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7  
8 **SUPERIOR COURT OF ARIZONA**  
9 **MARICOPA COUNTY**

10 ARIZONA CORPORATION  
11 COMMISSION

12 Plaintiff,

13 v.

14 MATHON MANAGEMENT COMPANY,  
15 L.L.C., fka an Arizona limited liability  
16 company now dba a Delaware limited  
17 liability company, SLADE WILLIAMS AND  
18 ASSOCIATES, L.L.C., an Arizona limited  
19 liability company, MATHON FUND I,  
20 L.L.C., an Arizona limited liability company,  
21 MATHON FUND, L.L.C., fka an Arizona  
22 limited liability company now dba a  
23 Delaware limited liability company,  
24 INTEGRITY101, L.L.C., an Arizona limited  
25 liability company, INTEGRITY 201, L.L.C.,  
26 an Arizona limited liability company,  
27 INTEGRITY 301, L.L.C., and Arizona  
28 limited liability company, INTEGRITY401,  
L.L.C., an Arizona limited liability company,  
INTEGRITY 501, L.L.C., an Arizona limited  
liability company, INTEGRITY 601, L.L.C.,  
an Arizona limited liability company,  
INTEGRITY 701, L.L.C., an Arizona limited  
liability company, INTEGRITY 801, L.L.C.,  
an Arizona limited liability company,  
INTEGRITY 901, L.L.C., an Arizona limited  
liability company, ROUND VALLEY  
CAPITAL, L.L.C., an Arizona limited  
liability company, W.S.F. – WORLD  
SPORTS FANS, L.L.C., an Arizona limited  
liability company, MILL CREEK, L.L.C., an  
Arizona limited liability company,  
BELLEVUE HOLDINGS, L.L.C., an

Case No. CV 2005-005484

**MOTION TO ALLOW  
CONSERVATOR TO ASSERT OR  
WAIVE ATTORNEY/CLIENT  
PRIVILEGE ON BEHALF OF THE  
CONSERVATORSHIP ENTITIES**

(Assigned to the Honorable  
Barry C. Schneider)

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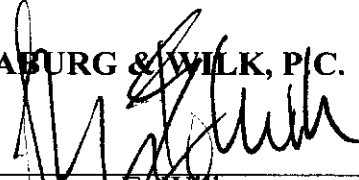
1 Arizona limited liability company, OAK  
2 HARBOR FINANCIAL, L.L.C., an Arizona  
3 limited liability company, SW STRATEGIC,  
4 WEALTH ADVISORS, L.L.C., an Arizona  
5 limited liability company, EVERETT  
6 CAPTIAL, L.L.C., an Arizona limited  
7 liability company, CRE CAPITAL, L.L.C.,  
8 an Arizona limited liability company,  
9 MEZZANINE MANAGEMENT, L.L.C., an  
10 Arizona limited liability company,  
11 MEZZANINE FUND I, L.L.C., an Arizona  
12 limited liability company, JONAS FUND I,  
13 L.L.C., an Arizona limited liability company,  
14 TEMPLAR FUND L.L.C., fka an Arizona  
15 limited liability company now dba a  
16 Delaware limited liability company,  
17 MERCER ISLAND, L.L.C., an Arizona  
18 limited liability company, CONNECTICUT  
19 PROPERTIES, L.L.C., an Arizona limited  
20 liability company, FIRST ATLANTA  
21 INVESTMENTS, L.L.C., a Georgia limited  
22 liability company, MM COLONIAL FUND,  
23 L.L.C., a Delaware limited liability company,  
24 SLADE CONSTRUCTION, L.L.C., an  
25 Arizona limited liability company, DUANE  
26 SLADE and JENNIFER SLADE, husband  
27 and wife, GUY ANDREW WILLIAMS and  
28 LISA WILLIAMS, husband and wife,

Defendants.

James C. Sell, the court appointed Conservator in the above referenced matter, through counsel of record undersigned, hereby requests a determination that the Conservator holds the attorney/client privilege for the Conservatorship Entities.

DATED this 31 day of May, 2005.

JABURG & WILK, P.C.

