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**BEFORE THE ARIZONA CORPORATION COMMISSION**

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COMMISSIONERS

- BOB STUMP, Chairman
- GARY PIERCE
- BRENDA BURNS
- BOB BURNS
- SUSAN BITTER SMITH

In the matter of:

TRI-CORE COMPANIES, LLC, an Arizona limited liability company,

TRI-CORE MEXICO LAND DEVELOPMENT, LLC, an Arizona limited liability company,

TRI-CORE BUSINESS DEVELOPMENT, LLC, an Arizona limited liability company,

ERC COMPACTORS, LLC, an Arizona limited liability company,

ERC INVESTMENTS, LLC, an Arizona limited liability company,

C&D CONSTRUCTION SERVICES, INC., a Nevada corporation;

PANGAEA INVESTMENT GROUP, LLC, an Arizona limited liability company, d/b/a Arizona Investment Center,

JASON TODD MOGLER, an Arizona resident,

BRIAN N. BUCKLEY and CHERYL BARRETT BUCKLEY, husband and wife,

CASIMER POLANCHEK, an Arizona resident,

NICOLE KORDOSKY, an Arizona resident,

Respondents.

DOCKET NO. S-20867A-12-0459

**SECURITIES DIVISIONS' RESPONSE IN OPPOSITION TO RESPONDENTS' APPLICATION FOR ISSUANCE OF A SUBPOENA FOR DOCUMENTS TO ARIZONA CORPORATION COMMISSION SECURITIES DIVISION**

Arizona Corporation Commission

**DOCKETED**

DEC 31 2013

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1 The Securities Division of the Arizona Corporation Commission (“the Division”) requests  
2 that Respondents Tri-Core Companies, LLC, Tri-Core Business Development, LLC, and Jason  
3 Mogler’s Application for Issuance of a Subpoena for Documents to Arizona Corporation  
4 Commission Securities Division (“Application”) be denied. Tri-Core Companies, LLC, Tri-Core  
5 Business Development, LLC, and Jason Mogler (“Moving Respondents”), have requested the  
6 Division’s entire unredacted investigatory file. Moving Respondents have failed to meet the  
7 relevant administrative criteria to obtain discovery, are precluded from the documents requested  
8 due to privilege and confidentiality, and the request is overbroad, unduly burdensome, and  
9 untimely. This Response is supported by the following Memorandum of Points and Authorities.

#### 10 MEMORANDUM OF POINTS AND AUTHORITIES

##### 11 **I. Background**

12 The Division filed this action on November 8, 2012. Moving Respondents have been  
13 represented by counsel, Bobby Thrasher, throughout the pendency of this action. Further, until  
14 just recently, Mr. Thrasher also represented Respondents ERC Investments, LLC and ERC  
15 Compactors, LLC. Prior to the filing of the Notice on November 8, 2012, Respondents Tri-Core  
16 Companies, LLC, Tri-Core Business Development, LLC, ERC Investments, LLC, ERC  
17 Compactors, LLC, and Jason Mogler produced approximately 30,000 documents in response to  
18 Division subpoenas. Jason Mogler signed custodian of records affidavits indicating he had  
19 custody and control of the documents produced on behalf of the entities.<sup>1</sup>

20 As ordered by the hearing officer and reflected in procedural orders, the parties exchanged  
21 their lists of witnesses and exhibits in August. See Fourth & Fifth Procedural Orders and August  
22 7, 2013 Stipulation. The Division produced thousands of documents in the form of over 250  
23 exhibits as its anticipated hearing exhibits, and listed its anticipated fact witnesses, including  
24 Division Investigator Annalisa Weiss.

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<sup>1</sup> These documents were admitted at hearing. See Exhibit S-32.

1 The hearing in this matter began on October 21, 2013, was scheduled to proceed for two  
2 weeks, and continue for three weeks in February 2014. *See* Sixth Procedural Order dated October  
3 4, 2013. On October 21-23, 2013, Mr. Thrasher appeared and participated on behalf of Tri-Core  
4 Companies, LLC, Tri-Core Business Development, LLC, ERC Compactors, LLC, ERC  
5 Investments, LLC, and Jason Mogler. On October 21 and 22, the Division presented a substantial  
6 amount of evidence through the testimony of Ms. Weiss. Mr. Thrasher began his cross  
7 examination of Ms. Weiss late in the afternoon on October 22, 2013. Mr. Thrasher specifically  
8 questioned Ms. Weiss about her investigation and the investigative file. (Hearing Trans., Vol. II,  
9 pp. 350-369). This Court denied Mr. Thrasher's oral request for investigative file materials,  
10 including memoranda prepared by Ms. Weiss on investors and background searches. (*Id.*) At that  
11 time, Judge Stern found the requests untimely, and also raised some relevance concerns.

