

1 **ARIZONA CORPORATION COMMISSION**

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6
7 **STATE OF ARIZONA**

8 **MARICOPA COUNTY SUPERIOR COURT**

9 ARIZONA CORPORATION COMMISSION)

No. CV 2005-005484

10 Plaintiff)

) **RESPONSE TO COURT’S REQUEST FOR**
) **INFORMATION RELATING TO**
) **RELEASE OF THE INJUNCTION**
) **AGAINST DEFENDANTS SLADE AND**
) **WILLIAMS FOR THE P URPOSE OF**
) **FILING FOR BANKRUPTCY**
) **PROTECTION**

11 v.)

12 MATHON MANAGEMENT COMPANY,)
13 L.L.C., fka an Arizona limited liability company)
now dba a Delaware limited liability company, et)
14 al.)

(Before the Honorable Barry C. Schneider)

15 Defendants.)
16)
17)

18 **SUMMARY OF ARGUMENT**

19 Plaintiff, the Arizona Corporation Commission (“Commission”), files this motion in
20 response to the Court’s inquiry as to whether or not the language imposed by the Preliminary
21 Injunction which prohibits the Defendants Duane Slade (“Slade”) and Guy Williams (“Williams”)
22 from initiating bankruptcy proceedings should be vacated. The Court requested information to
23 assist in reaching its conclusion.

24 The Court decided at its October 3, 2005 hearing, to grant Conservators’ motion to allow
25 him to seek bankruptcy protection for at least four of the Defendant Entities. In addition, the Court
26 lifted the injunctive language as to “all persons.” The issue currently before the Court is whether to

1 lift the injunction as to Defendants Slade and Williams' ability to file for bankruptcy protection on
2 behalf of Defendant Entities.

3 **I. Introduction.**

4 Plaintiff believes the Court should not allow Defendants Slade and Williams to file a
5 petition seeking bankruptcy protection for any of the Defendant Entities, in spite of the Defendants
6 Slade and Williams request, for several reasons:

- 7 1) The Conservator has the authority to seek bankruptcy protection for the
8 Defendant Entities;
- 9 2) Defendants Slade and Williams should not have the opportunity, no
10 matter how remote, to control the assets currently held in the
11 Conservator's Estate; and
- 12 3) Public policy should govern this Court's decision.

13 Therefore, Plaintiff urges this Court to continue to enjoin Defendants Slade and Williams
14 from filing bankruptcy on behalf of any of the Defendants Entities.

15 **II. Background.**

16 The Plaintiff filed a regulatory enforcement action on April 1, 2005. The verified complaint
17 alleges that Defendants violated the Arizona Securities Act. The same day Plaintiff filed an
18 Application for Preliminary Injunction and Appointment of Receiver requesting the Court to
19 appoint a Receiver and enjoin Defendants Slade and Williams and Defendant Entities from
20 "...disposing of any assets, funds or property owned by the Receivership Defendants", among
21 taking other action. *See* Application for Preliminary Injunction and Appointment of Receiver and
22 Order Appointing Receiver ("Order"). In addition, the Order provided that the Court take exclusive
23 jurisdiction and possession of assets, monies and securities. Further the Order provided that the
24 Conservator be the agent for the Court.
25
26

1 On April 5, 2005, this Court issued an Order appointing James C. Sell, the Receiver for
2 Defendant Entities and granted Plaintiff's request for a Temporary Restraining Order. On April 14,
3 2005, the Plaintiff, Defendants Slade and Williams and the Conservator entered into a stipulated
4 agreement for the appointment of a Conservator. The term Conservator replaced Receiver in name
5 only. The terms of the Order continue as if a Receiver was still in place. The parties agreed that the
6 Order would remain in effect until adjudication of the alleged securities violations. Specifically,
7 the Order states that it "shall continue in effect until trial on the merits or further order of this
8 Court...." *See* Order Approving Stipulation to Continue Order Appointment Conservator and
9 Preliminary Injunction ("Stipulation"). A trial on the matter is scheduled for August 2006.

