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COMMISSIONERS:

2003 JUN 23 P 4: 21

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

AZ CORP COMMISSION
DOCUMENT CONTROL

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
ANSWER TO THE ARIZONA
CORPORATION COMMISSION'S
TEMPORARY ORDER TO CEASE AND
DESIST AND NOTICE OF
OPPORTUNITY FOR HEARING**

Arizona Corporation Commission

DOCKETED

JUN 23 2003

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| DOCKETED BY | <i>CMC</i> |
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1 Respondent Michael E. Kelly (hereinafter "Respondent") answers the Temporary Order to
2 Cease and Desist and Notice of Opportunity for Hearing (the "C&D"), by admitting, denying and
3 alleging as follows:¹

4 **I.**

5 **JURISDICTION**

6 1. Answering paragraph 1 of the C&D, Respondent denies each and every allegation
7 of paragraph 1 and asserts that no securities are involved in the transactions and, therefore, the
8 Arizona Securities Act is inapplicable, as a matter of law.

9 **II.**

10 **RESPONDENTS**

11 2. Answering paragraph 2 of the C&D, Respondent admits that Yucatan Resorts, Inc.,
12 is a corporation, but specifically denies that Yucatan Resorts, Inc., is d/b/a Yucatan Resorts, S.A.
13 Respondent affirmatively alleges that Yucatan Resorts, S.A., is a Panamanian corporation that
14 marketed timeshare units for resorts in Cancun, Mexico. Respondent admits that Yucatan Resorts,
15 Inc., has a business address located in the United States at 3222 Mishawaka Avenue, South Bend,
16 Indiana, 46615, and a mailing address at P.O. Box 2661, South Bend, Indiana, 46680. Respondent
17 denies each and every remaining allegation contained in paragraph 2 of the C&D.

18 3. Answering paragraph 3 of the C&D, Respondent denies that Resort Holdings
19 International, Inc. ("RHI, Inc."), is d/b/a Resort Holdings International S.A. ("RHI, S.A.").
20 Respondent admits that RHI, Inc., has a business address located in the United States at 3222
21 Mishawaka Avenue, South Bend, Indiana, 46615, and a mailing address at P.O. Box 2661, South
22
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25 _____
26 ¹ Respondent Michael E. Kelly is filing this Answer strictly to comply with the requirements of Arizona
27 Administrative Code R14-4-305. By filing this Answer, Respondent is not consenting to the Commission's
jurisdiction nor is he waiving any right to assert that (a) the Commission lacks personal jurisdiction over him, and (b)
there has been a complete failure of service of process with respect to him.

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1 Bend, Indiana, 46680. Respondent denies each and every remaining allegation contained in
2 paragraph 3 of the C&D.

3 4. Answering paragraph 4 of the C&D, Respondent admits, upon information and
4 belief, that Majesty Travel d/b/a World Phantasy Tours is a Panamanian corporation operating a
5 resort management and travel business and has an address at Calle Eusebio A. Morales, Edificio
6 Atlantida, P Baja, APDO, 8301 Zona 7, Panama. Respondent denies each and every remaining
7 allegation contained in paragraph 4 of the C&D.

8 5. Answering paragraph 5 of the C&D, Respondent admits that he is the President of
9 Yucatan Resorts, Inc. Respondent denies each and every remaining allegation contained in
10 paragraph 5 of the C&D.

11 6. Respondent denies each and every allegation contained in paragraph 6 of the C&D.

12 7. Respondent denies each and every allegation contained in paragraph 7 of the C&D.

13 8. Paragraph 8 of the C&D does not contain any factual allegations and, therefore,
14 requires no response.
15

16
17 **III.**

18 **FACTS**

19 9. Respondent denies each and every allegation contained in paragraph 9 of the C&D.

20 10. Respondent denies each and every allegation contained in paragraph 10 of the
21 C&D.

22 11. Respondent denies each and every allegation contained in paragraph 11 of the
23 C&D.

24 12. Respondent denies each and every allegation contained in paragraph 12 of the
25 C&D.
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13. Respondent denies each and every allegation contained in paragraph 13 of the C&D.