12 Due to what Moving Respondents' counsel represented on October 23, 2013, as a newly  
13 identified conflict of interest in his representation, the October portion of the hearing was  
14 continued until February 3, 2014. On October 30, 2013, Mr. Thrasher sent undersigned counsel an  
15 email requesting the Division's entire unredacted investigative file. Undersigned counsel  
16 responded to Mr. Thrasher on October 31, 2013 advising him that appropriate procedures had to be  
17 followed to obtain discovery from the Division, and that the Division would only address the  
18 request if those procedures were followed. Notwithstanding, Moving Respondents failed to pursue  
19 any discovery until a month and a half later, nearly two months after the October hearing  
20 concluded, and over a year after the Notice was filed. On December 17, 2013, Moving  
21 Respondents filed this Application, vaguely asserting that the entire unredacted investigatory file  
22 was necessary to prepare for the cross-examination of the Division's witnesses, including Ms.  
23 Weiss. *See* Application p. 2.

24 For any of the reasons outlined below, the Application should be denied.

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1 **II. Argument**

2 Moving Respondents' broad request for the entire unredacted investigatory file ignores the  
3 requirements to obtain discovery in this administrative action. This action before the Commission  
4 is expressly governed by the Rules of Practice and Procedure Before the Commission Rule 14-3-  
5 101, *et seq.* ("Commission Rules") and the Administrative Procedures Act, A.R.S. § 41-1001, *et*  
6 *seq.* ("APA"). Discovery rules in administrative actions are not subject to the whims of individual  
7 litigants. To the contrary, the rules and procedures for conducting discovery in administrative  
8 proceedings are explicitly provided under Arizona statute and through local administrative agency  
9 rules.

10 **1. Moving Respondents' Application Ignores Administrative Requirements for Pre-**  
11 **Hearing Discovery.**

12 Only certain, specified methods of pre-hearing discovery are sanctioned in administrative  
13 proceedings before the Commission, and such methods of discovery are often both limited and  
14 discretionary. The primary method in which any form of pre-hearing discovery is sanctioned in  
15 proceedings before the Commission is the *discretionary* exchange of lists of witnesses and exhibits  
16 ("LWE") between parties in advance of the hearing. *See* A.R.S. § 41-1092.05(F); A.A.C. R14-3-  
17 108(A). This practice has been employed regularly by Commission hearing officers at prehearing  
18 conferences, and memorialized in procedural orders. Here, in August, the Division produced its  
19 LWE in compliance with the Fourth and Fifth Procedural Orders and Stipulation filed August 7,  
20 2013. The Division's LWE contained over 250 anticipated hearing exhibits comprised of  
21 thousands of documents, and its list of fact witnesses, including Ms. Weiss and several investors.

22 Notwithstanding the volume of information provided, and after hearing has already began,  
23 Moving Respondents now seek broad discovery on multiple items that neither comports with  
24 Arizona statute or administrative agency rules. Both the APA and Commission Rules contain  
25 explicit provisions addressing discovery procedures in contested administrative adjudications.  
26 Only by observing these controlling provisions can a party effectively pursue discovery in an

1 administrative matter before the Arizona Corporation Commission. Moving Respondents fail to  
2 do so.

3 **a. Legal Standard for Discovery in this Administrative Proceeding.**

4 The statute setting forth the parameters of discovery in administrative proceedings is, not  
5 surprisingly, found in the APA. Under Article 6 of this chapter, covering “Adjudicative  
6 Proceedings,” Arizona law provides as follows:

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

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

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

20 (emphasis added).

