

1 UNITED STATES BANKRUPTCY COURT
2 EASTERN DISTRICT OF CALIFORNIA
3 FRESNO DIVISION

3 In re
4 A Partners, LLC,
5 Debtor.
6
7 Scripps Investments & Loans, Inc.,
8 et al.,
9 Movants,
10 v.
11 A Partners, LLC,
12 Respondent.

Case No. 06-10069-B-11
DC No. BMJ-1

13 **MEMORANDUM DECISION REGARDING MOTION FOR**
14 **RELIEF FROM THE AUTOMATIC STAY**

15 Albert J. Berryman, Esq., of Baker, Manock & Jensen, P.C., appeared on behalf of
16 movants, Scripps Investments & Loans, Inc., et al.

17 Estela O. Pino, Esq., of Pino & Associates, appeared on behalf of respondent and
18 debtor-in-possession, A Partners, LLC.

19 Before the court is a motion for relief from the automatic stay under 11
20 U.S.C. § 362(d)(1) and (2).¹ Scripps Investments & Loans, Inc., et al. (“Scripps
21 Investments”) wants permission, on behalf of itself and all junior lienholders, to
22 proceed with the non-judicial foreclosure of various trust deeds against a
23 commercial building known as the Helm Building (the “Helm Building” or the
24 “Property”). The debtor-in-possession, A Partners, LLC, is a California limited
25 liability company (“Debtor”). For the reasons set forth below, Scripps
26 Investments’ motion will be granted as to the first and third priority trust deeds

27
28 ¹Unless otherwise indicated, all chapter, section and rule references are to
the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated after the
effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act
of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 which it holds or controls. The request for relief from stay on behalf of all other
2 entities holding liens or charges against the Helm Building will be denied. Scripps
3 Investments also asks the court to waive the provisions of Fed.R.Bankr.P.
4 4001(a)(3), which automatically stays the effect of this ruling for 10 days unless
5 the Rule is waived. Because Scripps Investments could potentially conduct a
6 trustee's sale of the first trust deed within 10 days after this ruling is entered, that
7 request will only be granted in part.

8 This Memorandum Decision contains the court's findings of fact and
9 conclusions of law as required by Fed.R.Bankr.P. 7052. The bankruptcy court has
10 jurisdiction pursuant to 28 U.S.C. § 1334 and 11 U.S.C. § 362. This is a core
11 proceeding pursuant to 28 U.S.C. § 157(b)(2)(G).

12 **FACTS AND PROCEDURAL BACKGROUND**

13 **The Helm Building.**

14 The principal asset of the Debtor's estate, and the focus of this motion, is
15 the Helm Building. The Debtor purchased the Helm Building in 2003 for \$1.55
16 million. The Debtor's manager, Ronald Allison,² testified that the Debtor acquired
17 the Property for less than its market value, but no evidence was offered as to the
18 condition of the Property or the actual value at the time. Constructed in or about
19 1914, the Helm Building sits on Fresno's downtown Fulton Mall, an area that is in
20 need of and undergoing redevelopment. The Helm Building is a ten-story steel,
21 concrete and brick structure with a basement. According to Mr. Allison, the Helm
22 Building has, including the basement, approximately 82,500 gross square feet of
23 space; approximately 70,000 square feet are "net rentable." The Property sits on
24 one of two adjacent 7,500 square foot lots. The second lot is vacant, but available
25
26

27 ²Ronald Allison and his wife also own or control 100% of the membership
28 interest in the Debtor.

1 for future development. The Helm Building has some on-site parking.

2 The Helm Building is undergoing a major renovation and is largely
3 unrentable. Mr. Allison testified that the Debtor purchased the Helm Building for
4 the purpose of redeveloping the Property. He believes that the Property is
5 particularly suitable for occupancy by agencies of the federal government based on
6 its location and configuration. The Debtor initially engaged the services of
7 Mauldin-Dorfmeier Construction, Inc. ("MDC") to begin renovation of the Helm
8 Building. It is not clear from the record how much of that work was completed or
9 how much the Debtor paid MDC for renovation work that was done. Mr. Allison
10 testified that the electrical service has been upgraded. However, the record also
11 reveals the following issues: the interior of the second, third, and fourth floors of
12 the Helm Building has been demolished; all six floors above that are vacant and in
13 need of substantial repairs before they can be occupied; three of the four elevators
14 are non-functional and all of the elevators need to be replaced; MDC is no longer
15 working on the Helm Building; MDC filed its own chapter 11 bankruptcy in 2005;
16 and MDC holds a group of promissory notes for work it performed totaling more
17 than \$1.1 million secured by a deed of trust against the Property. The record is
18 silent regarding a budget, a timetable, and a source of funds for the renovation
19 project, although Mr. Allison testified, without specifics, that he believes the
20 Debtor can get financing to complete the needed work.

