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BEFORE THE ARIZONA CORPORATION

COMMISSIONERS

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

ORIGINAL

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

Arizona Corporation Commission
DOCKETED

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ARIZONA CORPORATION COMMISSION
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**FOURTEENTH
PROCEDURAL ORDER
(Denies Motion to Dismiss)**

BY THE COMMISSION:

On November 8, 2012, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing ("Notice") against Tri-Core Companies, LLC, ("Tri-Core"); Tri-Core Mexico Land Development, LLC ("TC Mexico"); Tri-Core

1 Business Development, LLC (“TC Business”); ERC Compactors, LLC (“ERC Compactors”); ERC
2 Investments, LLC (“ERC Investments”); C&D Construction Services, Inc. (“C&D”); Pangaea
3 Investment Group, LLC (“Pangaea”), d/b/a Arizona Investment Center (“AIC”); Jason Todd Mogler;
4 Brian N. Buckley and Cheryl Barrett Buckley, husband and wife; Casimer Polanchek; and Nicole
5 Kordosky (collectively “Respondents”). In the Notice, the Division alleged multiple violations of the
6 Arizona Securities Act (“Act”) in connection with the offer and sale of securities in the form of
7 notes.¹

8 The Respondents were duly served with a copy of the Notice.

9 On November 26, 2012, a request for hearing in this matter was filed on behalf of C&D.

10 On November 30, 2012, Respondents Tri-Core, TC Business, ERC Compactors, ERC
11 Investments, Jason Todd Mogler, Brian N. Buckley and Cheryl Barrett Buckley filed requests for
12 hearing.

13 On December 10, 2012, by Procedural Order, a pre-hearing conference was scheduled on
14 January 15, 2013.

15 On January 15, 2013, at the pre-hearing conference, Respondents Tri-Core, TC Business,
16 ERC Compactors, ERC Investments, and Jason Mogler appeared through counsel. Respondents
17 Brian and Cheryl Buckley appeared on their own behalf. The Division also appeared through
18 counsel. Although the parties who requested a hearing were discussing a possible resolution of the
19 proceeding, the Division requested a status conference be scheduled to determine if a hearing should
20 be scheduled in the event settlement did not occur.

21 On January 16, 2013, by Procedural Order, a status conference was scheduled on March 20,
22 2013.

23 On January 29, 2013, Respondent Nicole Kordosky filed a request for hearing.

24 On January 31, 2013, by Procedural Order, Respondent Nicole Kordosky’s name was added
25

26 ¹ On February 6, 2013, the Commission issued Decision Nos. 73666 and 73667 against Pangaea and TC Mexico,
27 respectively, as Default Orders finding them in violation of the Act. On May 8, 2013, the Commission issued Decision
28 No. 73867, a Default Order, against Respondent Polanchek finding him in violation of the Act. On October 25, 2013, the
Commission issued Decision No. 71447, a Consent Order, against the Buckley Respondents finding him in violation of
the Act, and holding the Buckleys’ marital community liable. On January 7, 2014, the Commission issued Decision No.
74251, a Consent Order, against Respondent Kordosky.

1 to the service list and she was apprised of the status conference scheduled for March 20, 2013.

2 On March 20, 2013, at the status conference, the Division appeared through counsel,
3 Respondents Tri-Core, TC Business, ERC Compactors, ERC Investments and Jason Mogler appeared
4 through counsel, Respondent C&D appeared through counsel, and Respondents Brian Buckley and
5 Nicole Kordosky appeared on their own behalf. Mrs. Buckley did not appear. The Division's
6 counsel indicated that while discussions to resolve the issues raised by the Notice were ongoing, a
7 hearing should be scheduled in the fall to avoid scheduling conflicts in a lengthy proceeding because
8 there would be approximately 12 Division witnesses and voluminous exhibits. Additionally, one of
9 the attorneys who represents the Respondents indicated that he would call a like number of witnesses.

