IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: **RC SOONER HOLDINGS, LLC, *et al.*[1],** **Debtors.**	**Chapter 11** **Case No. 10-10528 (BLS)** **Jointly Administered** **Objections Due: April 12, 2010 at 4:00 p.m.** **Hearing Date: April 19, 2010 at 10:30 a.m.**

MOTION OF FANNIE MAE FOR RELIEF FROM AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d) AND RULE 4001 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Fannie Mae, as lender to certain of the debtors and debtors-in-possession (the õLenderö), hereby files this motion (the õMotionö) for relief from the automatic stay pursuant to 11 U.S.C. § 362(d) of the United States Bankruptcy Code (the õBankruptcy Codeö) and Rule 4001 of the Federal Rules of Bankruptcy Procedure (the õBankruptcy Rulesö) and Del. Bankr. L.R. 4001. In support of this Motion, the Lender shows this Court as follows:

JURISDICTION

1. The Court has jurisdiction over this Motion under 28 U.S.C. § 1334. Moreover, this is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(G). Venue is proper under 28 U.S.C. §§ 1408 and 1409.

[1]The Debtors and the last four digits of their taxpayer identification numbers are: RC Sooner Holdings, LLC (7904); RC Brixton Square Owner, LLC (8002); RC Cedar Crest Owner, LLC (7914); RC Fulton Plaza Owner, LLC (8011); RC Magnolia Owner, LLC (7998); RC Pomeroy Park Owner, LLC (7939); RC Salida Owner, LLC (7947); RC Savannah South Owner, LLC (7983); RC Southern Hills Owner, LLC (7958); Brixton Square Apartments, LLC (1844); CC Apartments, LLC (1798); Fulton Plaza Apartments, LLC (4344); Magnolia Manor Apartments, LLC (4486); Pomeroy Park Apartments, LLC (1649); Salida Apartments, LLC (1915); Savannah South Apartments, LLC (8586); and Southern Hills Villa Apartments, LLC (1721). The business address for each of the Debtors where notices should be sent is 1515 Broadway, 11th Floor, New York, New York 10036-8901.

2. The statutory and procedural predicates for the relief requested herein are Sections 362(d)(1) and (d)(2) of the Bankruptcy Code and Rule 4001 of the Bankruptcy Rules and Del. Bankr. L.R. 4001.

FACTS

Background:

1. The above jointly administered bankruptcy cases were filed on February 22, 2010 (the õPetition Dateö).

2. The Debtors include eight (8) Oklahoma limited liability companies (the õApartment Debtorsö),[2] each of which owns a residential apartment complex (the õApartmentsö) located in Tulsa County, Oklahoma. The Apartments owned by the respective Apartment Debtors are essentially the sole assets of each respective Apartment Debtor.

3. Each of the Apartment Debtors is indebted severally (the õDebtö), to Fannie Mae pursuant to notes (the õNotesö) held by Fannie Mae. The Debt is secured by valid and perfected first mortgage and lien interests (the õMortgagesö) against all assets (the õCollateralö) of each of the respective Debtors. There is no cross-collateralization of the Debt owed by the respective Apartment Debtors. The Collateral includes, but is not limited to, all rents, cash, negotiable instruments, deposit accounts and other cash equivalents of the respective Apartment Debtors, all of which constitutes Cash Collateral as defined by 11 U.S.C. § 363(a). The Collateral extends to post-Petition rents and proceeds. 11 U.S.C. § 552(b)(2).

4. Prior to the Petition Date, the Apartment Debtors each failed to make the monthly payments due under the Notes by August 1, 2009, and September 1, 2009, thereby constituting defaults under the Notes and Mortgages and other loan documents pertaining thereto.

[2] The Apartment Debtors consist of: Brixton Square Apartments, LLC; CC Apartments LLC; Fulton Plaza Apartments, LLC; Magnolia Manor Apartments, LLC; Pomeroy Park Apartments, LLC; Salida Apartments, LLC; Savannah South Apartments, LLC and Southern Hills Villa Apartments

5. By letters to the Apartment Debtors dated September 29, 2009, Fannie Mae gave notice of Apartment Debtorsø monetary default and notified Apartment Debtors that failure to cure the conditions of default by October 9, 2009, would cause the entire unpaid balance of the Notes and all other amounts owed by Apartment Debtors under the Notes, Mortgages and other loan documents to become immediately due and payable without further demand.

6. The Apartment Debtors failed to cure any of the conditions of default by October 9, 2009, and by letters to Apartment Debtors dated October 16, 2009, Fannie Mae accelerated the debt due under the Notes and declared the entire unpaid balances of the Notes and all other amounts owed by Apartment Debtors under the Notes, Mortgages and other loan documents to be immediately due and payable.