  
Lawrence E. Wilk  
Attorneys for James C. Sell

1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 I. **PROCEDURAL BACKGROUND**

4 On or about April 1, 2005, the Arizona Corporation Commission caused to be filed,  
5 in the Superior Court in and for the State of Arizona, a Verified Complaint in the above-  
6 captioned matter against numerous individual defendants and entities, seeking the  
7 appointment of a Receiver over the named Defendants.

8 On April 1, 2005, this Court issued its Order appointing James C. Sell Receiver for  
9 the approximately 30 entities named in the Receivership complaint.

10 Subsequently, after notice and hearing, the Court on April 14, 2005 issued its Order  
11 approving the Stipulation Regarding Order Appointing Conservator, in which the title of  
12 James C. Sell was changed from Receiver to Conservator (hereinafter, the  
13 "Conservatorship Order"). The rights and obligations of the Conservator remained  
14 identical to those of the Receiver.

15 Paragraph 1 of the Stipulation regarding Order Appointing Conservator (the  
16 "Conservatorship Stipulation") provides, in relevant part, that:

17 The parties acknowledge and agree the conservator shall have  
18 all the rights, powers and privileges of a receiver . . . .

19 Paragraph 3 of the Conservatorship Stipulation provides, in relevant  
20 part, that:

21 The Conservator is hereby authorized to take and have  
22 possession and control of the Conservatorship assets until  
23 further order of this Court, the conservator shall have  
24 complete and exclusive control, possession, and custody of all  
25 Conservatorship assets. The Conservator shall be the agent of  
26 the Court and shall be accountable directly to the Court.

24 Paragraph 18 of the Conservatorship Stipulation provides:

25 18. The Conservator shall be authorized to compromise or  
26 adjust obligations which may be owed to the Conservatorship  
27 estate. The Conservator shall seek and obtain the approval of  
28 the Court for the proposed compromise or settlement. Court  
approval may be sought on an expedited basis.

1           Based upon these broad powers adopted by the Conservatorship Order, the  
2 Conservator stands in the shoes of management as defacto “successor management”  
3 during his stewardship as Conservator. Consequently, the Conservator, as successor  
4 management, holds the authority to invoke or waive any attorney-client privilege  
5 belonging to the Conservatorship Entities.

6           **II. THE CONSERVATOR HOLDS THE ABILITY TO ASSERT OR**  
7           **WAIVE ANY ATTORNEY-CLIENT PRIVILEGE BELONGING TO**  
8           **THE CONSERVATORSHIP ENTITIES.**

9           It is well settled that successor management holds the ability either to assert or  
10 waive attorney-client privilege for all matters, including those which took place before the  
11 “new” management came in place. *See, e.g., Commodity Futures Trading Commission v.*  
12 *Weintraub*, 471 U.S. 343 (1985).

13           In *Weintraub*, the U.S. Supreme Court addressed this very issue in detail in the  
14 context of a trustee’s power in bankruptcy. In so doing, however, the Court did not  
15 restrict its holding to the bankruptcy context. Rather, the Court based its holding upon the  
16 general principles of corporate governance and equity.

17           In *Weintraub*, the Court was presented with the specific issue of whether a trustee  
18 in bankruptcy had the power to waive a corporate debtor’s attorney-client privilege with  
19 respect to communications that occurred before the filing of the bankruptcy petition.<sup>1</sup>

20           In considering the scope of the receiver/trustee’s authority, the Court considered  
21 the unique circumstances of “the administration of the attorney-client privilege in the case  
22 of corporations. . . .” *Id.* at 348. “As an inanimate entity, a corporation must act through  
23 agents. A corporation cannot speak directly to its attorneys.” *Id.*

24           In determining the scope of the trustee/receiver’s authority, the Court looked to the  
25 basis of the attorney-client privilege with regard to a solvent corporation. The Court  
26 reasoned that, with regard to a solvent corporation, “the power to waive the corporate

27           <sup>1</sup> Ironically, the bankruptcy trustee in *Weintraub* had previously been appointed receiver  
28 over the debtor corporation prior to its filing - a situation that may very well develop in the  
present case.

1 attorney-client privilege rests with the corporation's management and is normally  
2 exercised by its officers and directors. *Id.*

3 Finding no guidance under the Bankruptcy Code<sup>2</sup> as to whether a trustee was  
4 specifically empowered with such ability, the Court looked for guidance from the  
5 traditional roles played by the various actors of a solvent corporation – and their  
6 respective ability to control a corporation's attorney-client privilege - to determine which  
7 is the most analogous to the role in a bankruptcy proceeding. *Id.* at 351.

