



0000117351

ORIGINAL

RECEIVED

2003 AUG 25 P 3: 21

AZ CORP COMMISSION  
Jeffrey D. Gardner, Esq.  
jgardner@galbuthunter.com

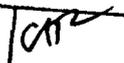
August 25, 2003

Via Hand-Delivery

Docket Control Center  
Arizona Corporation Commission  
1200 W. Washington  
Phoenix, Arizona 85007-2996

Arizona Corporation Commission  
**DOCKETED**

AUG 25 2003

DOCKETED BY 

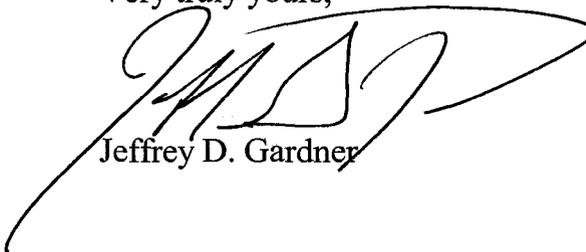
**Re: Arizona Securities Division Docket No: S-03539A-03-0000**

To Whom It May Concern:

Enclosed herewith please find an original and 13 copies of Respondents Yucatan Resorts, Inc., Yucatan Resorts, S.A., Resort Holdings International, Inc., and Resort Holdings, International, S.A.s' Response in Opposition to the Security Division's Motion for Leave to Amend the Temporary Order to Cease and Desist and Notice of Opportunity for Hearing.

If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

  
Jeffrey D. Gardner

Enclosures



cc: Joel Held, Esq.  
Elizabeth Yingling, Esq.  
Paul Roshka, Esq.  
Tom Galbraith, Esq.  
Martin R. Galbut, Esq.  
Jeana R. Webster, Esq.

RECEIVED

BEFORE THE ARIZONA CORPORATION COMMISSION

2003 AUG 25 P 3: 21

COMMISSIONERS:

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

ARIZONA CORPORATION 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  
Arizona Corporation Commission

DOCKETED

AUG 25 2003

DOCKETED BY	<i>(Signature)</i>
-------------	--------------------

**RESPONDENTS ~~RESORT HOLDINGS~~  
INTERNATIONAL, INC., RESORT  
HOLDINGS INTERNATIONAL, S.A.,  
YUCATAN RESORTS, INC. AND  
YUCATAN RESORTS, S.A.'S  
OPPOSITION TO SECURITIES  
DIVISION'S MOTION TO AMEND  
TEMPORARY ORDER TO CEASE AND  
DESIST AND NOTICE OF  
OPPORTUNITY FOR HEARING**

1 Respondents YUCATAN RESORTS, INC. ("Yucatan, Inc."), YUCATAN RESORTS,  
2 S.A. ("Yucatan S.A."), RESORT HOLDINGS INTERNATIONAL, INC. ("RHI, Inc."), and  
3 RESORT HOLDINGS INTERNATIONAL, S.A. ("RHI, S.A.")(collectively "Respondents"), file  
4 this, their Opposition to the Securities Division's Motion to Amend Temporary Order to Cease and  
5 Desist and Notice of Opportunity for Hearing (hereinafter "Motion to Amend"), and respectfully  
6 show the following:  
7

8  
9 **I.**  
**PRELIMINARY STATEMENT**

10 The Securities Division's Motion to Amend perhaps best highlights the utter lack of  
11 investigation conducted by the Securities Division both prior to the institution of the "Temporary"  
12 Order to Cease and Desist and prior to the preparation of the proposed Amended "Temporary"  
13 Order to Cease and Desist. By its Motion to Amend, the Securities Division seeks to add "Avalon  
14 Resorts, S.A.," although it fails to allege under what laws this alleged "company" is incorporated.  
15 However, no such entity exists, nor has any such entity ever existed. It is interesting that the  
16 Securities Division relies upon the Arizona Rules of Civil Procedure in supporting its Motion to  
17 Amend, for those very same rules require that, prior to submitting and signing a pleading, the  
18 attorney must have a good faith belief that the pleading is well grounded in fact. Specifically,  
19 Rule 11 of the Arizona Rules of Civil Procedure provides, in pertinent part, as follows:  
20  
21