21 The rules applicable to these proceedings are clear that aside from the discretionary  
22 exchange of the LWEs between the parties, discovery procedures allowed in this case are limited  
23 to: (1) the procurement of documents from witnesses or parties via subpoenas issued after a  
24 showing of reasonable need by the movant (*see*, A.R.S. § 41-1062(A)(4); A.R.S. § 41-  
25 1092.07(F)(4); A.A.C. R14-3-109(O)), and (2) depositions of witnesses via subpoenas issued after  
26 a showing of reasonable need (*see*, A.R.S. § 41-1062(A)(4), A.A.C. R14-3-109(P)). Under the  
APA, all other types of civil discovery are unambiguously prohibited. *See* A.R.S. § 41-1062(A)(4)  
 (“...no subpoenas, depositions or other discovery shall be permitted in contested cases except as  
 provided by agency rule or this paragraph.”). While Division documents may be available to  
 respondents via discovery requests under certain circumstances in administrative proceedings  
 within Arizona, it is only within the limits as defined by these specific statutes and agency rules.

1 *See, e.g., 73A C.J.S. Public Administrative Law and Procedure, § 124 (1983)* (“Insofar as the  
2 proceedings of a state administrative body are concerned, only the methods of discovery set forth  
3 by the pertinent statute are available, and the methods not set forth therein are excluded”); *see also*  
4 *2 Am.Jur.2d. Administrative Law § 327 (2d. ed. 1994)* (In the context of administrative law, any  
5 right to discovery is grounded in the procedural rules of the particular administrative agency). The  
6 Application filed by Moving Respondents in this instance utterly fails to acknowledge or operate  
7 within this discovery framework.

8 **b. No Showing of Reasonable Need.**

9 Moving Respondents cannot overcome the preliminary hurdle of a showing of reasonable  
10 need. As noted above, under the APA, the movant has the burden to show reasonable need before  
11 a subpoena will be issued for the production of documents. *See A.R.S. § 41-1062(A)(4); A.R.S. §*  
12 *41-1092.07(F)(4).* Moving Respondents fail to meet this threshold requirement.

13 In their Application, Moving Respondents’ assertion that the entire investigatory file is  
14 necessary “to adequately prepare for the cross examination of the Division’s witnesses and the  
15 multitude of unsupported hearsay testimony sought to be admitted during the hearing.”  
16 Application, p. 2. Moving Respondents’ counsel argued at hearing that production of the  
17 investigatory file was needed so that he could identify every background investigation that was  
18 performed, every aspect of the investigation that occurred, “gaps” in the investigation, the timeline  
19 in which various tasks in the investigation were performed, and because Moving Respondents’  
20 counsel was unhappy with what he called Ms. Weiss’ “poor answers” to his questions. (Hearing  
21 Trans., Vol. II, pp. 358-364). This is not reasonable need. In fact, it has questionable relevance.

22 Moving Respondents’ counsel did not question Ms. Weiss in depth at hearing about the  
23 entirety of the contents of the investigative file. Instead, on cross examination, Ms. Weiss testified  
24 that the investigatory file contains memoranda, background search information, and documents  
25 received from third parties, without providing a specific description of the substantive content of  
26 any of the documents. (Hearing Trans., Vol. II, pp. 350-352, 358).

1 Moving Respondents did not go into this hearing blind. Despite the fact that the Notice  
2 requirements before the Commission require only “[a] short and plain statement of the matters  
3 asserted” (see A.R.S. § 41-1061(B)(4); A.R.S. § 41-1092.05(D)(4)), the Division issued a 26 page  
4 Notice, containing 157 paragraphs of allegations against Respondents, not including  
5 subparagraphs. Moving Respondents, together with the ERC Respondents while represented by  
6 the same counsel, produced 30,000 documents in response to investigatory subpoenas issued by  
7 the Division. See A.R.S. §§ 44-1822 and 44-1823(A). As established at the October hearing, the  
8 majority of documents the Division admitted into evidence through Ms. Weiss originated from  
9 Respondents.

