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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

MARC SPITZER, Chairman
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KRISTIN K. MAYES

AZ CORP COMMISSION
DOCUMENT CONTROL

In the matter of:

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

DOCKET NO. S-03539A-03-0000

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
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**SECURITIES DIVISION'S RESPONSE
TO RESPONDENT MICHAEL KELLY'S
FIRST REQUEST FOR PRODUCTION
OF DOCUMENTS**

**RESORT HOLDINGS INTERNATIONAL,
INC.,**
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
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Arizona Corporation Commission

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1 **WORLD PHANTASY TOURS, INC.,**)
)
 2 **a/k/a MAJESTY TRAVEL**)
)
 3 **a/k/a VIAJES MAJESTY**)
)
 4 Calle Eusebio A. Morales)
)
 Edificio Atlantida, P Baja)
)
 APDO, 8301 Zona 7 Panama,)
)
 5 **AVALON RESORTS, S.A.**)
)
 6 Av. Coba #82 Lote 10, 3er. Piso)
)
 Cancun, Q. Roo)
)
 7 **MICHAEL E. KELLY and LORY KELLY,**)
)
 8 husband and wife,)
)
 9 29294 Quinn Road)
)
 North Liberty, IN 46554;)
)
 10 3222 Mishawaka Avenue)
)
 South Bend, IN 46615;)
)
 11 P.O. Box 2661)
)
 South Bend, IN 46680,)
)
 Respondents.)
)

13
 14 The Securities Division of the Arizona Corporation Commission (“Division”) hereby
 15 responds to Respondent Michael E. Kelly’s First Request for Production of Documents (“Request”)
 16 submitted in connection with the above-captioned matter. In short, this Request falls well outside
 17 acceptable discovery limits as permitted for administrative proceedings under both the Arizona
 18 Revised Statutes and Arizona Rules of Practice and Procedure before the Corporation Commission.
 19 Accordingly, the Division has no alternative but to reject the demands included in this Request. The
 20 Division will, of course, comply with appropriate discovery requests that comport with the
 21 prescribed discovery rules for administrative adjudications.

22 ***Discussion***

23 Discovery rules in administrative actions are not subject to the whims of individual
 24 litigants. To the contrary, the rules and procedures for conducting discovery in administrative
 25 proceedings are explicitly provided under Arizona statute and through local administrative agency
 26

1 rules. Only by adhering to these provisions can parties to an administrative adjudication
2 participate in an acceptable, effective and cooperative disclosure process.

3 **1. *Discovery is available for Administrative Proceedings within Arizona, but only***
4 ***within the limits as defined by statute and agency rule***

5 Courts have often had occasion to consider the limits of discovery in administrative
6 proceedings. Through these deliberations, two salient points have become evident. The first of
7 these is the fact that, because they derive from an entirely distinct process, the rules of civil
8 procedure for discovery **do not** apply in administrative proceedings.¹ *See, e.g., Pacific Gas and*
9 *Electric Company*, 746 F.2d 1383, 1387 (9th Cir. 1984); *Silverman v. Commodity Futures Trading*
10 *Commission*, 549 F.2d. 28, 33 (7th Cir. 1977); *National Labor Relations Board v. Vapor Blast Mfg.*
11 *Co.*, 287 F.2d 402, 407 (7th Cir. 1961); *LTV Steel Co. v. Industrial Commission*, 748 N.E.2d 1176
12 (Ohio 2000); *In re City of Anaheim, et al.* 1999 WL 955896, 70 S.E.C. Docket 1848 (the federal
13 rules of civil procedure do not properly play any role on the issue of discovery in an administrative
14 proceeding).

15 The second of these points is that the authority to pursue discovery during the course of an
16 administrative proceeding is not conferred as a matter of right. In fact, courts have repeatedly
17 recognized that there simply is no basic constitutional right to pretrial discovery in administrative
18 proceedings. *Silverman v. Commodity Futures Trading Commission*, 549 F.2d. 28, 33 (7th Cir.
19 1977); *See also Starr v. Commissioner of Internal Revenue*, 226 F.2d. 721,722 (7th Cir. 1955), cert.
20 denied, 350 U.S. 993, 76 S.Ct. 542 (1955); *National Labor Relations Board v. Interboro*
21 *Contractors, Inc.*, 432 F.2d 854, 857 (2nd Cir. 1970); *Miller v. Schwartz*; 528 N.E.2d 507 (N.Y.

