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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS:

2003 JUN 23 P 4: 19

- MARC SPITZER, Chairman**
- JIM IRVIN**
- WILLIAM A. MUNDELL**
- JEFF MATCH-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

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

Arizona Corporation Commission

DOCKETED

JUN 23 2003

DOCKETED BY 

ROSHKA HEYMAN & DEWULF, PLC
ONE ARIZONA CENTER
400 EAST VAN BUREN - SUITE 800
PHOENIX, ARIZONA 85004
TELEPHONE NO 602-256-6100
FACSIMILE 602-256-6800

1 Respondent Michael E. Kelly (“Kelly”), pursuant to Arizona Rule of Civil Procedure
2 12(b)(2) and (5), hereby moves the Arizona Corporation Commission (the “Commission”) for an
3 Order dismissing the Temporary Order to Cease and Desist and the Notice of Opportunity for
4 Hearing (“C&D”), as against Kelly, because (1) the Commission cannot exercise personal
5 jurisdiction over him and (2) the Commission’s Securities Division (the “Division”) failed to
6 properly serve the C&D on Kelly. This Motion is supported by the accompanying Memorandum
7 of Points and Authorities, the attached Declaration of Michael E. Kelly (“Kelly Declaration”), and
8 the record in this action, all of which are incorporated herein by this reference.
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10 Without waiving any defense for lack of personal jurisdiction or insufficiency of service of
11 process, Kelly also moves that in the event the Commission denies this Motion to dismiss for lack
12 of personal jurisdiction and insufficiency of service of process, the Commission dismiss this action
13 under Ariz.R.Civ.P. 12(b)(6), for the reasons set forth in “Respondents Resort Holdings
14 International, Inc. (“RHI”) and Yucatan Resorts, Inc.’s Motion to Dismiss Temporary Order to
15 Cease and Desist and Brief in Support Thereof.” Kelly hereby joins in that motion.
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17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. INTRODUCTION.**

19 The Division has named Kelly, among others, as a Respondent to the C&D. However,
20 Kelly is a full-time resident of Mexico, and does not have the minimum contacts with Arizona
21 necessary to permit the Commission to exercise personal jurisdiction over him. Also, the Division
22 failed to serve Kelly with the C&D in a manner prescribed and authorized under the Rules for
23 Administrative Proceedings. Accordingly, Kelly must be dismissed from this proceeding on both
24 grounds.
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1 **II. BACKGROUND.**

2 This matter arises out of the sale of Universal Leases for vacation resorts in Mexico and
3 Panama. The Division alleges that these Universal Leases are “investment contracts,” and subject
4 to the registration requirements and the anti-fraud provisions of the Arizona Securities Act (the
5 “Act”). The Division issued the C&D, based on alleged violations of the Act (A.R.S. §§ 44-1841,
6 -1842 and -1991).

7 Kelly is named as a Respondent, together with the following entities, among others: Resort
8 Holdings International, Inc. (“RHI, Inc.”), Resort Holdings International, S.A., Yucatan Resorts,
9 Inc., and Yucatan Resorts, S.A. (hereinafter, collectively, the “Respondent Entities”). Kelly is the
10 developer of various timeshare resort properties throughout Mexico and Central America. [Kelly
11 Declaration, ¶5.] He is a full-time resident of Cancun, Mexico, having lived outside the United
12 States since 1997. [*Id.*, ¶ 2.]

13 The Division does not allege that Kelly personally offered or sold any timeshare units in
14 Arizona or elsewhere. Nevertheless, the Division named Kelly in this proceeding, and is
15 attempting to compel him to appear as a Respondent, based solely on the allegation that Kelly
16 “oversees and controls” certain of the Respondent Entities. As set forth below, the Division’s
17 allegation is false and, in any event, Kelly does not have sufficient minimum contacts with Arizona
18 necessary for the Commission to assert personal jurisdiction over him.

19 With regard to service of the C&D, the Arizona Administrative Code (“A.A.C.”) provides
20 specific rules for service of process in foreign countries. See A.A.C. R14-4-303(F). But, the
21 Division ignored those rules and, instead, attempted to effectuate service on Kelly in Indiana. The
22 Division’s attempt at service fails.
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1 As demonstrated below, Kelly should be dismissed from this action because the
2 Commission lacks personal jurisdiction over him and the Division failed to properly serve the
3 C&D on him.

