UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: **ART AND ARCHITECTURE BOOKS OF THE 21ST CENTURY,** Debtor.	Case No. 2:13-bk-14135-RK Chapter 11 **MEMORANDUM DECISION ON MOTIONS OF DEBTOR AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR STAY PENDING APPEAL**

Pending before the court are the motions of debtor Art and Architecture Books of the 21st Century, dba Ace Gallery ("Debtor") and the Official Committee of Unsecured Creditors ("Committee"), for an order granting stay of this court's order denying Debtor's Motion to Assume ("Assumption Denial Order") pending debtor's appeals of that order pending before the District Court, and of the District Court's judgment reversing this court's order granting Debtor's assumption of the commercial lease for the property at 5500 Wilshire Boulevard ("AERC Property") between Debtor and AERC Desmond's Tower, LLC ("District Court Judgment"), which appeal is before the Ninth Circuit, (these

motions are referred to herein as the "Stay Motions"). Creditor AERC Desmond's Tower, LLC., ("Landlord") opposes the Stay Motions. Having reviewed the moving, opposing and reply papers of the parties, Debtor, Landlord, and the Committee, the arguments and evidence taken at the hearing on November 12, 2014, and the additional briefing submitted by the parties on November 14, 2014, for the reasons stated herein, the court grants the motions for stay pending appeal pursuant to Federal Rule of Bankruptcy Procedure 8005.

A stay pending appeal "is not a matter of right . . . It is instead 'an exercise of judicial discretion '. . . [that] is dependent upon the circumstances of the particular case." *Lair v. Bullock,* 697 F.3d 1200, 1203 (9th Cir. 2012), *quoting, Nken v. Holder*, 556 U.S. 418, 433 (2009). "Judicial discretion in exercising a stay is to be guided by the following legal principles, as distilled into a four factor analysis in *Nken*: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably harmed absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Lair v. Bullock,* 693 F.3d at 1203, *quoting, Nken v. Holder*, 556 U.S. at 433-434 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "The party requesting a stay bears the burden of showing that the circumstances justify the exercise of [the court's] discretion." *Id.* The first two of the *Nken* factors of likelihood of success on the merits and irreparable harm are the most critical. *Id.* Although this test is not elemental, the party seeking a stay must always satisfy the first two factors. *Nken v. Holder,* 556 U.S. at 435. ("Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest.")

Debtor and Committee Have a Substantial Case for Relief on the Merits

The party seeking stay pending appeal does not need to show that it is more likely than not to succeed on appeal, but it does not satisfy this factor by making a mere showing that the likelihood is "better than negligible" or that there is a "mere possibility of

relief." *Lair v. Bullock,* 697 F.3d at 2104, *quoting, Nken v. Holder,* 556 U.S. at 434; *see also, Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011), *also citing, Nken v. Holder,* 556 U.S. at 434. In opposition to the Stay Motions, Landlord argues that Debtor and Committee have not made a "strong showing" that Debtor is likely to succeed on appeal. *Landlord's Joint Opposition* at 4-8. Although "strong showing" is the language used by the Supreme Court in *Nken*, and Landlord repeats it numerous times, the exact phrasing of the stay applicant's likelihood of success on appeal is not crucial. *Leiva-Perez v. Holder*, 640 F.3d at 967-968. As the Ninth Circuit stated in *Leiva-Perez,* this factor of likelihood of success on the merits is also referred to as requiring a "substantial case for relief on the merits," although taken in context it is clear as explained in *Leiva-Perez* that the exact phrasing of this concept is not as important as the general idea that the appellant's chances are more than negligible but less than likely. *Id.* at 967-968.

