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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

- MARC SPITZER, Chairman
- JIM IRVIN
- WILLIAM A. MUNDELL
- JEFF HATCH-MILLER
- MIKE GLEASON

In the matter of:

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

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.

DOCKET NO. S-03539A-03-0000

**SECURITIES DIVISION'S RESPONSE
TO RESPONDENT LORY KELLY'S
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION AND
INSUFFICIENCY OF SERVICE OF
PROCESS**

Arizona Corporation Commission
DOCKETED

JUL 11 2003

DOCKETED BY	<i>CKB</i>
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1 Respondent Lory Kelly (“Mrs. Kelly”) has requested dismissal from this proceeding arguing
2 that the Arizona Corporation Commission (“ACC”) cannot exercise personal jurisdiction over her,
3 and that the Securities Division (“Division”) failed in properly effecting service on her with respect
4 to the Temporary Order to Cease and Desist and Notice of Opportunity for Hearing (“TC&D”).
5 Mrs. Kelly has been joined in this action solely to determine the liability of the marital community
6 under A.R.S. §44-2031(C). The Division opposes Mrs. Kelly’s motions to dismiss and asks that
7 they be denied. The Division supports its position with the following Memorandum of Points and
8 Authorities together with the simultaneously filed “Response to Respondent Michael E. Kelly’s
9 Motion To Dismiss For Lack Of Personal Jurisdiction And Insufficiency Of Service Of Process,”
10 incorporated herein by reference.
11

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. Background**

14 On May 20, 2003, a TC&D was targeted against a “Universal Lease” timeshare program
15 being directly or indirectly offered and sold, without limitation, by Kelly and the corporations
16 Yucatan Resorts, Inc., Yucatan Resorts, S.A., Resort Holdings, Inc., Resort Holdings S.A., (the
17 corporations are herein after collectively described as “Respondent Entities”).
18

19 On Thursday, May 22, 2003, Mrs. Kelly was served the TC&D by leaving a copy at the
20 business address for the Respondent Entities in South Bend, Indiana. This occurred when Paul K.
21 Lawson of the Securities Division of the Indiana Corporation Commission gave a copy of the
22 TC&D to a woman by the name of “Erin.”
23

24 ...

25 ...

1 II. The Law and Argument

2 A. Service of Process

3 Mrs. Kelly argues that she was not properly served because the Division did not utilize any
4 of the methods available under R14-4-303(F) governing service of a TC&D in a foreign country.
5 Contrary to Kelly's argument, R14-4-303(F) of the Arizona Administrative Code only applies to
6 service in a foreign country. Mrs. Kelly was served in the United States. Requirements for service
7 of process in a foreign country do not apply where service is made in the United States. See, for
8 example, *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 108 S.Ct. 2104, 2112 (1988), holding
9 that the Hague Convention does not apply to service on a foreign corporation through its domestic
10 subsidiary irregardless of whether the subsidiary later forwards the documents abroad to its foreign
11 principal.
12

13 Mrs. Kelly also argues that she was not properly served because the Division did not utilize
14 any of the methods available under R14-4-303(D) governing service upon an individual. Mrs.
15 Kelly states in her affidavit in paragraph 9 that she is not an officer, director, shareholder, or
16 employee of any of the Respondent Entities. Rule 14-4-303(D)(3) authorizes service upon an
17 individual "By leaving a copy at the individual's usual place of business or employment with an
18 employee, express or implied agent, supervisor, owner, officer, partner, or other similar individual
19 of suitable age and discretion."
20

21 The purpose of process is to provide the parties with notice of the action and to vest the
22 court with jurisdiction. See *Matter of Maricopa County Juvenile Action No. JS-5860* (App.1991).
23 Adequacy of service is dependent upon whether or not the form of substituted service is reasonably
24 calculated to give (the respondent) actual notice of the proceedings and an opportunity to be heard,
25 thus satisfying traditional notions of fair play and substantial justice implicit in due process. See
26

1 *Milliken v. Meyer*, 61 S.Ct. 339 (1941); See also *Mulane v. Central Hanover Bank & Trust Co.*, 70
2 S. Ct. 652 (1950). Joinder of a spouse must be accomplished within the requirements of due
3 process, including being served and having an opportunity to answer. See *Spudnuts, Inc. v. Lane*,
4 139 Ariz. 35 (App. 1984).