4 **III. KELLY SHOULD BE DISMISSED FROM THIS ACTION BECAUSE THE**
5 **COMMISSION LACKS PERSONAL JURISDICTION OVER HIM.**

6 **A. The Division Has The Burden of Establishing Personal Jurisdiction With Facts**
7 **Showing That Kelly Purposefully Established Minimum Contacts With**
8 **Arizona.**

9 A plaintiff, or in this matter the Division, bears the burden of establishing personal
10 jurisdiction over a nonresident defendant. *See Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir.
11 2001); *Maloof v. Raper Sales, Inc.*, 113 Ariz. 485, 487, 557 P.2d 522, 524 (1976). In order to
12 establish personal jurisdiction over Kelly, the Division must show that (1) Arizona's state long-
13 arm statute, Ariz.R.Civ.P. 4.2(a), confers personal jurisdiction over him, and (2) the exercise of
14 personal jurisdiction accords with federal constitutional principles of due process, which require
15 that Kelly have sufficient "minimum contacts" with the forum and that the assertion of jurisdiction
16 does not offend traditional notions of fair play and substantial justice. *See Petrick v. Public Serv.*
17 *Mut. Ins. Co.*, 879 F.2d 682, 684 (9th Cir. 1989); *Meyers v. Hamilton Corp.*, 143 Ariz. 249, 252,
18 693 P.2d 904, 907 (1984) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286
19 (1980)).

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21 As a practical matter, the sole issue here is whether the Division has established that the
22 exercise of personal jurisdiction over Kelly would comport with constitutional due process,
23 because Arizona's long-arm statute expressly permits jurisdiction over nonresident defendants "to
24 the maximum extent permitted by the Constitution of this State and the Constitution of the United
25 States." Ariz. R. Civ. P. 4.2(a) (West 2002); *see also Williams v. Lakeview Co.*, 199 Ariz. 1, 3, 13
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1 P.3d 280, 282 (2000). The Division has not satisfied – and, as discussed herein, cannot satisfy –
2 this burden with respect to Kelly.

3 When a party moves to dismiss for lack of personal jurisdiction, the Division is obligated to
4 come forward with facts sufficient to establish personal jurisdiction over that respondent. *Scott v.*
5 *Breeland*, 792 F.2d 925, 927 (9th Cir. 1986); *Armstrong v. Aramco Serv. Co.*, 155 Ariz. 345, 348,
6 746 P.2d 917, 920 (Ct. App. 1987). “[A]ctual facts, and not the mere allegations of the complaint,
7 are determinative of the jurisdictional question.” *Lycoming Div. of Avco Corp. v. Superior Ct.*, 22
8 Ariz. App. 150, 152, 524 P.2d 1323, 1325 (1974).
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10 In meeting its burden of establishing personal jurisdiction over Kelly, the Division must
11 point to contacts and conduct by Kelly himself. As the United States Supreme Court has held:
12 “Each defendant’s contacts with the forum State must be assessed individually.” *Keeton v. Hustler*
13 *Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) (refusing to attribute magazine’s in-state contacts to
14 its owner, editor and publisher for jurisdictional purposes, and noting that “jurisdiction over an
15 employee does not automatically follow from jurisdiction over the corporation which employs
16 him”); see also *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) (“The requirements of *International*
17 *Shoe* . . . must be met as to each defendant”).¹ Consequently, blanket allegations covering multiple
18 “Respondents” are insufficient to establish personal jurisdiction over Kelly. See *Magic Toyota,*
19 *Inc. v. Southeast Toyota Distrib., Inc.*, 784 F. Supp. 306, 314 (D.S.C. 1992).² To establish
20 jurisdiction, the Division must point to specific conduct by Kelly.
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23 ¹ See also *Hanson v. Denckla*, 357 U.S. 235 (1958) (“The unilateral activity of those who claim some relationship with
24 a nonresident defendant cannot satisfy the requirement of contact with the forum State.”)

25 ² The *Magic Toyota* court observed:

26 Not once do plaintiffs even attempt to address the acts committed by *each* defendant and the contacts
27 each defendant has had with South Carolina, but instead insist on referring to defendants collectively.
Without any evidence before it that Janice Moran, James Moran, Jr., Pat Moran and Arlene McNally
made the minimum contacts required by the Fourteenth Amendment, this Court cannot exercise
personal jurisdiction over these defendants.

Magic Toyota, 784 F. Supp. at 314.

1 A state may assert either “general” or “specific” jurisdiction over a nonresident defendant,
2 depending on the nature and the extent of contacts between that respondent and the forum. *See*
3 *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984); *Armstrong*, 155
4 *Ariz.* at 349, 746 P.2d at 921. Under either standard, “the constitutional touchstone remains
5 whether the [respondent] purposefully established ‘minimum contacts’ in the forum State,” *Burger*
6 *King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), although the extent of the contacts required
7 differs significantly under each of the two standards. In considering minimum contacts, “it is
8 essential in each case that there be some act by which the [respondent] purposefully avails
9 [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits
10 [and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). This “purposeful
11 availment” requires that the nonresident respondent’s conduct reflect such a deliberate connection
12 with the forum state that he should “reasonably anticipate being haled into court there.”
13 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Hoskinson Through*
14 *Fleming v. State of Cal.*, 168 *Ariz.* 250, 252, 812 P.2d 1068, 1070 (Ct. App. 1990). The mere fact
15 that it may have been foreseeable that the respondent’s actions could result in harm in the forum
16 state is not enough – the respondent must have purposefully directed his conduct toward the state.
17 *World-Wide Volkswagen*, 44 U.S. at 295; *Hanson*, 375 U.S. at 253; *Hoskinson*, 168 *Ariz.* at 253,
18 812 P.2d at 1071.