14. Respondent denies each and every allegation contained in paragraph 14 of the C&D.

15. Respondent denies each and every allegation contained in paragraph 15 of the C&D.

16. Respondent denies each and every allegation contained in paragraph 16 of the C&D.

17. Respondent denies each and every allegation contained in paragraph 17 of the C&D.

18. Answering paragraph 18 of the C&D, Respondent admits that under the Universal Lease, Leaseholders who purchase a Universal Lease are afforded the opportunity to select from one of three options in any given year: the Leaseholder may use the leased units themselves, the Leaseholder may rent out the leased unit, or the Leaseholder may opt to have a third party servicer locate a third party to rent the timeshare unit. Respondent denies each and every remaining allegation contained in paragraph 18 of the C&D.

19. Respondent denies each and every allegation contained in paragraph 19 of the C&D.

20. Answering paragraph 20 of the C&D, Respondent admits that one of three options afforded a Leaseholder is that the Leaseholder may chose to utilize his or her own unit. Respondent denies each and every remaining allegation contained in paragraph 20 of the C&D.

21. Answering paragraph 21 of the C&D, Respondent admits that the Universal Leaseholder is responsible for an annual operation and maintenance fee ranging from \$380 to \$650

1 per year and, further, that the annual operation and maintenance fee is subject to increases based
2 on increases in the Consumer Price Index. Respondent specifically denies that the annual
3 operation and maintenance fee is only assessed to Universal Leaseholders who elect to use the
4 leased unit themselves. Respondent denies each and every remaining allegation contained in
5 paragraph 21 of the C&D.

6 22. Respondent denies each and every allegation contained in paragraph 22 of the
7 C&D.

8 23. Answering paragraph 23 of the C&D, Respondent admits that a second option
9 afforded to a Universal Leaseholder is that they may rent out their leased unit themselves.
10 Respondent denies each and every remaining allegation contained in paragraph 23 of the C&D.

11 24. Respondent denies each and every allegation contained in paragraph 24 of the
12 C&D.

13 25. Respondent denies each and every allegation contained in paragraph 25 of the
14 C&D.

15 26. Respondent denies each and every allegation contained in paragraph 26 of the
16 C&D.

17 27. Answering paragraph 27 of the C&D, Respondent admits that a third option
18 afforded Universal Leaseholders is that they may elect to have a third party locate and lease the
19 leased unit on behalf of the Leaseholder. Respondent denies each and every remaining allegation
20 contained in paragraph 27 of the C&D.

21 28. Answering paragraph 28 of the C&D, Respondent admits that if the Universal
22 Leaseholder elects to have a third party locate and lease their leased unit and, further, the Universal
23 Leaseholder elects to have respondent World Phantasy serve as the third party leasing agent, the
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Universal Leaseholder is instructed by World Phantasy to complete a "Universal Lease Management Agreement." Respondent denies each and every remaining allegation contained in paragraph 28 of the C&D.

29. Respondent denies each and every allegation contained in paragraph 29 of the C&D.

30. Respondent denies each and every allegation contained in paragraph 30 of the C&D.

31. Respondent denies each and every allegation contained in paragraph 31 of the C&D.

32. Respondent denies each and every allegation contained in paragraph 32 of the C&D.

33. Respondent denies each and every allegation contained in paragraph 33 of the C&D.

34. Respondent denies each and every allegation contained in paragraph 34 of the C&D.

35. Respondent denies each and every allegation contained in paragraph 35 of the C&D.

36. Respondent denies each and every allegation contained in paragraph 36 of the C&D.

37. Respondent denies each and every allegation contained in paragraph 37 of the C&D.

38. Respondent denies each and every allegation contained in paragraph 38 of the C&D.

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1 39. Respondent denies each and every allegation contained in paragraph 39 of the
2 C&D.

3 40. Respondent denies each and every allegation contained in paragraph 40 of the
4 C&D.

5 41. Respondent denies each and every allegation contained in paragraph 41 of the
6 C&D.