7. In early October, 2009, principals and representatives of the Apartment Debtors began negotiating with RC Sooner Holdings, LLC, (õ RC Soonerö), lead Debtor in these jointly administered bankruptcy cases, or with persons who would shortly thereafter form RC Sooner, for the sale of the Apartments. To that end, RC Sooner was formed and it, in turn, formed eight (8) separate Oklahoma limited liability companies (the õRC LLCsö)[3] to serve as vehicles for the acquisition of the Apartment Debtors.

8. On October 29, 2009, each of the RC Sooner LLCs closed their purchases of 100% of the interests in the Apartment Debtors. At the time the transaction closed the loans were already in default status for failure to make the August-October 2009 payments.

9. Pursuant to the respective Mortgages, a transfer of more than fifty percent (50%) ownership interest in the Apartment Debtors without the consent of Fannie Mae is an event of default constituting a breach of the respective Notes, Mortgages and other loan documents. The

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[3] The RC LLCs are RC Brixton Square Owner, LLC; RC Cedar Crest Owner, LLC; RC Fulton Plaza Owner, LLC; RC Magnolia Owner, LLC; RC Pomeroy Park Owner, LLC; RC Salida Owner, LLC; RC Savannah South Owner, LLC; and RC Southern Hills Owner, LLC.

Mortgages are a public record, being recorded in the land records of Tulsa County, Oklahoma. RC Sooner acknowledged at the 341 Meeting that it had actual notice of the terms of the Mortgages including the restriction on transfer of ownership.[4] Nonetheless, the RC LLCs and RC Sooner made no effort to notify Fannie Mae of the acquisitions (either before or after closing) nor did they make any effort to qualify as borrowers under Fannie Mae guidelines and, apart from acquiring ownership of the Apartment Debtors, have no lender/borrower relationship with Fannie Mae. Had any of the RC LLCs on RC Sooner contacted Fannie Mae prior to the closings, they would have learned that the Debt was in default and they would have learned of the process required to obtain Fannie Maeøs consent to the transfers of ownership and the requirements to be approved as a successor borrower. The Debtors chose not to do so and now seek to use the Bankruptcy Code to nullify those requirements. Debtors should not be permitted to utilize the Bankruptcy Code to avoid the consequences of their own willful conduct.

10. On February 2 and February 8, 2010, Fannie Mae filed foreclosure actions (the õForeclosure Actionsö) against each of the Apartment Debtors and other non-debtor persons and entities that are also liable on the Debt, in State Court in Tulsa County, Oklahoma. The Foreclosure Actions are listed on Exhibit õAö to Exhibit 1 attached hereto.

11. A hearing for the appointment for a receiver respecting each of the Apartments was set in each Foreclosure Action for February 23, 2010. The filing of the bankruptcy cases of the Apartment Debtors on February 22, 2010, stayed the Foreclosure Actions, and the receivership hearings respecting the Apartment Debtors were stricken.

12. The Debt respecting each of the Apartment Debtors exceeds the value of the Collateral respecting each of the Apartment Debtors, the cash collateral is insufficient to pay the

[4] Prior to the sale, RC Sooner thoroughly reviewed documents and information furnished by the manager of the Apartment Debtors (õRemysö) and the Remysø agent and broker (SVN). Affidavit of Daniel Gordon in Support of Chapter 11 Petition And First Day Orders, filed February 22, 2010 [Docket No. 3].

operating expenses and service the loans to Fannie Mae and Fannie Mae will not consensually agree to any reduction in principal. In addition there is a nonmonetary default for the transfer of more than fifty percent (50%) ownership interest in the Apartment Debtors without the consent of Fannie Mae which constitutes a breach of the respective Notes, Mortgages and other loan documents and Fannie Mae will not waive this default. (*See* attached Affidavits of Marc McCarthy and Aaron Hargrove, attached hereto as Exhibit õ1ö and Exhibit õ2ö, respectively, and incorporated herein by reference.)

The Cash Collateral Orders:

13. On February 24, 2010, this Court entered an Interim Agreed Order (A) Authorizing Debtors In Possession To Use Cash Collateral; (B) Granting Replacement Liens To Lender; (C) Granting Adequate Protection; And (D) Scheduling A Final Hearing Thereon [Docket No. 20] (the õFirst Interim Orderö) whereby, *inter alia,* this Court authorized the limited use of Fannie Maeøs Cash Collateral through and including March 11, 2010, set a deadline to object to the Motion of March 8, 2010, and set a final hearing on the Motion for March 11, 2010.