10 Again, on June 6, 2005 the Plaintiff, Defendants Slade and Williams and the Conservator
11 stipulated to an agreement which retained the Conservator and converted the Temporary
12 Restraining Order into a Preliminary Injunction. *See* Stipulation. This Order contained the same
13 provisions as discussed above.

14 The Court's Orders appointing the Conservator and granting the preliminary injunction
15 were issued with the stated purpose "to prevent waste and dissipation of the Conservatorship
16 Assets by the Defendants to the detriment of the investors" and to prevent inequitable distribution.
17 *See* Order Approving Stipulation Regarding Order Appointing Conservator and Order Continuing
18 Restraining Order.

19 The Defendants stipulated, while represented by counsel, to give exclusive control of the
20 Defendant Entities to the Court and agreed to be enjoined from disposing of any assets owned by
21 the Conservatorship Defendants until after the case involving the securities violations had been
22 resolved. Defendants Slade and Williams voluntarily surrendered their control of the Defendant
23 Entities to the Court.

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1 **III. Argument.**

2 **a. The Conservator has the authority to seek bankruptcy protection on behalf of**
3 **Defendant Entities, with the Court's approval.**

4 The Conservator has the authority to seek bankruptcy protection for any of the Defendant
5 Entities with the Court's permission. The Stipulation states:

6 [t]he Conservator is hereby directed to file with this Court and serve upon
7 the parties, a preliminary report setting out the identity, location and value
8 of the Conservatorship Assets, and any liabilities pertaining thereto. The
9 Conservator shall issue the preliminary report within 45 days of entry of
10 this Order. Further, at the time the Conservator makes such report, he shall
11 recommend to the Court whether, in his opinion, based on his initial
12 investigation, claims against Defendants, should be adjudged in the
13 Bankruptcy Court. After providing the parties an opportunity to be heard,
14 this Court will determine whether to accept the Conservator's
15 recommendation and, if appropriate, issue an order authorizing the
16 Conservator to commence a bankruptcy proceeding. *See Stipulation*
17 *Regarding Order Appointing Conservator.*

18 The Conservator has an obligation to file for bankruptcy protection for the Defendant
19 Entities upon the Court's approval. This is consistent with the Conservator's charge to preserve
20 Conservatorship assets for the benefit of the investors and the creditors.

21 During the Conservator's appointment, he has analyzed financial records in order to
22 determine the flow of money through Defendant Entities. The Conservator has gained knowledge
23 about Defendants, the Defendant Entities, their assets and creditors. The Conservator is in the best
24 position to know what information will be necessary when preparing the bankruptcy petition and to
25 know which Defendant Entities are appropriate for a bankruptcy filing. In the Conservator's recent
26 report he states Defendants Slade and Williams were operating a Ponzi scheme in violation of the
Arizona Securities Act. If Defendants Slade and Williams are permitted to file bankruptcy on
behalf of the Defendant entities, they may use this opportunity to serve their own interests by not
providing complete disclosures. Also, they would control recovered assets. This Court should not
afford Defendants Slade and Williams another chance to have access to the investors' funds.

...

1 **b. The Defendants should not have the opportunity to control the assets**
2 **currently held in the Conservator's Estate.**

3 This Court should not support Defendants Slade and Williams attempt to regain control of
4 Defendant Entities and their assets until the underlying securities matter has been adjudicated. The
5 Plaintiff's action is premised on allegations that the Defendants violated the anti-fraud provisions
6 of the Arizona Securities Act. Specifically, Plaintiff contends that Defendants defrauded investors
7 for more than \$77 million. The recent Conservator's report states that Defendants Slade and
8 Williams lived lavishly at the expense of unsuspecting investors. In light of this, the Court should
9 not remove the current injunction, as it relates to Defendants Slade and Williams, to permit them to
10 file for bankruptcy protection on behalf of Defendant Entities.

