

1 Lawrence E. Wilk, # 006510
Jonathan P Ibsen, #023284
2 **JABURG & WILK, P.C.**
3200 North Central Avenue, Suite 2000
3 Phoenix, Arizona 85012
(602) 248-1000

4 *Attorneys for James C. Sell, Conservator*
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8 **SUPERIOR COURT OF ARIZONA**
9 **MARICOPA COUNTY**

10 ARIZONA CORPORATION
11 COMMISSION

12 Plaintiff,

13 v.

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

Case No. CV 2005-005484

**MOTION FOR RECONSIDERATION
OF CONSERVATOR'S MOTION
FOR AUTHORITY TO FILE
BANKRUPTCY PROCEEDINGS**

(Assigned to the Honorable
Barry C. Schneider)

JABURG & WILK, P.C.
ATTORNEYS AT LAW
3200 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, ARIZONA 85012

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

Defendants.

19 James C. Sell, the Court appointed Conservator in the above-referenced matter,
20 (the "Conservator"), through undersigned Counsel, hereby respectfully requests that this
21 Court reconsider his motion for authority to commence bankruptcy proceedings for
22 certain of the Conservatorship Entities (the "Bankruptcy Motion"), pursuant to Rule 7.1(e)
23 of the Arizona Rules of Civil Procedure ("ARCP").

24 Two independent basis establish the need for such reconsideration. First, this
25 Court's Order of July 25, 2005 denying the Bankruptcy Motion (the "July 25 Order"), was
26 based upon an incorrect interpretation of the United States Bankruptcy Code.
27
28

1 Specifically, the July 25 Order incorrectly interprets 11 U.S.C. §105¹ as providing the
2 Conservator with the ability to commence a bankruptcy proceeding for a Conservatorship
3 Entity, at a date in the future, with the presumption that such filing will be deemed *nunc*
4 *pro tunc* to the commencement of the this Conservatorship Action². Such interpretation is
5 a mistake of law as any such *nunc pro tunc* effect is wholly discretionary and falls within
6 the general equitable powers of the Bankruptcy Court.

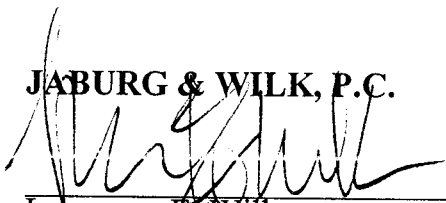
7 Consequently, the July 25 Order unreasonably exposes the Conservatorship Estate
8 to the risk that a subsequent bankruptcy filing may not be given *nunc pro tunc* effect, and
9 thereby would deprive the Conservator the ability to seek certain transfers under Chapter
10 5 of the Bankruptcy Code.

11 Second, newly discovered facts concerning individual creditor's attempts to assert
12 alleged liens on Conservatorship Assets underscore the need for the protections of the
13 Bankruptcy Code.

14 This Motion is based upon the following Memorandum and Points and Authorities
15 and the entire record before this Court.

16
17 DATED this 16 day of August, 2005.

18 **JABURG & WILK, P.C.**

19 
20 _____
21 Lawrence E. Wilk
22 Jonathan P. Ibsen
23 Attorneys for the Conservator
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27 ¹ 11 U.S.C. § 105 was apparently incorrectly cited in the July 25 Order because of a typographical error in the
28 Conservator's Reply, which was then similarly incorrectly cited by Keith Beauchamp, Esq. during oral argument at
the Hearing.

² Such date is synonymous with the filing of the Receivership Action.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Procedural Background**

3
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 (the "Conservatorship
12 Stipulation"), in which the title of James C. Sell was changed from Receiver to
13 Conservator (the "Conservatorship Order"). The rights and obligations of the Conservator
14 remained identical to those of the Receiver.

15 Paragraph 13 of the Conservatorship Stipulation provides that:

16 The Conservator is hereby directed to file with this Court and
17 serve upon the parties, within 30 days after entry of this Order,
18 a Preliminary Report setting out the identity, location and
19 value of the Conservatorship Assets, and any liabilities
20 pertaining thereto. Further, at the time the Conservator makes
21 such report, he will recommend to the Court whether, in his
22 opinion, based upon his initial investigation, claims against
23 Defendants, should be adjudged in the Bankruptcy Court.
24 After providing the parties an opportunity to be heard, this
25 Court will determine whether to accept the Conservator's
26 recommendation and, if appropriate, issue an Order
27 authorizing the Conservator to commence a Bankruptcy
28 proceeding.