22 Rule 11. Signing of pleadings.

23 (a) Signing of pleadings, motions and other papers; sanctions.  
24 Every pleading, motion, and other paper of a party represented by an  
25 attorney shall be signed by at least one attorney or record in the  
26 attorney's individual name, whose address shall be stated. . . . **The  
signature of an attorney or party constitutes a certificate by the  
signer that the signer has read the pleading, motion, or other  
paper; that to the best of the signer's knowledge, information,  
and belief formed after reasonable inquiry it is well grounded in**

1 fact and is warranted by existing law or good faith argument for the  
2 extension, modification, or reversal of existing law; and that it is not  
3 interposed for any improper purpose, such as to harass or to cause  
4 unnecessary delay or needless increase in the cost of litigation. . . .  
5 **.If a pleading, motion or other paper is signed in violation of this**  
6 **rule, the court, upon motion or upon its own initiative, shall**  
7 **impose upon the person who signed it, a represented party, or**  
8 **both, an appropriate sanction, which may include an order to**  
9 **pay to the other party or parties the amount of the reasonable**  
10 **expenses incurred because of the filing of the pleading, including**  
11 **a reasonable attorney's fee.**

12 Rule 11(a) Ariz.R.Civ.P. (emphasis added).

13 The Securities Division, obviously (i) failed to conduct an investigation into whether or not  
14 "Avalon Resorts, S.A." is a corporate entity, and (ii) failed to conduct an investigation into  
15 (indeed, failed to allege) what conduct this alleged entity engaged in that would even arguably  
16 violate the Arizona securities laws. Thus, the Motion to Amend and the Proposed Amended  
17 Temporary Order to Cease and Desist clearly lack any basis in fact (or law) for adding this non-  
18 existent entity as a Party to this proceeding. As such, the Securities Division has violated the very  
19 rules (Rules of Civil Procedure) they seek to utilize in amending their pleading. The Securities  
20 Division's actions – or, rather, inactions – violate both the letter and the spirit of Rule 11.

21 As discussed in detail below, the Securities Division's Motion to Amend should be denied.

## 22 **II.**

### 23 **ARGUMENT AND AUTHORITIES**

24 Upon a showing of undue delay, bad faith, dilatory motive on the part of the movant,  
25 recurring failures to cure deficiencies in prior amendments, undue prejudice or futility, motions to  
26 amend to add parties or add legal theories should be denied. *See Walls v. Arizona Dept. of Safety*,  
170 Ariz. 591, 596-97, 826 P.2d 1217 (Ct. App. 1991)(affirming denial of motion to amend based

1 upon futility where new legal theory had no legal basis). The Securities Division's Motion to  
2 Amend should be denied because of bad faith and because of futility.

3 Had the Securities Division conducted any investigation, they would have learned that  
4 "Avalon Resorts" is a trade name used by the developer of properties in Panama and Mexico. "A  
5 trade name is descriptive of the manufacturer or dealer himself and applies to a business and its  
6 good will . . . ." *New West Corp. v. NYM Co. of Calif.*, 595 F.2d 1194, 1201 (9<sup>th</sup> Cir. 1979); *see*  
7 *also* 15 U.S.C. § 1127 (defining "trade name"). Trade names are recognized and protected  
8 intellectual property rights in both the United States and in Mexico. *See New West*, 595 F.2d at  
9 1198-99 (trade names protected under the Lanham Act); Donald L. Dubuque, Comment, *The*  
10 *Implication of NAFTA to Intellectual Property Protection in the U.S. and Mexico and the*  
11 *Extraterritoriality of U.S. Intellectual Property Laws*, 5 *Detroit College of Law J. Int'l Law &*  
12 *Prac.*139, 144-45 (1996) (trade names are subject to protection under Mexican law). Thus, it is  
13 perfectly legal and appropriate for a person or business to use a trade name.  
14  
15

16 The Securities Division apparently made no attempts to ascertain whether or not an entity  
17 known as "Avalon Resorts, S.A." existed under U.S., Mexican, Panamanian or any other law.  
18 Rather, the Securities Division itself chose to name the entity, i.e., conveniently adding an "S.A."  
19 at the end of the trade name, and chose to allege that their fictitious entity is a "company."<sup>1</sup> The  
20 Securities Division's conduct in this regard is unquestionably violative of Rule 11 of the Arizona  
21 Rules of Civil Procedure.  
22

23 Not only does the Securities Division seek to add a non-existent entity, the Division also  
24 fails to specifically allege what conduct the non-existent entity engaged in that gives rise to the  
25 necessity for a Cease and Desist Order. Instead, the Securities Division groups all of the  
26

---

<sup>1</sup> Proposed First Amended Temporary Order to Cease and Desist, ¶ 7.