In arguing that this factor is not met, Landlord points out that it was victorious in both of the motions being appealed, and that Debtor and the Committee have made largely the same arguments as they made in their initial arguments. *Landlord's Joint Opposition*, ECF 730 at 5:16-20. However, as noted by the Ninth Circuit in *Leiva-Perez,* a party seeking stay pending appeal is not required to make new, better arguments that show it is more likely than not to succeed in its appeal. *Leiva-Perez v. Holder*, 640 F.3d at 967 ("We find additional evidence that this stay factor does not require the moving party to show that her ultimate success is probable from other post-*Nken* opinions."). As the Ninth Circuit further stated in *Leiva-Perez*, this rule "makes good sense" as "[a] more stringent requirement would either, in essence, put every case in which a stay is requested on an expedited schedule, with the parties required to brief the merits of the case in depth for stay purposes, or would have the court attempting to predict with accuracy the resolution of often-thorny legal issues without adequate briefing and argument." *Id., citing, Nken v. Holder,* 556 U.S. 418, 427 (2009). Thus, as the Ninth Circuit stated in *Leiva-Perez,* "[s]uch pre-adjudication adjudication would defeat the purpose of a stay, which is to give the reviewing court the time to 'act responsibility'

rather than doling out 'justice on the fly.'" *Id.* In addition, it seems to this court that a rule for stay pending appeal which would require a greater than 50 percent likelihood of success on appeal would require, in effect, the trial court to determine that it is more likely than not that its own decision was incorrect. *See, In re Public Service Co. of New Hampshire,* 116 B.R. 347, 348 (Bankr. D. N.H. 1990)(if the likelihood of success on the merits of the appeal were applied literally, then it would seem unlikely that any motion for stay pending appeal would ever succeed); *In re Miraj and Sons, Inc.,* 201 B.R. 23, 27 n. 8 (Bankr. D. Mass. 1995)(conditionally granting creditor's motion for stay pending appeal upon posting of supersedeas bond despite noting, "This Court finds itself completely persuaded by its own views. If this Court were to review itself, it would not reverse.").

With respect to the threshold showing needed to show likelihood of success on the merits, the Ninth Circuit observed, "There are many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a 'reasonable probability' or 'fair prospect,' as *Hollingsworth [v. Perry,* 558 U.S. 183, 190 (2010)] suggests; 'a substantial case on the merits,' in *Hilton's [v. Braunskill*, 481 U.S. at 778] words; or, as articulated in *Abassi [v. INS,]* 143 F.3d [477 (9th Cir. 1998)] at 514, that 'serious legal questions are raised." *Leiva-Perez v. Holder,* 640 F.3d at 967-968. "Regardless of how one expresses the requirement, a petitioner must show, at a minimum, that she has a substantial case for relief on the merits." *Id.* at 968; *see also, In re Goldie's Bookstore,* 739 F.2d 466, 470 (9th Cir. 1984).

Here, the court finds that Debtor and Committee have a substantial case for relief on the merits on appeal. The Stay Motions of Debtor and Committee show that they have a substantial case for relief on the merits in that they show that they have raised serious questions on the merits. First, they argue that Debtor had shown entitlement to assume the lease on grounds that Landlord had not properly terminated the lease under the strict requirements of unlawful detainer in California statutory law by not giving the required notice of termination upon a Default as prescribed by the lease. This court had initially determined that this argument had great force, which was the basis of the court's

granting of Debtor's motion to assume the lease, but this court's determination was overruled by the district court in the District Court Judgment, which reversed and remanded the matter. *See Order Granting Debtor's Motion to Assume Master Lease*, ECF 356; *Remand Order*, ECF 436. While Fed. R. Bankr. P. 8005 requires that a motion for stay pending appeal be presented first to the bankruptcy court and this puts the court "in the uncomfortable but inescapable posture of judging its own actions and the possible actions of an appellate court," the court recognizes that the District Court Judgment is the law of the case. This does not, however, necessarily mean that Debtor and the Committee have not shown that the serious questions are not raised on the merits. *See In re Public Service Co. of New Hampshire,* 116 B.R. at 349 n. 2. As to the court's decision on remand in holding that Debtor had waived its right to relief from forfeiture of the lease, the court notes, as argued by Debtor and the Committee, that there is no case law squarely on point which previously determined whether California's public policy abhorring forfeitures is no less important than its policy of freedom of contract. *See Harbor Island Holdings, LLC v. Kim,* 107 Cal. App. 4th 790, 798-799 (2003). Although the court is not convinced that its Assumption Denial Order was entered in error or that the District Court Judgment was incorrectly decided, Debtor and the Committee have raised serious questions on the merits, in that a serious case could be made construing the lease that under applicable California law, the requirements of notice were not given under the unlawful detainer remedy, and that the Assumption Denial Order required the court to interpret somewhat contradictory California public policies. It is conceivable that another court may interpret those policies differently on appeal.