5 At the time the Division served its notice on Mrs. Kelly, the address for Respondent Entities
6 was the only address known that was reasonably calculated to give Mrs. Kelly actual notice of the
7 TC&D. Personal service on Mrs. Kelly was not attempted primarily because the Division had no
8 idea where, or even in what country, she could be found. Service by publication would be less
9 likely to provide Mrs. Kelly with actual notice of the proceedings and an opportunity to be heard.
10 Sufficient notice of the allegations and an opportunity to appear and defend has obviously been
11 provided to Mrs. Kelly. She has hired adequate counsel and replied to the TC&D in a timely
12 manner.
13

14 If the Administrative Law Judge finds that sufficient service was not made to Mrs. Kelly,
15 the Division argues in the alternative that Mrs. Kelly not be dismissed to allow the Division time to
16 perfect service. Where service of process has been found insufficient or quashed, the plaintiff is
17 free to attempt further service. See, for example, *Stinson v. Johnson*, 414 P.2d 169 (1966), holding
18 that complaint was improperly dismissed where time for plaintiff to effect service had not run.
19

20 **B. Personal Jurisdiction**

21 Mrs. Kelly is also asking to be dismissed from this proceeding based on a lack of minimum
22 contacts for her and her husband, Michael E. Kelly, ("Kelly"). The ACC's personal jurisdiction
23 over Kelly has been argued separately. See the Securities Division's Response To Respondent
24 Michael E. Kelly's Motion To Dismiss For Lack Of Personal Jurisdiction And Insufficiency Of
25 Service Of Process which was filed separately and incorporated herein.
26

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

8
9 **C. Constitutionality of A.R.S. §44-2031(C)**

10 Mrs. Kelly also argues that A.R.S. §44-2031(C) is unconstitutional because it impermissibly
11 expands the Commissions authority beyond what is contemplated by and granted in the
12 Constitution. This ignores, however, that “such powers as the Commission may exercise do not
13 exceed those to be derived from a strict construction of the Constitution and implementing
14 statutes.” See *Rural/Metro Corp. v. Arizona Corporation Commission*, 129 Ariz. 116, 117 (1981).

15 A.R.S. §44-2031(C) was signed by the Governor on May 6, 2002 and went into effect on
16 August 22, 2002. The statute did not create community liability but merely established a procedure
17 for the ACC to exercise jurisdiction over the spouse and to determine community liability under
18 Arizona law. “Substantive law creates and defines rights, while procedural law prescribes the
19 method by which substantive law is enforced or implemented.” See *E.C. Garcia & Co., v. Arizona*
20 *State Department of Revenue*, 178 Ariz. 510, 518 (App. 1993). A.R.S. §44-2031(C) does not
21 expand the ACC’s authority beyond what is contemplated in the Constitution and implementing
22 statutes.
23

24 ...

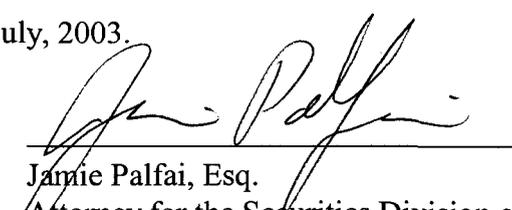
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III. Conclusion

For the foregoing reasons, Mrs. Kelly's Motions to Dismiss should be denied in full.

RESPECTFULLY SUBMITTED this th 11 day of July, 2003.

By:


Jamie Palfai, Esq.

Attorney for the Securities Division of
the Arizona Corporation Commission

ORIGINAL and thirteen copies
of the foregoing hand delivered
this 11th day of July, 2003 to:

Docket Control
Arizona Corporation Commission
1200 W. Washington
Phoenix, AZ 85007

Copies of the foregoing hand delivered

this 11th day of July, 2003 to:

Marc E. Stern
Administrative Law Judge
Hearing Division
Arizona Corporation Commission
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By 