

IN THE SUPREME COURT OF THE STATE OF NEVADA

In Re Manhattan West Mechanic's Lien
Litigation

APCO CONSTRUCTION, INC., a Nevada
corporation, *et al.*,

Petitioners,

vs.

The Honorable Susan W. Scann, Judge,
Eighth Judicial District Court, Clark
County, Nevada,

Respondent,

and

SCOTT FINANCIAL CORPORATION, a
North Dakota Corporation, *et al.*,

Real Parties in Interest.

Electronically Filed
Case No. 61131 Jun 27 2012 08:45 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

**OPPOSITION TO JOINT MOTION TO
STAY AND JOINT
EX PARTE MOTION FOR
IMMEDIATE TEMPORARY STAY OF
TRIAL COURT PROCEEDINGS**

District Court No. 08A571228
Consolidated with:

08A574391	A-09-589195-C
08A574792	A-09-589677-C
08A577623	A-09-590319-C
09A579963	A-09-592826-C
09A580889	A-09-596924-C
09A583289	A-09-597089-C
09A584730	A-09-606730-C
09A587168	A-10-608717-C
	A-10-608718-C

Respondents Scott Financial Corporation and Bradley J. Scott (collectively referred to herein as "SFC") hereby oppose the motion for stay brought by the Petitioners on the grounds that the proceedings currently pending before the District Court will not harm the Petitioners in any way; to the contrary, the sale of the property and the application of their liens to the proceeds from the sale of the property actually increases and ensures the potential value of those liens.

A. SUMMARY OF THE RELEVANT FACTS.

For context, the Court should be aware that the property that is the subject of this appeal (referred to herein as the "Manhattan West Project") was a mixed-use condominium project that stopped construction in 2008. SFC was the lead construction lender for Manhattan West. There has been extensive litigation surrounding the Manhattan West

1 Project, including the instant case, being litigated before Judge Susan Scann, regarding the
2 mechanic's liens claimed against the property and the priority of those liens *vis a vis* SFC's
3 interest in the property. As the property has sat vacant for nearly four years, Clark County
4 has continued to extend the construction permits. That is, they have done so until recently.
5 In the beginning of his year, they indicated that the permits that expired in May of 2012
6 would not be further renewed.

7 The parties, informed by an appraisal of the property and statements by various
8 individuals involved with Southern Nevada real estate development, learned that the value of
9 the property would decline sharply once those permits expired. The lien claimants, a handful
10 of which are the Petitioners in this action, agreed in February 2012 to sell the Manhattan
11 West Project prior to the expiration of the permits, placing the proceeds in the sale in an
12 interest-bearing account for the party or parties that prevailed in the mechanic's lien case.
13 Part of that agreement concerned a certain amount of fees that would be taken out of the
14 purchase price to pay SFC's protective advances on the property; a later disagreement as to
15 the amount of these costs caused the lien claimants to withdraw their support for a sale.

16 Recognizing that the need to sell the property was as urgent as ever, SFC continued to
17 market the property and obtained a successful bidder for the sale. That bidder agreed to
18 assume the risk for renewing the permits (pending trial court approval of the sale), and would
19 pay \$18,050,000 into an interest-bearing account, with only the broker's fees taken out (but
20 no costs of SFC). SFC moved in the instant action for the trial court to approve the sale of
21 the property, and Judge Scann responded by requiring an evidentiary hearing regarding the
22 facts of the sale (e.g., the expiration of the permits, the value of the property, etc.) It is this
23 evidentiary hearing that Petitioners seek to stay with their motion.

24 **B. THE MOTION PENDING BEFORE THE TRIAL COURT WILL NOT**
25 **PREJUDICE THE LIEN CLAIMANTS IN ANY WAY; IT IS DESIGNED TO**
PRESERVE THE VALUE OF THE PROPERTY.

26 First and foremost, Petitioners' motion fails to make clear that the sale of the property
27 will not leave them without legal recourse should they ultimately prevail before this Court.
28

1 In fact, the reality is quite the opposite: a key aspect of the sales proposal is that the entire
2 amount of the proceeds from the sale of the Manhattan West property (\$18,050,000, minus
3 broker fees) will be placed in an interest-bearing account and will not be taken by any parties
4 until the resolution of any proceedings before this Court on the issue of priority.

