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BEFORE THE ARIZONA CORPORATION COMMISSION

2003 JUL 10 P 4: 57

COMMISSIONERS

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JIM IRVIN  
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AZ CORP COMMISSION  
Arizona Corporation Commission CONTROL

DOCKETED

JUL 10 2003

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**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

DOCKET NO. S-03539A-03-0000

**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

**SECURITIES DIVISION'S RESPONSE TO  
RESPONDENTS RESORT HOLDINGS  
INTERNATIONAL, INC., RESORT  
HOLDINGS INTERNATIONAL, S.A.,  
YUCATAN RESORTS, INC., AND  
YUCATAN RESORTS S.A.'S MOTION TO  
DISMISS TEMPORARY ORDER TO  
CEASE AND DESIST**

**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,

**[AND RESPONSE TO JOINDER MOTION  
FILED BY RESPONDENTS MICHAEL E.  
KELLY AND LORY KELLY]**

**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.



1 annual return. Furthermore, despite the enormous sums raised in this program, no showing has  
2 been made as to where, and for what purpose, investors' funds have been allocated in Mexico,  
3 Panama, or any other location.

4 ***Argument***

5 Subsequent to the Administrative filing in this matter, Respondents filed a number of pre-  
6 hearing motions.<sup>2</sup> In the Motion to Dismiss that is the subject of this Response, Respondents have  
7 sought to challenge the validity of the TOCD on two separate grounds. Respondents initially argue  
8 that a certain timeshare statute exempts Respondents and their program from the provisions of the  
9 Securities Act of Arizona ("Securities Act"). This argument disregards the fact that the vast  
10 majority of hotel properties associated with Respondents' Universal Lease program fail to qualify  
11 for such an exemption. Moreover, Respondents' Universal Lease program had been in operation  
12 years before this particular exemption could possibly have applied.

13 The Respondents' next challenge to the Securities Division's TOCD rests on the claim that  
14 the Respondents' Universal Lease program does not constitute a security. Specifically, Respondents  
15 maintain that this program lacks the requisite elements of an investment contract. Once again, this  
16 analysis is founded upon factual omissions and faulty legal reasoning. Respondents' Universal Lease  
17 program is in fact routinely packaged, promoted and sold as a promising investment opportunity.  
18 More importantly, and as discussed further below, this program readily meets all recognized  
19 "prongs" of an investment contract security as contemplated under the Securities Act and under  
20 Arizona law.

21 ...

22 ...

23 ...

---

24  
25 <sup>2</sup> The Respondents to this matter have collectively filed several additional motions based on, *inter alia*,  
26 sufficiency of service and personal jurisdiction. This Motion, subsequently joined by co-respondents  
Michael and Lory Kelly, ostensibly focuses on a securities registration exemption and the issue of subject  
matter jurisdiction.

**I. Respondents' Universal Lease Program is not Sheltered From the Securities Act Through Certain Real Estate Timeshare Provisions**

1  
2 In their Motion, Respondents first maintain that a provision in the Real Estate Timeshare  
3 section of the Arizona Revised Statutes ("A.R.S.") removes their Universal Lease program from the  
4 purview of the Securities Act's registration statutes. Specifically, Respondents suggest that  
5 because their "Baccarat Resort Hotel" was issued a Time-share Public Report in July 2001, their  
6 Universal Lease program falls within the parameters of A.R.S. § 32-2197.22(A). Relying on this  
7 Report, Respondents conclude that the Securities Act is inapplicable to their Universal Lease  
8 program. This theory utterly fails in that it ignores two essential points relating to the scope and  
9 longevity of Respondents' Universal Lease program.