Debtor Will Be Irreparably Harmed if Stay Is Not Granted

Debtor has introduced evidence, primarily in the form of declaration and testimony of Douglas Chrismas, principal of the debtor, which is intended to show that a move from the Debtor's current location to a comparable location will cost approximately $3.2 million (a reduced amount as explained by Mr. Chrismas at the hearing on the motion). *Debtor's Motion for Stay Pending Appeal*, ECF 709 at 23:19-27. Landlord filed evidentiary

objections to Mr. Chrismas's declaration, and the court conducted an evidentiary hearing at which Landlord was able to cross-examine him. *Landlord's Evidentiary Objections to Declaration of Douglas Chrismas in Support of Debtor's Notice of Motion and Motion for Stay Pending Appeals*, ECF 730. Based on the examination of Mr. Chrismas, the court sustained Landlord objections as to paragraphs 5, 6, and 12 of his declaration testimony, but overruled the remaining objections. The court finds that Mr. Chrismas's testimony regarding the likely cost of such a move, and the deleterious effect it would have on Debtor's operations and business, is credible. Although Debtor's principal, Mr. Chrismas, has his detractors, Debtor has an established reputation as an art gallery with museum-like show qualities, which makes it a respected institution in the art community locally and nationally, and Mr. Chrismas's long history and experience in the art world deserves some credence. Thus, the court gives substantial weight to Mr. Chrismas's testimony that it would be difficult for Debtor to find an appropriate venue for relocation in a short period of time. *See Declaration of Douglas Chrismas in Support of Debtor's Motion for Stay Pending Appeals*, ECF 710, at ¶¶ 9 and 10; *Supplemental Declaration of Douglas Chrismas in Support of Motion for Stay Pending Appeals*, ECF 741, ¶¶ 9-11. Denial of stay of the enforcement of the appealed-from orders pending appeal would jeopardize any of Debtor's prospects for a successful reorganization in this Chapter 11 bankruptcy case and may result in great loss of value in a forced, rushed eviction of Debtor from its leased premises owned by Landlord if the estate assets are not properly moved and thus, damaged or destroyed from improper care. The prospect of loss of value of estate assets from this would indirectly harm the interests of creditors of the estate represented by the Committee. This factor weighs strongly in favor of granting stay pending appeal.

Landlord argues that mere economic injury resulting from eviction is not sufficient to constitute irreparable harm. *Landlord's Joint Opposition,* ECF 730 at 8:19-21. Landlord cites, among other cases, *Goldie's Bookstore, Inc. v. Superior Court of State of California,* 739 F.2d 466 (9th Cir. 1984), to show that "[m]ere financial injury … will not constitute irreparable harm if adequate compensatory relief will be available in the course

of litigation." 739 F.2d at 471 (applying California law). The court agrees with the general statement cited by Landlord from case authority, such as *Goldie's Bookstore* that mere financial injury does not constitute irreparable harm, but finds under the circumstances of this case that Debtor will suffer harm that exceeds "mere financial injury" if stay is not granted.

Debtor and the Committee argue that Debtor will be irreparably harmed in two ways if stay is not granted – (1) Debtor will likely be unable to effectuate a reorganization, and (2) Debtor would lose its leasehold interest and the option to purchase the underlying real property under that lease.