23 The Conservator filed his Initial Report in compliance with the provisions of
24 Paragraph 13 of the Conservatorship Stipulation, and in which he requested additional
25 time to, *inter alia*, confer with the Creditors' Committee regarding the benefits and
26 detriments of a Bankruptcy proceeding. His Initial Report further detailed that some of
27 the factors he was reviewing with respect to the potential bankruptcy filing included: (1)
28 the broad inherent powers that a Bankruptcy confers on a Debtor; (2) the nationwide

1 effect of a stay pursuant to 11 U.S.C. § 362; and (3) the scope of recoveries available
2 under Chapter 5 of the Bankruptcy Code.

3 Subsequently, the Conservator met with the Creditor's Committee and discussed
4 the potential of filing bankruptcy proceedings for certain Conservatorship Entities, and
5 was advised that the Committee authorized him to commence Bankruptcy Proceedings for
6 the following Conservatorship Entities: Mathon Management Company, LLC; Slade
7 Williams & Associates, LLC; Round Valley Capital, LLC; WSF – World Sports Fans,
8 LLC (the "Bankruptcy Entities").

9 This led to the Conservator filing the Bankruptcy Motion on June 24, 2005. Only
10 two objections were filed to the Bankruptcy Motion: (1) The objection filed by Duane
11 Slade and Guy Williams (the "Slade Objection"); and (2) The objection filed by Scott
12 Johnson, Ross N. Farnsworth, Jr., Cody Pearce, George Dover, Tom Fairbanks, Brent and
13 Pat Williams and Tom Farnsworth's (the "Farnsworth Objection")(collectively, the
14 "Objections").

15 The Slade Objection was based upon four arguments: (1) that the Bankruptcy
16 Entities are not financially distressed; (2) that the automatic stay provisions of 11 U.S.C. §
17 362 are unnecessary; (3) that the only benefit of any proceedings under Chapter 5 of the
18 Bankruptcy Code would be the recovery of transfers made while the Conservator was
19 running the Conservatorship Entities; and (4) that there must be a showing that assets are
20 being dissipated by the Bankruptcy Entities to support the Motion. The Farnsworth
21 Objection echoed these arguments and additionally argued that: (5) the proposed
22 acquisition of the Conservatorship Entities by B-Line, LLC would be harmed by the
23 proposed Bankruptcy Filing.

24 On July 20, 2005, the Conservator filed his reply to the Objections (the "Reply").
25 In his Reply, the Conservator argued that the Objections should be denied because, *inter*
26 *alia*, that: (1) the Initial Report of the Conservator filed with this Court, clearly established
27 that the Bankruptcy Entities were financially unsound; (2) the provisions of the automatic
28 stay of 11 U.S.C. § 362 are absolute and therefore a benefit to the Conservatorship Estate;

1 (3) the specific provisions of 11 U.S.C. § 105, may allow the Debtors, once a Bankruptcy
2 has been commenced, to deem the Petition Date be deemed *nunc pro tunc* to the date of
3 the filing of the Conservatorship Action; (4) Conservatorship assets were being
4 dissipated, and further dissipation could be stemmed by the provisions of the Bankruptcy
5 Code; and (5) the B-Line proposal makes no distinction or predicate condition regarding
6 the potential debtor status of any of the Conservatorship Entities.

7 The hearing on the Bankruptcy Motion was held on July 25, 2005 (the "Hearing").
8 Argument was offered by Counsel for the Creditors' Committee, Counsel for the
9 Conservator, Counsel for the Farnsworth Investors, and Counsel for Duane Slade and Guy
10 Williams.