21 The Helm Building currently has six retail tenants on the first floor who
22 collectively pay a small irregular amount of rent to the Debtor.³ All rent is cash
23 collateral for the senior lien held by Scripps Investments, which has not consented
24

25
26 ³According to the Debtor's bankruptcy schedules, the Debtor collected
27 rent from the Helm Building in the amount of \$116,545.57 for the entire 2005
28 fiscal year. The Debtor's monthly operating reports disclose that the Debtor has
collected rents after commencement of the bankruptcy for the months of
February, March, April and May 2006, in the amounts of \$9,484.91, \$5,666.67,
\$5,511.03, and \$5,623.04 respectively.

1 to its use. The Debtor's schedules report that at the commencement of this
2 bankruptcy case, the Debtor had cash bank deposits totaling \$145.95. On March
3 13, 2006, this court authorized the Debtor to borrow \$40,000 from Mr. Allison on
4 an unsecured basis (the "Motion to Borrow"). On June 29, 2006, this court
5 authorized the Debtor to borrow an additional \$40,000 from Mr. Allison on an
6 unsecured basis. The Debtor needed the money to fund its operating expenses,
7 including insurance, employee salaries, and utilities for the Helm Building. There
8 was no money in the proposed budgets for any payments to secured creditors. Mr.
9 Allison was personally funding the operations of the Debtor prior to the
10 bankruptcy. The Debtor's bankruptcy schedules list Mr. Allison as an unsecured
11 creditor with an estimated claim in excess of \$400,000.

12 The Helm Building is collateral for multiple obligations secured by three
13 deeds of trust; all of the obligations are in default. Scripps Investments holds the
14 "purchase money" promissory note secured by the first trust deed. It had a balance
15 due as of January 26, 2006, in excess of \$1.219 million and accrues interest at the
16 daily rate of \$625.70. The purchase money note first matured on September 1,
17 2003. Thereafter, the Debtor entered into a series of forbearance agreements, the
18 last of which matured in late 2004. The Debtor made its last payment to Scripps
19 Investments in January 2005, after which Scripps Investments commenced
20 foreclosure. The Debtor has not made any payments to Scripps Investments since
21 commencement of the bankruptcy case.

22 The second trust deed secures the obligations owed to MDC. MDC filed an
23 amended proof of claim in this bankruptcy showing a balance due as of January
24 26, 2006, in excess of \$1.149 million.⁴ MDC's representative, Alan Dorfmeier,
25

26 ⁴The Debtor presented evidence that it is in the process of negotiating a
27 "compromise" with MDC whereby MDC will accept \$500,000 as full payment of
28 its secured claim if paid not later than the end of January 2007. The purported
compromise has not yet been reduced to writing and it has not yet been presented
to the bankruptcy court for approval in MDC's chapter 11 bankruptcy. However,

1 confirmed the amounts stated in the amended proof of claim. Interest accrues on
2 the debt to MDC at the rate of \$354 per day. The Debtor has not made any
3 payments to MDC since commencement of this bankruptcy.

4 The third trust deed secures the Debtor's commercial guarantee of a debt
5 owed by AB Parking Facilities, LLC ("AB Parking") to Scripps GSB II, LLC
6 ("Scripps GSB II"), a related entity to Scripps Investments.⁵ This debt is also
7 secured by a third trust deed against AB Parking's property referred to in these
8 proceedings as the Guarantee Buildings. That obligation has a principal balance as
9 of January 26, 2006, in excess of \$4.541 million, and accrues interest at the daily
10 rate of \$2,948,42. AB Parking is in serious financial trouble and it does not appear
11 that AB Parking will be able to pay this obligation.⁶ For that reason, the court
12 must include the full amount secured by Scripps GSB II's third trust deed in the
13 total debt calculation.

14
15
16 the most important consideration for this dispute is the fact the Debtor's
17 purported compromise with MDC, and MDC's purported agreement to release
18 any secured debt against the Helm Building, are contingent upon the Debtor's
19 ability to perform, *i.e.*, to pay ½ million dollars by a date certain that is months in
20 the future. Nothing will be released unless and until that happens. MDC's
21 representative, Alan Dorfmeier, testified that MDC's secured claim would revert
22 to the full amount if the Debtor did not perform the proposed "compromise." For
23 those reasons, the court cannot consider the MDC compromise in its present
24 equity calculation.

25
26 ⁵Scripps GSB II apparently acquired the third trust deed and the
27 underlying obligation from Scripps Investments after commencement of this
28 bankruptcy case. Scripps Investments is the manager of Scripps GSB II. The
court notes that both entities have been represented in this proceeding by the
same law firm.