22 ¹ This principle is particularly important from a policy standpoint. Indeed, merging civil
23 discovery rules into the administrative arena would have many deleterious results, including: 1)
24 allowing respondents to access confidential investigative information far removed from the
25 witnesses and exhibits relevant to the active case against them; 2) allowing respondents to protract
26 the proceedings indefinitely; 3) allowing respondents to excessively consume scarce but vital
resources better expended on other matters necessary for the protection of the public; and 4)
allowing respondents to force the agency into the position of a civil litigant rather than into its
proper role as a governmental regulatory authority.

1 1988); *Pet v. Department of Health Services*, 542 A.2d 672 (Conn. 1988). The federal
2 Administrative Procedures Act echoes this point by offering no provision for pretrial discovery
3 during the administrative process. 1 Davis, *Administrative Law Treatise* (1958), § 8.15, p. 588.

4 In accordance with these findings, discovery within the confines of an administrative
5 proceeding is only authorized to the extent that it is explicitly provided for in a separate statute or
6 rule. *See, e.g., 73A C.J.S. Public Administrative Law and Procedure*, § 124 (1983)(“Insofar as the
7 proceedings of a state administrative body are concerned, only the methods of discovery set forth
8 by the pertinent statute are available, and the methods not set forth therein are excluded”); *See also*
9 2 Am.Jur.2d. *Administrative Law* § 327 (2d. ed. 1994)(In the context of administrative law, any
10 right to discovery is grounded in the procedural rules of the particular administrative agency).

11 Following these precepts, the state of Arizona has enacted both statutes and agency rules to
12 address the issue of discovery in the context of administrative proceedings. Indeed, both the
13 Arizona Revised Statutes and the Arizona Rules of Practice and Procedure before the Corporation
14 Commission (“Rules of Practice and Procedure”) contain explicit provisions addressing discovery
15 procedures in contested administrative adjudications. Only by observing these controlling provisions
16 can a party effectively pursue discovery in an administrative matter before the Arizona Corporation
17 Commission.

18 The statute setting forth the parameters of discovery in administrative proceedings is, not
19 surprisingly, found in the chapter on Administrative Procedure, A.R.S. § 41-1001, *et seq.* Under
20 Article 6 of this chapter, covering “Adjudicative Proceedings,” Arizona law provides as follows:

21 ...
22 ...
23 ...
24 ...
25 ...
26 ...

1 A.R.S. § 41-1062: Hearings; evidence; official notice; power to require testimony
2 and records; Rehearing

3 A. Unless otherwise provided by law, in contested cases the following shall apply:

- 4 ...
- 5 4. The officer presiding at the hearing may cause to be issued
6 subpoenas for the attendance of witnesses and for the production of
7 books, records, documents and other evidence and shall have the
8 power to administer oaths.... *Prehearing depositions and*
9 *subpoenas for the production of documents may be ordered by the*
10 *officer presiding at the hearing, provided that the party seeking*
such discovery demonstrates that the party has reasonable need of
the deposition testimony or materials being sought....
Notwithstanding the provisions of section 12-2212, no subpoenas,
depositions or other discovery shall be permitted in contested
cases except as provided by agency rule or this paragraph.

11 (Emphasis added). The plain import of this provision is that, in Arizona, the only forms of pre-trial
12 discovery permitted in administrative proceedings are 1) subpoenas, based on a showing of need
13 and authorized by the administrative hearing officer; 2) depositions, based on a showing of need
14 and authorized by authorized by the hearing officer; and 3) any other discovery provision specifically
15 authorized under the individual agency's rules of practice and procedure.

16 The Rules of Practice and Procedure, *R14-3-101, et seq.*, thus serve to augment the available
17 means of pre-trial discovery within the Corporation Commission. Under these rules, the presiding
18 administrative law judge may also direct a pre-hearing conference wherein an arrangement is made
19 for the exchange of proposed exhibits, witness lists, or prepared expert testimony. *See Arizona*
20 *Administrative Code, Title 14, R-14-3-108(A)*. These rules also provide that a party may gain access
21 to additional pre-hearing materials by way of a discretionary ALJ order requiring that the parties
22 interchange copies of exhibits prior to hearing. *See Arizona Administrative Code, Title 14, R-14-3-*
23 *109(L)*. Indeed, Corporation Commission administrative law judges often call upon these rules in
24 ordering parties to file a list of witnesses and exhibit at a time and date in advance of the hearing,
25 thereby facilitating the hearing preparation process.