5 Accordingly, the sale of the property is the correct thing to do to preserve the value of both
6 the property and the mechanic's liens claimed by Petitioners. See, e.g., Motion to Lift Stay,
7 Allow Sale to Proceed With Deposit of Finds Pending Further Court Order, and for Posting
8 of Bond on Order Shortening Time, on file with the District Court herein and attached hereto
9 as Exhibit A.¹

10 The purpose of the motion, as discussed infra, is to protect the value of the property
11 due to expired construction permits. One of the critical evidentiary determinations that will
12 be before the District Court on July 2 is how much the loss of those permits will negatively
13 affect the value of the Manhattan West property should the currently contracted-for sale not
14 close. If the hearing is indefinitely postponed as Petitioners request, there exists the very real
15 possibility that whichever side prevails before this Court will have substantially less value to
16 recover. Accordingly, the hearing before the District Court is critical in order to establish
17 just how much can be obtained by the prevailing party. If the sale falls through, the costs of
18 continuing this litigation may not be worth the eventual result. It is therefore critical for all
19 parties that the July 2 scheduled evidentiary hearing go forward as scheduled.

20 **C. IF THE JULY 2 HEARING DOES NOT GO FORWARD AND THE SALE OF**
21 **THE PROPERTY IS POSTPONED BY THIS COURT, THERE IS A**
22 **SIGNIFICANT THREAT OF LOSS OF VALUE THAT POTENTIALLY**
23 **AFFECTS EVERY PARTY TO THIS LITIGATION.**

24 One of the central reasons that the trial court has set a hearing for July 2 is to
25 determine the extent to which the prior construction permits on the property affect the value
26 of that property. The prospective buyer of the property, which even now is under contract to

27 ¹ For brevity's sake, only the points and authorities of the motion have been attached.
28

1 purchase it for \$18,050,000, has only agreed to do so because of its understanding that it will
2 be able to renew the now-expired construction permits.² It has been communicated to the
3 buyer and to the Respondents that if this sale does not go through, the permits will not be
4 renewed, and that the value of the property will drop dramatically. (One estimate was that
5 the property value could fall to as low of \$5 million.³) It would be an extremely unwise
6 decision to put the sale of the Manhattan West property off and risk this loss of value, which
7 potentially affects the lien claimants every bit as much as it affects the other parties to this
8 matter.

9 **D. THE INSTANT MOTION IS PROCEDURALLY IMPROPER BECAUSE**
10 **PETITIONERS HAVE NOT YET MOVED THE DISTRICT COURT TO STAY**
11 **THE JULY 2 HEARING.**

12 Apart from the substantive reasons to deny the instant motion, the fact is that the
13 Petitioners have failed to follow proper procedure in seeking a stay from the Court, and
14 therefore their motion must be denied. NRAP 8(a)(1) provides as follows:

15 Initial Motion in the District Court. A party must ordinarily
16 move first in the district court for the following relief:
17 (A) a stay of the judgment or order of, or proceedings in, a
18 district court pending appeal or resolution of a petition to the
Supreme Court for an extraordinary writ;
(B) approval of a supersedeas bond; or
(C) an order suspending, modifying, restoring or granting an
injunction while an appeal or original writ petition is pending.

19 (Emphasis added.) While Petitioners mention that the district court granted a stay after it
20 granted SFC's motion for reconsideration, Judge Scann later became convinced that hearing
21 the motion to lift the stay and sell the property was not only proper, but wise. Petitioners
22 have never moved the district court to stay those proceedings, and have instead run directly
23 _____

24 ² The current buyer of the property signed the contract for the sale prior to the expiration of the
25 permits, and understands from Clark County that it will be able to grandfather in those permits based
on the current contract.

26 ³ An appraisal is right now being prepared to put an exact number on the loss of value resulting
27 from the loss of the Manhattan West construction permits. That appraisal will be presented to the
28 trial court at the upcoming evidentiary hearing.

1 to this Court to obtain a stay. This procedure is improper and constitutes a jurisdictional
2 defect that should bar the requested relief. While NRAP 8(a)(2)(A)(I) does provide that this
3 Court may consider a motion where moving before the district court would be impracticable,
4 there is no such showing in Petitioners' motion. Because the procedural requirements for the
5 instant motion have not been met, it ought to be summarily denied.