1 Respondents together and alleges that Avalon Resorts owns the resort properties.<sup>2</sup> A review of the  
2 Proposed Amendment leaves the reader with a very important unanswered question: What  
3 conduct did Avalon Resorts, S.A. engage in that necessitates the entry of a Cease and Desist  
4 Order? Due Process requires that a Respondent be put on fair notice of the claims made against it.  
5 In this case, even if "Avalon Resorts, S.A." existed, the failure of the Securities Division to  
6 specifically allege the factual basis for the action it seeks to take against that "company" violates  
7 Due Process." Indeed, the Securities Division's failure to specify the complained-of conduct  
8 against "Avalon Resorts, S.A." violates Rule 14-3-106 of the Arizona Administrative Code – yet  
9 another rule relied on by the Division to support its Motion to Amend:  
10

11 L. Formal complaints. Complaints shall be in writing and shall  
12 contain the name and address of the complainant, the name of the  
13 person or company against whom complaint is made, **a complete**  
14 **statement of the grounds for said complaint, indicating the date**  
15 **or dates of the commission or omission of the acts or things**  
16 **complained of,** and the nature of the relief sought by the  
17 complainant. . . .

18 AAC Rule 14-3-106(L)(emphasis added).

19 Moreover, Rule 11 requires that an attorney have a well-grounded basis in fact before  
20 signing and filing pleadings. Obviously the Securities Division lacks any facts to support any  
21 alleged wrongdoings on the part of "Avalon Resorts, S.A." because the Division has utterly failed  
22 to allege any specific facts against the non-existent entity.

23 The foregoing demonstrates the bad faith of the Securities Division in filing its Motion for  
24 Leave without conducting any investigation and, thus, without having any basis in fact for adding  
25 a non-existent Respondent. In addition, the foregoing demonstrates the complete futility of the  
26

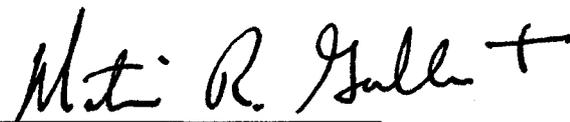
---

<sup>2</sup> Amended Temporary Cease and Desist, ¶ 14.

1 proposed Amendment, as no liability can attach to a non-existent entity. Accordingly, the  
2 Securities Division's Motion to Amend should be, in all things, DENIED.

3 **RESPECTFULLY SUBMITTED** this 25<sup>th</sup> day of August, 2003.

4 GALBUT & HUNTER  
5 A Professional Corporation

6 

7  
8 Martin R. Galbut  
9 Jeana R. Webster  
10 Jeffrey D. Gardner  
11 Camelback Esplanade  
12 2425 East Camelback  
13 Suite 1020  
14 Phoenix, Arizona 85016

15  
16 Joel Held  
17 Elizabeth L. Yingling  
18 Baker & McKenzie  
19 2300 Trammell Crow Center  
20 2001 Ross Avenue  
21 Dallas, Texas 75201

22 Attorneys for Respondents Yucatan Resorts, S.A.,  
23 Yucatan Resorts, Inc., Resort Holdings International,  
24 S.A., Resort Holdings International, Inc.