1 The aforementioned provisions establish that only certain, specified methods of discovery are
2 sanctioned in administrative proceedings before the Arizona Corporation Commission, and that such
3 methods of discovery are often both limited and discretionary. The discovery Request filed by
4 Respondent Kelly in this instance utterly fails to acknowledge or operate within this discovery
5 framework.

6 **2. *The Arizona rules and procedures governing discovery for administrative***
7 ***proceedings comport with the principles of due process.***

8 As previously addressed, *supra*, there is simply no constitutional right to discovery in
9 administrative proceedings. Nor does the Constitution require that a respondent in an
10 administrative proceeding be aware of all evidence, information and leads to which opposing
11 counsel might have access. *Federal Trade Commission v. Anderson*, 631 F.2d 741, 748 (D.C.Cir.
12 1979). Despite this, the concept of due process is still germane to the procedures of governmental
13 actions such as the administrative proceeding at issue. As the Supreme Court noted in *Willner v.*
14 *Committee on Character and Fitness*, 373 U.S. 96, 107 (1963), a respondent must be adequately
15 informed of the evidence against him and be afforded an adequate opportunity to rebut this
16 evidence.

17 Courts have since had occasion to consider what types of procedures do in fact comply with
18 due process in the context of administrative proceedings. It is now well-settled that procedures
19 designed to ensure “rudimentary requirements of fair play” are sufficient to meet the due process
20 requirements in administrative adjudications. *Mitchell v. Delaware Alcoholic Beverage Control*
21 *Commission*, 193 A.2d 294, 313 (Del.Super. 1963), *rev'd on other grounds*, 196 A.2d 410
22 (Del.Supr. 1963); *see also Matthews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v.*
23 *Manzo*, 380 U.S. 545, 552 (1965)(“the fundamental requirement of due process is the opportunity
24 to be heard at a meaningful time and in a meaningful manner”); *Swift & Co. v. U.S.*, 308 F.2d 849,
25 851 (7th Cir. 1962)(“due process in an administrative proceeding, of course, includes a fair trial,
26 conducted in accordance with fundamental principles of fair play and applicable procedural

1 standards established by law”); 73A C.J.S. *Public Administrative Law and Procedure*, § 60 (1983);
2 *see also Adamchek v. Board of Education*, 387 A.2d. 556 (Conn. 1978)(although the Uniform
3 Administrative Procedures Act does not expressly provide for pre-trial discovery, the procedures
4 required for the UAPA still exceed the minimal procedural safeguards mandated by the due
5 process clause).

6 Petitioners have often sought to challenge this due process standard for administrative
7 proceedings. For instance, in *Cimarusti v. Superior Court*, 79 Cal.App.4th 799, 94 Cal.Rptr.2d
8 336 (2000), a petitioner argued that his due process rights were compromised through the lower
9 court’s curtailment of his discovery requests. The court rejected this claim, reasoning that the pre-
10 hearing discovery and hearing procedures as provided under the state’s Administrative Procedures
11 Act fully satisfied the petitioner’s due process rights. Similarly, in *Silverman v. Commodity*
12 *Futures Trading Commission*, 549 F.2d 28 (7th Cir. 1997), a petitioner argued that he was denied
13 due process in connection with the prehearing production of documents by the CTFC. In noting
14 that the petitioner received copies of all proposed exhibits, a list of all proposed witnesses, the
15 identity of the government employees who had investigated the case, and copies of memoranda
16 reflecting petitioner’s own statements to administrative representatives, the court ruled that the
17 proceedings did not involve a denial of due process. Responding to a similar appeal, a Texas court
18 found that due process in administrative proceedings mandates notice, a hearing, and an impartial
19 trier of facts, but not various methods of discovery. *Huntsville Mem. Hospital v. Ernst*, 763
20 S.W.2d 856, 859 (Tex.App. 1988).

21 These cases demonstrate that, in order to comport with procedural due process in the
22 context of an administrative proceeding, an agency need only enforce the guidelines of applicable
23 administrative statutes and rules while using the discretion inherent in these guidelines to ensure a
24 level of fundamental fairness. See *Pacific Gas and Electric Company v. Federal Energy*
25 *Regulatory Commission*, 746 F.2d 1383 (9th Cir. 1984)(If an agency has adopted rules providing
26 for discovery in its proceedings, **the agency is bound by those rules** and must ensure that its

1 procedures meet due process requirements)(*emphasis added*). It follows that the Arizona statutes
2 and agency rules governing discovery procedure in administrative proceedings are more than
3 adequate in satisfying any due process concerns.