10 Moving Respondents have known about all of the Division’s witnesses, including its  
11 investigator, since last August when the list of witnesses and exhibits (“LWE”) were exchanged.  
12 At no point did Moving Respondents raise the issue of the need for the investigatory file until  
13 cross examination at the hearing in October. Further, the Division named all of the investor  
14 witnesses it expects to call in its LWE, and provided as proposed exhibits all documents it intends  
15 to rely upon, including the investors’ investment documents. Going even further, the Division  
16 disclosed summary exhibits with its LWE that outlined each and every investor at issue in this  
17 hearing by name. See Exhibits S-219 – S-224. These investors were primarily identified through  
18 investor lists produced by Mr. Mogler individually, or as the custodian of records for the  
19 producing entity. See *id.* (citing Exhibit S-38 (produced by ERC Compactors, LLC); Exhibit S-35  
20 (produced by Tri-Core Business Development, LLC); Exhibits S-44 & S-47 (produced by Tri-Core  
21 Companies, LLC); S-50 & S-51 (produced by Mr. Mogler)); Hearing Trans., Vol. I, pp. 70-71,  
22 109, 155; Hearing Trans., Vol. II, pp. 238, 253, 293.

23 Moving Respondents have had the same opportunity as the Division to investigate this case  
24 to prepare their defense in this matter. In short, there should be no allegation in the Notice that  
25 Moving Respondents cannot confirm or deny from simply reviewing their own records, by  
26 interviewing their own investors and other third party witnesses, or by conducting their own legal

1 research. Moving Respondents can run their own background searches or pay to have them  
2 performed by a third party. Mr. Mogler has, in fact, retained third parties to assist with his defense  
3 in this matter – an expert accountant. Further, Moving Respondents are afforded the same  
4 opportunity as the Division to call investors at hearing by filing an application for hearing  
5 subpoenas, *see* A.A.C. R14-3-109(O), and can cross examine all of the Division’s witnesses. At  
6 any time in the last year, Moving Respondents could have contacted their own investors the same  
7 way that Ms. Weiss did and, as a result, would be able to determine if Ms. Weiss’ hearing  
8 testimony is accurate. Moving Respondents can subpoena them at hearing if they want to dispute  
9 her testimony. *See* A.A.C. R14-3-109(O). Moving Respondents apparently chose not to do so,  
10 and now instead expect the Division to turn over its entire work product, which consists of hours  
11 and hours of investigatory time.

12 The sequence of the investigation, and whether certain individuals or entities were  
13 investigated that are not parties to this proceeding is not only irrelevant, but raises statutory  
14 confidentiality issues (*see* Section 2(b), below). Notably, the Division has prosecutorial discretion  
15 in who it names as respondents to an action. The Division should not have to do all of the work,  
16 expend significant resources, and then have to turn over its confidential work product simply  
17 because Moving Respondents failed to adequately prepare. No reasonable need has been  
18 established, and the Application should be denied.

19 **c. No Due Process Violation.**

20 Moving Respondents vaguely reference “prejudice” that would result in not having the  
21 entire investigatory file to cross examine witnesses when hearsay testimony is admitted, although  
22 the specific prejudice is not set forth. Application, p. 2. To the extent Moving Respondents are  
23 making an ambiguous due process argument related to hearsay evidence to support a request for  
24 discovery, this should be rejected.

25 First, under the APA, an administrative hearing, “may be conducted in an informal manner  
26 and without adherence to the rules of evidence required in judicial proceedings.” A.R.S. § 41-

1 1062(A)(1). It has long been recognized that hearsay is admissible in administrative proceedings  
2 at the discretion of the hearing officer. See A.A.C. R14-3-109(K)<sup>2</sup>; A.R.S. §§ 41-1062(A)(1)<sup>3</sup> and  
3 41-1092.07(F)(1). “It is clear in Arizona that hearsay is admissible in administrative proceedings,  
4 and that it may, in proper circumstances, be given probative weight.” *Begay v. Arizona Dep’t of*  
5 *Econ. Sec.*, 128 Ariz. 407, 409, 626 P.2d 137, 139 (App. 1981). In *Wiesler v. Prins*, 167 Ariz. 223,  
6 227, 805 P.2d 1044, 1048 (App. 1990), the court held that the general rule that “reliable hearsay is  
7 admissible in administrative proceedings and may even be the only support for an administrative  
8 decision.” Hearsay evidence is considered reliable where the circumstances tend to establish that  
9 the evidence offered is trustworthy. *Reynolds Metals Co. v. Industrial Comm’n of Arizona*, 98  
10 Ariz. 97, 102, 402 P. 2d 414, 417 (1965). The courts look to the information provided regarding  
11 the speaker, the speaker’s knowledge, and the source of information to determine if the testimony  
12 is reliable and trustworthy. Hearsay would be considered unreliable “when the speaker is not  
13 identified, when no foundation for the speaker’s knowledge is given, or when the place, date, and  
14 time, and identity of others present is unknown or not disclosed.” *Plowman v. State Liquor Bd.*,  
15 152 Ariz. 331, 337, 732 P.2d 222, 228 (App. 1986).