11 At the hearing, Counsel for Slade and Williams mischaracterized one of the
12 Conservator's arguments to be that provisions of 11 U.S.C. § 105, shall require the
13 Bankruptcy court to deem the petition date *nunc pro tunc* to the date the initial
14 Receivership.³

15 This Court then, incorrectly, incorporated this mischaracterization into its July 25
16 Order, wherein it denied the Bankruptcy Motion stating that:

17 In the Court's view, especially considering the retroactive
18 application of § 108 of the Bankruptcy Code, there is no
19 present urgency to go into Bankruptcy Court.

20 **II. The July 25 Order Must be Reconsidered**
Because It is Based Upon a Mistake of Law.

21 The July 25 Order incorrectly presumes that Section 105 of the Bankruptcy Code
22 will automatically give the Conservator the ability to deem any bankruptcy filing *nunc pro*
23 *tunc* to the filing of the Receivership Action.
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27 ³ At the hearing, Counsel for the Creditors' Committee affirmed the Creditors' Committee's support of
28 placing one entity in bankruptcy and further supported the Conservator's argument that such filing was necessary to
preserve the Conservatorship Estate's potential recoveries under Chapter 5 of the Bankruptcy Code.

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The Conservator cited 11 U.S.C. § 105's potential *nunc pro tunc* effect as a potential benefit that would arise from a bankruptcy filing. The Conservator made no representation that such relief would be granted – nor could he.

11 U.S.C. § 105 sets forth the general equitable powers of a Bankruptcy Court. Specifically, 11 U.S.C. § 105(a) provides, in relevant part, that:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. (See full text attached as Exhibit "A")

No provision of this section guarantees – or even speaks directly – to *nunc pro tunc* relief. Further, a Bankruptcy Court's exercise of its equitable powers is discretionary and must be exercised carefully in light of the facts of each case. *In re Fraley*, 247 B.R. 417, 422 (Bankr. N.D. Ohio 2000). "Despite the broad grant of equitable powers, bankruptcy courts cannot use them to defeat clear statutory language, nor to reach results inconsistent with the statutory scheme established by the Code." *In re Reinerston*, 241 B.R. 451, 454 (9th Cir. BAP 1999). Consequently, any evaluation of a motion for *nunc pro tunc* effect would be wholly up to the equitable discretion of the Bankruptcy Court.

While the Conservator believes that strong equitable arguments exist in favor of the *nunc pro tunc* relief, it was not his intention to mislead the Court into the belief that it is mandated.

Accordingly, the Conservator respectfully requests that this Court reconsider the July 25 Order, as it is based upon an incorrect reading of 11 U.S.C. § 105.

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2 **III. The July 25 Order Must be Reconsidered**
3 **Because of Newly Discovered Evidence.**

4 Prior to, and subsequent to the issuance of the July 25 Order, at least two Investors
5 and Creditors of Mathon have filed motions for Leave to Assert Assignment of Interest.
6 The gravamen of the Motions seek to enforce the alleged requirement of an assignment of
7 collateral, or proceeds.

8 If Mathon Management Company LLC were in bankruptcy, such collateral would
9 not be reachable by creditors bringing similar motions - as such collateral would be
10 deemed to be property of the estate.

11 11 U.S.C. § 541(a), which defines what assets are presumptively property of the
12 estate, provides in relevant part that:
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15 The commencement of a case under section 301, 302, or 303
16 of this title creates an estate. Such estate is comprised of all
17 the following property, wherever located and by whomever
18 held.

19 Section 541 then enumerates seven sub-paragraphs which detail the scope of such
20 property. 11 U.S.C. § 541(a)(1) is directly applicable and includes within the definition of
21 property of the estate:

22 Except as provided in subsections (b) and (c)(2) of this
23 section, all legal or equitable interests of the debtor in property
24 as of the commencement of the case.

25 Consequently, were Mathon Management Company LLC in Bankruptcy, the
26 automatic stay would preclude investors from a "race to the courthouse" to assert claims
27 that are inequitable, and potentially disastrous, to the creditor body as a whole and would
28 negate the opportunity for an orderly distribution. Similarly, were Mathon Management

1 Company LLC in Bankruptcy, neither this Court nor the Conservatorship Estate would
2 have to expend the time and costs associated with defending such motions.

3
4 **IV. Conclusion.**

5 Accordingly, the Conservator respectfully requests that this Court reconsider its
6 decision as set forth in the July 25 Order, and grant him the authority to immediately place
7 Mathon Management Co., LLC into Bankruptcy.