10 As repeatedly referenced in their promotional literature, Respondents' Universal Lease  
11 actually encompasses at least 7 distinct resort hotels in its program. Respondents' hotels include  
12 the Baccara, the Avalon Grand, the Avalon Reef Club, the Avalon Acapulco, the Avalon Bay, the  
13 Avalon Grand - Panama, and the Avalon Reef Club - Belize. None of these resort hotels, save the  
14 small boutique hotel known as the Bacarra, has ever been the subject of a Time-share Public Report  
15 in Arizona. As such, Respondents' Universal Lease program relies almost exclusively on  
16 properties *without* a Time-share Public Report; it follows that the timeshare exemption claimed by  
17 Respondents has no genuine application. Ironically, the Time-share Public Report for the Bacarra  
18 only serves to highlight the fact that the remaining non-licensed timeshare properties may actually  
19 be in violation of licensing regulations overseen by the Arizona Department of Real Estate.

20 The inapplicability of the cited Time-Share Public Report exemption is not the only  
21 justification to reject Respondents' position on this issue. Respondents also failed to acknowledge  
22 that their Universal Lease Program has continued unabated since at least 1999. During the period  
23 from 1999 until July 2001, when the small Bacarra hotel finally received its Time-Share Public  
24 Report, Universal Lease investments were being repeatedly offered and sold within Arizona. Any  
25 possible real estate exemption from provisions of the Securities Act would plainly have no  
26

1 applicability to the many offers and sales of the Universal Lease consummated far before any Time-  
2 share Public Reports were issued.

3 For these and other reasons,<sup>3</sup> the suggestion that Respondents' Universal Lease program  
4 enjoyed an exemption from provisions of the Securities Act, and hence any enforcement action  
5 stemming therefrom, simply has no basis in this case.

6 **II. Respondents' Universal Lease Program Constitutes an Investment**  
7 **Contract Under Arizona Securities Law**

8 The second argument underlying Respondents' Motion is premised on the claim that  
9 Respondents' Universal Lease program, and in particular the Universal Lease itself, does not  
10 qualify as a security under Arizona law. This conclusion is born out of misstatements of fact and  
11 misapplications of law. In truth, and as the facts of this case will ultimately bear out, the Universal  
12 Lease program falls squarely within the definition of an investment contract, a common form of  
13 security as recognized under the Securities Act. *See A.R.S. § 44-1801(26)*.

14 **A. Respondents' Universal Lease program is characterized by**  
15 **all recognized elements of the Investment Contract**

16 The core definition of an investment contract was set forth in *S.E.C. v. W.J. Howey Co.*,  
17 328 U.S. 293 (1946), and this definition is now universally recognized as the starting point for  
18 assessing whether any particular offer or sale constituted the offer or sale of an investment  
19 contract. Under the *Howey* test, an investment contract exists if the program at issue involves 1)  
20 an investment of money; 2) in a common enterprise; 3) with the expectation of profits earned  
21 solely from the efforts of others.<sup>4</sup> The basic framework of this definition has been repeatedly

22  
23 <sup>3</sup> Yet a third reason to reject Respondents' "Time-Share Public Report" Exemption is based on the simple  
24 fact that this exemption is directed solely against the *registration provisions* of the Securities Act. In  
25 focusing in this specific manner, the timeshare exemption is plainly designed to avoid impacting upon the  
26 fraud provisions of the Securities Act, including A.R.S. § 44-1991.

<sup>4</sup> Some authorities have sought to examine this third element in terms of two separate prongs, the  
"expectation of profits" prong, and the "efforts of others" prong. This distinction is not important for  
purpose of this Response.

1 interpreted and expanded, and each of these elements has since developed its own line of judicial  
2 reasoning. In Arizona, the *Howey* test remains the basis for investment contract analysis in many  
3 respects, although more recent case law has served to expand the confines of this test  
4 considerably. Citing *Howey*, Arizona courts agree that the definition of securities including  
5 investment contracts embody "a flexible rather than static principle, one that is capable of  
6 adaptation to meet the countless and variable schemes devised by those who seek to use the  
7 money of others on the promise of profits." *Nutek Information Systems, Inc. v. Arizona*  
8 *Corporation Commission*, 194 Ariz. 104, 108 (App.1998); *Rose v. Dobras*, 128 Ariz. 209, 211  
9 (App.1981). In accordance with this view, Arizona courts have developed and adopted flexible  
10 interpretations for each of the three prongs set forth in *Howey*.