8 The Court reasoned that the powers and duties of a bankruptcy trustee are  
9 extensive, and that a trustee is in power to, among other things: To be accountable for all  
10 property received; to investigate the debtor's financial affairs; to sue officers, directors  
11 and other insiders to recover, on behalf of the estate, fraudulent or preferential transfers of  
12 the debtor's property; and subject to court approval to use, sell, or lease property of the  
13 estate. *Id.* at 351.

14 Based on these duties, the Weintraub Court concluded that the broad powers of a  
15 trustee paralleled that of normal corporate management, and thus a trustee as successor  
16 "management" would hold privilege.

17 Subsequently, the U.S. District Court for the District of Arizona applied Weintraub  
18 to a situation where the resolution trust corporation was acting as conservator. *See, In re*  
19 *American Continental Corporation*, 741 F.Supp. 1368 (1990).

20 Specifically, the Arizona District Court was presented with the question of whether  
21 a conservator controlled the entity's attorney-client privilege as it pertained to  
22 communications of pre-conservatorship management. *Id.* at 1368 to 1369. In its analysis,  
23 the Arizona District Court applied *Weintraub* and looked to the scope of the conservator's  
24 powers.

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26  
27  
28 <sup>2</sup> Arguably, had there been such a provision under the Bankruptcy Code, there might be some merit in  
attempting to restrict the Court's holding to a Bankruptcy Trustee.

1 In so doing, the Court found that the conservator's broad duties were most  
2 analogous to that of a solvent entity's management. In *American Continental*, the scope  
3 of the conservator's duties included:

4 All rights, titles, powers and privileges of the insured  
5 depository institution, and of any stock holder member,  
6 account holder, depositor, officer or director of such an  
7 institution and the assets of the institution. *Id.* at 1370.

8 The Court concluded, that based upon the conservator's broad duties, control had  
9 passed to the conservator.

10 The Court commented that as an inanimate entity a corporation itself cannot  
11 directly assert or waive the attorney-client privilege, but that when control a corporation  
12 "passes to new management, the authority to assert and waive the corporation's attorney-  
13 client privilege passes as well." *Id.* at 1371. *See also, United States v. Plache*, 913 F.2d  
14 1375, 1380 (1990) (holding that a receiver had authority to control attorney-client  
15 privilege on behalf of the corporation, and that displaced managers may not assert such a  
16 privilege over the wishes of current managers, "even as to statements that the former  
17 might have made to counsel concerning matters within the scope of their corporate  
18 duties.") (*citing, Weintraub, supra, and Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195  
19 (8<sup>th</sup> Cir. 1981)).

20 Here, Paragraphs 1, 3 and 18 of the Conservatorship Stipulation, as approved by  
21 the Conservatorship Order, grant the Conservator broad powers – just like that of a  
22 trustee in bankruptcy, or those of the conservator in *American Continental, supra*.  
23 Consequently, the Conservator therefore has powers akin to "successor management" and  
24 thereby controls the attorney-client privilege.

25 Significantly, this power is even more critical in the present case, than the  
26 aforementioned authority. Here, the above-captioned individual defendants are currently  
27 represented by Lewis & Roca – the Conservatorship Entities' former Counsel. It is this  
28 prior counsel who now represents the named individual defendants that will attempt to  
preclude the turnover of information by asserting the privilege.



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**ORIGINAL** filed and **COPY**  
of the foregoing faxed this  
3/5<sup>th</sup> day of May, 2005 to:

The Honorable Barry C. Schneider  
MARICOPA COUNTY SUPERIOR COURT  
101 West Jefferson, CCB 13A  
Phoenix, Arizona 85003-2243

**COPIES** of the faxed this 3/5<sup>th</sup> day  
of May, 2005 to:

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<p>J. Grant Woods GRANT WOODS P.C. 1726 N. Seventh Street Phoenix, Arizona 85006-2200 <i>Attorney for Duane and Jennifer Slade And Guy and Lisa Williams</i></p>	<p>Gerald L. Shelley, Esq. QUARLES &amp; BRADY STREICH LANE Two N. Central Avenue Phoenix, Arizona 85004-2391</p>
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