8
9 DATED this 16 day of August, 2005.

10 **JABURG & WILK, P.C.**

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12 _____
13 Lawrence E. Wilk
14 Jonathan P. Ibsen
15 Attorneys for James C. Sell, Conservator

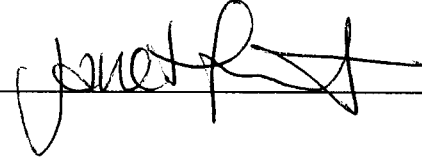
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JABURG & WILK, P.C.
ATTORNEYS AT LAW
3200 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, ARIZONA 85012

1 ORIGINAL filed and COPY
2 of the foregoing hand-delivered this
3 16 day of August, 2005 to:

3 The Honorable Barry C. Schneider
4 MARICOPA COUNTY SUPERIOR COURT
5 101 West Jefferson, CCB 13A
6 Phoenix, Arizona 85003-2243

6 COPIES of the foregoing mailed and
7 emailed this 16 day of August, 2005 to:

<p>7 Wendy L. Coy, Esq. 8 ARIZONA CORPORATION COMMISSION 9 SECURITIES DIVISION 10 1300 West Washington, 3rd Floor 11 Phoenix, Arizona 85007 12 <i>Attorney for Plaintiff</i> 13 WCoy@azcc.gov</p>	<p>Keith Beauchamp, Esq. LEWIS & ROCA, LLP 40 N. Central Avenue Phoenix, Arizona 85004-4429 <i>Attorney for Duane Slade and Guy Williams</i> kbeauchamp@lrlaw.com</p>
<p>11 J. Grant Woods 12 GRANT WOODS P.C. 13 1726 N. Seventh Street 14 Phoenix, Arizona 85006-2200 15 <i>Attorney for Duane and Jennifer Slade</i> 16 <i>And Guy and Lisa Williams</i> 17 gw@grantwoodspc.net</p>	<p>Robert A. Shull, Esq. MARISCAL, WEEKS, MCINTYRE & FRIEDLANDER, P.A. 2901 N. Central Avenue, Suite 200 Phoenix, AZ 85012-2705 <i>Attorney for Scott Johnson & Ross Farnsworth, Jr.</i> rob.shull@mwmf.com</p>
<p>15 Gerald L. Shelley, Esq. 16 QUARLES & BRADY STREICH LANE 17 Two N. Central Avenue 18 Phoenix, Arizona 85004-2391 19 <i>Attorney for Creditors Committee</i> 20 gls@quarles.com</p>	<p>Steven C. Mahaffy, Esq. BEUS GILBERT PLLC 4800 N. Scottsdale Road, Suite 6000 Scottsdale, Arizona 85251-7630 <i>Attorney for Wealth Partners</i> smahaffy@beusgilbert.com</p>
<p>18 Merwin D. Grant, Esq. 19 GRANT & VAUGHN, PC 20 6225 N. 24th Street, Suite 125 21 Phoenix, Arizona 85016 22 <i>Attorney for Dr. Glauser, Larry Pew & Rich Stewart</i> 23 grant@phxlaw.com</p>	<p>James C. Sell 2222 E. Camelback Road, Suite 110 Phoenix, Arizona 85016 <i>Court Appointed Conservator</i> jsellsprint@earthlink.net</p>

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JABURG & WILK, P.C.
ATTORNEYS AT LAW
3700 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, ARIZONA 85012

BANKRUPTCY CODE

11 USC § 105. Power of court

- (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
- (b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.
- (c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 [28 USC §§ 151 et seq.] from its operation.
- (d) The court, on its own motion or on the request of a party in interest, may—
- (1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and
 - (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—
 - (A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or
 - (B) in a case under chapter 11 of this title—
 - (i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;
 - (ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;
 - (iii) sets the date by which a party in interest other than a debtor may file a plan;
 - (iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;
 - (v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or
 - (vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

Treatise Reference: Norton Bankruptcy Law and Practice 2d, Chapter 13

Rule References: 7001(7), 7065

West Key No. Digests References: Bankruptcy ⇌ 2124.1-2126