7 42. Answering paragraph 42 of the C&D, Respondent admits that whether or not
8 Yucatan Investment Corp. is the subject of an administrative order of the New Mexico Securities
9 Division is a matter of public record. Respondent specifically denies that Yucatan Investment
10 Corp. is related to respondent Yucatan Resorts, Inc., or to respondent Yucatan Resorts, S.A.
11 Respondent denies each and every remaining allegation contained in paragraph 42 of the C&D.

12 43. Answering paragraph 43 of the C&D, Respondent admits that whether or not
13 Yucatan Investment Corp. is the subject of an administrative order of the South Carolina Securities
14 Division is a matter of public record. Respondent specifically denies that Yucatan Investment
15 Corp is related to respondent Yucatan Resorts, Inc., or to respondent Yucatan Resorts, S.A.
16 Respondent denies each and every remaining allegation contained in paragraph 43 of the C&D.

17 44. Answering paragraph 44 of the C&D, Respondent admits that whether or not
18 Yucatan Investment Corp. is the subject of an administrative order of the Connecticut Department
19 of Banking is a matter of public record. Respondent specifically denies that Yucatan Investment
20 Corp. is related respondent Yucatan Resorts, Inc., or to respondent Yucatan Resorts, S.A.
21 Respondent denies each and every remaining allegation contained in paragraph 44 of the C&D.

22 45. Respondent denies each and every allegation contained in paragraph 45 of the
23 C&D.
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- 46. Respondent denies each and every allegation contained in paragraph 46 of the C&D.
- 47. Respondent denies each and every allegation contained in paragraph 47 of the C&D.
- 48. Respondent denies each and every allegation contained in paragraph 48 of the C&D.

IV.
VIOLATION OF A.R.S. § 44-1841
(Offer or Sale of Unregistered Securities)

- 49. Respondent denies each and every allegation contained in paragraph 49 of the C&D.
- 50. Respondent denies each and every allegation contained in paragraph 50 of the C&D.
- 51. Answering paragraph 51 of the C&D, Respondent states that A.R.S. § 44-1841 speaks for itself. Respondent denies each and every remaining allegation contained in paragraph 51 of the C&D.

V.
VIOLATION OF A.R.S. § 44-1842
(Transactions by Unregistered Dealers or Salesmen)

- 52. Answering paragraph 52 of the C&D, Respondent denies each and every allegation contained therein.

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53. Answering paragraph 53 of the C&D, Respondent states that A.R.S. § 44-1842 speaks for itself. Respondent denies each and every remaining allegation contained in paragraph 53 of the C&D.

VI.

VIOLATION OF A.R.S. § 44-1991

(Fraud in Connection with the Offer or Sale of Securities)

54. Answering paragraph 54 of the C&D, Respondent denies each and every allegation contained therein.

55. Answering paragraph 55 of the C&D, Respondent states that A.R.S. § 1991 speaks for itself. Respondent denies each and every remaining allegation contained in paragraph 55 of the C&D.

56. Respondent denies each and every allegation of the C&D not specifically admitted herein.

VII.

TEMPORARY ORDER

With regard to the Temporary Order, Respondent denies that Cease and Desist Order is proper, warranted, or for good cause, and denies that he personally should be subject to this Order or this proceeding based on the foregoing Answer, its Affirmative Defenses and the Motion to Dismiss filed with this Answer.

VIII.

SECURITIES DIVISION'S REQUESTED RELIEF

With regard to the Securities Division's Requested Relief, Respondent asks the Commission to deny the Request for a Cease and Desist Order and dismiss this proceeding, deny

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the Request for restitution because there have been no violations of law, deny the request for administrative penalties, and deny any request that the marital assets of Respondent and Lory Kelly be subject to any order of restitution, rescission, administrative penalties or other affirmative action. Lory Kelly and Michael E. Kelly are not, and never have been, residents of the State of Arizona and, thus, are not subject to Arizona's community property laws. The Request for restitution is inappropriate as the purchasers continue to hold their timeshare interests. Respondent requests that the Commission deny the Requested Relief as identified in Paragraph Nos. 1, 2, 3, 4, and 5 of Section VIII of the C&D.

IX.

HEARING OPPORTUNITY

Respondent has requested a hearing pursuant to A.R.S. § 44-1972.