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

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23  
24 <sup>2</sup> “In conducting any investigation, inquiry or hearing, neither the Commission nor any officer or employee thereof  
25 shall be bound by the technical rules of evidence, and no informality in any proceeding or in the manner of taking of  
testimony shall invalidate any order, decision, rule or regulation made, approved or confirmed by the Commission.”

26 <sup>3</sup> “A hearing may be conducted in an informal manner and without adherence to the rules of evidence required in  
judicial proceedings. Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence  
required in judicial proceedings shall be grounds for reversing any administrative decision or order providing the  
evidence supporting such decision or order is substantial, reliable, and probative.”

1 432 F.2d 854, 857 (2d Cir. 1970); *Miller v. Schwartz*; 528 N.E.2d 507 (N.Y. 1988); *Pet v.*  
2 *Department of Health Services*, 542 A.2d 672 (Conn. 1988).

3 Moving Respondents have obtained significant pretrial documents from the Division that  
4 will be used as the Division's proof at hearing. Moving Respondents know every possible witness  
5 the Division intends to call. In fact, due to the three month gap in the proceedings, Moving  
6 Respondents have the extra benefit of hearing the testimony and evidence admitted from the  
7 Division's primary witness, Ms. Weiss, in October. Moving Respondents have had more time than  
8 most respondents in administrative actions to prepare for cross examination. What Moving  
9 Respondents are not entitled to in this administrative proceeding is discovery of all information  
10 that is in the Division's possession (i.e. the investigatory file) because there is no Constitutional  
11 requirement that a respondent in an administrative proceeding be aware of all evidence,  
12 information, and leads to which opposing counsel might have access. *Pet v. Dep't of Health Serv.*,  
13 207 Conn. 346, 542 A.2d 672 (quoting *Federal Trade Comm'n v. Anderson*, 631 F.2d 741, 748  
14 (D.C.Cir. 1979); *Cash v. Indus. Comm'n of Arizona*, 27 Ariz. App. 526, 556 P.2d 827 (App. 1976).

15 **2. The Division Is Not Required to Produce Privileged or Confidential Documents.**

16 Not only do Moving Respondents fail to meet the "reasonable need" requirement outlined  
17 in the administrative rules, but the investigative file also contains documents that are privileged  
18 and/or confidential, thus not automatically subject to disclosure. No provision within the  
19 Commission Rules, APA or the Act requires the Division to provide its attorney client and/or work  
20 product to Moving Respondents.

21 **a. Work Product and Attorney-Client Privilege.**

22 The information sought by Moving Respondents is work product not subject to disclosure.  
23 The work product privilege exists to promote the adversary system by safeguarding the fruits of an  
24 attorney's trial preparations from the discovery attempts of an opponent. The work product  
25 doctrine protects material obtained by or prepared by an attorney or the attorney's agent in  
26 anticipation of litigation or in preparation for trial. *See Torres v. Goddard*, 2010 WL 3023272, \*4

1 (D. Ariz. July 30, 2010) (*citing Hickman v. Taylor*, 329 U.S. 495, 509-12, 67 S.Ct. 385 (1947)).  
2 “Work product protection covers a wide range of documents, including ‘interviews, statements,  
3 memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other  
4 tangible and intangible ways.’” *Torres*, 2010 WL 3023272, \*4 (*citing Hickman*, 329 U.S. at 511).

