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17 **IN THE UNITED STATES BANKRUPTCY COURT**
18 **FOR THE DISTRICT OF ARIZONA**

19 **IN RE:**

20 **MATHON FUND LLC,**
21 **Debtor.**

22 **BAR K, INC., R.E. LOANS, INC.,**
23 **Movants,**

24 **vs.**

25 **MATHON FUND LLC, DEBTOR,**
26 **Respondent.**

27 **CHAPTER 11**

28 **CASE NO. 2:05-bk-27993-GBN**

EMERGENCY MOTION FOR RELIEF
FROM THE AUTOMATIC STAY

Comes now Movants, Bar K, Inc., and R.E. Loans, Inc. ("Movant"), and request that this honorable Court lift the Automatic Stay pursuant to 11 U.S.C. 362, for the reasons set forth herein.

1 Respectfully submitted this 23rd day of November, 2005, at Phoenix, Arizona.

2
3 **CHARLES L. FIRESTEIN, P.C.**

4 Charles L. Firestein, #002986

5 Charles L. Firestein, Esq.

6 Attorney for Movant

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8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9
10 **OVERVIEW FACTS**

11 1. Bar K, Inc. is a California Corporation and is the original servicing agent on
12 behalf of Gold Mountain Financial Institution, Inc., (hereinafter referred to as "Movant").

13 2. Mathon Fund I ("Respondent") is a Chapter 11 Debtor, having filed its
14 Voluntary Petition on November 13, 2005 in the District of Arizona.

15 3. On June 12, 2002, Gold Mountain Financial Institution, Inc. ("Gold
16 Mountain") made a loan to a California Limited Liability Company named End Real Estate
17 Development ("ERED"), in the principal sum of \$6,600,000.00. A copy of the Note
18 Secured By Deed of Trust is attached hereto, marked Exhibit "A", and is incorporated
19 herein by reference.

20 4. On June 12, 2005, ERED executed a Deed of Trust Assignment of Rents and
21 Fixture Filing, in favor of Gold Mountain, a copy of which is attached hereto, marked
22 Exhibit "B", and is incorporated herein by reference.

23 5. The security for the loan to ERED is real property located at 122 Lakeview
24 Drive, Woodside, California ("the subject real property").

25 6. On June 12, 2002, Movant commenced servicing of the loan on behalf of
26 Gold Mountain.
27
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1 7. On August 20, 2002, Gold Mountain executed an Assignment of Deed of
2 Trust, transferring all beneficial interest of the subject Deed of Trust to Movant. A copy of
3 the Assignment of Deed of Trust is attached hereto, marked Exhibit "C", and in
4 incorporated herein by reference.

5 8. On September 13, 2003, an individual, Dean Delis, who had an interest in the
6 subject Deed of Trust, transferred his .505% interest in the subject Deed of Trust to R.E.
7 Loans, LLC, a California Limited Liability Company ("R.E. Loans"). A copy of the
8 Assignment of Deed of Trust is attached hereto, marked Exhibit "D", and is incorporated
9 herein by reference. As a beneficial owner of an interest in the subject Deed of Trust, R.E.
10 Loans is also designated as a Movant herein.

11 9. On or about August 29, 2003, ERED executed a promissory note in the face
12 amount of \$1,150,000.00 in favor of Respondent. The promissory note was secured by a
13 Second Deed of Trust on the subject real property.

14 10. James Paulett Charlton ("Charlton") is an individual and a Chapter 11 Debtor
15 who filed a Voluntary Petition in the United States Bankruptcy Court for the Northern
16 District of California on August 24, 2004, Case Number 04-32400-TEC.

17 11. On or about February 14, 2005, Respondent made a general appearance in
18 the Charlton Bankruptcy. Respondent filed a Joinder To Bar K, Inc's Motion for Relief From
19 Automatic Stay on or about February 14, 2005, and filed an Opposition to Motion For
20 Relief From Automatic Stay on or about September 15, 2005. A copy of both Pleadings is
21 attached hereto, marked Exhibits "E" and "F", and are incorporated herein by reference.
22

23 12. The alleged primary asset of Charlton's Bankruptcy is the subject real
24 property, which is approximately 20 acres, and which is improved by a house, guest house,
25 horse stable, garage, and green house.
26