21 **B. There Is No Basis For General Jurisdiction Over Kelly Because He Does Not**
22 **Have “Continuous And Systematic” Contacts With Arizona.**

23 General jurisdiction subjects the respondent to suit on virtually any claim, whether or not
24 the cause of action arises out of, or relates to, the respondent’s activities in the forum State. *See*
25 *Helicopteros*, 466 U.S. at 416. An individual is only subject to general jurisdiction if the
26 respondent has such “continuous and systematic” contacts with the forum state that he could
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1 reasonably foresee being haled into court there, even for claims that have no relation to his
2 activities in that state. *Id.*; *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 270, 736
3 P.2d 2, 4 (1987). “[I]solated or sporadic contacts with [the] state will not suffice.” *Meyers*, 143
4 Ariz. at 252, 693 P.2d at 907.

5 “The level of contact required to show general jurisdiction is quite high.” *Williams*, 199
6 Ariz. at 3, 13 P.3d at 282. The United States Supreme Court has found general jurisdiction to exist
7 only once, when the defendant corporation had an office in the state, kept its files in the state, sent
8 business correspondence from the state, employed people in the state, maintained and used bank
9 accounts in the state, used a transfer agent in the state, and held its board of directors’ meetings in
10 the state. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952). Absent such
11 an extensive presence in the forum state, there can be no general jurisdiction. For example, in
12 *Helicopteros*, the Supreme Court rejected an assertion of general jurisdiction, even though the
13 defendant’s activities in the state included negotiating an agreement in the state, accepting checks
14 drawn on a bank in the state, purchasing helicopters, equipment and training from a company in
15 the state, and sending personnel to the state for training. 466 U.S. at 412.

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18 As stated above, Kelly is a full-time resident of Mexico, and has never lived in Arizona.
19 [Kelly Dec., ¶¶2,19.] He has never owned or leased property in Arizona, has never had a bank
20 account, checking account or brokerage account in Arizona, has never held any Arizona
21 professional licenses or an Arizona driver’s license, has never filed an Arizona State income tax
22 return, and is not registered to vote in Arizona. [*Id.*, ¶¶20- 22] Kelly has never had an office or
23 telephone listing in Arizona, has never kept files in Arizona and has never personally conducted a
24 business out of Arizona or had any employees in Arizona. [*Id.*, ¶23] He, personally, has never
25 entered into a contract in Arizona, nor has he personally entered into a contract that was to be
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1 performed in Arizona. [*Id.*, ¶ 24] Other than the present matter, Kelly has never been named as a
2 party to a lawsuit, administrative proceeding or criminal proceeding in Arizona. [*Id.*, ¶26] He
3 does not maintain an agent for service of process in Arizona and was not served with process in
4 this action in Arizona. [*Id.*, ¶25] To the best of his recollection, Kelly has only been in Arizona
5 once, in 1988, for a vacation weekend and not for any business purpose. [*Id.*, ¶19]

6 In short, Kelly has had virtually no contact with Arizona. At most, Kelly's contact with
7 Arizona can be described as "isolated or sporadic." *See Meyers*, 143 Ariz. at 252, 693 P.2d at 907.
8 It clearly does not rise to the level of "continuous and systematic," which is required to meet the
9 high standard for general jurisdiction. *See Helicopteros*, 466 U.S. at 416. Arizona courts have
10 repeatedly recognized that the exercise of general jurisdiction over a nonresident defendant is
11 improper when such traditional contacts are lacking.³ There are simply no allegations that could
12 possibly support a finding of general jurisdiction over Kelly.

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15 **C. There Is No Basis For Specific Jurisdiction Over Kelly: The Division's C&D**
16 **Does Not Arise Out Of Any Contact By Kelly With Arizona, Kelly Did Not**
17 **Purposefully Establish Minimum Contacts With Arizona, And To Exercise**
18 **Personal Jurisdiction Over Kelly Would Be Unreasonable.**

19 An Arizona tribunal may exercise specific jurisdiction over a nonresident respondent only
20 if (1) the respondent "purposefully avails" himself of the privilege of conducting business in the
21 forum; (2) the claim arises out of or relates to the respondent's contacts with Arizona; and (3) the
22 exercise of personal jurisdiction over the nonresident respondent is reasonable under the
23 circumstances. *See Williams*, 199 Ariz. at 3, 13 P.3d at 282 (citing *Shute v. Carnival Cruise Lines*,
24 897 F.2d 377, 381 (9th Cir. 1990)).