5 Various courts have found that similar documents and things are covered by the work-  
6 product doctrine. *See U.S. v. Nobles*, 422 U.S. 225, 239, 95 S. Ct. 2160, 2170 (1975) (documents  
7 created by investigators working for attorneys); *Dritt v. Morris*, 235 Ark. 40, 48, 357 S.W. 2d 13,  
8 18 (1962) (witness interviews and statements); *U.S. v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461,  
9 462 (E.D. Mich. 1954) (signed statements of witnesses and reports of investigations and other  
10 communications prepared at the direction of government attorneys); *S.E.C. v. World-Wide Coin*  
11 *Inv., Ltd.*, 92 F.R.D. 65, 32 Fed. R. Serv. 2d 1401, Fed. Sec. L. Rep. P 98, 336 (1981) (staff  
12 memorandum and communications between attorneys and investigators regarding investigation);  
13 *United States v. Deere & Co.*, 9 F.R.D. 523, 528 (D.C. Minn. 1949) (formulation of questions  
14 propounded through questionnaires prepared by government attorneys; court determined both  
15 questions and answers were protected); *Hertzberg v. Veneman*, 273 F. Supp. 2d 67 (D.D.C. 2003)  
16 (documents, videotapes, and simple forms with boxes to check that were sent to individuals);  
17 *Maguire v. State*, 458 S.2d 311 (Fla. Dist. App. 1984) (recorded statements and written transcripts  
18 thereof from victim and insurance adjuster); *U.S. v. Salsedo*, 607 F.2d 318 (9<sup>th</sup> Cir. 1979)  
19 (transcript from tape recording of conversations between defendant and government informant);  
20 *Gargano v. Metro- North*, 222 F.R.D. 38 (D. Conn. 2004) (transcripts of audio taped statements of  
21 insurer’s employees); *U.S. v. Stewart*, 287 F.Supp.2d 461 (S.D.N.Y. 2003) (email from defendant  
22 to defendant’s attorney and to defendant’s daughter detailing facts surrounding a transaction was  
23 covered by the work product); *In re Grand Jury Proceedings*, 601 F.2d 162 (5<sup>th</sup> Cir. 1979)  
24 (documents prepared by an accountant at the direction of an attorney); *Corbin v. Ybarra*, 161 Ariz.  
25 188, 192 (1989) (documents prepared by expert) *citing In re Grand Jury Proceedings*, 601 F.2d  
26 162.

1 As noted above, the information Moving Respondents are attempting to obtain through this  
2 late discovery request are interviews, statements, and documents that are the fruit of the Division's  
3 years of labor to get this matter to hearing. This situation is similar to the U.S. Supreme Court  
4 case, *Hickman v. Taylor*, wherein an attorney interviewed witnesses and prepared memoranda  
5 summarizing the interviews. Written discovery requests were issued by opposing counsel for  
6 witness statements and memoranda concerning witness interviews. The Court refused to require  
7 production, finding the work product privilege applied, and the moving party could not show they  
8 could not obtain the information from other sources. *Hickman*, 329 U.S. at 509-511.

9 Further, the investigatory file may, and often does, contain other privileged materials such  
10 as legal research performed by counsel, attorney notes, drafts of pleadings, materials from  
11 consulting experts<sup>4</sup>, correspondence between counsel for the Division, correspondence between  
12 counsel and the investigator, and correspondence between the Division and third parties. All of  
13 these materials are either attorney-client privileged or protected under the work product doctrine.

14 In order to obtain work product, Moving Respondents "must show that it has a substantial  
15 need for the materials and cannot, without undue hardship, obtain the substantial equivalent by  
16 other means." Moving Respondents have made no attempt to show substantial need or that they  
17 cannot obtain the information requested by other means. Moving Respondents have equal access  
18 to the investors, have equal access to their investment documents, and equal access to background  
19 information. They had the ability to subpoena third parties during the pendency of this action, and  
20 can do so at hearing as well with a showing of reasonable need, but failed to file any application  
21 until now. Simply because Moving Respondents do not want to (or failed to) put in the time, effort  
22 and resources, and instead want to have the information handed to them by the Division does not  
23 constitute substantial need.

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25 \_\_\_\_\_  
26 <sup>4</sup> Consulting experts' materials are protected by the work product doctrine when the expert is not disclosed as a  
testifying expert. See *Emergency Care Dynamics Ltd. v. Superior Court*, 188 Ariz. 32, 36, 932 P.2d 297, 301 (App.  
1997).

1                   **b. Commission's Confidentiality Statute.**

2           To the extent Moving Respondents could somehow overcome the reasonable need  
3 threshold requirement, and then overcome the work product and attorney-client privileges  
4 applicable to their discovery request, they have yet another hurdle: the Act's confidentiality  
5 statute.