29
30 ⁶Scripps Investments holds or controls the first three priority liens against
31 the Guarantee Buildings. The aggregate liability on those obligations exceeds
32 \$37 million. The Guarantee Buildings are in foreclosure. A foreclosure of the
33 first or second trust deeds against the Guarantee Buildings will also extinguish
34 Scripps GSB II's third trust deed against the Guarantee Buildings, thereby
35 forcing the Debtor to honor the \$3 million guarantee to Scripps GSB II, which is
36 secured by the Helm Building. There is no evidence to show that AB Parking
37 can or will do anything to prevent a foreclosure against the Guarantee Buildings.
38 See footnote 7 *supra*.

1 Finally, the court notes that the Debtor has not paid the 2004-2005 real
2 property taxes for the Helm Building. The redemption amount of that obligation
3 now exceeds \$25,000. Neither has the Debtor paid the 2005-2006 property taxes.
4 Those delinquent payments now exceed \$21,000. As of the evidentiary hearing,
5 the total debt secured by liens and charges against the Helm Building, with taxes
6 and accruing interest, substantially exceeded \$7 million.

7 Scripps Investments contends that the Helm Building has a fair market
8 value of \$1 million. It offered into evidence a written appraisal and the testimony
9 of Gregg Palmer, a MAI certified commercial property appraiser. Conversely, the
10 Debtor values the Helm Building at \$15 million. The Debtor's valuation is
11 supported solely by the opinion testimony of Mr. Allison. The Debtor did not
12 offer a third party appraisal to support its valuation.

13 APPLICABLE LAW

14
15 Scripps Investments moves for relief under § 362(d) which provides:

16 On request of a party in interest and after notice and a hearing, the court
17 shall grant relief from the stay provided under subsection (a) of this section,
such as by terminating, annulling, modifying, or conditioning such stay—

18 (1) for cause, including the lack of adequate protection of an interest in
19 property of such party in interest;

20 (2) with respect to a stay of an act against property under subsection (a)
of this section, if—

21 (A) the debtor does not have an equity in such property; and

22 (B) such property is not necessary to an effective reorganization.

23 Pursuant to § 362(g), Scripps Investments has the burden of proof on the
24 issue of the Debtor's equity. The Debtor has the burden of proof on all other
25 issues. Although the Debtor has the ultimate burden of proof on the "cause" issue,
26 Scripps Investments must produce some evidence in the first instance to support
27 the "cause" allegation. *Tirey Distributing Company v. Sloan (In re Tirey*
28 *Distributing Co.)*, 242 B.R. 717, 723 (Bankr. E.D. Okla. 1999) (quoting *In re*

1 *Tursi*, 9 B.R. 450, 453 (Bankr. E.D. Pa. 1981)).

2 Scripps Investments moves for relief under both subsections 362(d)(1) and
3 (d)(2). However, the grounds for relief are independent and relief can be granted
4 under either subsection. The court is not required to determine under subsection
5 362(d)(1) whether the fair market value of the Helm Building is sufficient to
6 adequately protect Scripps Investments' interest in the Property if it finds that the
7 value does not exceed the total liens and that relief is otherwise warranted under
8 subsection 362(d)(2).

9 10 **ANALYSIS AND CONCLUSIONS OF LAW**

11 **There is No Equity in the Helm Building – § 362(d)(2)(A).**

12 The term “equity” in subsection 362(d)(2) is defined to mean the value of
13 the subject property in excess of the total liens and charges. *Stewart v. Gurley*, 745
14 F.2d 1194, 1196 (9th Cir. 1984).

15 Looking first to the liens and charges against the Helm Building, the court
16 has found, as set forth above, that the total liens and charges exceed \$7 million.
17 Therefore, to prevail under subsection 362(d)(2)(A), Scripps Investments needs
18 only to establish, by a preponderance of the evidence, that the value of the Helm
19 Building does not exceed \$7 million. When the values are conflicting, the
20 Bankruptcy Code only requires the court to determine whether the Debtor has
21 equity in the Property, the court is not required to determine how much. Here, the
22 parties' respective valuations differ by \$14 million, a ratio of 15 to 1. The total
23 liens fall squarely in the middle of the competing valuations. The court does not
24 have to make a finding as to the actual value of the Helm Building unless that
25 finding is necessary to the court's decision; unless it appears that the actual value
26 is close to the total liens and charges and might affect the outcome one way or the
27 other.