The court holds that the loss of the ability to reorganize constitutes irreparable harm, and finds that Debtor will likely be unable to successfully reorganize if stay is not granted. The court in *In re Family Showtime Theatres, Inc.*, 67 B.R. 542 (Bankr. E.D.N.Y. 1986), in determining whether to grant stay pending appeal under Federal Rule of Bankruptcy Procedure 8005, stated "'[T]he Court acknowledges the serious, perhaps mortal, blow to the ability of Family Showtime Bay Parkway to formulate a successful plan of reorganization, represented by the loss of a leasehold interest constituting one of its principal assets.' Irreparable injury, in the absence of a stay, is well nigh incontrovertible." 67 B.R. at 552. The court believes that this statement aptly describes the situation here.

If stay pending appeal is not granted, and Debtor is forced to leave the premises during the appellate process, it is likely that Debtor will be unable to successfully reorganize. Debtor's principal, Douglas Chrismas, gave credible testimony that it would be difficult or impossible for Debtor to move into an equivalent space if it is forced to leave its primary business premises at 5500 Wilshire Boulevard. *Supplemental Declaration of Douglas Chrismas In Support of Motions for Stay Pending Appeals*, ECF 741 at ¶¶ 8-10. Without a suitable venue to display and sell its art work like its current premises at 5500 Wilshire Boulevard, Debtor's prospects for reorganization are not good.

Furthermore, Debtor estimates that moving costs will be $3.2 million if Debtor is required to immediately vacate the AERC Properties. *Declaration of Douglas Chrismas in Support of Debtor's Motion for Stay Pending Appeals*, ECF 710 at ¶ 10, as modified by *Testimony of Douglas Chrismas on November 13, 2014*. If Debtor is successful in its appeal, it may also be faced with substantial costs if it moves back into the AERC Properties, especially if Landlord makes significant alterations to the Properties. These significant costs, combined with Debtor's likely loss of income in the intervening periods, would further endanger Debtor's likely ability to effectuate a reorganization.

The court also holds that the loss of the leasehold at 5500 Wilshire Boulevard and this unique character of the subject real property will result in irreparable harm to Debtor. Debtor cites a number of cases which support the principle that the loss of a unique leasehold constitutes irreparable injury. *Reply to Landlord's Joint Opposition*, ECF 740 at 4:8-27.[1] Although these cases all involve motions for preliminary injunction, and not a motion for stay pending appeal, as here, the courts in each case found that the loss of a unique piece of property was "irreparable injury." *See, e.g., Sundance Land Corp.* 840 F.2d at 661-662 ("According to Sundance, it would lose the orchard property if Community were allowed to foreclose. Since the property at issue is unique, Sundance's legal remedy—i.e., damages—is inadequate.").

The property has a few characteristics that make it uniquely valuable to Debtor. First, the AERC Property is located close to the Los Angeles County Museum of Art ("LACMA"), and visitors to LACMA frequently visit Debtor's gallery and purchase art. *Direct Testimony of Douglas Chrismas In Support of Debtor's Motion to Assume Master Lease*, ECF 261 at ¶ 6. In addition, the building "has historical value and is considered a cherished monument," and has been designated a historical landmark. *Id.* ¶ 4; *Transcript*

[1] *Park Village Apt. Tenants Assoc. v. Mortimer Howard Trust,* 636 F.3d 1150 (9th Cir. 2011); *Sundance Land Corp. v. Community First Fed. Savings & Loan Assoc.,* 840 F.2d 653 (9th Cir. 1988); *Sun Village Farms v. Bowery Savings Bank*, 735 F. Supp. 945 (D. Ariz. 1990); *Drakes Bay Oyster Co. v. Salazar*, 921 F. Supp. 2d 972 (N.D. Cal. 2013)

of August 30, 2013, Proceedings, ECF 338, 56:3-7; *Los Angeles Department of City Planning, Office of History Resources, Designated Historic-Cultural Monuments,* http://www.preservation.lacity.org/files/HCMDatabase%23073114.pdf (listing "Wilshire Tower 5500-5522 Wilshire Boulevard" as a City Declared Monument). As a result of the unique historical value of the AERC property, the court finds that the loss of the lease, and the associated purchase option, would constitute irreparable harm to Debtor.