6 Additionally, the fact that the trial court has yet to even hear SFC's motion or decide
7 whether relief is necessary renders the lien claimants' motion premature. There is no
8 conceivable harm to any party that would result from the trial court (and by extension, this
9 Court) having more information about the property. Indeed, it would be in the best interests
10 of all parties if the trial court were fully apprised of all issues relating to the value of the
11 property so that the best possible ruling can be made before the start of what will no doubt be
12 a lengthy appellate process.

13 **E. CONCLUSION**

14 The lien claimants are unable to demonstrate any harm that will befall them or any
15 other party if the evidentiary hearing regarding the sale of the Manhattan West property
16 happens as scheduled. Even if the sale goes through, the lien claimants will be secured in
17 their claims to the tune of \$18 million, which is far more than they would be entitled to if the
18 permits on Manhattan West were lost. There is therefore every reason for this Court to allow
19 the district court to proceed as it sees fit, conduct the evidentiary hearing, and make a timely,
20

21 ...

22 ...

23 ...

24 ...

25 ...

1 informed decision regarding the sale of the Manhattan West property.

2 DATED this 26 day of June, 2012.

3 Respectfully submitted by:

4 KEMP, JONES & COULTHARD, LLP

5 

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2012, the foregoing **OPPOSITION TO JOINT MOTION TO STAY AND JOINT EX PARTE MOTION FOR IMMEDIATE TEMPORARY STAY OF TRIAL COURT PROCEEDINGS** was served on the following persons via the court's electronic service, e-mail and by mailing a copy, postage prepaid and addressed to the following listed below:

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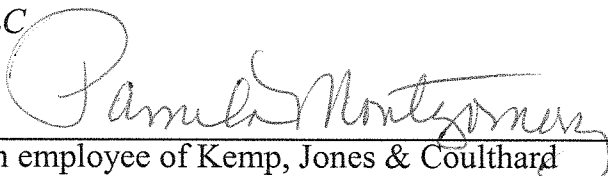
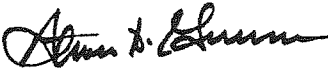

An employee of Kemp, Jones & Coulthard

EXHIBIT A

ORIGINAL

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CLERK OF THE COURT

ENTERED
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AN

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Nevada Bar No.: 000267
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8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 APCO CONSTRUCTION, a Nevada
11 corporation,

12 Plaintiff,

13 v.

14 GEMSTONE DEVELOPMENT WEST,
INC., a Nevada corporation; NEVADA
15 CONSTRUCTION SERVICES, a
Nevada corporation; SCOTT
16 FINANCIAL CORPORATION, a North
Dakota corporation;
17 COMMONWEALTH LAND TITLE
INSURANCE COMPANY; FIRST
18 AMERICAN TITLE INSURANCE
COMPANY; and DOES I through X,

19 Defendants.

20
21 AND ALL RELATED CASES AND
MATTERS.
22

Case No.: A571228
Dept. No. XXIX

CONSOLIDATED CASES:

A571792, A574391, A574792, A577623,
A579963, A580889, A583289, A584730,
A587168, A589195, A589677, A590319,
A592826, A596924, A597089, A606730,
A608717, and A608718

**MOTION TO LIFT STAY, ALLOW
SALE TO PROCEED WITH DEPOSIT
OF FUNDS PENDING FURTHER
COURT ORDER, AND FOR POSTING
OF BOND ON ORDER SHORTENING
TIME**

Hearing date:

Hearing time:

23 COME NOW Scott Financial Corporation and Bradley J. Scott (the "Scott
24 Defendants"), by and through their attorneys of record, and hereby move this Court to (1)
25 lift the stay for the limited purpose of considering and granting the instant motion, (2)
26 allow the sale of the Manhattan West Project to proceed with funds therefrom deposited
27 in an interest bearing account pending resolution of this litigation and/or further order of
28 this Court, and (3) for the posting of a bond in the amount of the sale price by any

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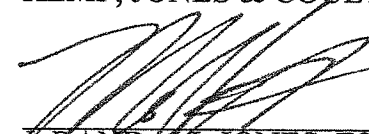
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1 this Court, and (3) for the posting of a bond in the amount of the sale price by any
2 mechanic's lien claimant refusing to release its lien and allow the sale to proceed. This
3 Motion is made and based upon the pleadings and papers on file herein, the memorandum
4 of points and authorities, as well as any oral argument this Court may entertain at a
5 hearing on this Motion.

