Convention with Mrs. Kelly – an individual and non-resident.

Additionally, the Division is clearly familiar with, and has effected service through, the Hague Convention. (See, e.g., Docket No. S-3177-I, *In the Matter of: Forex Investment Services Corporation.*) The Respondents in *Forex* were actually served in Asia. The Division has not complied with the Hague Convention in this matter because it takes time and effort to do so. The Division is clearly more interested in hastily issuing a C&D then complying with an international treaty. As was obvious at the pre-hearing conference, the Division rushed to issue the C&D and rushed to leave a copy with a person named “Erin” in Indiana, approximately thousands of miles from where proper service could be effected.

The Division also wrongly claims it used adequate “substitute” service when it left the C&D with “Erin.” [Response at p. 3.] R14-4-303(D) does authorize personal service “by leaving a copy with an agent authorized by express or implied appointment or by law to receive service of process for the individual upon whom service is being made.” However, RHI Inc.’s office is not Mrs. Kelly’s “usual place of business or employment.” [Lory Kelly Dec. a ¶ 9.] And, even though the Division contends the RHI Inc.’s address was the only address known that “was reasonably

1 calculated to give Mrs. Kelly actual notice of C&D," this benign contention does not suggest or
2 otherwise inform the Commission of the Division's effort, or lack thereof, to actually locate
3 Mrs. Kelly in Mexico. And, given the allegations in the C&D, it is inconceivable that the Division
4 did not know that the Kellys are residents of Mexico. Finally, the use of substitute or alternative
5 service is only proper if service is otherwise impractical and only upon the Commission's
6 directive. *See* Ariz. R. Civ. P. 4.1(m).² There is nothing in the record indicating the Commission
7 directed the use of "substitute" service and the service of process in this matter was ineffective.³

8
9 **IV. CONCLUSION.**

10 The Division has failed to meet its burden of establishing personal jurisdiction over
11 Mrs. Kelly. First, the Division cannot establish the "minimum contacts" necessary to invoke the
12 Long Arm statute. As such, the only Due Process violation that could or will occur here, is if
13 Mrs. Kelly is forced to remain as a Respondent under the guise of A.R.S. § 44-2031(C). Second,
14 because the Kellys are full time residents of Mexico, there is no "marital community" subject to
15 Arizona law or, in particular, A.R.S. § 44-2031(C). And, A.R.S. § 22-2031(C) itself is also
16 unconstitutional. The Division also has failed to properly serve the C&D on Mrs. Kelly as
17 required by the Administrative Rules by leaving a copy with "Erin." Consequently, the
18 Commission must dismiss the C&D, as against Mrs. Kelly.
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22 ² Pursuant to A.A.C. R14-3-101, "in all cases in which procedure is set forth neither by law, nor by these rules, nor by
23 regulations or orders of the Commission, the Rules of Civil Procedure for the Superior Court of Arizona as established
by the Supreme Court of the State of Arizona shall govern."

24 ³ The Division also makes the unremarkable argument that the "purpose of process" was obviously accomplished
25 because Mrs. Kelly retained counsel and timely responded to the C&D. However, the mere fact that Mrs. Kelly
26 fortuitously learned of the C&D does not cure the improper service. *See Koven v. Saberdyne Systems Inc.*, 128 Ariz.
27 321, 625 P.2d 907, 911 (Ariz. App. 1981) ("proper service of process is essential for the court to have jurisdiction over
[a party]"); *Stinson v. Johnson*, 3 Ariz.App. 320, 323, 414 P.2d 169, 171 (Ariz.App 1966) ("failure to comply with the
statutes and rules concerning legal notice to (or service of process upon) the defendants of a pending lawsuit denies the
court jurisdiction to enter judgment against the defendants in the matter, despite the fact of knowledge of the lawsuit
on the part of defendants").

1 RESPECTFULLY SUBMITTED this 30th day of July, 2003.

2 ROSHKA HEYMAN & DeWULF, PLC

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4 By 

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12 Attorneys for Respondents
13 Michael E. Kelly and Lory Kelly

14 ORIGINAL and thirteen copies of the foregoing
15 hand-delivered this 30th day of July, 2003 to:

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20 COPY of the foregoing hand-delivered
21 this 30th day of July, 2003 to:

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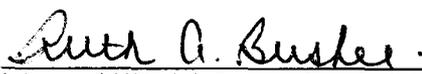
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