11 **1.) Universal Lease and the "Investment of Money"**

12 In the context of evaluating investment contracts, the first prong of the *Howey* test - the  
13 investment of money - has rarely been the subject of dispute. This point is amply illustrated by  
14 the fact that Arizona courts have yet to have an occasion to meaningfully evaluate this particular  
15 prong. *See, e.g., Foy v. Thorp*, 186 Ariz. 151 (App.1996) ([respecting the first prong] "there is no  
16 question [plaintiff] invested money"); *Vairo v. Clayden*, 153 Ariz. 13 (App.1987) ("There is no  
17 question [plaintiff] invested money. Thus, the first prong of *Howey* is met"); *Daggett v. Jackie*  
18 *Fine Arts*, 152 Ariz. 559 (App.1986) ("The first prong of *Howey* is met in the instant case.  
19 Plaintiff made an investment of money"); *Rose v. Dobras*, 128 Ariz. 209 (App.1981) ("In this  
20 case, there clearly has been an investment of money").

21 Like with the cases cited above, Respondents' Universal Lease program plainly involved  
22 the investment of money. As evidenced through both investor accounts and through program  
23 literature, each investment in the Universal Lease program was initiated through the investment of  
24 a minimum of \$5,000 money into the program (there was no maximum investment amount). The  
25 Universal Lease application form similarly required the "investment of money" for investors to  
26 begin participating in the program.

2.) *Universal Lease as part of a "Common Enterprise"*

1  
2 Different jurisdictions have adopted a range of definitions for the second "common  
3 enterprise" or "commonality" prong of the *Howey* test. The Ninth Circuit traditionally employs a  
4 form of commonality known as "strict vertical commonality." *S.E.C. v. Eurobond Exchange,*  
5 *Ltd.*, F.3d 1334 (9<sup>th</sup> Cir.1994); *See also Hector v. Wiens*, 533 F.2d 429 (9<sup>th</sup> Cir.1976); *S.E.C. v.*  
6 *Glen W. Turner Enterprises, Inc.*, 474 F.2d 476 (9<sup>th</sup> Cir.1973). Under this approach, the  
7 commonality required is vertical (between the investor and the promoter) rather than horizontal  
8 (pooling among multiple investors). *Id.*

9 In Arizona, courts have adopted the Ninth Circuit's interpretation of vertical commonality  
10 with some material modifications. In general, the fortunes of the investor must still be interwoven  
11 with and dependent upon the efforts and success of those seeking the investment. *Vairo*, 153  
12 *Ariz.* at 17, *citing Turner*, 474 F.2d at 482, n.7. For the vertical form of commonality to be  
13 established, however, a positive correlation between the potential profits of the investor and the  
14 potential profits of the promoter need only be demonstrated. *Daggett*, 152 *Ariz.* at 566; *Vairo*,  
15 153 *Ariz.* at 17; *Foy*, 186 *Ariz.* at 158. Notably, Arizona courts have also held that commonality  
16 will be satisfied if either horizontal or vertical commonality can be shown. *See Daggett*, 152  
17 *Ariz.* at 566; *Vairo*, 153 *Ariz.* at 17; *Foy*, 186 *Ariz.* at 158.