6 DATED this 25 day of May, 2012.

7 Respectfully submitted by:

8 KEMP, JONES & COULTHARD, LLP

9 

10 J. RANDALL JONES, ESQ. (#1927)

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16 *Attorneys for Scott Financial Corporation and
Bradley J. Scott*

17 **APPLICATION FOR ORDER SHORTENING TIME**

18 STATE OF NEVADA

19 COUNTY OF CLARK

} ss

20 J. Randall Jones, Esq., being first duly sworn, deposes and says:

21 1. I am a partner in the law firm of Kemp, Jones & Coulthard, LLP, and I
22 represent Scott Financial Corporation and Bradley J. Scott (the "Scott Defendants") in the
23 above-entitled action. I am an attorney admitted to practice before all courts in the State
24 of Nevada.

25 2. I make this declaration under penalty of perjury. I have personal knowledge
26 of the facts and circumstances set forth in this affidavit and can testify thereto in a court
27 of law.

28 3. Pursuant to EDCR 2.26, the Scott Defendants submit that good cause exists
to justify shortening time of a hearing on this motion.

1 4. Exigent circumstances exist which require that the instant Motion be heard
2 within the next 5 judicial days or as soon as this Court's calendar will allow. Since the
3 purpose of the Motion is to facilitate the sale of the Manhattan West Project at issue in
4 order to retain its value, it is essential that the determination as to the permissibility of the
5 sale and the clearing of title be immediately determined.

6 5. The urgency of the sale of the Manhattan West Project is a result of the
7 current owner's inability to obtain an additional extension of the permits necessary to
8 complete the project. I have been informed that the current permits were set to expire on
9 or before May 18, 2012. I have been informed and believe that if the permits are not
10 extended, it will greatly reduce the value of the project given that new permits will
11 require significant and costly changes and changes to the buildings on site.

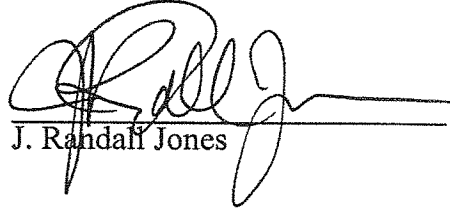
12 6. Upon information and belief, the buyer of the Manhattan West Project
13 reached out to the Clark County Building Department regarding the permit extensions.
14 However, the buyer was informed that it will not be provided with a written approval of
15 an additional extension of the permits until the sale has been finalized and it is on title as
16 the new owner of the project. Clark County has not given the new buyer an open-ended
17 extension and its patience appears to be running thin. Also, Clark County has not given
18 the buyer any indication that a different buyer would be afforded this same consideration
19 so far past the extension deadline. Thus, if this sale is not approved and approved
20 quickly, it is possible the only collateral in this litigation will lose significant value.

21 7. Based upon all information available to me, including Exhibit A, which is a
22 copy of the April 2010 appraisal of the Property valuing it at \$19,300,000,¹ I believe the
23 successful offer price of \$18,050,000 is fair and reasonable under the circumstances.
24 Based upon all information I have received I believe that time is of the essence.

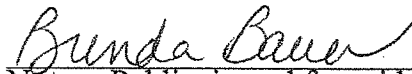
25
26
27 ¹ It is my understanding and belief that this appraisal was done on behalf of the
28 Participating Banks for their use in determining what loan value they could retain on their books,
as required by the federal bank examiners.

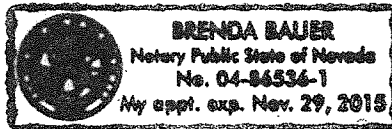
8. Accordingly, good cause exists for the issuance of an Order Shortening Time so that this matter may be heard within the next 5 judicial days or as soon as this Court's calendar will allow.

Further, your affiant sayeth naught.


J. Randall Jones

Subscribed and Sworn to before me
this 25 day of May, 2012



Notary Public, in and for said
County and State



ORDER SHORTENING TIME

Upon application of the Scott Defendants and the Affidavit of J. Randall Jones, and good cause appearing, it is hereby:

ORDERED, ADJUDGED AND DECREED that time for notice and hearing of this Motion to Lift Stay, Allow Sale to Proceed with Deposit of Funds Pending Further Court Order, and for Posting of Bond on Order Shortening Time, is shortened, and the same shall be heard on ^{JUNE} May 13, 2012, at the hour of 10:00 a.m.