10 On March 21, 2013, by Procedural Order, a hearing was scheduled to commence on October
11 7, 2013 and last over a number of weeks.

12 On April 4, 2013, the Division filed a Motion to Continue ("Motion") the hearing due to the
13 unavailability of a key witness during the scheduled hearing. The Division requested that the
14 proceeding be continued to October 21, 2013, and that the remaining dates of the hearing also be
15 rescheduled. The Division further indicated that counsel for the Respondents who were represented
16 as well as the pro per Respondents in the proceeding had been contacted concerning the Division's
17 Motion and that they had no objections to the Motion.

18 On April 24, 2013, by Procedural Order, the Division's Motion was granted and the hearing
19 was continued to October 21, 2013.

20 On September 11, 2013, the Division filed a Motion to Allow Telephonic testimony of
21 approximately six witnesses who mostly reside out of state. There were no objections to this motion.

22 On September 20, 2013, the Division filed a Stipulation to Partially Continue the Hearing
23 Dates because counsel for the majority of the Respondents recently informed the Division that he had
24 a conflict with a criminal matter in which he is counsel of record and that proceeding had been set for
25 an eight to ten week trial which was to commence on November 5, 2013. The Division further stated
26 that the judge in that proceeding has refused to continue the criminal trial in deference to the
27 Commission's proceeding. Additionally, the Division stated that the parties had agreed to proceed
28 with the first two weeks of hearing scheduled in October 2013 and to continue the remaining three

1 weeks scheduled in November 2013 to February or March 2014 with the majority of the Respondents
2 represented by the affected counsel presenting their case in chief at that time.

3 On October 4, 2013, by Procedural Order, telephonic testimony was authorized to be utilized
4 in the proceeding. Additionally, a portion of the proceeding was continued as agreed by the parties to
5 February, 2014.

6 On October 21, 2013, a full public hearing was convened before a duly authorized
7 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The Division, Tri-
8 Core, TC Business, ERC Compactors, ERC Investments, Jason Mogler and C&D appeared with
9 counsel. Ms. Kordosky appeared on her own behalf. The hearing also proceeded as scheduled on
10 October 22, 2013, with the presentation of evidence by the Division.

11 On October 23, 2013, at the beginning of the proceeding, Mr. Bobby Thrasher, counsel for
12 Tri-Core, TC Business, ERC Compactors, ERC Investments and Jason Mogler stated that an issue
13 had arisen with respect to his continued representation of ERC Compactors and ERC Investments
14 ("ERC Entities"). Counsel related that the ERC Entities which he was representing were in fact sold
15 by Respondent Mogler in March 2013 to a non-party to the proceeding, Mr. Guy Quinn. As evidence
16 of this sale, Mr. Thrasher provided a copy of the Purchase Contract. However, it did not appear to be
17 either complete or the final agreement with pages numbered consecutively. Counsel stated further
18 that although he had initially represented the ERC Entities, he believed that a clear conflict of
19 interests existed, and that he could no longer represent these companies without prejudice to them
20 and their new owner. Mr. Thrasher further indicated that he wished to file a Motion to Withdraw as
21 counsel for the ERC Entities, and he also requested that the balance of the proceeding be continued
22 and resume in the February proceeding, as previously ordered.

23 Counsel for the Division indicated that she had been unaware of this conflict previously, and
24 had only been apprised of this situation shortly before the hearing on October 23, 2013, and had been
25 surprised by these requests.

26 After a recess, the parties agreed that the proceeding should be continued to February and that
27 a Motion to Withdraw and a Motion for a Procedural Conference be filed as discussed at the hearing.
28

1 On October 25, 2013, the Division filed a Motion for a Procedural Conference and indicated
2 that copies of the following documents were e-mailed to Mr. Quinn: the Notice; documents related to
3 the representation of the ERC Entities filed by Mr. Thrasher; and a copy of the Sixth Procedural
4 Order which scheduled the matter for further hearing on February 3, 2014.