18 Based on the program's many unique characteristics, it is readily apparent that the  
19 Respondent's Universal Lease program satisfies the commonality prong of the *Howey* test.  
20 Although facts educed at hearing will firmly establish the existence of both vertical and horizontal  
21 commonality in connection with this Universal Lease program, the available evidence already  
22 demonstrates the existence of horizontal commonality. This recognized form of commonality is  
23 demonstrated on many levels. For instance, both brochures and contractual materials  
24 disseminated in connection with the Universal Lease program require monies to be pooled into  
25 the same bank account in Indiana. More telling of the horizontal pooling is evidenced by the  
26 usage of investor funds. According to Universal Lease sales literature, investment funds "are

1 basically being used to purchase more hotels.” The designation of funds in such a manner  
2 demands the very type of pooling as required under the horizontal form of commonality.  
3 *Compare Howey, supra* (using investor funds for the purchase of orange groves satisfied  
4 commonality component). This horizontal pooling is still further evidenced by the fact that  
5 investments must be in amounts of at least \$5,000, but can be limitlessly increased in any  
6 incremental amount thereafter. (Indeed, many investors have invested hundreds of thousands of  
7 dollars in one single investment). This investment protocol ensures that Universal Lease  
8 investments will arrive in radically differing amounts, ensuring, at a minimum, the  
9 fractionalization and mingling of “assigned” timeshare units. The natural implication from this  
10 practice is that investor funds are being pooled together to achieve balanced timeshare  
11 assignments in the program. In sum, the presence of at least horizontal commonality as part of the  
12 Universal Lease program serves to easily satisfy the second commonality prong of the *Howey*  
13 investment contract test.

### 14 3.) *Universal Lease profits through “Efforts of Others”*

15 Despite the conspicuous attempt by the designers of the Universal Lease to circumvent the  
16 final element of the *Howey* test by padding the program with illusory investor “options,” the  
17 Universal Lease program still satisfies the final “efforts of others” element under applicable law.  
18 The inescapable fact is that Respondents’ sales agents consistently recommend, and their investor-  
19 clients consistently select, the annual 9 to 11 percent annual return option through this program.  
20 The other purported options associated with the Universal Lease program are in fact, from each a  
21 logistical, financial, and promotional standpoint, simply non-starters. Ultimately, the only  
22 functions delegated to Universal Lease investors in this program were the submission of investment  
23 monies and the anticipated receipt of a promised annual rate of return.

24 To appreciate the scope and meaning of “efforts of others” in the context of an investment  
25 contract analysis, it is essential to examine a number of judicial interpretations considering this  
26 final element. The original definition of *Howey’s* third “efforts of others” prong was subsequently

1 expanded to reflect "a more realistic test," where the efforts made by those other than the investor  
2 are only required to be the undeniably significant ones, those essential managerial efforts which  
3 ultimately affect the failure or success of the enterprise. *Turner, supra*. Arizona courts are  
4 consistently in accord with *Turner* in broadening this final prong. *See, e.g., Nutek*, 194 Ariz. at  
5 108; *see also Foy*, 186 Ariz. 151; *Daggett*, 152 Ariz. 559. It follows that in order to satisfy the  
6 final *Howey* element under Arizona law, one must only establish that the efforts made by those  
7 other than the investors were the undeniably significant ones, and were those essential managerial  
8 efforts which affected the failure or success of the enterprise. *Id.*

9 A number of recent Arizona court decisions have provided more specific guidance on this  
10 investment contract element by identifying certain investment features that reflect upon the degree  
11 to which the "efforts of others" are an essential component to a particular investment. Two of these  
12 features include the "level of control" of the investors to their investments and the "economic  
13 realities" of the particular investment.

14 Level of control

15 An essential component recognized by Arizona courts in considering the final *Howey*  
16 element is the actual level of control retained by the investor. *Nutek*, 194 Ariz. at 109; *Foy*, 186  
17 Ariz. at 158; *Vairo*, 153 Ariz. at 18, *citing Williamson v. Tucker*, 645 F.2d 404, 421 (5<sup>th</sup>  
18 Cir.1981); *Rose*, 128 Ariz. at 212. The greater the degree of managerial control an investor  
19 retains in his or her investment, the greater the likelihood that the investment is not an investment  
20 contract. *Foy, supra*. Conversely, where an investor has some powers of control but does not  
21 control the "*undeniably significant*" managerial efforts of the enterprise, an investment contract  
22 may very well exist. *Rose*, 128 Ariz. at 212.