AFFIRMATIVE DEFENSES

57. For his first affirmative defense, Respondent alleges that the C&D fails to state a claim upon which relief can be granted.

58. For his second affirmative defense, Respondent alleges that no security is involved in these alleged transactions and, therefore, there is no proper application of the Arizona securities laws, or jurisdiction of this administrative tribunal.

59. For his third affirmative defense, Respondent alleges that Arizona's securities registration statutes and regulations do not apply to the sale of timeshares under an approved timeshare plan, pursuant to, *inter alia*, A.R.S. § 32-2197.

60. For his fourth affirmative defense, Respondent alleges that the Commission lacks personal jurisdiction over Respondent and his spouse, respondent Lory Kelly.

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61. For his fifth affirmative defense, Respondent alleges that there is a lack of subject matter jurisdiction.

62. For his sixth affirmative defense, Respondent alleges failure to join indispensable parties.

63. For his seventh affirmative defense, Respondent alleges that parties have been misnamed and misjoined in this action.

64. For his eighth affirmative defense, Respondent alleges that there has been a defect in service of process, and that any attempted service of process on Respondent was insufficient and/or ineffective.

65. For his ninth affirmative defense, Respondent alleges that there are collateral proceedings so that there is the threat of inconclusive and contrary results and, therefore, this matter should alternatively be stayed.

66. For his tenth affirmative defense, Respondent alleges that there was a lack of agency.

67. For his eleventh affirmative defense, Respondent alleges that there has been a failure of service of process on Respondent and his spouse, Lory Kelly.

68. For his twelfth affirmative defense, Respondent alleges that any ruling in this action would be unconstitutional under the laws of the State of Arizona and under the laws of the United States of America for, *inter alia*, failing to provide due process, among other provisions.

69. For his thirteenth affirmative defense, Respondent alleges that application of A.R.S. § 44-2031(C) in this case exceeds the authority granted to the Commission by the Arizona Constitution.

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70. For his fourteenth affirmative defense, Respondent alleges that application of A.R.S. § 44-2031(C) does not convey personal jurisdiction over Respondent's spouse, as a non-resident of Arizona.

71. For his fifteenth affirmative defense, Respondent alleges that all of his actions were taken for a proper purpose.

72. For his sixteenth affirmative defense, Respondent alleges that he has not taken any improper action within or from the State of Arizona.

73. For his seventeenth affirmative defense, Respondent alleges that Respondent and his spouse, Lory Kelly, are not, and never have been, residents of the State of Arizona and, thus, are not subject to Arizona's community property laws.

74. For his eighteenth affirmative defense, Respondent alleges that persons who took actions as alleged in the C&D did not have authority, and no agency relationship existed with the other respondents named in this action.

75. For his nineteenth affirmative defense, Respondent alleges that the Commission's claims are barred by the applicable statute(s) of limitations.

76. For his twentieth affirmative defense, Respondent states that he did not sell investment contracts under Arizona law.

77. For his twenty-first affirmative defense, Respondent alleges the claims in the C&D are barred by estoppel.

78. For his twenty-second affirmative defense, Respondent alleges the claims in the C&D are barred by laches.

79. For his twenty-third affirmative defense, Respondent alleges that the claims in the C&D are barred by waiver.

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80. For his twenty-fourth affirmative defense, Respondent alleges that the claims in the C&D are barred by assumption of risk.

81. For his twenty-fifth affirmative defense, Respondent alleges that the Division has failed to allege securities fraud with reasonable particularity as required by Rule 9(b) of the Arizona Rules of Civil Procedure.

82. For his twenty-sixth affirmative defense, Respondent states that purchasers of timeshare units referred to as Universal Leases did not rely, reasonably or otherwise, on any alleged misrepresentations by Respondent.

83. For his twenty-seventh affirmative defense, Respondent alleges that he did not know, and in the exercise of reasonable care could not have known, of any alleged untrue statements or material omissions as set forth in the C&D.

84. For his twenty-eighth affirmative defense, Respondent states that he has not acted with the requisite scienter.

85. For his twenty-ninth affirmative defense, Respondent states that he has not employed a deceptive or manipulative device in connection with the purchase or sale of any security.