25 ³ *See, e.g., A. Uberti & Co. v. Leonardo*, 181 Ariz. 565, 569, 892 P.2d 1354, 1358 (1995) (Plaintiffs do not contend
26 Arizona has general jurisdiction over Defendant. Indeed, Defendant has no agents, no physical presence, no offices,
27 and no property within Arizona."); *Armstrong*, 155 Ariz. at 352, 746 P.2d at 924 (denying general jurisdiction over
nonresident defendant, in part, because "[Defendant's] principal place of business is in Texas; it owns no property in
Arizona, nor does it have a mailing address, an office, or any other direct contact with Arizona").

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The constitutional touchstone for specific jurisdiction “remains whether the [respondent] purposefully established “minimum contacts’ in the forum State.” *Burger King*, 471 U.S. at 474. Those minimum contacts “must come about by an action of the [respondent] purposefully directed toward the forum state.” *Uberti*, 181 Ariz. 565, 570, 892 P.2d 1354, 1359 (1995) (quoting *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 112 (1986)); *see also* *Batton*, 153 Ariz. at 271, 736 P.2d at 5 (defendant must have “purposefully created contacts” with, or “purposefully directed [his] activities at” the forum state). Most significantly, however, the Division’s claim must result from ““alleged injuries that ‘arise out of or relate to’ [the respondent’s] . . . activities”” in the forum. *See Williams*, 199 Ariz. at 4, 13 P.3d at 283 (citing *Burger King*, 471 U.S. at 472) (emphasis added). Absent such a nexus, no basis for specific jurisdiction exists.

The Division’s C&D is fifteen (15) pages long and contains (55) fifty-five paragraphs. A fair reading the C&D reveals only a handful of allegations (the “Jurisdictional Allegation”) upon which the Division could possibly attempt to rely for specific jurisdiction:

- (1) Kelly oversees and controls [the YUCATAN Respondents] operations and the resulting proceeds. [C&D ¶5]
- (2) To date, at least 5 Arizona-based YUCATAN sales agents have been identified selling YUCATAN’s investment product to well over 300 investors. [C&D ¶ 10; *see also id.*, ¶¶ 34-38, 40]
- (3) Since at least 1999, Respondents have been directly or indirectly engaged in the offer and sale of securities to the general public in Arizona in the form of investment contracts as defined by Arizona Revised Statutes (A.R.S.) § 44-1801(25). [C&D ¶9]
- (4) From on or about December 2001, Respondents offered or sold unregistered securities in the form of investment contracts, within or from Arizona. [C&D ¶ 49]
- (5) Respondents offered or sold securities within or from Arizona, while not registered as dealers or salesmen pursuant to the provisions of Article 9 of the Securities Act. [C&D ¶ 52]

1 (6) Respondents engaged in conduct that operated as fraud on investors in
2 violation of A.R.S. §44-1991. [See C&D ¶54]⁴

3 Examining the Division's Jurisdictional Allegations, the Division cannot establish specific
4 jurisdiction over Kelly in Arizona, because Kelly never purposefully directed any conduct toward
5 Arizona, out of which the claims in the C&D arise.

6 1. The Jurisdictional Allegation that Kelly oversees and controls
7 YUCATAN is insufficient to confer specific jurisdiction over Kelly.

8 The gravamen of the Division's claims is that the Respondents violated the Arizona
9 Securities Act by selling timeshare units, known as Universal Leases, to the Arizona public.
10 However, none of the Jurisdictional Allegations mention a specific contact between Kelly and
11 Arizona. Instead, the Division alleges, albeit incorrectly, that "Kelly oversees and controls both
12 YUCATAN operations and the resulting proceeds." [C&D, ¶5] Then, the Division alleges that
13 various unnamed Arizona-based YUCATAN sales agents have sold timeshare units, referred to as
14 Universal Leases, to individuals and entities in the State of Arizona. [See C&D ¶¶ 10, 34-38, 40]

15 As a preliminary matter, the Division incorrectly alleges that Yucatan Resorts, Inc., and
16 Yucatan Resorts, S.A., are one and the same entity, and collectively defines them as
17 "YUCATAN." [See C&D ¶2] Contrary to the Division's allegations, however, Respondent
18 Yucatan Resorts, Inc., and Respondent Yucatan Resorts, S.A., are separate and distinct entities.
19 [See Kelly Declaration, ¶¶ 11, 15] One engaged in the sale of Universal Leases, and the other
20 never did. [Id. at ¶13, 16]

21 More specifically, Respondent Yucatan Resorts, Inc., is an Indiana corporation, with its
22 sole office and principal place of business in South Bend, Indiana.⁵ [Id., ¶11] Kelly is its
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26 ⁴ The Division also alleges that Kelly delivered a power point presentation on the Universal Lease Program. [C&D at
27 ¶32]. Kelly denies this allegation. Notwithstanding this, the Division does not actually allege that Kelly delivered this
presentation in Arizona and/or to Arizona investors. Kelly's Declaration serves to refute any such allegation. [See
Kelly Declaration, ¶ 19]