28 One of the most puzzling aspects of this case lies in the fact that the Debtor

1 did not produce a professional appraiser to corroborate Mr. Allison's opinion of
2 the Helm Building's value. Scripps Investments' valuation was supported by the
3 testimony of a MAI certified appraiser. Mr. Allison offered his opinion of value as
4 a representative of the owner of the Helm Building pursuant to Fed.R.Ev. 701.
5 Mr. Palmer testified as an expert witness pursuant to Fed.R.Ev. 702. Mr. Allison
6 was permitted to testify as a percipient witness, not an expert. Mr. Allison's
7 opinion of value differed from Mr. Palmer's opinion by a factor of 15 to 1. Based
8 on the extraordinary difference between the parties' respective positions, the court
9 must carefully scrutinize the methods by which the competing opinions were
10 derived. The court must determine how much weight to give the competing
11 testimonies. However, the parties' valuations are so far apart, the court cannot
12 selectively weigh and apply various portions of each testimony to derive a value
13 that lies somewhere in the middle. If the court is persuaded that one of the
14 opinions is correct, or approximately so, then it must also conclude that the other is
15 completely out of the proverbial "ball park." Mr. Allison's testimony is subject to
16 the same critical analysis as that of an independent appraiser. When the owner of
17 property is unable to provide a detailed explanation of how he or she arrived at a
18 lump-sum value for the property, the testimony may be insufficient to establish in
19 the court's mind an "actual belief . . . derived from the evidence" as to the validity
20 of the owner's opinion. *Russell*, Bankruptcy Evidence Manuel § 701.2 at page
21 1218 (West 2006 edition), quoting *In re Brown*, 244 B.R. 603, 612 (Bankr.
22 W.D.Va. 2000).

23 Mr. Allison testified that his opinion of value is based on his experience in
24 commercial property leasing and development, his familiarity with other buildings
25 in the area, and his general knowledge of redevelopment activity in downtown
26 Fresno. Mr. Palmer's appraisal was based, in part, on a detailed comparison of
27 "comparable sales" of other commercial buildings in downtown Fresno. At the
28 conclusion of Mr. Palmer's testimony, it was clear to the court what methods,

1 procedures and specific facts he used to derive a value for the Property. Mr.
2 Allison's valuation was not supported by any specific factual analysis. Indeed,
3 much of his testimony was focused more on trying to discredit Mr. Palmer's
4 appraisal. While it does appear that Mr. Allison has an extensive base of
5 knowledge regarding the Helm Building and the downtown redevelopment
6 industry, he was unable to "connect the dots"; that is, he was unable to pull
7 together a detailed explanation of how he arrived at the lump-sum value for the
8 Property which he asks the court to accept.

9 Mr. Allison testified generally that other developers are acquiring properties
10 in the downtown area for commercial redevelopment, but he offered no empirical
11 data by which the court could compare those other projects to the Helm Building.
12 Mr. Allison testified that the Helm Building could have a gross rental stream of
13 \$304,176 per year once it is fully renovated and occupied, but he offered no
14 evidence to establish (1) how and when the Helm Building will achieve its full
15 income potential, (2) how the projected "gross" income would equate to "net"
16 income, and (3) how the estimated income stream would translate into a
17 calculation of the Property's present value.

18 In contrast, Mr. Palmer's analysis was set forth in a written report and he
19 testified at length regarding the information in that document and the basis for his
20 conclusions. Mr. Palmer testified that he did not use the "income" approach to
21 value the Helm Building; he relied on other accepted valuation methods because
22 approximately 90% of the Property is currently vacant and produces no income.
23 The Debtor had an opportunity to vigorously cross-examine Mr. Palmer regarding
24 his methods and conclusions, and various inconsistencies and errors in the
25 appraisal. Those inconsistencies and errors may affect the weight which the court
26 would give to Mr. Palmer's appraisal and could affect the outcome in a close
27 contest, but this is not a close contest. The defects in Mr. Palmer's appraisal do
28 not affect the admissibility of his testimony, and they were not sufficient to cause

1 the court to reject his testimony altogether.

2 At trial, the court asked Mr. Allison why he had not produced a professional
3 appraisal to corroborate or provide more support for his opinion of the Property's
4 value. He responded, in essence, that he did not have sufficient cash to pay the
5 estimated cost, \$15,000, of a professional appraiser and that he had "better things
6 to do with the money." Both of these answers strike the court as implausible. Mr.
7 Allison has requested and received permission from this court to personally loan
8 \$80,000 to the Debtor to pay for operating expenses. Mr. Allison testified at trial
9 that he had the funds to build a multi-story parking structure on the vacant land
10 adjacent to the Helm Building if given an opportunity to do so. Mr. Allison
11 represented in support of the Debtor's Motion to Borrow, in March 2006, that he
12 was then actively engaged in a search for refinancing. Mr. Allison and Mr. Briggs
13 both testified at this hearing that they have been negotiating with an unnamed third
14 party investor to purchase a major interest in the Debtor, which could close escrow
15 within 60 days. It is difficult for the court to believe that the Debtor can be
16 actively engaged in negotiating a multimillion dollar financing deal, and be within
17 60 days of closing escrow with a bona fide investor, and that no one has yet
18 commissioned a professional appraisal of the Debtor's assets.