DISTRICT COURT JUDGE
May 29, 2012

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

It goes without saying that a lien priority action is only as valuable as the encumbered real property. The Scott Defendants and many of the Lien Claimants understand this - some other Lien Claimants do not. If the encumbered real property

1 drops significantly in value while parties litigate priority before the Nevada Supreme
2 Court, then all parties lose. It therefore becomes necessary for those who have the ability
3 to do so, to try and preserve the property's value as much as possible. It is for this reason
4 that the Scott Defendants have filed the instant motion.

5 The value of the real property at issue in this litigation, namely the Manhattan
6 West Project (the "Project"), is in extreme peril. Only partially constructed, the Project's
7 value lies in large part on building permits which guided the initial construction, but
8 which no longer conform with the current building code. If these original permits expire,
9 new permits would require a new design and alterations to the Project costing millions of
10 dollars – significantly reducing the value of the Project. Since these permits were to
11 expire on or before May 18, 2012, the Scott Defendants and their real estate broker
12 worked feverishly to find a new buyer in order to extend the original permits and retain
13 the Project's value. To make the deal work, the Scott Defendants need the Lien
14 Claimants to release their liens on the property and direct them instead to the money
15 resulting from the purchase - over \$18 million. Unfortunately, not all of the Lien
16 Claimants see the severity of the situation. Certain claimants have indicated that they will
17 refuse to cooperate despite the financial consequences.

18 In order for the sale to succeed and the Project's value to be secured, the Project
19 will need to be clear of any and all encumbrances. To accomplish this end, the Scott
20 Defendants request that this Court (1) lift the stay imposed in its May 7, 2012 Order for
21 the sole purpose of considering and granting this Motion; (2) approve the sale; (3) order
22 that all proceeds from the sale, less broker's fees and costs in the amount of \$361,000, be
23 deposited in an interest bearing account, not to be withdrawn, transferred or disbursed
24 without further order from this Court and until there has been a final determination of the
25 lien priority issues relevant in the instant action; and (4) order any Lien Claimants who
26 hinder the sale by refusing to release their encumbrances against the Project to post a
27 bond in the full amount of the current sales price (\$18,050,000) or, should they fail to do
28 so, have their liens stricken and lis pendens expunged. By granting the Scott Defendants'

1 Motion in its entirety, the Project's value will be preserved and the parties can proceed
2 with priority action in due course.

3
4 **II.**
ARGUMENT

5 **A. The Stay in the Litigation Should Be Lifted for the Sole Purpose of**
6 **Addressing the Motion.**

7 On May 7, 2012, this Court entered its Decision, Order and Judgment on
8 Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of
9 Liens (the "Stay Order") wherein it granted a stay of the litigation "pending a petition to
10 the Nevada Supreme Court provided such is timely filed and for which no bond is
11 required." Stay Order, on file herein, at 7:19-21. Given that the Stay Order was the result
12 of a partial summary judgment motion, there are aspects of this litigation which still may
13 be litigated even after the Supreme Court hands down a decision on the Lien Claimants'
14 anticipated appeal. Thus, it was deemed necessary to stay the remaining litigation
15 pending the appeal. The Scott Defendants now request that this Court temporarily lift the
16 stay for the sole purpose of considering the Motion and protecting the value of the only
17 collateral in this litigation.

18 In requesting a temporary lift of stay, the Scott Defendants are not attempting to
19 subvert the Court's Stay Order and reopen litigation on any other remaining issues in the
20 case. They are only seeking to close on the sale of the Project in order to avoid huge
21 losses to all parties. As mentioned previously and outlined in more detail below, the
22 inability to close on the sale of the Project at this time will more than likely result in a loss
23 of the original permits on the Project and the loss of millions of dollars in value.
24 Therefore, the Scott Defendants request that this Court grant their request to temporarily
25 lift the stay to consider these matters.

26 ///

27 ///

28 ///

1 **B. Given the Scott Defendants' Reasonable Efforts to Market and Sell the**
2 **Project Under These Specific Circumstances, this Court Should Approve the**
3 **Sale.**

4 There is no question that the Project's owner has every right to sell the Project with
5 or without Court approval. However, given the numerous mechanic's liens recorded
6 against the Project and the need to immediately protect the Project's value, the Scott
7 Defendants request that this Court review and approve its efforts to sell the Project.