1 President. [*Id.*, ¶11] However, he was not involved in Yucatan Resorts, Inc.’s day-to-day business
2 operations, nor did he maintain an office at Yucatan Resorts, Inc. [*Id.*, ¶14] In fact, Kelly has
3 visited Yucatan Resorts, Inc.’s office in South Bend, Indiana, on only two or three occasions and
4 has spent of total of approximately two hours there. [*Id.*]

5 However, regardless of Kelly’s degree of involvement in Yucatan Resorts, Inc.’s
6 day-to-day business operations, no employee of Yucatan Resorts, Inc. has ever sold a timeshare
7 unit, referred to as a Universal Lease, and no sale of timeshare units has ever occurred from
8 Yucatan Resorts, Inc.’s offices. [*Id.*, ¶13]

9 Respondent Yucatan Resorts, S.A., on the other hand, did engage in the sale of timeshare
10 units, referred to as Universal Leases.⁶ [*Id.*, ¶16] However, Kelly is not, and never has been, an
11 officer, director or employee of Yucatan Resorts, S.A. [*Id.*, ¶15] And, Kelly was not involved in
12 recruiting or supervising any of Yucatan Resorts, S.A.’s independent contractor sales agents. [*Id.*,
13 ¶16] Thus, Kelly cannot be said to “oversee and control” Yucatan Resorts, S.A.

14 Assuming, *for purposes of this Motion only*, that independent contractor sales agents for
15 Yucatan Resorts, S.A., did sell Universal Leases to Arizona residents, such conduct in no way
16 gives the Commission specific jurisdiction over Kelly, because Kelly lacks the requisite minimum
17 contacts with Arizona. Again, the requisite minimum contacts for specific jurisdiction exist only if
18 Kelly “purposefully created contacts” with Arizona, or “purposefully directed [his] activities at
19 Arizona residents.” *See Batton*, 153 Ariz. at 270, 736 P.2d at 4. However, the Kelly Declaration
20 establishes that (i) Kelly did not recruit or supervise any of Yucatan Resorts, S.A.’s independent
21 contractor sales agents, and (ii) Kelly was never involved in any Universal Lease/timeshare unit
22 offers or sales that occurred in Arizona. [Kelly Declaration, ¶¶ 16, 17.] Consequently, the
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27 ⁵ Yucatan Resorts, Inc., ceased business operations in or around April, 2002. [Kelly Declaration ¶ 12]
⁶ Yucatan Resorts, S.A., ceased selling Universal Leases in approximately April of 2002. [Kelly Declaration, ¶ 16]

1 Jurisdictional Allegations that Kelly “oversees and controls YUCATAN” and that “YUCATAN”
2 sales agents sold Universal Leases to Arizona residents, taken together, cannot support the exercise
3 of specific personal jurisdiction over Kelly. *See Alexander v. Circus Circus Enters., Inc.*, 972 F.2d
4 261, 262 (9th Cir. 1992) (“for purposes of personal jurisdiction, ‘we may not assume the truth of
5 allegations in a pleading which are contradicted by affidavit’”) (citation omitted).

6 **2. The Jurisdictional Allegations that the “Respondents,” collectively,**
7 **offered and/or sold timeshare units in Arizona are insufficient to confer**
8 **specific jurisdiction over Kelly.**

9 Four of the six Jurisdictional Allegations (numbers 3, 4, 5 and 6) are simply blanket
10 “group” allegations indicating that “Respondents,” collectively, engaged in conduct violating the
11 Securities Act. The most obvious defect with these blanket allegations is that they fail to give any
12 specific facts about Kelly. For example, the Division fails to allege whether or how (if at all)
13 Kelly was himself involved in selling the timeshare units in Arizona, as it must, if it hopes to
14 establish personal jurisdiction over Kelly. Again, this sort of group pleading is wholly insufficient
15 to establish personal jurisdiction over any individual. *See Magic Toyota*, 784 F.Supp. at 314
16 (refusing to find jurisdiction based on allegations in which plaintiffs “insist on referring to
17 defendants collectively”); *Keeton*, 465 U.S. at 781 n.13 (“[e]ach defendant’s contacts with the
18 forum State must be assessed individually”); *Rush*, 444 U.S. at 332 (“The requirements of
19 *International Shoe* . . . must be met as to each defendant”).

20
21 Furthermore, the Division’s vague allegations are directly contradicted by Kelly’s
22 Declaration, in which he confirms that he was never involved in any Universal Lease/timeshare
23 unit offers or sales that occurred in Arizona. [Kelly Declaration ¶17] The Division’s conclusory
24 allegations cannot stand in the face of Kelly’s Declaration to the contrary. *See Alexander*, 972
25 F.2d at 262. The Division must come forward with specific facts sufficient to establish personal
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1 jurisdiction over Kelly. *See Scott*, 792 F.2d at 927; *Armstrong*, 155 Ariz. at 348, 746 P.2d at 920.
2 The Division cannot do so. Consequently, no grounds exist for exercising specific jurisdiction
3 over Kelly.

