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Central District of California
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Attorneys for Chapter 11 Debtor and Debtor in Possession

CHANGES MADE BY COURT

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
(LOS ANGELES DIVISION)**

11 In re:
12 ART AND ARCHITECTURE BOOKS
13 OF THE 21ST CENTURY, dba ACE
14 GALLERY,
15 Debtor and Debtor in Possession.

Case No. **2:13-bk-14135-RK**

Chapter 11

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW WITH
RESPECT TO ORDER GRANTING
DEBTOR'S MOTION TO ASSUME
MASTER LEASE (NNN) RE 5500
WILSHIRE BOULEVARD, LOS
ANGELES, CALIFORNIA**

Trial Schedule

Date: August 19 and 30, 2013
Time: 9:00 a.m.

Date: August 28, 2013
Time: 1:30 p.m.

Date: September 4, 2013
Time: 8:45 a.m.
Place: Courtroom 1675
255 East Temple Street
Los Angeles, California 90012

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1 A trial (the "Lease Assumption Trial") was held on August 19, 28 and 30, 2013 and
2 September 4 and 10, 2013 before the undersigned United States Bankruptcy Judge on behalf of
3 this Court to consider approval of that certain "Motion Of Debtor To Assume Master Lease
4 (NNN) Re 5500 Wilshire Boulevard, Los Angeles, California" (the "Lease Assumption Motion")
5 [Docket No. 71] filed by Art and Architecture Books of the 21st Century dba Ace Gallery, the
6 Chapter 11 debtor in possession in the above-captioned bankruptcy case (the "Debtor").
7 Appearances at the Lease Assumption Trial were made as set forth on the record of this Court.

8 This Court heard testimony at trial as listed below and considered the following exhibits
9 and evidence in making the findings of fact and conclusions of law set forth below:

- 10 1. The Lease Assumption Motion
- 11 2. The Direct Testimony of Douglas Christmas (both as a percipient witness and as an
12 expert witness) by Declaration
- 13 3. The Direct Testimony of Shirley Holst by Declaration
- 14 4. The Direct Testimony of Bradley Van Auken as Attached to the Declaration of Beth
15 Ann R. Young by Declaration
- 16 5. The Direct Testimony of Bradley Van Auken by Declaration
- 17 6. The Direct Testimony of Dr. Barbara Luna by Declaration
- 18 7. Certain deposition testimony of Dr. Barbara Luna
- 19 8. Certain deposition testimony of Matthew Friedman
- 20 9. The Testimony of Eric Wilson via Deposition Transcript submitted by the Parties
- 21 10. The Debtor's Trial Brief
- 22 11. The Committee of Unsecured Creditors' Trial Brief
- 23 12. The Landlord's Trial Brief
- 24 13. The Evidentiary Objections to the Direct Testimony by Declaration
- 25 14. The Debtor's Exhibits as admitted on the record
- 26 15. The Landlord's Exhibits as admitted on the record
- 27 16. The Stipulated Joint Pre-Trial Order

1 This Court also considered the live testimony of the following witnesses over the course
2 of three days during the Lease Assumption Trial:

- 3 1. Douglas Christmas
- 4 2. Shirley Holst
- 5 3. Gary Mendelson
- 6 4. Bradley Van Auken
- 7 5. Matthew Friedman
- 8 6. Barbara Luna, Ph.D.

9 Upon consideration of the foregoing, and good cause appearing, this Court hereby makes,
10 pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure (the "Federal Bankruptcy
11 Rules"), incorporating by reference, Rule 52 of the Federal Rules of Civil Procedure, the
12 following Findings of Fact and Conclusions of Law with respect to this Court's granting of the
13 Lease Assumption Motion:

14 1. This Court has jurisdiction over the Lease Assumption Motion under 28 U.S.C. §
15 1334(b). The Lease Assumption Motion is a core proceeding under 28 U.S.C. §§ 157(a) and
16 157(b)(2)(A) and (M). Venue properly lies in this judicial district pursuant to 28 U.S.C.
17 § 1409(a) because the instant proceeding arises under Title 11 or arises in a case under Title 11.

18 2. On or about May 8, 2012, the Debtor and AERC Desmond's Tower, LLC (the
19 "Landlord") entered into the Master Lease (the "Master Lease") for the real property located at
20 5500 Wilshire Blvd., Los Angeles, California 90036 (the "Property"). Trial Exhibit 1 is a true
21 and correct copy of the Master Lease. The Debtor's headquarters and main art gallery are located
22 at the Property.