23 This "level of control" component led to a finding of an investment contract in the case of  
24 *Nutek, supra*. In *Nutek*, the court examined the "level of control" component in the context of an  
25 LLC business arrangement. The *Nutek* court noted that in determining the level of investor  
26

1 control, it is necessary to look at both legal and practical control. The court continued that in order  
2 to assess this level of control, not only is a formal agreement outlining the enterprise important,  
3 but any oral representations made by the promoters at the time of the investment as well as the  
4 practical possibility that the investors could exercise the powers they purportedly possessed is also  
5 highly relevant. Citing the Fifth Circuit case of *Williamson, supra*, the *Nutek* court concluded that  
6 "an investor's knowledge of the business being operated provides one of the most reliable  
7 indicators of that investor's ability to exercise control over the investment." *Id.* at 111. Using this  
8 analysis, the court in *Nutek* concluded that the investors in an LLC were so dependent on the  
9 unique entrepreneurial and managerial abilities of the promoters, that they were incapable of  
10 exercising meaningful powers of control. As a consequence, the third prong of *Howey* was  
11 ultimately satisfied.

12 The *Nutek* reasoning easily transfers to the Universal Lease program at issue. In its  
13 promotional literature, the Universal Lease program purports to offer two options for investors to  
14 generate profits from this venture. The "popular" Universal Lease option required investors to  
15 contract with a professional management company to handle the servicing, management, and  
16 rental of the assigned timeshare units. The alternative option required that the serving,  
17 maintenance, management and rental duties of the timeshare units - all located in foreign  
18 countries - be handled by the investors themselves. Consequently, it is patently clear that as a  
19 practical matter, most if not all of the investors in this program were so dependent on the special  
20 linguistic and managerial abilities of the packaged servicing agent that they were incapable of  
21 exercising any meaningful control over their investments.

22 *The economic reality of the investment*

23 Another interrelated factor recognized by Arizona courts in assessing the third *Howey*  
24 element involves the "economic realities" of the investment. Arizona courts have consistently  
25 recognized that the ultimate emphasis in determining whether an investment is a security is on  
26 economic reality. *Davis v. Metro Productions, Inc.*, 885 F.2d 515 (9th Cir.1989); *see also*

1 *Daggett, supra; Sullivan, supra.* As the court in *Davis* noted, "it is well established that the courts  
2 look beyond contractual language to economic realities in determining whether an investment is  
3 an investment contract." *Id. at 525, citing Tcherepnin v. Knight, 389 U.S. 332 (1967).*

4 The court in *Sullivan* employed this "economic realities" analysis in assessing whether the  
5 purchase of a master videotape constituted the sale of an investment contract. The promoter  
6 insisted that the final prong of *Howey* was not satisfied in that instance because the investors in  
7 this case did not make passive investments in purchasing the master videotapes. The promoter  
8 pointed to the selling brochure connected with the tapes that informed the investors that they  
9 would be responsible for distributing the tapes themselves or would be responsible for engaging  
10 an agent to distribute them. The court was not persuaded by this argument and concluded that the  
11 sales did in fact constitute the sale of investment contracts. As justification for this finding, the  
12 *Sullivan* court noted that although the brochure spoke of the investors actively distributing the  
13 tapes as though that was truly an option, the economic reality of the situation was that the  
14 investors would have to hire a sales agent to have any chance of distributing the tapes. The  
15 investments were offered without any regard to the experience or sophistication of the investors in  
16 the television industry, and it was not ultimately intended or expected by the promoter that the  
17 typical investor would attempt to market the tapes by himself. Based on these economic realities,  
18 the investors were not active participants in the success of the venture.