4 3. The exercise of jurisdiction over Kelly would be unreasonable and
5 unfair.

6 The final step in any jurisdictional inquiry is for the Division to show that the exercise of
7 personal jurisdiction over the nonresident defendant does “not offend ‘traditional notions of fair
8 play and substantial justice,’” *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de*
9 *Guinee*, 456 U.S. 694, 703 (1982) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316
10 (1945)), or in other words, that it would not be “unreasonable and unfair.” *Asahi*, 480 U.S. at 116.
11 In determining whether the exercise of personal jurisdiction is reasonable, Arizona courts have
12 considered the following factors: (i) the defendant’s burden of cross-country litigation; (ii)
13 Arizona’s interest in the action; (iii) the plaintiff’s interest in obtaining relief in Arizona; and (iv)
14 another forum’s procedural and substantive interest in Arizona’s exercise of jurisdiction. *See A.*
15 *Uberti*, 181 Ariz. at 575, 892 P.2d at 1364 (citing *Asahi*, 480 U.S. 102).⁷

17 “[T]he weaker the plaintiff’s showing on [minimum contacts], the less [the] defendant
18 need show in terms of unreasonableness.” *OMI Holdings, Inc. v. Royal Ins. Co.*, 149 F.3d 1086,
19 1092 (10th Cir. 1998) (citation omitted). As demonstrated above, the Division’s jurisdictional
20 showing here with respect to minimum contacts is extremely weak. On the other hand, the burden
21 on Kelly of conducting this litigation in a jurisdiction where he has no contacts would
22 unquestionably be significant. And “[w]hile not dispositive, the burden on the defendant litigating
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25 ⁷ The Ninth Circuit considers similar factors. *See Ziegler v. Indian River County*, 64 F.3d 470, 475 (9th Cir. 1995)
26 (“(1) the extent of the defendant’s purposeful interjection into the forum state’s affairs; (2) the defendant’s burdens
27 from litigating in the forum; (3) the extent of conflict with the sovereignty of the defendant’s state; (4) the forum
state’s interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the

1 [a] case in a foreign forum is of primary concern in determining the reasonableness of personal
2 jurisdiction.” *Id.* at 1096. Against the backdrop of the Division’s weak showing and the priority
3 that must be given to Kelly’s burden of litigating in a foreign state and country, the exercise of
4 personal jurisdiction over Kelly would not be reasonable and, thus, would offend traditional
5 notions of fair play and substantial justice. Consequently, the C&D must be dismissed, as against
6 Kelly.

7
8 **IV. KELLY SHOULD BE DISMISSED FROM THIS ACTION BECAUSE THE
DIVISION FAILED TO PROPERLY SERVE THE C&D ON HIM.**

9 The Rules of Procedure for Investigations, Examinations, and Administrative Proceedings
10 set forth the service requirements for a C&D issued by the Division. R14-4-307 applies to
11 “Temporary Orders” and provides that “[t]emporary cease-and-desist orders shall be served
12 pursuant to the provisions of R14-4-303.” R14-4-303, in turn, contains various provisions for
13 service upon individuals, service upon corporations or other entities, and service in a foreign
14 country.
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16 With regard to service in a foreign country, R14-4-303(F) provides:

17 F. Service in a foreign country. When serving a subpoena, notice, or
18 temporary cease-and-desist order in a foreign country, service shall be
19 by any internationally agreed means. If service is not accomplished
20 within 120 calendar days from the date service was undertaken under
21 the internationally agreed means or if no internationally agreed means
22 of service has been established or the international agreement does not
23 prohibit the use of other means of service, then service of any
24 document may be made by any of the following:

- 25 1. In the manner prescribed by the law of the foreign country for
26 service in that country in an action in any of its courts of general
27 jurisdiction.
2. As directed by the foreign authority in response to a letter of
request.

importance of the forum to the plaintiff’s interest in convenient and effective relief; and (7) the existence of an
alternative forum. All seven factors must be weighed. None is dispositive.”).

- 1 3. By any of the following if not prohibited by the law of the foreign
2 country:
3 a. Any method of service authorized by subsections (D) or (E).
4 b. Diplomatic or consular officers when authorized by the United
5 States Department of State.
6 c. By any other lawful method that is reasonably calculated to
7 give notice as directed by the Commission.