86. For his thirtieth affirmative defense, Respondent states that purchasers of the timeshare units referred to as Universal Leases have suffered no injuries or damages as a result of Respondent's acts or the alleged acts of any of the other respondents named in this action.

87. For his thirty-first affirmative defense, Respondent states that he never made any misrepresentations or omissions, material or otherwise.

1 88. For his thirty-second affirmative defense, Respondent alleges that the violations, if
2 any, of the Securities Act, were proximately caused and contributed to by the improper conduct or
3 intervening acts of other third persons who are not named in this action as parties.

4 89. For his thirty-third affirmative defense, Respondent alleges that he acted in good
5 faith and did not directly or indirectly induce the conduct at issue.

6 90. For his thirty-fourth affirmative defense, Respondent alleges that purchasers of the
7 timeshare units referred to as Universal Leases have approved and/or authorized and/or directed all
8 of the transactions at issue.

9 91. For his thirty-fifth affirmative defense, Respondent alleges that the length of time
10 between the alleged conduct and the filing of the C&D (May 2003) violates fundamental principles
11 of fairness and the Due Process Clauses of the U.S. and Arizona Constitutions.

12 92. For his thirty-sixth affirmative defense, Respondent states that he has caused no
13 damages.

14 93. For his thirty-seventh affirmative defense, Respondent alleges that purchasers relied
15 on others and not the respondents named in this action, in connection with the matters at issue in
16 the C&D.

17 94. For his thirty-eighth affirmative defense, Respondent alleges, upon information and
18 belief, that the conduct attributed to the unnamed independent agents in the C&D was outside the
19 scope of the unnamed independent agents' agreements with the other named respondents to this
20 action.

21 95. For his thirty-ninth affirmative defense, Respondent alleges that the timeshare units
22 are not securities and, thus, the sales agents selling such timeshare units are not required to register
23 as dealers or salesmen pursuant to the provisions of Article 9 of the Securities Act.
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1 96. Respondent alleges such other affirmative defenses set forth in Arizona Rule of
2 Civil Procedure 8(c), as may be determined to be applicable through discovery.

3 97. Respondent reserves the right to amend this Answer to assert additional defenses
4 after completion of appropriate discovery.

5 X.

6 **ANSWER AND AFFIRMATIVE DEFENSE REQUIREMENTS**

7 Respondent has fully complied with the Answer and Affirmative Defense requirements.

8 WHEREFORE, there is no basis for the imposition of liability of any kind or nature, and
9 the Temporary Order to Cease and Desist should be vacated and there should be no award of any
10 kind or nature against the Respondent.
11

12 RESPECTFULLY SUBMITTED this 23rd day of June, 2003.

13 ROSHKA HEYMAN & DeWULF, PLC

14 By 

15 Paul J. Roshka, Jr., Esq.
16 Dax R. Watson, Esq.
17 One Arizona Center
18 400 East Van Buren Street, Suite 800
19 Phoenix, Arizona 85004
20 602-256-6100
21 602-256-6800 (facsimile)
22 Attorneys for Respondent Michael E. Kelly

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

25 Docket Control
26 Arizona Corporation Commission
27 1200 West Washington Street
Phoenix, Arizona 85007

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

2 Marc E. Stern
3 Hearing Officer
Hearing Division
4 Arizona Corporation Commission
1200 West Washington Street
5 Phoenix, Arizona 85007

6 Jaime Palfai, Esq.
7 W. Mark Sendrow, Esq.
Securities Division
8 Arizona Corporation Commission
1300 West Washington Street, 3rd Floor
9 Phoenix, Arizona 85007

10 COPY of the foregoing mailed
11 this 23rd day of June, 2003 to:

12 Joel Held, Esq.
Elizabeth Yingling, Esq.
13 Baker & McKenzie
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14 2001 Ross Avenue, Suite 2300
15 Dallas, Texas 75201
Attorneys for Respondents
16 Yucatan Resorts, Inc., Yucatan Resorts, S.A.,
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23
24 By: *Ruth A. Bushee*

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