8 1. *The Imminent Expiration of the Manhattan West Permits Requires an*
9 *Immediate Sale of the Project to Protect the its Value.*

10 The urgency surrounding the need to immediately sell the Project as a result of
11 expiring permits is best explained by Peter Smith of Dundar Consulting ("Dundar"). In
12 February 2009, Scott Financial Corporation hired Dundar Consulting ("Dundar") to
13 provide site management services and maintain the building department permits on the
14 Project. *See* Affidavit of Peter Smith, attached hereto as Exhibit B, ¶¶ 4 and 5.

15 Pursuant to the applicable Clark County Building Code, the permits expire six (6)
16 months from the termination of construction activity. Consequently, every six (6)
17 months, Dundar requested an extension of the permits from the Clark County Building
18 Department. *Id.* at ¶ 6. When applying for these extensions, Dundar cited the loss of
19 financing as the reason for the delay in completion of the Project and requested that the
20 permits be extended while an attempt was made to either obtain additional financing or
21 locate a third party to purchase and complete the Project. *Id.* at ¶ 7. Every six months,
22 Dundar repeated this process and was successful in obtaining extensions in May 2009,
23 December 2009, May 2010, December 2010, May 2011 and December 2011. *Id.* at ¶ 8.

24 However, in December 2011, Clark County informed Dundar that no further
25 extensions would be granted unless work on the Project commenced. *Id.* at ¶ 9. Because
26 Dundar had already received six extensions, it was informed that Clark County no longer
27 believed its representations that it was seeking additional financing or a third party to
28 purchase and complete the Project. *Id.* at ¶ 10.

On or about January 5, 2012, Clark County adopted an updated version of its building code series (“updated building code”) and any permits expiring after the date of that update could not be renewed. *Id.* at ¶ 12. The expiration of the permits on the Project would cause a number of problems, including the need for new permits, the developer’s need to prepare and submit new plans that comply with the updated building code, and, upon information and belief, the cost of preparing a new set of plans to comply with the updated building code would be approximately \$5 million. *Id.* at ¶ 13. Furthermore, once the new plans are completed, Clark County would have to review and approve them. The plan review and approval process could take between 6-12 months, and the approximate cost of the review by the Clark County is \$235,000.00. *Id.* at ¶ 14. Finally, the new design would not match the construction that has already been completed on the Project and the existing buildings would have to be retrofitted to fit the new design. *Id.* at ¶ 15. Upon information and belief, the cost to retrofit the existing buildings would be approximately \$5 million. *Id.* at ¶ 16.

In light of the updated building code and the refusal by Clark County to grant any additional extensions, it became absolutely necessary to sell the Project before the permits expired. According to Peter Smith, it was his “understanding that Clark County would consider a compromise to extend the permits if a third party entered into a Purchase and Sale Agreement prior to the permits expiring on or before May 18, 2012.” *Id.* at ¶ 11. This is exactly what the Scott Defendants have done, and the buyer of the property is on track to extend the permits once the sale has been completed.

2. *The Scott Defendants Attempt to Work with the Lien Claimants Prior to Entering to a Purchase and Sale Agreement.*

Shortly after learning of the urgent situation with the permits, the Scott Defendants contacted the Lien Claimants and attempted to work with them to find a solution to the issue. On February 14, 2012, the Scott Defendants held a meeting with the Lien Claimants and agreed that the Scott Defendants would sell the Project without the Lien Claimants’ encumbrances, funds from the sale would be put in escrow pending a

1 conclusion of the litigation. Due to the disagreement regarding the reimbursement of
2 Scott Financial Corporation's costs, however, that deal fell through, with counsel for a
3 few of the lien claimants taking the position that no sale of the property was acceptable.
4 Regardless of the fact that that particular deal with the Lien Claimants was no longer
5 firmly in place, the circumstances requiring the sale of the property remained, and
6 continue to be, as urgent as ever.