27 13. Through a series of conveyances (without the consent of Movant) Charlton
28 claims sole ownership of the subject real property, subject to (among other indebtedness)

1 the First Deed of Trust in favor of Movant and subject to the Second Deed of Trust in favor
2 of Respondent, among other encumbrances of record. Although Charlton asserts that the
3 subject real property is property of the estate as defined in 11 U.S.C. 547, other interested
4 parties in Charlton's Bankruptcy have asserted that the subject real property is not property
5 of the estate, due to the argument that a company called Integrity 701 LLC, an Arizona
6 Limited Liability Company is the true owner of the subject real property.
7

8 14. There has been a default on the Note held by Movant. The loan has been
9 delinquent since on or about July of 2004, and the current amount owing Movant as of
10 August 25, 2005, is the sum of \$8,132,050.95. A copy of the Calculation of Default and
11 Compound Interest is attached hereto, marked Exhibit "G", and is incorporated herein by
12 reference. The loan is also subject to increase as interest and fees and costs accrue.
13 Further, according to the Report of Heather Van De Velde, Examiner in the Charlton
14 Bankruptcy, at Page 36, as of January 15, 2005, the amount due under the Second Deed of
15 Trust is approximately \$3,389,000.00, which includes the initial principal balance of
16 \$1,550,000.00, plus amounts the Respondent disbursed to Bar-K, Inc., accrued interest
17 and penalties/late fees. She concluded on page 37, that as of January 15, 2005,
18 approximately 10+ months ago, the total indebtedness of the subject real property was
19 approximately \$10,574,000. A copy of the face page and pages 36 and 37 of the
20 Examiners Report, along with the signature page is attached hereto, marked Exhibit "H",
21 and is incorporated herein by reference.
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26 15. There has been a wide disparity in valuations of the subject real property. It
27 is undisputed that it will take almost \$11 million dollars to satisfy all of the current
28 indebtedness on the subject real property and the debt service accrues at approximately

1 \$150K per month. Movant has submitted in the Charlton Bankruptcy an appraisal from a
2 respected appraiser, George H. Miller Associates. The Appraisal gives an "as is value" of
3 \$8.75 million dollars and \$11.030 million dollars if the subject real property is split into
4 three parcels. The Appraisal, dated December 17, 2004, is approximately 200 pages long,
5 and is available for viewing at the office of undersigned Counsel.
6

7 16. Because of the default in payments, Movant filed a Motion to Lift the
8 Automatic Stay and to Annul the Automatic Stay on January 31, 2005. Included in the
9 arguments to lift the stay were the following:
10

11 1. Lender is owed approximately \$7.3 million dollars.

12 2. There is approximately \$11 million dollars in acknowledged secured
13 debt encumbering the Property. The actual amount is higher.
14

15 3. There is a dispute as to whether Debtor even owns the Property.

16 4. The property is in a state of disrepair and has been "red-flagged" by
17 the City of Woodside, California for Code Violations.

18 5. The property has been on the market for sale for a long time. During
19 the years 2003-2004, the highest known offer for the Property was \$10.5 million dollars.
20

21 6. Lender has submitted an appraisal that shows an "as is value" of \$8.75
22 million dollars and \$11.030 million if the Property is split into three parcels.
23

24 7. Debtor has not paid taxes related to the Property and lists the amount
25 of \$76,007.00 as owing to the San Mateo Tax Collector, which does not include taxes due
26 April 10, 2005.

27 8. Lender incorporates by reference, as though set forth fully herein, the
28 findings in the REPORT OF HEATHER VAN DE VELDE, filed with this court on or about

1 March 9, 2005. Lender requests that this court take judicial notice of this report pursuant to
2 F.R.E. 201.”

3 17. After a series of contested hearings, the parties executed a Stipulation For
4 Limited Relief From Automatic Stay on May 10, 2005. The provisions of the Stipulation
5 included:
6

7 a. The Automatic Stay is annulled to validate all actions taken by Bar K, Inc. to
8 bring into effect its Notice of Default recorded on or about September 29, 2004;

9 b. The Chapter 11 Trustee shall be permitted to market the property for sale.
10

11 A copy of the Stipulation For Limited Relief From Automatic Stay is attached hereto,
12 marked Exhibit “I”, and is incorporated herein by reference.