11 In a matter brought by the Commodities Futures Trading Commission ("CFTC"), the CFTC
12 brought a receivership action against a number of defendants who were believed to have defrauded
13 investors. The CFTC had a receiver appointed and the president of FITC, Inc. immediately filed
14 for protection under the U.S. Bankruptcy Code. The Court in *Commodities Futures Trading*
15 *Commission v. FITC, Inc.*, 52 B.R. 935 (Bankr. N.D. Cal.1985), found that "[o]nce a court appoints
16 a receiver, the management loses the power to run the corporation's affairs. The receiver obtains all
17 the corporations' power and assets." The Court further stated that "it was the receiver, and *only* the
18 receiver, who this Court empowered with the authority to place FITC in bankruptcy." *Id* at 937.
19 This Court took "exclusive jurisdiction and possession of the assets, monies, securities, choses in
20 action, and properties, real and personal, tangible and intangible, of whatever kind and description,
21 wherever situated, of the Conservatorship Defendants." *See* Stipulation at page 2.

22 The Court in *Commodities Futures Trading Commission v. FITC, Inc.* was very concerned
23 that the defendants in that case might obtain control over the assets of the companies and again
24 defraud the investors if they were allowed to file bankruptcy with the defendants in control of the
25 assets, stating:

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1 To allow [defendant] to control the assets without a receiver would
2 leave the defendants free to dispose of their assets virtually at will
and would defeat the entire purpose of interposing a receiver to
protect the investors from the further wrongdoing.

3 *Id* at 937 quoting *FTC v. R.A. Walker & Assoc., Inc.*, 37 B.R. 608,
4 612 (D.D.C. 1983)

5 Similarly, in this instance, by lifting the injunction, the Court would position Defendants
6 Slade and Williams to once again control Conservatorship assets, including \$12 million in cash,
7 which the Conservator has recovered. Defendants Slade and Williams should not be allowed to
8 control any Conservatorship assets, for any period of time.

9 Furthermore, the Investors' Committee has proposed a plan that if permitted would give
10 control of the Defendant Entities to Defendants Slade and Williams. *See* The Official Committee of
11 Mathon Investors' Motion for Authority to Resolve Case Through Bankruptcy. The Investors'
12 Committee plan would have Defendants Slade and Williams transfer any control they may have to
13 a third party Alvarez and Marsal ("A&M") which would then act as a "fiduciary" or "liquidating
14 trustee". The plan is inherently flawed because it asks the Court to relinquish control of specific
15 Defendant Entities back to Defendants Slade and Williams who would then surrender whatever
16 control they may have of the Defendant Entities to A&M through two executory contracts. One
17 contract will require Defendants Slade and Williams to surrender whatever control they may have
18 to a voting trust controlled by A&M and the second will allow Defendants Slade and Williams to
19 employ A&M. In essence, Defendants Slade and Williams would give their interests and control in
20 each of the Defendant Entities to A&M for the purpose of liquidating the assets.

21 The fundamental flaw is that the proposed plan does not provide any provisions to prevent
22 Defendants Slade and Williams from changing their minds once the injunction is lifted as to the
23 various Defendant Entities. Thus, Defendants Slade and Williams could simply disregard their
24 agreement to relinquish their voting rights or to hire A&M as their "fiduciary" or "liquidating
25 trustee." If Defendants Slade and Williams enter into the agreements and later decide not to hire
26 A&M, they could regain custody and control of the Defendant Entities' and their assets which now

1 includes \$12 million in cash. The proposed method of transferring the assets to a “fiduciary” or
2 “liquidating trustee” does not guarantee that their assets will be protected from Defendants Slade
3 and Williams if they choose to withdraw from, or refuse to enter, either one of these agreements. In
4 addition, Defendants Slade and Williams could transfer any control they have to another individual
5 or entity that does not have the investors’ best interest in mind.