5 The Division further requested that certain time deadlines be established with respect to the
6 future representation of the ERC Entities and requested that other procedural matters be addressed at
7 the Procedural Conference.

8 On November 1, 2013, Mr. Bobby Thrasher filed a Motion to Withdraw as Counsel of Record
9 for the ERC Entities due to the change in ownership and for other reasons disclosed on the record at
10 the October 23, 2013 hearing. No objections have been filed to this motion.

11 On November 19, 2013, by Procedural Order, the Motion to Withdraw by Mr. Bobby
12 Thrasher was granted conditioned upon a copy of the complete and final Purchase Contract being
13 filed. Additionally, a lawful representative or counsel for the ERC Entities was ordered to enter an
14 appearance in this matter if they were going to participate further in the proceeding and contest the
15 Notice.

16 On December 6, 2013, an Arizona attorney filed a letter on behalf of the ERC Entities and
17 stated that no appearance would be entered on behalf for the ERC Entities and that the current
18 manager of these Respondents "was not in control of the entities during the relevant time frame."
19 Further, the attorney went on to state that a resolution of the matter was being sought with the
20 Commission.

21 On December 12, 2013, at the procedural conference, the Division and Tri-Core, TC Business
22 and Mr. Mogler were represented by counsel. No appearance was made on behalf of C&D or any
23 remaining Respondents. The Purchase Contract for the ERC Entities was further discussed, and
24 counsel for Tri-Core, TC Business and Mr. Mogler indicated that he would be seeking discovery with
25 respect to the Division investigator's notes, logs and reports beyond the documentary material
26 disclosed by the Division with the exchange of Exhibits and Witness Lists as ordered previously. Mr.
27 Thrasher agreed that he would pursue the material he required by filing for a subpoena by December
28 17, 2013, and the Division's counsel agreed to file a response by January 6, 2014.

1 On December 17, 2013, counsel for Tri-Core, TC Business and Mr. Mogler filed what was
2 captioned "Application for Issuance of Subpoena for Documents to Arizona Corporation Securities
3 Division" ("Application"). Therein counsel requested "an unredacted copy of the investigative file."
4 The only documents excluded from the Application were those documents previously provided to the
5 Respondents in the Division's List of Exhibits and Witnesses pursuant to stipulation on August 26,
6 2013.²

7 On December 31, 2013, the Division filed its Response in Opposition ("Response") to the
8 Application by Tri-Core, TC Business and Mr. Mogler. The Division stated that on October 31, 2013,
9 it had advised Respondents' counsel the procedures necessary to obtain discovery from the Division,
10 and that Respondents' counsel had delayed until December 17, 2013, to file their request in this
11 proceeding.

12 The Division stated that the action herein is governed by the Commission's Rules A.A.C.
13 R14-3-101, et seq. and the Administrative Procedures Act, A.R.S. § 41-1001, et seq. ("APA"). The
14 Division argued that the Respondents had been provided with thousands of documents along with its
15 list of witnesses prior to the commencement of the hearing and that Respondents' Application neither
16 complied with the Commission's Rules nor the APA. The Division stated that Respondents failed to
17 meet their burden to show "reasonable need" before a subpoena would issue for the production of
18 documents. The Division detailed how Respondents had produced more than 30,000 documents to
19 the Division and the majority of them were admitted into evidence through the Division's
20 investigator. These documents contained no surprises and Respondents had the opportunity to
21 conduct their own investigation prior to the start of the hearing. The Division further stated that no
22 specific prejudice was set forth in the Application and that Respondent's "due process" rights were
23 not violated. Additionally, the Division argued that it was not required to provide privileged or
24 confidential documents, and cited a plethora of cases in support of its position that Respondents had
25 either not shown a substantial need or that they could not obtain the information elsewhere. Lastly,
26 the Division cited A.R.S. § 44-2042, the Commission's confidentiality statute, arguing that all
27 information or documents acquired by the Division during its investigation were confidential unless
28

² In the exchange, the Division provided Respondents with in excess of 250 Exhibits.

