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BEFORE THE ARIZONA CORPORATION COMMISSION

2003 SEP 30 P 4: 46

AZ CORP COMMISSION
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COMMISSIONERS:

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

In the matter of:

DOCKET NO. S-03539A-03-0000

YUCATAN RESORTS, INC., d/b/a/ YUCATAN RESORTS, S.A.;
 3222 Mishawaka Avenue
 South Bend, IN 46615
 P.O. Box 2661
 South Bend, IN 46680
 Av. Coba #82 Lote 10, 3er Piso
 Cancun, Q. Roo
 Mexico C.P. 77500

REPLY IN SUPPORT OF MOTION TO QUASH SUBPOENAS, OBJECTION TO SUBPOENAS, AND MOTION TO STAY DISCOVERY PENDING FURTHER ORDER

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

Arizona Corporation Commission
DOCKETED

SEP 30 2003

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

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

Respondents

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I.
INTRODUCTION

The Arizona Securities Division (the “Division”), under the guise of “investigatory subpoenas,” is now in search of a cause of action in this matter – a search that should have been instituted and completed long before this “temporary” action was instituted. In its Response to the Motion to Quash, the Division claims that the Arizona Rules of Civil Procedure are inapplicable,¹ that Respondents lack standing to object to non-party subpoenas, and that the Division has unfettered authority to issue investigative subpoenas. The Division’s Response highlights the inappropriateness of the Division’s actions. Indeed, the Division’s Response re-emphasizes the necessity for the improper subpoenas to be quashed and for a stay order to be put in place in this case.

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II.
RESPONDENTS HAVE STANDING TO PROTECT THEIR DUE PROCESS RIGHTS

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Contrary to the Division’s arguments, the Respondents have both a direct and an immediate interest in the Division’s subpoenas, as it is clear that the Division’s purpose for issuing the investigative subpoenas is to obtain evidence to use in this matter against these Respondents. In this regard, the *Lipschultz* case, relied upon by the Division, actually supports Respondents’ request for relief.

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In the *Lipschultz* case, the court expressly held that a party had a right to object to a non-party subpoena because the party had a privilege claim to the underlying documents. *Lipschultz v. Superior Gurt*, 128 Ariz. 16, 20, 623 P. 2d 805, 809 (1981). Likewise, in this case, Respondents’

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¹ The Division argues the applicability of the Arizona Rules of Civil Procedure when it serves their interests, and argues against their applicability when they do not serve the Division’s interests. See, e.g., Division’s Motion to Amend Temporary Order to Cease and Desist and Notice of Opportunity for Hearing, p. 2 (arguing applicability of Arizona Rules of Civil Procedure to this Hearing).

1 fundamental due process rights are being trampled upon by the Division in its transparent efforts
2 to “blindsided” Respondents at the ultimate hearing of this matter.

3 Indeed, at the July 17, 2003 Pre-Hearing Conference, the Division, by and through its
4 counsel, stated that there were “quite a few items that we are interested in getting from the
5 Respondents in this case . . . [a]nd I would suggest perhaps we get some type of discovery
6 schedule. . . It is trying to find out who all the investors are and full investor lists, things of that
7 nature, financial information.”²

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9 In the more than two months that have passed since that Pre-Hearing Conference, the
10 Division has yet to serve Respondents with any discovery requests. Rather, the Division seeks to
11 obtain the very information enumerated by the Division’s counsel from non-party witnesses,
12 claiming that the information relates to other matters. The Division’s argument is, at best,
13 disingenuous.

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15 The Division admits, as it must, that Respondents are entitled to due process under the
16 United States Constitution. Due process means a full and fair hearing, which necessarily includes
17 notice of the claims made against Respondents and a right to be heard. By happenstance,
18 Respondents learned of various subpoenas issued to non-parties in this action – at least one
19 subpoena has actually been issued to a non-party’s bank and seeks personal and non-personal bank
20 records. Such tactics do not give notice to Respondents, and certainly do not give them a right to
21 be heard.

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23 If, in fact, the Division, by and through its counsel, is issuing “investigatory” subpoenas
24 with no intent to use some or all of the derived information in the ultimate hearing of this case,
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26 ² Transcript of July 17, 2003 Pre-Hearing Conference, p. 23, L.2 – L.5, p. 24, L.2 – L.4 (attached hereto as Exhibit “A”).

1 then Respondents would accept a stipulation to that fact and would agree to withdraw their
2 Motion. Respondents do not expect to see such a stipulation.

3 The very refusal of the Division to issue such a stipulation manifests, not only the standing
4 of Respondents to object to these subpoenas, but also the absolute necessity for their issuance to
5 be immediately stopped.

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7 **III.**
THE DIVISION'S CRIES OF FOUL RING HOLLOW

8 The Division claims that it should not be required to make a choice between issuing a
9 Temporary Cease and Desist Order – which is not so temporary – or “eschewing these protections
10 for the purpose of pursuing investigations to their utter completion.”³ The absurdity of the
11 Division’s argument proves Respondents’ point. If the Division needed more “evidence” to
12 support its claims set forth in its “Temporary” Cease and Desist Order, why hasn’t the Division
13 issued any discovery in this matter? The answer: The Division *is seeking* its evidence, but doing
14 so pursuant to its own rules by conducting its “discovery” in this case through alleged
15 “investigatory” subpoenas issued outside of this case.
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17 Respondents do not quibble with the Division’s right to conduct investigations. The
18 Respondents do, however, strenuously object to the Division seeking the extraordinary relief of a
19 “Temporary” Cease and Desist Order without any evidence to support such an Order, and then
20 being allowed, outside of the presence of the Respondents, to conduct their “investigation,” i.e.,
21 discovery, to support such extraordinary relief.
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23 The Division’s actions are improper and violative of Respondents’ due process rights.

24 Therefore, the Respondents respectfully request that their Motion be, in all things, granted.
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³ Division’s Response to Motion to Quash, p. 6.

1 ORIGINAL and thirteen copies of the foregoing
2 hand-delivered this 30th day of September, 2003 to:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington Street
6 Phoenix, Arizona 85007

7 COPY of the foregoing hand-delivered
8 this 30th day of September, 2003 to:

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21 COPY of the foregoing sent *via* U.S. Mail
22 this 30th day of September, 2003 to:

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