6 To surrender the Defendants Entities’ assets to Defendants Slade and Williams is contrary
7 to well-founded principles of public policy. Instead, this Court should authorize the Conservator
8 who currently controls the Defendant Entities’ assets to seek bankruptcy protection for them. This
9 is the only alternative which ensures assets are protected for the benefit of the investors and other
10 creditors and does not fall under the control of Defendants Slade and Williams.

11 **c. Public Policy Should Govern This Court’s Decision.**

12 The Investors’ Committee counsel has based its argument on the Supremacy Clause. The
13 Supremacy Clause is not reached in this matter. Defendants Slade and Williams knowingly, with
14 presence of counsel, forfeited their rights and gave “exclusive” control of the Defendant Entities to
15 the Court. They do not have the ability to make any corporate decisions, including the decision to
16 file bankruptcy. See *Commodities Futures Trading Commission v. FITC, Inc.*, 52 B.R. 935 (Bankr.
17 N.D. Cal. 1985).

18 The Court in *Commodities Futures Trading Commission v. FITC, Inc. et al.* stated that,
19 while it is not common, the Court may preclude petitions in bankruptcy where there are compelling
20 circumstances. *Id.* at 937 citing *SEC v. Lincoln Thrift Assn.*, 577 F.2d 600, 609 (9th Cir. 1978);
21 *Limited States v. Royal Business Funds Corp.*, 724 F.2d 12, 15-16 (2nd Cir.1983). The Court in
22 *Commodities Futures Trading Commission v. FITC, Inc.* stated the following as compelling
23 circumstances to preclude petitions in bankruptcy: 1) the uncontroverted evidence before the Court
24 showed that FITC was merely a front for a large and elaborate commodities fraud and 2) the
25 evidence presented to the Court by the government and the receiver indicated a real danger that any
26

1 assets released to these defendants would be dispersed, and the fraud against FITC investors would
2 be perpetuated. *Id* at 938.

3 A number of the cases cited by opposing counsel are easily distinguishable. *In Re*
4 *Donaldson Ford, Inc.*, 19 B.R. 425 (Bankr. N.D. Ohio 1982) is not a governmental action. In the
5 *Donaldson* case, the receiver was not seeking to place the matter into bankruptcy court. In the
6 matter before this Court, the Conservator has attempted to obtain Court permission to file
7 bankruptcy as to a number of the Defendant Entities. The goals of the parties and interested
8 persons are the same. In *Kreisers, Inc. v. Larson*, 112 B.R. 996 (Bankr. S.D. 1990) the decision to
9 file bankruptcy by the officers of the entity was made prior to the appointment of a receiver. In this
10 case, the Conservatorship is in place and the Conservator, Investors' Committee, Certain Investors
11 and Defendants Slade and Williams are all seeking to put a number of the Defendant Entities into
12 bankruptcy. The Investors' Committee cites *Merritt v. Mt. Forrest Fur Farms of America, Inc.*,
13 103 F.2d 69 (6th Cir.) *cert. denied* 308 U.S. 583, 60 S. Ct., 105, 84 L.Ed. 48 (1939) in support of its
14 motion. In that case, there was already approval for a reorganization plan before the receiver was
15 appointed. That is not the case in the present matter.

16 **IV. Conclusion**

17 The injunction against Defendants Slade and Williams should not be vacated to allow them
18 to file for bankruptcy protection for any of the Defendant Entities. The court appointed
19 Conservator is in the best position to file bankruptcy on behalf of any of the Defendant Entities due
20 to his analysis of the Defendant Entities, assets, investors and creditors. Public policy mandates
21 that this Court not relinquish Conservatorship assets to Defendants Slade and Williams so they may
22 file for bankruptcy. The Conservator was appointed to preserve these assets due to allegations that
23 Defendants Slade and Williams committed fraud and mismanaged investors' money.

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1 Original filed and copy of the foregoing
hand delivered this 7th October, 2005 to:

2 Honorable Barry C. Schneider
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125 W. Washington, OCB 101
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5 Copy of the foregoing mailed this 7th day of October, 2005 to:

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