23 3. The Debtor has offered credible evidence to show that as evidenced by the terms
24 of the Master Lease itself, the Master Lease was heavily negotiated by the Debtor and the
25 Landlord, both of whom were represented by their respective experienced and sophisticated real
26 estate counsel in connection with such negotiations and that numerous drafts of the Master Lease
27 were exchanged prior to its execution. This evidence is relevant because it reflects the intentions
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1 of the parties for the Master Lease and provides a context for the Court in considering whether
2 the Landlord properly terminated the Master Lease by its December Notice to Quit as defined in
3 paragraph 4 below in accordance with its available contractual and/or statutory remedies.

4 4. The Debtor did not pay the December, 2012 rent on or before Monday, December
5 3, 2012. On December 4, 2012, the Debtor received, by Federal Express delivery, a written
6 notice entitled “Ten Day Notice to Pay or Quit” (the “December Notice to Quit”). Trial Exhibit 7
7 is a true and correct copy of the December Notice to Quit. Federal Express picked up the
8 December Notice to Quit from the Landlord at 7:31 pm Eastern Standard Time on December 3,
9 2012.

10 5. On December 20, 2012, the Landlord filed an unlawful detainer action in the
11 Superior Court for the State of California (the “Unlawful Detainer Action”) predicated on the
12 December Notice to Quit. Trial Exhibit 35 is a true and correct copy of the complaint filed by
13 the Landlord in the Unlawful Detainer Action.

14 6. The Debtor did not pay to the Landlord any Monthly Base Rent or any Additional
15 Rent due for December, 2012, January 2013 and February 2013 (the “Delinquent Rent”).

16 7. Prior to trial in the Unlawful Detainer Action, on February 19, 2013 (the “Petition
17 Date”), the Debtor commenced its chapter 11 bankruptcy case.

18 8. The Debtor has offered credible evidence that the Master Lease is extremely
19 valuable to the Debtor because the Debtor is able to sublet a substantial portion of the Property to
20 third parties, which currently generates revenue for the Debtor in the sum of approximately
21 \$95,000 per month (the “Subtenant Rent”), though the evidence also shows that historically, the
22 revenue was sometimes lower. The Debtor has offered credible evidence to show that it is
23 negotiating a potential sub-lease with Wells Fargo Bank (“WFB Sub-Lease”) which would
24 increase the Subtenant Rent by another \$22,000, to the sum of approximately \$117,000 per
25 month according to the Debtor.

26 9. The total monthly rent owing to the Landlord for the Debtor’s use of the Property
27 is currently the sum of \$184,337.37. The Debtor has offered credible evidence that after
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1 application of the Subtenant Rent, the Debtor's remaining portion of the monthly rent for the use
2 of the Property is the sum of \$89,127.11 approximately, and may be reduced to the lesser sum of
3 approximately \$67,104.71 if and when the WFB Sub-Lease is allowed to go into effect. The
4 Court makes no determination whether the WFB Sub-Lease should be allowed to go into effect.

5 10. In addition to the Subtenant Rent, the Debtor has offered credible evidence to
6 show that it generates monthly parking revenue ranging between \$8,000 and \$22,000 on the
7 leased premises, depending upon the events scheduled during that time.

8 11. The Landlord issued the December Notice to Quit before the end of the day on
9 which the Debtor's rent payment for the month of December, 2012 was due.

10 12. The December Notice to Quit was served prior to the expiration of the grace
11 period during which the Debtor could timely make the rent payment for the month of December,
12 2012.

13 13. Pursuant to § 22.1(b) of the Master Lease, an event of "Default" occurs when
14 there is a "failure by Tenant to make any payment of Rent, Additional Rent or any other payment
15 required to be made by Tenant hereunder, where such failure continues for ten (10) days after
16 written notice thereof from Landlord that such payment was not received when due" *See*
17 *Master Lease, § 22.1(b), at 19.*

18 14. At the time the December Notice to Quit was delivered to the Debtor, there was
19 no Default in any performance under the terms of the Master Lease. The December Notice to
20 Quit was prematurely issued and delivered to the Debtor and therefore was defective.

21 15. The Unlawful Detainer Action was predicated upon the defective December
22 Notice to Quit and therefore could not serve to terminate the Master Lease.

23 16. The Master Lease was not terminated prior to the Petition Date.

24 17. On April 9, 2013, the Debtor and the Landlord entered into a stipulation regarding
25 adequate protection (the "Adequate Protection Stipulation") [Docket No. 80] requiring the
26 Debtor to segregate rents that the Debtor receives from sub-tenants and to pay the Landlord
27 monthly rent. Pursuant to the Adequate Protection Stipulation, the Debtor has made all post-
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1 Petition Date payments required to be made by the Debtor to the Landlord, and the Debtor
2 segregates rents it receives from sub-tenants of the Property.