8 R14-4-303(F).

9 Kelly is a full-time resident of Cancun, Mexico. [Kelly Declaration, ¶2.] He has not lived
10 in the United States since 1997. [Id.] Nevertheless, the Division failed to take the steps necessary
11 to even attempt to serve Kelly by internationally agreed means, as required by R14-4-303(F).⁸
12 Instead, the Division attempted to accomplish service under R14-4-303(D), which provides:

- 13 D. Service upon individuals. Service upon an individual may be made by any
14 of the following:
15 1. By personal service.
16 2. By leaving a copy at the individual's dwelling, or usual place of abode, with
17 an individual of suitable age and discretion residing therein.
18 3. By leaving a copy at the individual's usual place of business or employment
19 with an employee, express or implied agent, supervisor, owner, officer,
20 partner, or other similar individual of suitable age and discretion.
21 4. By leaving a copy with an agent authorized by express or implied
22 appointment or by law to receive service of process for the individual upon
23 whom service is being made.
24 5. By mailing a copy to the last known dwelling, usual place of abode,
25 business address, or mailing address. Subpoenas, notices, and temporary
26 cease-and-desist orders served by mail shall be sent, return receipt
27 requested, by certified mail, express mail, registered mail, or commercial
courier or delivery service. The signed return receipt shall constitute proof
of service, but shall not be the exclusive method of proving service.

⁸ Because Mexico is a signatory to the Hague Convention (as of June 1, 2000), service must be accomplished as provided for under that treaty. See *NSM Music, Inc. v. Villa Alvarez*, No. 02 C 6842, 2003 WL 685338, at *1 (N.D. Ill. Feb. 25, 2003). The Hague Convention does not permit personal service via a privately-retained process server. *Id.* "Rather, the Hague Convention contemplates personal service via the authorities of the country of destination [i.e., Mexico], or through the originating country's [i.e., the United States'] consular officials in the country of destination." *Id.*

1 A.A.C. R14-4-303(D).

2 Even assuming, arguendo, that the Division could serve Kelly by complying with
3 R14-4-303(D) without first attempting to accomplish service by internationally agreed means
4 (which it cannot), the Division has failed to serve the C&D on Kelly. The Division attempted to
5 accomplish service of the C&D on Kelly under R14-4-303(D)(3), by leaving it with an employee
6 of RHI, Inc., at RHI, Inc.'s office in South Bend, Indiana. However, RHI Inc.'s office is not
7 Kelly's "usual place of business or employment." Kelly lives and works, year-round, in Cancun,
8 Mexico. [Kelly Declaration, ¶¶2, 3, 5.] Kelly does not have an office at RHI, Inc. [*Id.*, ¶8.] In
9 fact, he has only been at RHI, Inc.'s office two or three times since it opened in 1998, and even
10 then only for a total of approximately two (2) hours. [*Id.*] Consequently, the Division has failed to
11 properly serve the C&D on Kelly.
12
13

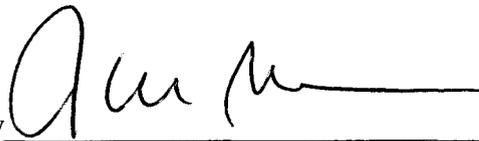
14 **V. CONCLUSION.**

15 The Commission does not have personal jurisdiction over Kelly. The Division has failed to
16 meet its burden of establishing personal jurisdiction over Kelly under either the "general
17 jurisdiction" or "specific jurisdiction" standards. The Division also has failed to serve the C&D on
18 Kelly, as required by the Administrative Rules. Consequently, the Commission must dismiss the
19 C&D, as against Kelly.
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24 ...
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26 ...
27 ...

RESPECTFULLY SUBMITTED this 23rd day of June, 2003.

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By 

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ORIGINAL and thirteen copies of the foregoing
hand-delivered this 23rd day of June, 2003 to:

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

COPY of the foregoing hand-delivered
this 23rd day of June, 2003 to:

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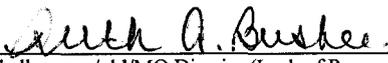
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kellym.acc/pld/MO Dismiss (Lack of Personal Jurisdiction).doc

1
2 **DECLARATION OF MICHAEL E. KELLY**

3 I, Michael E. Kelly, declare:

4
5 1. I am named as a Respondent in this action. I have personal knowledge of the
6 matters stated herein and am competent to testify to the following.

7 2. I am a full-time resident of Cancun, Q.Roo, Mexico, and Cancun is my place of
8 domicile. I have been a full-time resident of Cancun, Mexico, since 1997.

9
10 3. I do not own or maintain a residence in the United States.

11 4. I do not have an agent for service of process in the United States.

12 5. I am a hotel and timeshare resort developer of resort properties throughout Mexico
13 and Central America. My business office is located in Cancun, Mexico.

14
15 6. I am the President of Resort Holdings International, Inc. ("RHI Inc."), which is also
16 named as a Respondent in this action. RHI Inc., is a Nevada corporation that was formed on
17 July 16, 1999. RHI Inc.'s sole office and principal place of business is located at 3222
18 Mishawaka Avenue, South Bend, Indiana 46615.