25 ORIGINAL and thirteen copies of the foregoing  
26 hand-delivered this 25<sup>th</sup> day of August, 2003 to:

27 Docket Control  
28 Arizona Corporation Commission  
29 1200 West Washington Street  
30 Phoenix, Arizona 85007

1 COPY of the foregoing hand-delivered  
2 this 25<sup>th</sup> day of August, 2003 to:

3 Marc Stern, Esq.  
4 Administrative Law Judge  
5 Hearing Division  
6 Arizona Corporation Commission  
7 1200 West Washington Street  
8 Phoenix, Arizona 85007

9 Jaime Palfai, Esq.  
10 Securities Division  
11 Arizona Corporation Commission  
12 1300 West Washington Street, 3rd Floor  
13 Phoenix, Arizona 85007

14 COPY of the foregoing sent *via* U.S. Mail  
15 this 25<sup>th</sup> day of August, 2003 to:

16 Paul J. Roshka, Jr., Esq.  
17 Dax Watson, Esq.  
18 Roshk, Heyman & DeWulff  
19 One Arizona Center  
20 400 East Van Buren Street, Suite 800  
21 Phoenix, Arizona 85004  
22 Attorneys for Respondents  
23 Michael and Lori Kelly

24 Tom Galbraith, Esq.  
25 Kirsten Copeland, Esq.  
26 Meyer, Hendricks & Bivens, P.A.  
3003 N. Central Avenue, Suite 1200  
Phoenix, Arizona 85012-2915  
Attorneys for Respondent  
World Phantasy Tours, Inc.