1 the presiding judge authorized their disclosure. In conclusion, the Division argued that the
2 Application was overbroad, unduly burdensome, untimely and that it constituted a “stall tactic” after
3 considering the timeline in the proceeding.

4 Respondents Tri-Core, TC Business and Mr. Mogler did not file a reply to the Response.

5 On January 16, 2014, by Procedural Order, the Application was denied because it was not
6 timely and the Respondents had not shown a reasonable or substantial need for the documents, and
7 they failed to show why the confidentiality of the documents should not be maintained pursuant to
8 A.R.S. § 44-2042.

9 On January 22, 2014, counsel for C&D filed a Motion to Withdraw as counsel for C&D citing
10 A.A.C. R14-3-104(E) which permits the withdrawal of an attorney upon good cause being shown.
11 Pursuant to Rule 42 of the Rules of the Arizona Supreme Court, counsel cited Ethical Rule (“ER”)
12 1.16 which governs the termination of representation. Counsel stated “C&D has failed to
13 substantially fulfill its obligations” to counsel by failing to make payments for its defense in this
14 complex proceeding. It was further stated that this was placing an unreasonable financial burden on
15 counsel who, after warning to C&D, was requesting permission to withdraw from the proceeding as
16 C&D’s counsel. Counsel further represented that C&D had been served with a copy of the motion
17 and had been advised when the proceeding was to resume.

18 A Motion to Continue the February 3, 2014, hearing was also filed on January 22, 2014, by
19 counsel for Tri-Core, TC Business and Mr. Mogler. Therein, counsel requested a 30 to 45 day
20 continuance or another date convenient to the Commission for the remaining portion of the
21 proceeding which was presently scheduled to be heard on various dates between February 3, 2014
22 and February 20, 2014. Counsel requested this continuance due to a conflict which had arisen with a
23 criminal proceeding which he was involved in at the Maricopa County Superior Court. The criminal
24 case had been rescheduled to commence on February 4, 2014. Counsel represented that the criminal
25 proceeding was scheduled for a four to six day jury trial which would take it into the second week of
26 the Commission’s ongoing proceeding.

27 On January 24, 2014, the Division filed responses to each of the pending motions by counsel
28 for C&D and by counsel for Tri-Core, TC Business and Mr. Mogler. With respect to the Motion to

1 Withdraw, the Division argued that the motion was not timely since apparently nonpayment had been
2 at issue for at least nine months, and additionally, C&D should not be granted any further
3 continuances whether it was represented or not.

4 With respect to the Motion to Continue the February 3, 2014 hearing, the Division argued that
5 the proceeding was continued previously due to a conflict of interest of counsel and that a hearing
6 with an expected duration of three weeks could not easily be rescheduled. According to the
7 Division's counsel, its representative attended the court's scheduling conference and that counsel for
8 Tri-Core, TC Business and Mr. Mogler did not "raise the conflict with this administrative hearing."
9 However, in the Motion to Continue, counsel stated, "Pursuant to local rule, a criminal trial has
10 priority over an administrative hearing." The Division argued further that the "better part of two
11 weeks" would remain of the presently scheduled administrative hearing with no conflict. However,
12 this could lead to a further fragmentation of the proceeding if the matter was not concluded by the
13 end of February.

14 On January 28, 2014, by Procedural Order, the Motion to Withdraw by counsel for C&D was
15 granted. With respect to the Motion for a Continuance by counsel for Tri-Core, TC Business and Mr.
16 Mogler, a brief continuance to February 18, 2014 was granted.