6           The legislative mandate imposed by the confidentiality statute of the Act, A.R.S. § 44-  
7 2042, provides as follows:

8           **A. The names of complainants and all information or documents obtained by**  
9 **any officer, employee or agent of the commission**, including the shorthand  
10 **reporter or stenographer transcribing the reporter's notes, in the course of any**  
11 **examination or investigation are confidential unless the names, information or**  
12 **documents are made a matter of public record. An officer, employee or agent**  
13 **of the commission shall not make the confidential names, information or**  
14 **documents available to anyone** other than a member of the commission, another  
15 officer or employee of the commission, an agent who is designated by the  
16 commission or director, the attorney general or law enforcement or regulatory  
17 officials, except pursuant to any rule of the commission or **unless the commission**  
18 **or the director authorizes the disclosure of the names, information or**  
19 **documents as not contrary to the public interest.**

20 A.R.S. § 44-2042 (emphasis added).

21           By statute, all information or documents obtained by the Division during an investigation  
22 are confidential. In their request for the full unredacted investigatory file, Moving Respondents  
23 fail to even reference this statute in their Application, let alone realize that compliance with the  
24 confidentiality statute is not discretionary, but mandatory under the law. Moving Respondents  
25 have not cited any authority that would obviate the Division's required compliance with the  
26 confidentiality statute nor has there been any authorization by the Commission or Director  
authorizing disclosure of names, information or documents in the investigatory file as not contrary  
to public interest.

          Although disclosure of such information would be in the Commission hearing officer's  
discretion per the statute, there would still have to be a finding that the disclosure is not contrary to  
the public interest. This standard should not be glossed over lightly. Disclosure of investigatory

1 file materials could reveal the agency's strategy, and interfere with or obstruct the Division's  
2 ability to effectively examine, investigate, or enforce the Act. It creates precedent that could cause  
3 investors to fail to report violations of the Act, when the primary purpose of the Act is to protect  
4 the public. *See* 1951 Ariz. Sess. Laws ch. 20, § 18.

5       Additionally, merely disclosing the names of the Division's witnesses and documents  
6 related to those investors' investments in the LWE pursuant to procedural order (which is not  
7 made a matter of public record), and submitting Division witness testimony regarding the  
8 investigation of the matter does not mean the entire investigatory file is subject to discovery. The  
9 only documents the Division made "a matter of public record" were those the *Division* admitted  
10 into evidence at hearing. Simply because the Division's investigator testified that the Division  
11 maintains an investigatory file does not mean that all documents contained therein are public  
12 record. That clearly is erroneous. Unless and until those investigatory documents are made  
13 public, or the Commission hearing officer requires disclosure as not contrary to the public interest,  
14 the confidentiality provision still applies.

15       **3. Moving Respondents' Request is Overbroad, Unduly Burdensome, and Untimely.**

16       The documents requested as part of the Application include documents that are outside of  
17 the scope of this administrative hearing. The Commission has the ability to prohibit a document  
18 request if a subpoena is "unreasonable or oppressive." A.A.C. R14-3-109(O). Simply because  
19 Ms. Weiss testified that she investigated this matter, performed background searches, obtained  
20 documents from third parties, and prepared memoranda based on investor interviews, does not  
21 mean that all of the investigatory file is relevant and subject to discovery. This case is not  
22 governed by broad civil discovery rules.

23       As noted above, the investigatory file contains documents concerning individuals that are  
24 not named as respondents, and investors that the Division has determined are not within the  
25 jurisdiction of the Act. Moving Respondents fail to establish why investigatory documents not  
26 related to an allegation in the Notice or named respondent are relevant.

1           The requested documents referenced in the Application are also overbroad and production  
2 of the same is unduly burdensome. Although Moving Respondents attempt to limit their request  
3 by excluding documents produced under the Division's LWE (Application, Subpoena Ex. A), this  
4 is the only limitation on their request. With this exception, Moving Respondents requested the  
5 **entire unredacted investigatory file**. They specifically request all documents provided to the  
6 Division by "any Respondent", apparently including their own 30,000 documents produced during  
7 the investigation, and the tens of thousands of documents they disclosed in their own LWE! There  
8 can be no dispute that not only is this overly burdensome on the Division, but overbroad and  
9 unnecessary. Moving Respondents also want documents from other respondents, some of which  
10 were exchanged during the LWE process and already in the possession of Moving Respondents.  
11 To the extent other respondents' documents were not exchanged with the LWE, Moving  
12 Respondents could have requested them directly from the other respondents or filed an application  
13 to issue a subpoena on them.