The Balance of Harms Weighs In Favor of Debtor, not Landlord

Landlord contends that it will be substantially injured by imposition of a stay pending appeal because: (1) Debtor is not paying rent at the fair market rate, (2) Landlord is paying out of pocket costs related to parking and legal fees, (3) Landlord's inability to make improvements to the property while Debtor occupies it. *Landlord's Joint Opposition to Debtor's and Committee's Motions for an Order Granting Stay of Further Hearings on Remand Pending Appeals to the Ninth Circuit,* ECF 730 at 13:2-17:2. Landlord estimates it is losing $107,184 in monthly rent.

As discussed above, Debtor estimates that moving costs will be $3.2 million if Debtor is required to immediately vacate the AERC Properties. *Declaration of Douglas Chrismas in Support of Debtor's Motion for Stay Pending Appeals,* ECF 710 at ¶ 10, as modified by *Testimony of Douglas Chrismas on November 13, 2014*. Even if the court does not give full weight to Mr. Chrismas's testimony that moving Debtor from its current location will cost approximately $3.2 million, Landlord's stated harm is likely to at most equal the financial harm caused to Debtor.

Finally, the factors governing stay pending appeal in *Nken* require the court to balance the harm to "other parties interested in the proceedings." *Nken v. Holder*, 556 U.S. at 425-426. This requires the court to take into consideration the likely injury to other creditors, aside from the injury to Landlord and Debtor. As discussed above, if Debtor is required to immediately vacate the property, the likelihood of reorganization will be significantly reduced. This will likely mean that unsecured creditors, which are "other

parties interested in the proceedings," will receive significantly less than they would under a successful reorganization.

In balancing the harms, the court finds that the irreparable harm to Debtor, in the form of inability to reorganize and loss of real property interest, exceeds the harm to Landlord, which is mostly in the form of lost income, which can be compensated for under the Lease.

This factor does not weigh in favor of denying stay pending appeal.

Granting or Denying Stay Pending Appeal Does Not Affect the Public Interest

There is no great public interest on either side of what is essentially a private party commercial dispute between a landlord and a tenant over a nonresidential commercial lease. The court finds that any public interest the State of California may have in "preserving the summary nature of the unlawful detainer proceeding," *Barela v. Superior Court*, 30 Cal. 3d 244, 254 (1981) is outweighed here by the goals of the federal bankruptcy system to preserve Debtor's ability to successfully reorganize. This factor of the public interest does not weigh heavily toward either granting or denying the stay.

In conclusion, as discussed above, the court determines that Debtor and the Committee, as parties moving for stay pending appeal have, demonstrated the existence of three of the *Nken* factors in their favor, most notably, the two critical factors of showing a likelihood of success on the merits and irreparable harm if stay pending appeal is not granted, and the fourth factor, public interest, is not influential under these circumstances. However, as formulated by the Ninth Circuit in *Leiva-Perez,* a party seeking stay pending appeal cannot simply meet the standard by showing that it has met a number of the *Nken* factors by a minimum threshold. *Leiva-Perez v. Holder,* 640 F.3d at 970. The Ninth Circuit has stated in *Leiva-Perez*:

> In sum, and for the sake of clarity, we hold that in light of *Nken*'s impact on our prior precedent, a petitioner seeking stay of removal must show that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in

> petitioner's favor. As has long been the case, "[t]hese standards represent the outer extremes of a continuum, with relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified."

640 F.3d at 970, *quoting, Abassi v. INS,* 143 F.3d 514. While *Leiva-Perez* involved a petitioner seeking a stay pending appeal of an order denying his application for asylum and for removal from the United States, other courts have applied this formulation of the stay pending appeal standard in a non-immigration law context, including this court in deciding issues of commercial and bankruptcy law in *In re GGW Brands, LLC,* 2013 WL 6906375 at *11 (Bankr. C.D. Cal. 2013), *citing, Leiva-Perez v. Holder,* 640 F.3d at 970; *Lair v. Bullock,* 697 F.3d at 1200-1204 (granting stay pending appeal of district court's order enjoining state from enforcing its campaign contribution limits law).