19 The dramatic difference between the parties' competing valuations causes
20 the court to consider what it can and should infer from the Debtor's decision not to
21 produce a professional appraisal. When a party to litigation fails to call an
22 available witness whose testimony could be expected to favor him, the court can
23 draw a "missing witness" inference that the witness would have exposed facts
24 unfavorable to the party. *Bohm v. The Horsley Company (In re Groggel)*, 333
25 B.R. 261, 303-04 (Bankr. W.D. Pa. 2005), citing *United States v. Busic*, 587 F.2d
26 577, 586 (3rd Cir. 1978) (other citations omitted). "The missing witness inference
27 is inapplicable unless the information possessed by the absent witness is both
28 material, that is relevant to the case, and non-cumulative." *Id.* at 304. When it is

1 shown that a witness was not called for reasons that are reasonable and proper, no
2 unfavorable inference is permitted. *Id.* at 304, citing 29 Am.Jur.2d, *Evidence* §
3 247 (other citation omitted). Similarly, the missing witness inference is not
4 permitted if a party has good reason to believe the opponent has failed to meet its
5 burden of proof, *Id.* at 304, citing *Int'l Union, UAW v. N.L.R.B.*, 459 F.2d 1329,
6 1338 (D.C. Cir. 1972) (other citation omitted).

7 An inference is a “deduction of fact that may be logically and reasonably
8 drawn from another fact or group of facts found or otherwise established in an
9 action.” *Giacalone v. Malget (In re Malget)*, 165 B.R. 933, 937 (Bankr. S.D. Cal.
10 1994), citing *Cal.Ev.Code* § 600(b) (West 1994).

11 Inferences are an indispensable tool of logical analysis and the finder of fact
12 may draw reasonable inferences that are supported by evidence of sufficient
13 probative value to form a rational basis for the court’s conclusion. The inference
14 “must be drawn by reason from the facts on which it purports to rest.” *In re*
15 *Malget*, 165 B.R. at 937, quoting *Dreijer v. Girod Motor Company*, 294 F.2d 549,
16 554 (5th Cir. 1961).

17 Here, the Debtor knew when this motion was first filed in late March 2006,
18 that Scripps Investments was relying upon a professional appraisal to prove its
19 case. The Debtor, through Mr. Allison, had the financial ability to retain and
20 produce its own expert witness to value the Property, but apparently chose not to.
21 Since Mr. Allison’s opinion was based on generalities, the testimony of an expert
22 based upon specific facts and accepted appraisal methods would have been highly
23 relevant to the case and non-cumulative. The Debtor could not have reasonably
24 believed that the court would totally reject Mr. Palmer’s appraisal, thus leaving
25 Scripps Investments unable to sustain its burden of proof. The Debtor did not
26 object to Mr. Palmer’s qualifications to testify as an expert witness, or attempt to
27 exclude his appraisal at trial. Instead, the Debtor relied upon its efforts to impeach
28 and totally discredit Mr. Palmer in hopes that the court would find Mr. Allison’s

1 testimony to be more believable. The Debtor contends that the value of the Helm
2 Building is 1,000 times the estimated cost of an appraisal that could have helped to
3 establish that value. While it was not improper for the Debtor to defend this
4 motion without a professional appraisal, Mr. Allison's statement that he "had
5 better things to do with the money" strikes the court as an unreasonable
6 explanation for attempting to do so, considering the magnitude of what was at
7 stake for the Debtor.

8 The Debtor's strategic decision not to produce an appraisal in opposition to
9 this motion leads the court to logically deduce that the Debtor was not able to find
10 an appraiser who would agree with Mr. Allison's valuation, and/or that the Debtor
11 already had access to an appraisal which did not support Mr. Allison's opinion.
12 Neither of those facts, standing alone, is directly probative of the Property's value.
13 However, when Mr. Allison's testimony is subjected to the same critical analysis
14 as Mr. Palmer's, either of those inferences would tend to impeach Mr. Allison's
15 testimony and mitigate the weight which the court can give to his opinion.