14. On March 11, 2010, the Court entered a Second Interim Agreed Order (A) Authorizing Debtors In Possession To Use Cash Collateral, (B) Granting Replacement Liens To Lender, (C) Granting Adequate Protection, and (D) Scheduling a Final Hearing Thereon [Docket No. 55] (the õSecond Interim Orderö), essentially extending the First Interim Order and setting hearing for the entry of a final Order on March 18, 2010.

15. On March 19, 2010, the Court entered a Third Interim Agreed Order (A) Authorizing Debtors In Possession To Use Cash Collateral, (B) Granting Replacement Liens To Lender, (C) Granting Adequate Protection, and (D) Scheduling a Final Hearing Thereon [Docket No. 75] (the õThird Interim Orderö), essentially extending the Second Interim Order, limiting the

manner in which the Cash Collateral may be used, and setting hearing for the entry of a final Order on March 30, 2010.

RELIEF REQUESTED

16. Lender respectfully requests that the Court enter an order terminating the automatic stay pursuant to Section 362(d)(1) for cause or, alternatively, terminating the stay under Section 362(d)(2) because the Debtor lacks equity in the Property and there is no possibility of a successful reorganization. An independent basis exists for granting stay relief under both sections.

ARGUMENT AND CITATION OF AUTHORITY

17. This Court should terminate the automatic stay to allow the Lender to exercise all its nonbankruptcy rights against each of the Debtors. One of the main purposes of the automatic stay is to õgive[] the business a breathing spell and time to work constructively with its creditorsö to propose a plan of reorganization. H.R. Rep. No. 95-595, at 174 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6135. Courts have recognized, however, that: õ[t]he continuance of the automatic stay contemplates a debtor that is reorganizable and that is actively pursing that goal. Where there is no reasonable likelihood of reorganization or where the debtor unreasonably delays in its efforts to reorganize, the Bankruptcy Code affords several avenues for relief to all creditors, secured as well as unsecured.ö *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 808 F.2d 363, 370 (5th Cir. 1987), *aff'd,* 484 U.S. 365 (1988). Indeed, the automatic stay is not intended to be indefinite or absolute, and relief from the stay may be granted in appropriate circumstances. *Wedgewood Inv.*

Fund, Ltd. v. Wedgewood Realty Group, Ltd. (In re Wedgewood), 878 F.2d 693, 697 (3d Cir. 1989).

Cause Exists to Lift the Automatic Stay under Section 362(d)(1)

18. One way in which the Bankruptcy Code affords secured creditors relief from the automatic stay is 11 U.S.C. § 362(d)(1). Under this section, upon request of a party in interest and after notice and hearing, the court shall grant relief from the automatic stay õfor cause, including the lack of adequate protection.ö 11 U.S.C. § 362(d)(1). Although the Bankruptcy Code does not define the term õcause,ö courts make the determination of cause on a case-by-case basis. *E.g. In re Brown*, 311 B.R. 409, 412-13 (Bankr. E.D. Pa. 2004); *Trident Assos. Ltd. P'ship v. Metro. Life Ins. Co. (In re Trident Assocs. Ltd. P'ship)*, 52 F.3d 127, 131 (6th Cir. 1995). Because the term õcauseö is such an õintentionally broad and flexible concept,ö multitudes of cases exist, all of which õoffer no precise standards to determine when ÷causeø exists to successfully obtain relief from the stay.ö *In re Brown*, 311 B.R. at 412-13. Instead, bankruptcy courts are guided by õthe particular circumstances of the case and . . . considerations that under the law make for the ascertainment of what is just to the claimants, the debtor and the estate.ö *Foust v. Munson S.S. Lines*, 299 U.S. 77, 83 (1936). Procedurally, after the movant makes a prima facie showing that cause exists, the ultimate burden shifts to the nonmovant to prove that cause does not exist to lift the automatic stay. *See* 11 U.S.C. §362(g); *In re Brown*, 311 B.R. at 412.

19. Sufficient cause exists to grant the Lender relief from the automatic stay under Section 362(d)(1) of the Bankruptcy Code. First, the Debtors will not suffer any significant prejudice if this Court grants stay relief. There is no equity in any of the apartment complexes. Consequently, they will not provide the Debtorsø estates with any value.

20. At the time of the filing of this Motion the Debtorsø only have authority to use cash collateral for the limited purpose of maintaining the apartment complexes. Without such funds, the Debtors cannot adequately protect or preserve Fannie Maeøs interest in the Apartment Properties. Furthermore, there are not sufficient funds to cover the costs of these proceedings, maintain the apartment complexes and pay the post petition obligations to Fannie Mae. Absent a substantial write down of the capital obligations to Fannie Mae there is absolutely no possibility of a successful reorganization. In addition the Debtors own actual first week of performance post petition shows a marked decrease from the Debtorsø estimated budget. And, because of the lack of adequate protection, this Court should grant Fannie Maeøs Motion

21. There is no indication that Debtors can perform any of their obligations under the promissory notes. While Fannie Mae does not acknowledge the accuracy of the income alleged by the Debtors in its proposed budgets, even the anticipated revenues listed in the proposed budgets are woefully inadequate to address the required Debt Service.