13 18. On November 16, 2005, a Notice of Bankruptcy of Mathon Fund I, LLC was
14 filed in the Charlton Bankruptcy, giving notice of the within Bankruptcy.
15

16 19. A further Hearing regarding Movants Motion to Lift the Automatic Stay has
17 been set in the Charlton Bankruptcy for December 2, 2005.

18 20. Respondent filed its Voluntary Petition, Schedules and Statement of Affairs on
19 November 13, 2005. Respondent included as an asset of this Estate a loan to Paul Charlton
20 in the sum of one million dollars. A copy of the Schedule B. Personal Property Schedules
21 are attached hereto, marked Exhibit “J”, and are incorporated herein by reference.
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25 **ARGUMENT**

26 According to 11 U.S.C. 362(d)(1), on request of a party in interest, and after notice
27 and a hearing, the court shall grant relief from the automatic stay for cause.
28

1 The issue before this Court is whether to lift the Stay to permit the parties to return
2 to the Charlton Bankruptcy to determine their respective rights and interests. The issue of
3 the lifting of the automatic stay by Movant commenced on January 31, 2005, and there
4 have been extensive filings and court appearances by the parties since inception of the
5 Motion to Lift the Automatic Stay. As previously stated, Respondent has made a general
6 appearance in the Charlton Bankruptcy, is therefore represented by Counsel in that
7 jurisdiction, and as such, its interests are being protected.
8

9 In the Charlton Bankruptcy, Movant has alleged that there is abundant cause for
10 relief from the automatic stay, that there are no reorganization prospects, and that there is
11 no equity in the subject real property. Movant further argued that the case should be
12 recognized as a liquidating reorganization and should be treated as such, instead of
13 reorganization. Respondent first argued in favor of lifting the automatic stay and then filed
14 an Opposition to the Motion for Relief From the Automatic Stay, touting a purported sale of
15 \$10 million dollars for the subject real property, which would probably payoff its loan in
16 full.
17

18 Assuming, arguendo, that Respondent continues to claim an interest secured by a
19 Second Deed of Trust in the subject real property, Respondent is represented by Counsel in
20 the Charlton Bankruptcy and has chosen the Northern District of California to litigate the
21 issues regarding the loan. Since the purported owner of the subject real property,
22 Charleton, previously filed a Chapter 11 Bankruptcy in order to attempt to reorganize his
23 affairs, the stay should be lifted here to enable the parties to complete their litigation and
24 have their legal rights and responsibilities determined in that jurisdiction. Should the
25 Motion to Lift Stay prevail, Respondent will be wiped out and will have a cause of action
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1 against Charleton in this Bankruptcy. Should the Motion to Lift Stay not prevail because of a
2 sale which pays off the secured parties, then Respondent will receive a payment, which will
3 become property of the estate in its Chapter 11, herein.

4 WHEREFORE, for the foregoing reasons, Movant respectfully requests that the Court
5 issue its Order Lifting Stay, as follows:
6

7 1. That all stays, including but not limited to, any injunction, restraining order,
8 and the automatic stay provided by 11 U.S.C. § 362 be terminated or modified to permit
9 Movant, the Trustee, or any successor Trustee to the Deed of Trust, or such persons as the
10 Court may deem appropriate, to take any and all action necessary and appropriate to
11 enforce Movant's first secured interest against the subject real property located at 122
12 Lakeview Drive, Woodside, California.
13

14 2. That the Court's Order specifically provides that Movant may return to the
15 United States Bankruptcy Court For The Northern District Of California, unencumbered by
16 the automatic stay imposed herein by the within Chapter 11 filing, to further prosecute its
17 rights and remedies against the Respondent herein in Case Number 04-32400, which is
18 entitled James Paulett Charlton, E. Lynn Schoenmann, Chapter 11 Trustee.
19

20 3. That this Court's Order herein be binding on the Respondent with respect to
21 any subsequent conversion to another Chapter of the Bankruptcy Act or subsequent filing
22 of another Bankruptcy Petition by the Respondent which may affect Movant's interest in the
23 subject real property; and
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25 4. For such other and further relief as this Court deems just and proper.
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RESPECTFULLY SUBMITTED this 23rd day of November, 2005.

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CHARLES L. FIRESTEIN, P.C.

/s/ Charles L. Firestein, #002986
Charles L. Firestein, Esq.
Attorney for Movant

A copy of this Motion was mailed
to the following on November 23, 2005:

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