16 Based on all of the testimony and evidence presented, and given the choice
17 between two irreconcilable values, the court is persuaded that the fair market value
18 of the Helm Building does not exceed \$7 million. The court is not persuaded that
19 the value of the Property even exceeds the debt secured by the first and second
20 trust deeds, approximately \$2.3 million, excluding for argument sake the third
21 priority obligation to Scripps GSB II that is cross-collateralized with the Guarantee
22 Buildings. The court is not persuaded that Mr. Allison's lump-sum valuation is
23 based on an unbiased analysis of the Helm Building's present condition and the
24 current market for "redevelopment" properties. Mr. Palmer's appraisal may have
25 contained some errors and omissions, but his conclusion was based on empirical
26 data. Mr. Palmer was retained and paid by Scripps Investments to provide an
27 appraisal, but he is also a licensed professional. There was no evidence to suggest
28 that he skewed the data or manipulated the facts to achieve a particular result. In

1 light of the huge gap between Mr. Palmer’s appraisal and the secured debt, over \$6
2 million, the court is not persuaded that the questionable aspects in Mr. Palmer’s
3 appraisal were material. Even if Mr. Palmer missed the mark by 100%, that would
4 only lead to a valuation of \$2 million, which is still less than the debts secured by
5 the first and second liens and would not affect the outcome of this motion.

6 **The Helm Building is Not Necessary to an Effective Reorganization –**
7 **§ 362(d)(2)(B).**

8 When a creditor establishes that the chapter 11 debtor does not have equity
9 in its property within the meaning of § 362(d)(2)(A), the burden shifts to the
10 debtor to establish the second prong of the § 362(d)(2) inquiry, that the property is
11 nevertheless “necessary to an effective reorganization.” § 362(d)(2)(B). “What
12 this requires is not merely a showing that if there is conceivably to be an effective
13 reorganization, this property will be needed for it; but that the property is essential
14 for an effective organization *that is in prospect*.” (emphasis original.) *United Sav.*
15 *Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76,
16 108 S.Ct. 626, 633, 98 L.Ed.2d 740 (1988). This means that there must be “a
17 reasonable possibility of a successful organization within a reasonable time.” *Id.*
18 at 376. (citation omitted.) The debtor’s burden to make this showing increases as
19 the exclusivity period expires. *Id.*

20 After the U.S. Supreme Court issued the *Timbers*’ decision, the Ninth
21 Circuit BAP refined the “effective reorganization” test, recognizing that after the
22 expiration of the exclusivity period, “the debtor must offer sufficient evidence to
23 indicate that a successful reorganization within a reasonable time is ‘assured’ ” *Sun*
24 *Valley Newspapers, Inc. v. Sun World Corporation (In re Sun Valley Newspapers*
25 *Inc.)*, 171 B.R. 71, 75 (9th Cir. BAP 1994), citing *In re Holly’s Inc.*, 140 B.R. 643,
26 700 (Bankr. W.D. Mich. 1992).

27 A chapter 11 plan cannot be based upon a visionary scheme. *See* §
28 1129(a)(11); *Pizza of Hawaii, Inc. v. Shakey’s, Inc. (In re Pizza of Hawaii, Inc.)*,

1 761 F.2d 1374, 1382 (9th Cir. 1985).

2 After the debtor fails to confirm a chapter 11 plan, the bankruptcy court is
3 not required to hold a hearing on every subsequent plan and disclosure statement
4 before it can grant relief from the automatic stay under § 362(d)(2). “All that is
5 required is that the court determine if a successful reorganization is possible within
6 a reasonable period of time.” *In re Sun Valley Newspapers, Inc.*, 171 B.R. at 74.

7 Just prior to expiration of the exclusivity period in this case, the Debtor
8 filed a chapter 11 plan and a disclosure statement. The hearing to approve the
9 disclosure statement has not yet occurred. However, the proposed plan is based on
10 two assumptions, neither of which appear to be realistic: (1) that upon
11 confirmation, the Debtor can service the restructured debt with income from the
12 operation of its business, which includes rental income from the Helm Building,
13 and (2) that the Debtor can permanently enjoin, through confirmation of the plan,
14 any effort by Scripps Investments and its related entities to foreclose against the
15 Guarantee Buildings.⁷ The problems with the proposed plan include, *inter alia*, the
16 facts that (1) the plan fails to demonstrate an adequate means for implementation
17 (§ 1123(a)(5)), *i.e.*, that the Debtor has financing and a timetable to renovate and
18 fully lease the Property and generate sufficient cash to satisfy the liens, and (2) the