27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50  
51  
52  
53  
54  
55  
56  
57  
58  
59  
60  
61  
62  
63  
64  
65  
66  
67  
68  
69  
70  
71  
72  
73  
74  
75  
76  
77  
78  
79  
80  
81  
82  
83  
84  
85  
86  
87  
88  
89  
90  
91  
92  
93  
94  
95  
96  
97  
98  
99  
100  
101  
102  
103  
104  
105  
106  
107  
108  
109  
110  
111  
112  
113  
114  
115  
116  
117  
118  
119  
120  
121  
122  
123  
124  
125  
126  
127  
128  
129  
130  
131  
132  
133  
134  
135  
136  
137  
138  
139  
140  
141  
142  
143  
144  
145  
146  
147  
148  
149  
150  
151  
152  
153  
154  
155  
156  
157  
158  
159  
160  
161  
162  
163  
164  
165  
166  
167  
168  
169  
170  
171  
172  
173  
174  
175  
176  
177  
178  
179  
180  
181  
182  
183  
184  
185  
186  
187  
188  
189  
190  
191  
192  
193  
194  
195  
196  
197  
198  
199  
200  
201  
202  
203  
204  
205  
206  
207  
208  
209  
210  
211  
212  
213  
214  
215  
216  
217  
218  
219  
220  
221  
222  
223  
224  
225  
226  
227  
228  
229  
230  
231  
232  
233  
234  
235  
236  
237  
238  
239  
240  
241  
242  
243  
244  
245  
246  
247  
248  
249  
250  
251  
252  
253  
254  
255  
256  
257  
258  
259  
260  
261  
262  
263  
264  
265  
266  
267  
268  
269  
270  
271  
272  
273  
274  
275  
276  
277  
278  
279  
280  
281  
282  
283  
284  
285  
286  
287  
288  
289  
290  
291  
292  
293  
294  
295  
296  
297  
298  
299  
300  
301  
302  
303  
304  
305  
306  
307  
308  
309  
310  
311  
312  
313  
314  
315  
316  
317  
318  
319  
320  
321  
322  
323  
324  
325  
326  
327  
328  
329  
330  
331  
332  
333  
334  
335  
336  
337  
338  
339  
340  
341  
342  
343  
344  
345  
346  
347  
348  
349  
350  
351  
352  
353  
354  
355  
356  
357  
358  
359  
360  
361  
362  
363  
364  
365  
366  
367  
368  
369  
370  
371  
372  
373  
374  
375  
376  
377  
378  
379  
380  
381  
382  
383  
384  
385  
386  
387  
388  
389  
390  
391  
392  
393  
394  
395  
396  
397  
398  
399  
400  
401  
402  
403  
404  
405  
406  
407  
408  
409  
410  
411  
412  
413  
414  
415  
416  
417  
418  
419  
420  
421  
422  
423  
424  
425  
426  
427  
428  
429  
430  
431  
432  
433  
434  
435  
436  
437  
438  
439  
440  
441  
442  
443  
444  
445  
446  
447  
448  
449  
450  
451  
452  
453  
454  
455  
456  
457  
458  
459  
460  
461  
462  
463  
464  
465  
466  
467  
468  
469  
470  
471  
472  
473  
474  
475  
476  
477  
478  
479  
480  
481  
482  
483  
484  
485  
486  
487  
488  
489  
490  
491  
492  
493  
494  
495  
496  
497  
498  
499  
500  
501  
502  
503  
504  
505  
506  
507  
508  
509  
510  
511  
512  
513  
514  
515  
516  
517  
518  
519  
520  
521  
522  
523  
524  
525  
526  
527  
528  
529  
530  
531  
532  
533  
534  
535  
536  
537  
538  
539  
540  
541  
542  
543  
544  
545  
546  
547  
548  
549  
550  
551  
552  
553  
554  
555  
556  
557  
558  
559  
560  
561  
562  
563  
564  
565  
566  
567  
568  
569  
570  
571  
572  
573  
574  
575  
576  
577  
578  
579  
580  
581  
582  
583  
584  
585  
586  
587  
588  
589  
590  
591  
592  
593  
594  
595  
596  
597  
598  
599  
600  
601  
602  
603  
604  
605  
606  
607  
608  
609  
610  
611  
612  
613  
614  
615  
616  
617  
618  
619  
620  
621  
622  
623  
624  
625  
626  
627  
628  
629  
630  
631  
632  
633  
634  
635  
636  
637  
638  
639  
640  
641  
642  
643  
644  
645  
646  
647  
648  
649  
650  
651  
652  
653  
654  
655  
656  
657  
658  
659  
660  
661  
662  
663  
664  
665  
666  
667  
668  
669  
670  
671  
672  
673  
674  
675  
676  
677  
678  
679  
680  
681  
682  
683  
684  
685  
686  
687  
688  
689  
690  
691  
692  
693  
694  
695  
696  
697  
698  
699  
700  
701  
702  
703  
704  
705  
706  
707  
708  
709  
710  
711  
712  
713  
714  
715  
716  
717  
718  
719  
720  
721  
722  
723  
724  
725  
726  
727  
728  
729  
730  
731  
732  
733  
734  
735  
736  
737  
738  
739  
740  
741  
742  
743  
744  
745  
746  
747  
748  
749  
750  
751  
752  
753  
754  
755  
756  
757  
758  
759  
760  
761  
762  
763  
764  
765  
766  
767  
768  
769  
770  
771  
772  
773  
774  
775  
776  
777  
778  
779  
780  
781  
782  
783  
784  
785  
786  
787  
788  
789  
790  
791  
792  
793  
794  
795  
796  
797  
798  
799  
800  
801  
802  
803  
804  
805  
806  
807  
808  
809  
810  
811  
812  
813  
814  
815  
816  
817  
818  
819  
820  
821  
822  
823  
824  
825  
826  
827  
828  
829  
830  
831  
832  
833  
834  
835  
836  
837  
838  
839  
840  
841  
842  
843  
844  
845  
846  
847  
848  
849  
850  
851  
852  
853  
854  
855  
856  
857  
858  
859  
860  
861  
862  
863  
864  
865  
866  
867  
868  
869  
870  
871  
872  
873  
874  
875  
876  
877  
878  
879  
880  
881  
882  
883  
884  
885  
886  
887  
888  
889  
890  
891  
892  
893  
894  
895  
896  
897  
898  
899  
900  
901  
902  
903  
904  
905  
906  
907  
908  
909  
910  
911  
912  
913  
914  
915  
916  
917  
918  
919  
920  
921  
922  
923  
924  
925  
926  
927  
928  
929  
930  
931  
932  
933  
934  
935  
936  
937  
938  
939  
940  
941  
942  
943  
944  
945  
946  
947  
948  
949  
950  
951  
952  
953  
954  
955  
956  
957  
958  
959  
960  
961  
962  
963  
964  
965  
966  
967  
968  
969  
970  
971  
972  
973  
974  
975  
976  
977  
978  
979  
980  
981  
982  
983  
984  
985  
986  
987  
988  
989  
990  
991  
992  
993  
994  
995  
996  
997  
998  
999  
1000

By:   
Jeffrey D. Gardner, Esq.