14           If the Division is ordered to produce documents received from Respondents, other third  
15 parties, and information compiled internally, the Division is limited in its ability to disclose certain  
16 information by statute and/or would have to expend significant resources to redact confidential  
17 information depending on the statute. This includes, for example, documents in the investigatory  
18 file that contain dates of birth, results of criminal history records, and social security numbers. *See*  
19 *e.g.* A.R.S. § 36-340; A.R.S. § 13-4051; A.R.S. § 31-221; A.R.S. § 41-1750, 42 U.S.C. §  
20 405(c)(2)(C)(viii); A.R.S. § 44-1373. Disclosure of this information is statutorily prohibited.  
21 Redaction on the documents produced by Moving Respondents alone would likely take weeks  
22 when the Division has to review tens of thousands of pages. Imposing such a burden on the  
23 Division when Moving Respondents have or had the ability to obtain all information they deem  
24 "necessary" through other means is untenable.

25           Last, the subpoena request is untimely. The Notice was filed in November 2012. Moving  
26 Respondents have had over a year to take appropriate steps to request discovery from the Division

1 in this matter. They chose not to do so until December 17, 2013. Moving Respondents have had  
2 the same period of time to file applications to serve subpoenas for documents or testimony on third  
3 parties, including investors, or other respondents. They have never done so. Moving Respondents  
4 raised the issue of discovery of the investigatory file during the pendency of the hearing in  
5 October, yet chose to wait nearly two additional months to file the Application.

6 Moving Respondents cannot sit idly by doing nothing for the entire pendency of this matter  
7 and now seek discovery in the middle of hearing. Moving Respondents, apparently troubled by  
8 the substantial evidence the Division presented through its investigator at hearing, now wishes to  
9 begin investigating a defense at the last hour. This is nothing more than a stall tactic.

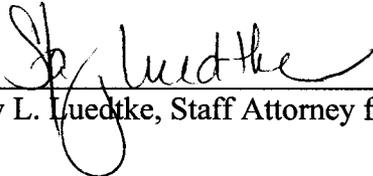
10 The Application should be rejected as over broad, unduly burdensome, and untimely.

11 **III. Conclusion**

12 The discovery rules for contested administrative proceedings in this state are expressly  
13 provided by statute and agency rule, and the principles of due process are amply preserved within  
14 these rules. The Division is neither inclined nor obligated to comply with Moving Respondents'  
15 subpoena for the entire unredacted investigatory file, and Moving Respondents have shown no  
16 reasonable need for the same. Moving Respondents have sat idly by for over a year and now ask  
17 the Division to hand over years of work product and confidential information in the middle of  
18 hearing. Not only does the Application fail to meet administrative requirements, but the burden on  
19 the Division to respond to such an overly broad request would be enormous.

20 For the reasons herein, the Division requests that Moving Respondents' Application be  
21 denied.

22  
23 RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of Dec, 2013

24  
25   
26 \_\_\_\_\_  
Stacy L. Luedtke, Staff Attorney for the Securities Division

1 ORIGINAL and 9 copies of the foregoing  
2 filed this 31<sup>st</sup> day of Dec., 2013 with:

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 W. Washington St.  
6 Phoenix, AZ 85007

7 COPY of the foregoing hand-delivered  
8 this 31<sup>st</sup> day of Dec, 2013, to:

9 The Honorable Marc E. Stern  
10 Administrative Law Judge  
11 Arizona Corporation Commission  
12 1200 W. Washington St.  
13 Phoenix, AZ 85007

14 COPY of the foregoing mailed  
15 this 31<sup>st</sup> day of Dec, 2013, to:

16 Dale B. Rycraft Jr., Esq.  
17 THE RYCRAFT LAW FIRM, PLLC  
18 2929 N. Power Rd., Suite 101  
19 Mesa, Arizona 85215  
20 *Attorney for C&D Construction*

21 Bobby Thrasher, Jr.  
22 530 E. McDowell Rd., Ste 107-495  
23 Phoenix, Arizona 85004  
24 *Attorney for Mogler, Tri-Core Companies, Tri-Core Business Dev.,*

25 Guy Quinn  
26 1129 Stonegate Ct.  
Bartlett, IL 60103  
*Manager of ERC Compactors, ERC Investments*

*Karen Houle*