17 On January 31, 2014, Mr. Bobby Thrasher filed what he represented was the final Purchase
18 Contract for the ERC Entities to comply with the Commission's Seventh Procedural Order. In
19 addition, Mr. Thrasher filed what was captioned Notice to Withdraw [Sic] ("Notice of Withdrawal")
20 with respect to his remaining clients/Respondents in the proceeding, Tri-Core, TC Business and Mr.
21 Mogler (the "Mogler Entities") for what he termed a "conflict of interests that currently exist or have
22 the potential to exist." He provided Mr. Mogler's address, and the pleading was also signed by Mr.
23 Mogler, but the character of the "conflict" was not explained further.

24 On February 3, 2014, the Division filed its response to Mr. Thrasher's Notice of Withdrawal
25 questioning the timing of his filing and whether it would "prejudice the judicial process and delay the
26 hearing" scheduled to resume on February 18, 2014. The Division argued that no good cause had
27 been shown to permit an authorization for Mr. Thrasher to withdraw pursuant to A.A.C. R14-3-
28 104(E), and that his filing was merely a delaying tactic. The Division argued that the Notice of

1 Withdrawal should be denied if it delayed the February 18th resumption of the hearing in any way.
2 Concluding its arguments, the Division stated that the Mogler Entities “should not be allowed to
3 continue any of the scheduled hearing dates whether represented or not.”

4 On February 6, 2014, Mr. Mogler on behalf of himself and the Mogler Entities appearing *pro*
5 *se* filed a Motion to Continue the February 18, 2014, hearing for a period of 45 days “or other such
6 date that is convenient with the Court.” Mr. Mogler stated that he was requesting a short delay after
7 the Division concluded its case to present the Mogler Entities’ defense in the proceeding against the
8 Division’s allegations. He stated that he would need only two days to present this defense. It did not
9 appear that he wished to delay the Division’s presentation of its case in chief.

10 On February 7, 2014, by Procedural Order, Mr. Thrasher’s withdrawal of representation from
11 the ERC Entities was granted unconditionally. It was further ordered that Mr. Thrasher’s Notice of
12 Withdrawal from his representation of the Mogler Entities would require further explanation to
13 establish good cause for his withdrawal and that Mr. Mogler’s Motion to Continue required further
14 explanation also. It was also ordered that a procedural conference be held on February 13, 2014.

15 On February 13, 2014, Attorney Thrasher filed a reply to the Division’s response to his Notice
16 of Withdrawal setting forth more fully his reasons for requesting permission to withdraw from his
17 representation of the Mogler Entities and cited ER 1.7 with respect to the possible conflicts between
18 his clients and himself.

19 At the procedural conference, on February 13, 2014, the Division appeared through counsel
20 and Mr. Thrasher and Mr. Mogler also appeared. Mr. Thrasher explained that he had been in contact
21 with both independent counsel and the ethics counsel for the Arizona State Bar to discuss the conflict
22 issues which had arisen for him and his inability to secure the signatures of the other three members
23 of Mr. Mogler’s two limited liability companies to a Joint Representation Agreement in order to
24 comply with ER 1.7(b) in the event future issues regarding a conflict of interests arose. Mr. Thrasher
25 had made repeated attempts to secure these signatures, but these other members of the two limited
26 liability companies had failed to respond to his requests. As a result, he filed his Notice of
27 Withdrawal.

28 With respect to Mr. Mogler’s Motion to Continue, he made clear that he did not wish to delay

1 the Division's presentation of its case, but was requesting a brief continuance in order for him to
2 prepare the Mogler Entities' defense to the Division's evidence. Towards that end, Mr. Mogler
3 estimated the defense would take two days. It was determined that leave should be granted for Mr.
4 Thrasher to withdraw from his representation of the Mogler Entities and a brief continuance should
5 be granted in order that the Mogler Entities could prepare their defense.

6 On February 14, 2014, by Procedural Order, Mr. Thrasher's Notice of Withdrawal as counsel
7 for the Mogler Entities was granted, and an extension of time was allowed for the Mogler Entities to
8 prepare their defense.