22. Finally, cause exists because there is a non curable, non monetary default under the promissory notes. Despite the fact that Debtors were aware of the obligation to obtain Fannie Maeøs consent to the transfer of more than fifty (50%) ownership interest in the Apartment Debtors, Debtors deliberately proceeded to closing without completing the obligation to qualify as a borrower as required under the respective Notes, Mortgages and other loan documents. Fannie Mae believes and therefore avers that from the information supplied by the Debtors post petition they would not qualify and Fannie Mae will not waive this obligation.

Because There Is No Equity in the Apartment Complexes and because there is no Possibility of an Effective Reorganization, this Court Should Lift the Automatic Stay Under Section 362(d)(2).

23. Because there is no equity in Apartment Complexes and because the Debtors are not reorganizing, stay relief under Section 362(d)(2) is warranted. Section 362(d) of the Bankruptcy Code provides secured creditors relief from the automatic stay when (1) there is no equity in the collateral *and* (2) such collateral õis not necessary to an effective reorganization.ö 11 U.S.C. § 362(d)(2)(A)-(B). Although the secured creditor has the burden to establish the lack of equity in the property, the debtor has the burden of proof on all other issues, including the burden to show a õreasonable possibility of a successful reorganization within a reasonable time.ö *Timbers*, 484 U.S. at 366; *see also* 11 U.S.C. § 362(g). The õmere indispensability of the property to the debtorøs survival and the debtorøs hopes of reorganization are insufficient to justify continuation of the stay when reorganization is not reasonably possible.ö *Timbers*, 808 F.2d at 370-371; *see also Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 673 n.7 (11th Cir. 1984) (õ[I]t must be demonstrated that an effective reorganization is realistically possible; the mere fact that the property is indispensable to the debtorøs survival is insufficient.ö) The automatic stay is not meant to be indefinite or absolute and this Court has the power to grant relief from the automatic stay in appropriate circumstances. *See El Paso Pros. Co. Stock Bonus Plan v. Rexene Prods. Co. (In re Rexene Prods. Co.)*, 141 B.R. 574, 576 (Bankr. D. Del. 1992).

24. The Debtor has no equity in the Apartment Complexes. A debtor has no equity in the property for purposes of Section 362(d)(2) when the debts secured by the liens on the property exceed the current value of the property. *E.g. In re Indian Palms Assoc., Ltd.*, 61 F.3d 197, 206 (3d Cir. 1995); *Riggs Nat'l Bank v. Perry (In re Perry)*, 729 F.2d 982, 985 (4th Cir. 1984). The debt secured by Fannie Maeøs properly perfected security interest is at least $29,000,000 which includes, among other things, default interest and late charges. This amount

is greater than the current value of the Apartment Complexes. *See* Affidavit of Aaron Hargrove attached hereto as Exhibit 2, and incorporated herein by reference. Accordingly, because the debt secured by Fannie Maeøs security interest exceeds the Apartment Complexesø values, the Debtors have no equity in the Apartment Complexes, and the first element of Section 362(d)(2) is satisfied.

25. Additionally, the Apartment Complexes are not necessary for the Debtorsø reorganization because the Debtors cannot reorganize without a substantial reduction of principal on the loans, which reduction Fannie Mae will not consent to. Nonetheless, even if the Debtors were attempting to reorganize, the likelihood that they could successfully reorganize within a reasonable time is slim because the amount owing on the Loan exceeds the current value of the Apartment Complexes. Therefore, the second element under Section 362(d)(2) is satisfied, and accordingly, this Court should enter an order granting Fannie Mae relief from the stay to allow Fannie Mae to exercise its nonbankruptcy rights and remedies against the Apartment Complexes.

WHEREFORE, Fannie Mae respectfully requests that the Court enter an order:

a. Granting Fannie Mae relief from the automatic stay pursuant to Section 362(d)(1) or Section 362(d)(2) of the Bankruptcy Code or under both sections to prosecute the Foreclosure Actions to conclusion including, without limitation appointment of receivers with full authority over the Collateral under applicable state law, obtaining judgments against the Apartment Debtors, completion of foreclosure sales of the Collateral under applicable state law and obtaining declaratory judgments against the Apartment Debtors as may be warranted pursuant to applicable state law; and

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b. Granting other such relief as the Court deems just and proper.

Dated: March 30, 2010

MONZACK MERSKY MCLAUGHLIN AND BROWDER, P.A.

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