19 The economic realities of the Universal Lease program are hardly in question. Of the  
20 three options ostensibly presented through the Universal Lease program, only the "third party"  
21 management option, producing the 9 to 11 percent annual return – was economically feasible for  
22 investors. This fact can be demonstrated on several levels. For example, a great percentage of  
23 investors chose to invest in the Universal Lease by rolling their IRA savings into the program.  
24 (An IRA rollover form was included in the Universal Lease packet). The inevitable result of this  
25 roll-over process was that investors were constrained to select the third-party management option;  
26

1 choosing any of the other purported options would have triggered tax penalties and would have  
2 run counter to the growth and security objectives of investors' retirement accounts.

3         Additionally, the purported "options" of either using the timeshare units for personal use  
4 or personally managing/renting the timeshare units were designed to be vague and financially  
5 prohibitive. An individual electing the personal use option would not be eligible for any returns  
6 and would instead be responsible for annual maintenance dues and local taxes. Still further, a  
7 \$5,000 investment would only entitle the purchaser to access to the timeshare unit every other  
8 year. To make the option even more unpalatable, an individual would be *assigned* a "specific"  
9 timeshare unit only after remitting his funds. Only at this point would the individual learn which  
10 resort, in which country, and at what time of year, the timeshare unit would be available.

11         An individual electing the option to manage and rent his timeshare unit would face the  
12 same restrictive conditions as those seen in the prior selection. The individual would be  
13 responsible for maintenance fees and taxes (subject to yearly increases), and would again learn of  
14 where and at what time of year his timeshare unit would be available only after paying the  
15 minimum amount of \$5,000. This option would also ultimately require that the investor attempt  
16 to hire a foreign servicing company to manage/rent his timeshare unit, as investors targeted by this  
17 program simply did not have the requisite training or local contacts to even contemplate  
18 generating a profit from their investment through self-management. It follows that, as a practical  
19 matter, investors only had one true choice with respect to the Universal Lease program – to select  
20 the third party management option and receive a purported guaranteed annual rate of return.

21 *Compare Sullivan, supra.*

22         Based on these factors and in light of applicable law, it is readily apparent that the  
23 Universal Lease program was, in effect, wholly dependent upon the efforts of others, namely the  
24 promoters' hand-picked servicing agent. Because this was the case, the final prong of *Howey* was  
25 again satisfied with respect to this Universal Lease investment.

1           The Universal Lease program consequently satisfied all prongs of the *Howey* test and, as a  
2 result, fell within the definition of an investment contract under the Securities Act. As an  
3 investment contract, it constituted a security, and all activities associated with the offer and sale of  
4 this product yet again fell within the jurisdiction of the Securities Division.

5                           **B. Respondents' Universal Lease program constitutes**  
6                           **an investment contract under SEC guidelines**

7           With condominiums, real estate developments and timeshare units becoming increasingly  
8 popular, the Securities & Exchange Commission ("SEC") issued an SEC Release in 1973,  
9 attempting to clarify what types of these programs would constitute a security for purposes of the  
10 Securities Act of 1933 and Securities Exchange Act of 1934. The information provided in this  
11 Release is particularly instructive in determining whether the Universal Lease Program is a  
12 security.

13           Under this SEC Release, the Commission stated:

14                           "The existence of various kinds of collateral arrangements may cause an  
15 offering of condominium [or timeshare] units to involve an offering of  
16 investment contracts or interests in a profit sharing agreement. The  
17 presence of such arrangements indicates that the offeror is offering an  
18 opportunity through which the purchaser may earn a return on his  
19 investment through the managerial efforts of the promoters or a third party  
20 in their operation of the enterprise."