7 3. Scott Financial Corporation Markets the Project

8 As the Scott Defendants reminded the Lien Claimants in a recent letter, the Scott
9 Defendants retained Doug Schuster of Newmark Grubb Knight Frank ("Grubb Ellis") to
10 market the Project. The Scott Defendants provided Mr. Schuster with its list of
11 prospective buyers that had previously contacted them. Grubb Ellis also marketed the
12 property through an e-mail campaign, press release and on its website. See Jones
13 Correspondence, dated May 23, 2012, attached hereto as Exhibit C. Essentially, the Scott
14 Defendants cast as wide a net as possible to bring in the highest offers and most qualified
15 buyers for the project. In fact, an advertisement was even placed in the Wall Street
16 Journal to attract as much attention as possible.

17 4. A Successful Bid is Made to Purchase the Project

18 Because of the short period of time before the permits on the Project expired,
19 Grubb Ellis wanted to ensure that all prospective buyers actually had the ability to close
20 on the Property in a reasonable period of time. Interested buyers were provided with
21 basic due diligence materials and given until May 2, 2012, to submit a sealed bid due to
22 the rapidly approaching expiration date for the project permits. The bidders had been
23 informed that, in order to submit an acceptable bid, they would have to provide proof of
24 funds showing the buying entity's ability to perform, in addition to executing a Purchase
25 and Sale Agreement ("PSA"). After the initial bidding period closed, there were 18 bids,
26 ranging from \$7 million to \$25 million. *Id.*; see also First Manhattan West LOI Matrix
27 ("First Matrix"), attached hereto as Exhibit D.
28

1 On May 3, 2012, Grubb Ellis sent a letter to the final bidders that informed them,
2 among other material requirements, that they had until 5:00 p.m. on May 10, 2012, to
3 submit a signed acceptance of the Purchase and Sale Agreement with their best price and
4 wire a \$500,000 deposit that would immediately become non-refundable upon acceptance
5 of their bid, along with proof the named buyer had the necessary funds to close escrow.
6 *See* Final Bid Letter, dated May 3, 2012, attached hereto as Exhibit E.

7 After the deadline of 5:00 p.m. on May 10, 2012 passed, Grubb Ellis had not
8 received a bid that reached the Scott Defendants' targeted minimum price of \$18,000,000.
9 Grubb Ellis thereafter attempted to contact all final bidders to see if the offers could be
10 increased at least to the minimum targeted price of \$18,000,000. Grubb Ellis was only
11 able to contact two bidders.² The winning bidder signed a PSA for \$18,050,000.

12 The winning bidder was thereafter informed by the Scott Defendants that its bid
13 was accepted, subject to approval by the Scott Financial Participating Banks, and the lien
14 holders or court order. The Participating Banks voted overwhelmingly to accept the offer
15 the next morning, Friday, May 11th.

16 As a result of the foregoing, Gemstone Development West, Inc. has entered into a
17 Purchase and Sale Agreement. *See* Purchase and Sale Agreement, attached hereto as
18 Exhibit F. Clearly, the Scott Defendants have gone to great lengths to ensure that they
19 received the highest priced offer from the most qualified buyer. Therefore, the Scott
20 Defendants respectfully request that this Court approve the sale of the Project.

21 **C. All Proceeds from the Sale of the Project, Less Broker's Fees and Costs,**
22 **Should Be Ordered Deposited Pending Further Order from this Court.**

23 To be clear, the Scott Defendants are not attempting to swindle the Lien Claimants
24 out of any potential right they may ultimately have to the value of the Project in the event
25 they succeed in this litigation. The Scott Defendants are simply attempting to preserve

26 _____
27 ²Though one of the bidders contacted, Bond Rok, did increase its bid, Grubb Ellis
28 determined that it did not submit proof of funds required to close the deal. Accordingly, its bid
was not accepted.

1 the Project's value before the permits expire and the value of the Project drops
2 significantly. To be sure that they preserve the Project's value, while still ensuring that
3 all parties have equal access to the Project's current value, the Scott Defendants move for
4 this Court to enter an order directing the funds from the sale of the Project, less broker's
5 fees and costs in the amount of \$361,000, to be held in an interest bearing account, not to
6 be withdrawn, transferred or disbursed without further order from this Court and until
7 there has been a final determination of the lien priority issues relevant in the instant
8 action.