Based on its review of the record pertaining to the Stay Motions, the court determines that Debtor and the Committee have shown, as discussed herein, that irreparable harm to Debtor is probable if stay pending appeal is not granted, that they have a substantial case on the merits, and that the balance of hardships tips sharply in their favor. However, the court determines that as discussed herein, there is not a strong likelihood of success on the merits, though the public interest does not weigh heavily against a stay.

Landlord argues that stay pending appeal should not be permitted unless the court requires the Debtor to post a supersedeas bond. The requirement of a bond for a stay pending appeal is discretionary with the court in that Fed. R. Bankr. P. 7062, incorporating by reference, Fed. R. Civ. P. 62, which generally provides for a stay pending appeal upon posting of a supersedeas bond, is not applicable to a contested matter like the dispute here involving Debtor's motion to assume the lease. *See* 10 Resnick and Sommer, *Collier on Bankruptcy,* ¶ 7062.03 at 7062-5 – 7062-6, *citing inter alia, In re Texas Equipment Co.,* 283 B.R. 222, 225 (Bankr. N.D. Tex. 2002) and ¶ 7062.06 at 7062-9 – 7062-11; *see also,* 10 Resnick and Sommer, *Collier on Bankruptcy,* ¶ 8005.09[1] at 8005-7 – 8005-8, *citing Farmer v. Crocker National Bank (In re Swift Aire*

Lines, Inc.), 21 B.R. 12 (9th Cir. BAP 1982) ("The amount of the bond and the sufficiency of the sureties are matters entrusted to the discretion of the bankruptcy court."). However, as a leading bankruptcy treatise has noted, "Generally courts are more inclined to consider not requiring a bond when the order does not involve a monetary judgment." 10 Resnick and Sommer, *Collier on Bankruptcy,* ¶ 8005.09[1] at 8005-8, *citing, In re Fiesta Inn & Suites, L.P.,* 2009 Bankr. LEXIS 4176, at *11, 2009 WL 5195961 at *4 (Bankr. W.D. Tex. 2009), *citing, In re Adelphia Communications Corp.,* 361 B.R. 337 (S.D.N.Y. 2007) and *In re Tubular Technologies, LLC,* 348 b.r. 699 (Bankr. D. S.C. 2006). Here, Debtor and the Committee are appealing a non-monetary judgment denying Debtor's motion to assume the lease and for immediate turnover of possession of the leased premises. The court has considered the arguments of the parties regarding the bond and determines on this record that Landlord's interests are protected by payment of post-termination rent at the appropriate rate (which will be determined by the court's decision on Landlord's motion for immediate payment pursuant to 11 U.S.C. § 365(d)(3)). The court finds that Landlord has not introduced credible evidence establishing the amount, if any, of monetary harm it will suffer if stay pending appeal is granted. Landlord's arguments that it will be unable to make planned improvements if Debtor does not immediately vacate is too speculative to warrant the requirement of a bond, and Landlord has not provided sufficient evidence to establish that there is a difference between the "fair market value" of the AERC Property and the holdover rent which Debtor is obligated to pay. *Landlord's Joint Opposition*, ECF 730, Exhibit D. In the absence of concrete evidence of monetary injury, the court determines that Debtor should not be required to post a supersedeas bond.

The court enters this order with the knowledge that Federal Rule of Bankruptcy Procedure 8005 gives the parties the ability to seek review of this order by the United States District Court, which will hear the appeal of the Assumption Denial Order, and expects that ultimately the district court will likely have to review this court's order

granting stay pending appeal. *See* 10 Resnick and Sommer, *Collier on Bankruptcy,* ¶ 8005.11 at 8005-9 – 8005-10.

For the foregoing reasons, the court determines that the Motions of Debtor and the Committee for Stay Pending Appeal should be granted. Debtor and the Committee are directed to file a joint order consistent with this memorandum decision.

IT IS SO ORDERED.

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Date: November 26, 2014

Robert Kwan
United States Bankruptcy Judge