19
20 ⁷The Debtor holds a fifth priority trust deed against the Guarantee
21 Buildings securing an obligation from AB Parking, which exceeds \$4.5 million.
22 The Debtor contends that its ability to collect this obligation is necessary to an
23 effective reorganization. That trust deed is an asset of this estate, protected
24 initially by the automatic stay, but the court has already ruled in a prior relief
25 from stay motion that the fifth priority trust deed has no value to the Debtor
26 unless and until AB Parking can find a buyer for, or refinance the debt against the
27 Guarantee Buildings. The Guarantee Buildings are facing imminent foreclosure.
28 On June 5, 2006, this court granted a motion for relief from the automatic stay to
allow Scripps GSB I to foreclose its first priority trust deed against the Guarantee
Buildings. On July 3, 2006, this court also granted relief from stay to allow
foreclosure of the second and third trust deeds held by Scripps GSB II. On July 5,
2006, the bankruptcy court in the MDC bankruptcy (case no. 05-11402) approved
an agreement for *nunc pro tunc* relief from stay allowing the Scripps entities to
foreclose against MDC's fourth priority trust deed against the Guarantee
Buildings. MDC has its own motion for relief from the automatic stay pending in
this court which is set for hearing on July 20, 2006.

1 Debtor cannot restructure the senior debt against the Guarantee Buildings through
2 its chapter 11 plan. *First Federal Bank of California v. Cogar (In re Cogar)*, 210
3 B.R. 803, 812 (9th Cir. BAP 1997) (the senior lienholder does not have a claim
4 against the estate of the junior lienholder that could be modified through the junior
5 lienholder's chapter 11 plan, even if the plan provides for transfer of the
6 underlying real property to the debtor).

7 At the hearing of this matter, Mr. Allison and Mr. Briggs testified, in
8 essence, that the Debtor's reorganization will require a significant infusion of new
9 capital. The Debtor's counsel acknowledged that the proposed plan will have to be
10 amended to address purported "recent developments" in the Debtor's efforts to
11 find new financing. For purposes of this motion, the court therefore deems the
12 present chapter 11 plan to be withdrawn. The exclusivity period has now expired
13 and there is no plan before the court for confirmation. Without an actual plan to
14 consider, the court must determine from the evidence presented if a successful
15 reorganization within a reasonable period of time appears certain. The Debtor
16 bears the burden of proof on this issue.

17 Based on the evidence, and the record of this case, the court simply cannot
18 find for the Debtor on this issue. Mr. Allison testified that the Debtor is close to a
19 "deal" with a purported investor to infuse a large amount of new capital into the
20 business. But Mr. Allison would not disclose any of the terms and details of the
21 purported deal, including the name of the investor, and the conditions for closing
22 the escrow. Nothing has been filed in this case to seek approval of a new
23 financing arrangement under § 364. Nothing was offered to show that the Debtor
24 has developed a formal business plan. Mr. Allison testified that the Helm Building
25 will produce a significant income stream in the form of rent from prospective new
26 tenants, but he was not able to show how or when the renovations might be
27 completed and ready to accept new tenants. Mr. Allison's hope to rent the Helm
28 Building to government tenants is still in the request-for-proposal (RFP) stage.

1 Mr. Allison failed to show that the Debtor has a realistic operating budget, or that
2 the anticipated gross income stream will translate into net income that would be
3 sufficient to service the restructured debt. How and when the Debtor might be in a
4 position to actually rent the Helm Building, and its ability to do so profitably, are
5 at this point matters of pure conjecture. Any chapter 11 plan which presents the
6 Helm Building as a properly capitalized, fully rented, and profitable business
7 operation is, at this time, little more than a “visionary scheme.” The Debtor’s
8 evidence falls far short of showing that a successful reorganization is assured, or
9 even likely, within a reasonable period of time.

10 **Scripps Investments Cannot Seek Relief From the Automatic Stay on Behalf**
11 **of Third-Party Junior Lienholders.**

12 Scripps Investments is in a position to conduct the trustee’s sale on its first
13 trust deed once relief from the automatic stay is granted. Yet Scripps Investments
14 also asks the court to grant relief for the benefit of all junior lienholders such that
15 they might also commence and complete judicial or non-judicial foreclosure
16 proceedings against the Helm Building. By implication, this would include the
17 second trust deed held by MDC. The request will be granted only as to the first
18 and third priority trust deeds.

19 This motion for relief from the automatic stay is a “contested matter” within
20 the meaning of the Federal Rules of Bankruptcy Procedure. Under Fed.R.Bankr.P.
21 9014(a), a contested matter may be decided by motion, as opposed to an adversary
22 proceeding. However, Rule 9014(c) incorporates many of the rules for adversary
23 proceedings into contested matters. One of those is Fed.R.Bankr.P. 7017, which
24 makes Fed.R.Civ.P. 17 applicable here. Rule 17(a) states that, “[e]very action
25 shall be prosecuted in the name of the real party in interest.”