21           *SEC Release No. 33-5347.*

22           Establishing that certain timeshare programs could indeed constitute investment contracts,  
23 the SEC proceeded to identify which types of collateral arrangements associated with a  
24 condominium (or timeshare) program would in fact constitute such a security. The Commission  
25 continued:

26                           "In any situation where collateral arrangements are coupled with the  
offering of condominiums, whether or not specifically of the types  
discussed above, *the manner of offering and economic inducements held  
out to the prospective purchaser play an important role in determining  
whether the offering involves securities.* In this connection, see Securities

1 and Exchange Commission v. C.M. Joiner Leasing Corp., 320 U.S. 344  
2 (1943). In Joiner, the Supreme Court also noted that ‘in enforcement of  
3 [the Securities Act], it is not inappropriate that promoters’ offerings be  
4 judged as being what they were represented to be.’ In other words,  
5 condominiums, coupled with a rental arrangement, *will be deemed to be*  
6 *securities if they are offered and sold through advertising, sales literature,*  
*promotional schemes or oral representations which emphasize the*  
*economic benefits to the purchaser to be derived from the managerial*  
*efforts of the promoter, or a third party designated or arranged for by the*  
*promoter, in renting the units.”*

7 *Id. (emphasis added).*

8 This Release speaks directly towards Respondents’ Universal Lease program. Respondents  
9 have developed a nationwide promotional scheme to push the Universal Lease program to  
10 investors across the country. In doing so, Universal Lease sales agents have consistently touted the  
11 safe and tremendous economic benefit to be gained from sinking money into this program. And, as  
12 Universal Lease promotional literature explains, investors need only enter into a  
13 management/servicing agreement with the program’s designated serving company, World Phantasy  
14 Tours, to reap these economic benefits.

15 As demonstrated, the Universal Lease program tracks the investment contract model  
16 identified by in the SEC Release cited above. Such similarity compels the conclusion that the  
17 Universal Lease program is indeed an investment contract and hence a security.

18 **C. Evidence to establish Respondents’ Universal Lease program**  
19 **as an investment contract will be elicited at trial**

20 The crux of Respondents’ Motion to Dismiss is premised on their unsubstantiated position  
21 that the Universal Lease does not constitute a security. To advance this position, Respondents  
22 have sought to advance a series of incomplete, inaccurate, and/or unsupportable factual assertions.  
23 In fact, evidence educed at trial in this matter will contradict these assertions, and will instead  
24 demonstrate the true nature of the Universal Lease program.

25 In short, there is simply no basis upon which this Motion to Dismiss can be granted  
26 without any consideration of the material facts and circumstances making up the Universal Lease

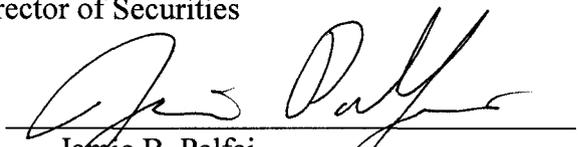
1 program. Only though a proper adjudicative process can a final determination be made as to  
2 whether this Universal Lease program was in violation of multiple provisions of the Securities  
3 Act. This point is particularly salient in light of the *Howey* test and SEC Release No33-5347,  
4 which both suggest that the Universal Lease is indeed a security.

5 ***Conclusion***

6 For the foregoing reasons, the Securities Division requests that the Respondents' Motion  
7 to Dismiss be denied in full, along with any joinders thereto, and that the Temporary Order to  
8 Cease and Desist issued in this case remain effective until a final adjudication of this matter is  
9 reached.

10 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of July, 2003.

11  
12 MARK SENDROW,  
13 Director of Securities

14 By 

15 Jamie B. Palfai

16 Attorney for the Securities Division of the  
17 Arizona Corporation Commission

18  
19  
20  
21  
22 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing  
23 filed this 10<sup>th</sup> day of July, 2003, with

24 Docket Control  
25 Arizona Corporation Commission  
26 1200 West Washington  
Phoenix, AZ 85007

1 COPY of the foregoing hand-delivered this  
2 18<sup>th</sup> day of July, 2003, to:

3 Mr. Marc Stern  
4 Hearing Officer  
5 Arizona Corporation Commission/Hearing Division  
6 1200 West Washington  
7 Phoenix, AZ 85007

8 COPY of the foregoing mailed  
9 this 18<sup>th</sup> day of July, 2003, to:

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