19
20 7. RHI Inc., does not offer or sell timeshare units referred to as "Universal Leases."
21 Nor does RHI Inc., employ any individual who offers or sells timeshare units referred to as
22 Universal Leases.

23
24 8. I am not involved in RHI Inc.'s day-to-day business operations. I do not have an
25 office at RHI Inc., and it is not my usual place of business. In fact, I have visited RHI Inc.'s
26 office in South Bend, Indiana, on only two or three occasions. Since RHI Inc.'s office opened in
27

1 January 1998 (as an office for Respondent Yucatan Resorts, Inc.), I have spent a total of
2 approximately two (2) hours at such office.

3 9. Respondent Resort Holdings International, S.A. ("RHI S.A."), is a Panamanian
4 corporation, with its principal place of business in the country of Panama at the P.H. Cort
5 Building- Primer Piso, Panama City, Panama. I am not, and never have been, an officer, director
6 or employee of RHI S.A.
7

8 10. RHI S.A., is a sales company that sells timeshare units, referred to as Universal
9 Leases, to individuals and families worldwide for vacation enjoyment. (RHI S.A. sells timeshare
10 units referred to as Universal Leases for resort development companies in Mexico and Central
11 America.) It is my understanding that Resort Holdings International is registered in Arizona to
12 sell timeshare units, referred to as Universal Leases, Registration Number DM01-027605. I am
13 not involved in recruiting or supervising any independent contractors, referred to as sales agents,
14 related to RHI S.A.
15
16

17 11. I am the President of Yucatan Resorts Inc., another named Respondent in this action.
18 Yucatan Resorts, Inc., is an Indiana corporation, with its sole office and principal place of
19 business located at 3222 Mishawaka Avenue, South Bend, Indiana 46615.
20

21 12. Yucatan Resorts, Inc., ceased operations in or around April, 2002, at approximately
22 the same time that Respondent Yucatan Resorts, S.A.'s ("Yucatan S.A.") sales agreements with
23 the resort development companies expired.
24

25 13. No sale of timeshare units, referred to as Universal Leases, has ever occurred from
26 Yucatan Resorts, Inc.'s offices. Nor has Yucatan Resorts, Inc., ever employed any individual
27

1 who sold timeshare units referred to as Universal Leases. Nor has Yucatan Resorts, Inc. ever
2 been involved in recruiting or supervising any independent contractors, referred to as sales
3 agents, related to Yucatan S.A.

4 14. I was not involved in Yucatan Resorts, Inc.'s day-to-day business operations. I did
5 not maintain an office at Yucatan Resorts, Inc. As stated above, I visited Yucatan Resorts, Inc.'s
6 office in South Bend, Indiana, on only two or three occasions, and I have spent a total of
7 approximately two hours there.
8

9 15. Yucatan S.A. is a Panamanian corporation, with its principal place of business in
10 Panama. I am not, and never have been, an officer, director or employee of Yucatan S.A.
11

12 16. Yucatan S.A., engaged in the sale of timeshare units, referred to as Universal
13 Leases, in Panama to individuals and families at various locales. Yucatan S.A., ceased selling
14 Universal Leases in approximately April of 2002. I was not involved in recruiting or supervising
15 any independent contractors, referred to as sales agents, related to Yucatan S.A.
16

17 17. I never participated in any Universal Lease/timeshare unit offer or sale that occurred
18 in Arizona.
19

20 18. I am not, and never have been, an officer, director, shareholder or employee of
21 named Respondent World Phantasy Tours, Inc., aka Majesty Travel, aka Viajes Majesty.
22

23 19. I have never lived in the State of Arizona. In fact, the last time that I visited Arizona
24 was in 1988, for a vacation weekend and not for any business purpose.

25 20. I have never owned or leased property in Arizona.
26
27

1 21. I have never had a bank account in Arizona, and I have never drawn checks on an
2 Arizona bank. I have never had any personal brokerage accounts managed by firms or branches
3 of firms situated in Arizona.

4 22. I have never held any Arizona professional licenses and have never had an Arizona
5 driver's license. I have never filed an Arizona State income tax return, and I am not registered to
6 vote in Arizona.

7 23. I have never maintained an office in Arizona. I have never had a telephone listing or
8 kept files in Arizona. I, personally, have never conducted business in Arizona, nor have I ever
9 had any employees in Arizona.

10 24. I, personally, have never entered into a contract in Arizona, nor have I ever
11 personally entered into a contract that was to be performed in Arizona.

12 25. I do not maintain an agent for service of process in Arizona. I was not served with
13 process in this action in Arizona.

14 26. Other than the present matter, I have never been named as a party to a lawsuit,
15 administrative proceeding or criminal proceeding in Arizona.

16 27. I was not served with process in this action in Cancun, Mexico.

17 I declare under penalty of perjury that the foregoing is true and correct.

18 Executed on this 23 day of June, 2003.

19
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21
22
23
24 MICHAEL E. KELLY
25
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