26 One of the main purposes of Rule 17(a), known as the “Real Party in
27 Interest” rule, is to protect litigants from suits by persons who do not hold, by
28 substantive law, the rights to be enforced; those who do not have the power to

1 make binding decisions regarding prosecution, compromise and settlement. 10
2 *Collier on Bankruptcy*, (15th Ed. Revised), ¶ 7017.02, pg. 7017-2. The “Real
3 Party in Interest” rule applies to motions for relief from the automatic stay. *Roslyn*
4 *Savings Bank v. Comcoach Corporation (In re Comcoach Corp.)*, 698 F.2d 571,
5 573 (2nd Cir. 1983).

6 Here, Scripps Investments holds and controls, either directly or as manager
7 of Scripps GSB II, the power to enforce, prosecute, compromise and settle the
8 obligations secured by the first and third trust deeds against the Helm Building. At
9 trial, for reasons which the court accepts, Scripps Investments declined to commit
10 as to the order in which it will actually foreclose those liens. However, MDC is a
11 separate entity and it holds the rights to enforce or compromise the obligations
12 secured by the second trust deed. MDC is not a party to this contested matter and
13 has not joined in the request for relief. Indeed, MDC filed a written opposition to
14 this motion which states in pertinent part:

15 MDC, as creditor and junior lienholder, is continuing to evaluate how to
16 proceed in this matter to liquidate its notes and lien against the Helm
17 Building for the benefit of its creditors. At present, MDC has not
18 determined how to proceed and has not authorized Scripps or anyone else to
19 proceed on its behalf in the A Partners bankruptcy case. Moreover, MDC
20 does not adopt the valuations or other allegations set forth by Scripps in the
21 Motion. The issue of valuation is of significant importance not only to A
22 Partners, LLC, but to its creditors and the creditors of MDC. MDC reserves
23 the right to proceed as it sees fit in light of the best interests of its creditors
24 and its estate.

21 The court can find no authority for the proposition that a senior lienholder
22 may seek relief from the automatic stay on behalf of one or more third party junior
23 lienholders. The relief granted in this ruling will only apply to the first and third
24 trust deeds.

25 **Waiver of Rule 4001(a)(3).**

26 Federal Rule of Bankruptcy Procedure 4001(a)(3) provides that an order
27 granting a motion for relief from an automatic stay is stayed until the expiration of
28 10 days after the order is entered, unless the court orders otherwise. Scripps

1 Investments requests that the court waive the application of this rule because the
2 Debtor is not paying Scripps Investments for the interest which will accrue during
3 the stay. Rule 4001(a)(3), which was added by the 1999 amendments to the
4 Federal Rules of Bankruptcy Procedure, recognizes that motions granting relief
5 from the automatic stay can have enormous consequences for the parties involved
6 and can often dictate the success or failure of the entire bankruptcy case. Rule
7 4001(a)(3) enables the debtor, or other party who opposes relief from stay, to seek
8 a stay pending appeal of an adverse ruling. 9 *Collier on Bankruptcy*, (15th Ed.
9 Revised), ¶ 4001.04A, pg. 4001-18. “[W]ithout a stay pending appeal, appeals
10 from such orders can often become moot if the party granted relief proceeds with a
11 sale or some other action that cannot be easily undone.” *Id.* at pg. 4001-19. For
12 that reason, the court is reluctant to make any ruling which prematurely terminates
13 the Debtor’s appellate remedies.

14 Scripps Investments published a notice of sale under Cal.Civ.Code §
15 2924(f)(b) for its first trust deed before commencement of this bankruptcy. That
16 sale date has been continued pending a ruling on this motion. In theory, Scripps
17 Investments will be in a position to conduct a trustee’s sale soon after this ruling is
18 entered. The timing and delay inherent in the State’s statutory foreclosure scheme
19 will not give the protection here that is intended by Rule 4001(a)(3). Scripps
20 Investments’ request to waive Rule 4001(a)(3) is appropriate only to the extent that
21 Scripps Investments may need to take some action to enforce the first and third
22 priority liens, so long as the foreclosure sale itself does not take place until at least
23 10 days after entry of the accompanying order.

24 CONCLUSION

26 Based on the foregoing, the court finds and concludes that the Debtor has
27 no equity in the Helm Building. The court is not persuaded that the Helm Building
28 is necessary to an effective reorganization. Scripps Investments’ motion for relief

1 from the automatic stay will be granted as to the first and third priority trust deeds
2 only. The motion will be denied without prejudice as to all other liens.

3 Scripps Investments' motion to waive the 10-day stay provision of
4 Fed.R.Bankr.P. 4001(a)(3) will be granted in part. Scripps Investments may
5 proceed to enforce the first and third priority liens under applicable law, so long as
6 the foreclosure sale does not take place until at least 10 days after entry of the
7 accompanying order.

8 Dated: July 14, 2006

9
10
11 /s/ W. Richard Lee
12 W. Richard Lee
13 United States Bankruptcy Judge
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28