9 This order would put the Lien Claimants in an even better position than it was
10 under the original agreement on February 14, 2012, given that the Scott Defendants are
11 no longer requesting that its fees for past preservation of the Project be paid out from the
12 Project's sale proceeds before they are deposited.³ Therefore, in the event this Court
13 approves the sale of the Project, it should also order that the proceeds from the sale be
14 deposited as stated above.

15 **D. All Non-Cooperating Lien Claimants Should Be Ordered to Post a Bond in**
16 **the Amount of the Sales Price or Have Their Liens Stricken and Lis Pendens**
Expunged.

17 On May 23, 2012, the Scott Defendants' counsel, J. Randall Jones, Esq., sent
18 correspondence to all Lien Claimants informing them of the sale process, the commitment
19 to put sales proceeds into escrow, and the need for quick cooperation. *See Jones*
20 *Correspondence, Exhibit. C.* Wisely, a number of the Lien Claimants understood the
21 advantage the sale of the Project will have for all parties and have agreed either by
22 forthcoming stipulation or by non-opposition to the sale of the Project for \$18,050,000.
23 The Scott Defendants will supplement this Motion with the executed stipulations as soon
24 as possible. However, there are certain Lien Claimants which have informed the Scott
25 Defendants that they will oppose these efforts to sell the Property. Ultimately, those Lien
26

27 ³ As mentioned supra, this was previously the sticking point with the lien claimants that
28 prevented an earlier agreement to sell the Project.

1 Claimants' oppositions will likely come in the form of a refusal not to release their
2 recorded encumbrances against the Project, resulting in the implosion of the deal, the
3 expiration of the permits, and the loss of significant value for the Project.

4 This Court should not let a few Lien Claimants hijack this process, stop the sale
5 and allow the Property to loose millions of dollars in value. These Lien Claimants,
6 already having lost the priority issue at the district court level, apparently have no concern
7 about risking the value of the Project. (Though they certainly should be concerned about
8 this, considering that an appeal of this Court's decision on priority is forthcoming.) If the
9 dissenting Lien Claimants wish to risk the Project's current value by not allowing this
10 sale to proceed, then they should be required to show the conviction of their belief by
11 posting a bond and protecting all those parties who do not wish to take such a risk.
12 Accordingly, this Court must order the dissenting Lien Claimants to post a bond in the
13 amount of the sales price, or \$18,050,000, to protect the value of the Project.

14 In the event that the dissenting Lien Claimants fail to timely post the entire bond,
15 this Court should order that their mechanic's liens will be stricken and their respective
16 notices of lis pendens expunged to allow the sale to proceed. The value of the Project can
17 only be knowingly preserved with the sale and, likewise, the sale can only be completed
18 if the title to the Project is clear. Lien Claimants will not be prejudiced by such an action
19 given that any claims in this action that they may succeed on will be secured by proceeds
20 of the sale in an interest bearing account.

21 III.

22 CONCLUSION

23 The value of the Project is at significant risk. There is only one way to save the
24 Project's value and that is to complete the sale of the Project. Therefore, the Scott
25 Defendants request that this Court (1) lift the stay imposed in its May 7, 2012 Order for
26 the sole purpose of considering this Motion, (2) approve the sale; (3) order that all
27 proceeds from the sale, less broker's fees and costs in the amount of \$361,000, be
28 deposited in an interest bearing account, not to be withdrawn, transferred or disbursed

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1 without further order from this Court and until there has been a final determination of the
2 lien priority issues relevant in the instant action; and (4) order any Lien Claimants who
3 hinder the sale by refusing to release their encumbrances against the Project to post a
4 bond in the full amount of the current sales price (\$18,050,000) or, should they fail to do
5 so, have their liens stricken and lis pendens expunged.

6 DATED this 25 day of May, 2012.

7 Respectfully submitted,

8 KEMP, JONES & COULTHARD, LLP

9
10 

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APPENDIX OF EXHIBITS

No.	Document	Page No.
1.	Exhibit A - Appraisal	APP-00001 - 00317
2.	Exhibit B - Affidavit of Peter Smith	APP-00318 - 00321
3.	Exhibit C - Jones Correspondence dated 5/23/2012	APP-00322 - 00328
4.	Exhibit D - First Manhattan West LOI Matrix	APP-00329 - 00331
5.	Exhibit E - Final Bid Letter	APP-00332 - 00333
6.	Exhibit F - Purchase and Sale Agreement	APP-00334 - 00374