3 18. The Debtor's Monthly Operating Reports (Trial Exhibits 11, 12, 13, 14 and 15)
4 show that the Debtor's post-Petition Date revenues are in excess of the amounts generated by the
5 Debtor prior to the Petition Date, and are sufficient to show that the Debtor is able to pay the
6 Debtor's obligations to the Landlord under the Master Lease as they become due.

7 19. The total cure amount owing by the Debtor to the Landlord for the Delinquent
8 Rent is the sum of \$626,642.73.

9 20. The Debtor has obtained a loan commitment in the sum of \$1,575,000 (the
10 "Assumption Loan") from Wilson Administrative Services LTD for the purpose of funding the
11 Debtor's assumption of the Master Lease and the Debtor's assumption of the Debtor's other real
12 property lease located in Beverly Hills, California. This Court previously entered an order
13 approving the Assumption Loan. [Docket No. 336]

14 21. During May, June, and early July, 2013 (the "Inventory Period"), the Debtor
15 undertook the task of compiling inventories of the Debtor's owned art work and consigned art
16 work (excluding posters). As part of that task, the Debtor inspected and evaluated each art work
17 and listed its opinion of the value on the inventories of owned art work and consigned art work.
18 The Debtor has offered credible evidence that the aggregate value of the owned art work as of the
19 Inventory Period may be worth \$13 million. *See* Trial Exhibit 51; Trial Testimony of Douglas
20 Christmas. The Debtor has offered credible evidence that aggregate value of the consigned art
21 work as of the Inventory Period may be worth \$26 million (the court also notes that the artists or
22 other cosigning owners whose art is cosigned would be entitled to some payment from any sales
23 of this art). *See* Trial Exhibit 52; Trial Testimony of Douglas Christmas. Therefore, the Debtor
24 has offered credible evidence that the combined value of the Debtor's owned and consigned art
25 work may be \$39 million, not including posters, even net of any compensation due to consigning
26 artists or owners, and the court determines that the value of these assets supports the Debtor's
27 showing of adequate assurance of future performance under the Master Lease, if allowed to be
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1 assumed by Debtor. The court does not value these assets for any other purpose other than for
2 the purpose of determining this motion.

3 22. The Landlord is not entitled to recover from the Debtor as part of the cure any
4 holdover rent under the Master Lease.

5 23. The Landlord is not a prevailing party and is not entitled to recover from the
6 Debtor its costs or expenses, including attorneys' fees, relating to the Master Lease, the Unlawful
7 Detainer Action, or the Lease Assumption Motion, whether as part of the cure, compensation for
8 pecuniary loss, or otherwise.

9 24. [Proposed finding is omitted - The court makes no determination at this time
10 whether Debtor is a prevailing party under § 31.5 of the Master Lease.]

11 25. The Debtor is not prohibited from assuming the Master Lease under either
12 11 U.S.C. § 365(c)(1) or 11 U.S.C. § 365(c)(3).

13 26. It is a proper exercise of the Debtor's business judgment to assume the Master
14 Lease, and the Debtor has made this decision on an informed basis, in good faith and in the
15 honest belief that the action taken is in the best interests of the Debtor's bankruptcy estate. The
16 Official Committee of Unsecured Creditors appointed in the Debtor's bankruptcy case supports
17 the Debtor's assumption of the Master Lease.

18 27. The evidence presented at the Lease Assumption Trial has established that the
19 Debtor has provided adequate assurance of future performance under the Master Lease, pursuant
20 to 11 U.S.C. §365(b)(1)(C).

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NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled: **FINDINGS OF FACTS AND CONCLUSIONS OF LAW WITH RESPECT TO ORDER GRANTING DEBTOR'S MOTION TO ASSUME MASTER LEASE (NNN) RE 5500 WILSHIRE BOULEVARD, LOS ANGELES, CALIFORNIA** was entered on the date indicated as Entered on the first page of this judgment or order and will be served in the manner stated below:

1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of **September 12, 2013**, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

- Jason Balitzer jbalitzer@sulmeyerlaw.com
- Ron Bender rb@lnbyb.com
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- Beth Ann R Young bry@lnbyb.com

2. SERVED BY THE COURT VIA UNITED STATES MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

Service information continued on attached page

3. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an Entered stamp, the party lodging the judgment or order will serve a complete copy bearing an Entered stamp by United States mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following persons and/or entities at the addresses, facsimile transmission numbers, and/or email addresses stated below:

Service information continued on attached page