4 **3. *Attempts to invoke the Civil Discovery Rules in this administrative forum are***
5 ***misplaced and unsustainable***

6 As previously discussed, the extent of discovery to which a party to an administrative
7 proceeding is entitled is primarily determined by the particular agency; the rules of civil procedure
8 are inapplicable. *See, e.g., Pacific Gas and Electric Company*, 746 F.2d at 1387 (9th Cir. 1984); *see*
9 *also LTV Steel Co. v. Industrial Commission*, 748 N.E.2d 1176 (Ohio 2000) (discovery as
10 generally provided by the rules of civil procedure in court proceedings is not available in
11 administrative proceedings). This point is particularly obvious in light of the fact that the Arizona
12 legislature and Corporation Commission have enacted and adopted specific statutes and rules,
13 respectively, to govern discovery procedure in this administrative forum. *See A.R.S. § 41-1001 et*
14 *seq.; Arizona Administrative Code, Title 14 (Rules of Practice and Procedure Before the*
15 *Corporation Commission)*.

16 Despite these explicit rules on discovery, respondents to the present action are nevertheless
17 bent on ramming the Arizona Rules of Civil Procedure down the throat of this administrative
18 proceeding. Recognizing their untenable position with respect to the implementation of these civil
19 rules, respondents have sought to champion a catch-all phrase in the Rules of Practice and
20 Procedure to support their contention. This catch-all provision is in fact wholly inapplicable to the
21 issue of discovery in administrative proceedings.

22 Respondents wheel out Rule 14-3-101(A) of the Rules of Practice and Procedure to justify
23 their position on discovery. In pertinent part, this provision states: "In all cases in which procedure
24 is set forth *neither by law, nor by these rules, nor by regulations or order of the Commission*, the
25 Rules of Civil Procedure for the Superior Court of Arizona as established by the Supreme Court of
26 Arizona shall govern" (*emphasis added*). Using this language, respondents reason that any

1 discovery method they want to borrow from the civil rules is permissible since this type of
2 discovery is found neither in the administrative statutes nor in the Rules of Practice and Procedure.
3 This reasoning is flawed on an elemental level.

4 In reality, this catch-all provision provides a secondary procedural resource only *where*
5 *there is nothing in the law or rules governing a particular procedure.*² As has been pointed out at
6 great length above, however, there is already plenty of governing authority with respect to
7 discovery procedure in administrative proceedings within Arizona. Indeed, both laws **and** rules
8 explicitly outline the proper discovery procedures for administrative proceedings in this state. As
9 such, there is neither need nor justification to charge into the civil rules of procedure for guidance
10 on discovery.

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25 ² Note that this Commission rule references different types of *procedures* (e.g. “service,” “time
26 computation,” “motion practice”, etc.), and not just specific “discovery procedures” as respondents
have apparently interjected into the provision.

1
2 COPY of the foregoing hand-delivered this
3 5th day of March, 2004, to:

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

9 COPY of the foregoing mailed
10 this 5th day of March, 2004, to:

11 Martin R. Galbut, Esq.
12 Jeana R. Webster, Esq.
13 GALBUT & HUNTER, P.C.
14 Camelback Esplanade, Suite 1020
15 2425 East Camelback Road
16 Phoenix, Arizona 85016
17 Attorneys for Respondents Yucatan Resorts, Inc.,
18 Yucatan Resorts S.A., RHI, Inc., and RHI, S.A.

19 Paul J. Roshka, Jr., Esq.
20 James McGuire, Esq.
21 ROSHKA HEYMAN & DEWULF, P.L.C.
22 400 East Van Buren Street, Suite 800
23 Phoenix, Arizona 85004
24 Attorneys for Respondents Michael and Lory Kelly

25 Joel Held, Esq.
26 Elizabeth Yingling, Esq.
Jeffrey D. Gardner, Esq.
BAKER & MCKENZIE
2300 Trammell Crow Center
2001 Ross Avenue, Suite 2300
Dallas, Texas 75201
Attorneys for Respondents Yucatan Resorts, Inc.,
Yucatan Resorts S.A., RHI, Inc., and RHI, S.A.

1 Tom Galbraith, Esq.
2 Kirsten Copeland, Esq.
3 3003 North Central Avenue, Suite 1200
4 Phoenix, Arizona 85012-2915
5 Attorneys for Respondent World
6 Phantasy Tours, Inc.

7 By: 
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11
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17
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