9 On February 20, 2014, the Division completed the presentation of its case in chief.

10 On February 21, 2014, by Procedural Order, the proceeding was scheduled to resume on May
11 6, 2014.

12 On March 18, 2014, the Division filed a Motion to Compel Compliance by Mr. Mogler and
13 the Mogler Entities to submit to the Division an amended list of witnesses and exhibits within two
14 weeks of the February 20, 2014, proceeding as agreed by Mr. Mogler at that time. Mr. Mogler failed
15 to do so, and as a result the Division filed the instant motion.

16 On March 26, 2014, Mr. Mogler filed an updated list of expected witnesses and failed to
17 specify if any of these witnesses would be called as an expert witness. Additionally, Mr. Mogler
18 failed to provide any updated copies of exhibits which he planned to introduce in the proceeding.

19 On April 10, 2014, by Procedural Order, Mr. Mogler and the Mogler entities were ordered to
20 file by April 18, 2014, notice if any of their witnesses is to be called as an expert and he was ordered
21 to submit copies of their exhibits to the Division.

22 On April 17, 2014, Mr. Mogler on behalf of himself and the Mogler Entites filed a Motion to
23 Dismiss the above-captioned proceeding arguing that the Commission lacks legal authority to pursue
24 its action herein under the Arizona Constitution.

25 On April 22, 2014, the Division filed its response to Mr. Mogler's Motion to Dismiss stating
26 that it was untimely and that the Arizona Supreme Court has held that the express powers which have
27 been granted to the Commission under the Arizona Constitution "are merely the minimum and that
28 under the constitution, the Commission may exercise all powers which may be necessary or essential

1 in connection with the performance of its duties.” See *Garvey v. Trew*, 64 Ariz. 342, 346, 170 P. 2d
2 845, 848 (1946). The Division further argued that the Arizona legislature expanded the powers of the
3 Commission with the passage of the Act which authorizes the Commission to regulate the sale of
4 securities as is the case here.

5 Under the circumstances, the Respondents’ Motion to Dismiss should be dismissed.

6 IT IS THEREFORE ORDERED that the Motion to Dismiss filed by Mr. Mogler and the
7 Mogler Entities is hereby denied.

8 IT IS FURTHER ORDERED the hearing shall resume on **May 6, 2014, at 10:00 a.m.**, at the
9 Commission’s offices, 1200 West Washington Street, Hearing Room No. 2, Phoenix, Arizona, as
10 previously ordered.

11 IT IS FURTHER ORDERED that the parties shall reserve **May 7 and 8, 2014**, for additional
12 days of hearing, if necessary.

13 IT IS FURTHER ORDERED that **if the parties reach a resolution of the issues raised in**
14 **the Notice prior to the hearing, the Division shall file a Motion to Vacate the proceeding.**

15 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized
16 Communications) is in effect and shall remain in effect until the Commission’s Decision in this
17 matter is final and non-appealable.

18 IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules
19 of the Arizona Supreme Court and A.R.S. § 40-243 with respect to the practice of law and admission
20 *pro hac vice*.

21 IT IS FURTHER ORDERED that withdrawal or representation must be made in compliance
22 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the
23 Rules of the Arizona Supreme Court). Representation before the Commission includes appearances
24 at all hearings and procedural conferences, as well as all Open Meetings for which the matter is
25 scheduled for discussion, unless counsel has previously been granted permission to withdraw by the
26 Administrative Law Judge or the Commission.

27 IT IS FURTHER ORDERED that the Presiding Administrative Law Judge may rescind, alter,
28 amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by

1 ruling at hearing.

2 DATED this 25th day of April, 2014.

3
4 
5 MARCE. STERN
6 ADMINISTRATIVE LAW JUDGE

7 Copies of the foregoing mailed/delivered
8 this 25th day of April, 2014 to:

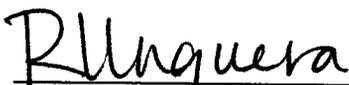
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