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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
DEBTOR'S REQUEST FOR RELIEF
FROM FORFEITURE AND ON
DEBTOR'S MOTION TO ASSUME THE
MASTER LEASE ON PREMISES AT 5500
WILSHIRE BOULEVARD, LOS
ANGELES, CALIFORNIA

The above-captioned bankruptcy case came on for trial before the undersigned United States Bankruptcy Judge on April 23, May 7 and 14, 2014, pursuant to the judgment of the United States District Court for the Central District of California (the "District Court Judgment"), entered on January 15, 2014, on the appeal of AERC Desmond's Tower LLC ("Landlord"), reversing the court's prior decision granting the motion of Debtor Art and Architecture Books of the 21st Century ("Debtor") to assume the Master Lease (NNN), 5500 Wilshire Blvd., Los Angeles, California ("Lease") and remanding for proceedings consistent with the District Court Judgment, specifically, to

determine Debtor's request for relief from forfeiture of the terminated Lease pursuant to state law (i.e., the District Court "concluded that, with respect to Debtor's eligibility for relief from forfeiture, it would permit the Bankruptcy Court to address the full scope of the arguments and potential factual issues on remand."). See District Court Judgment at 3; see also, *In re Windmill Farms, Inc.*, 841 F.2d 1467, 1471-1472 (9th Cir. 1988). The Official Committee of Unsecured Creditors in this bankruptcy case ("Creditors' Committee") supports Debtor's request for relief from forfeiture of the Lease and assumption of the Lease. Landlord opposes the request and motion. The background facts are discussed in the prior rulings of the court and the District Court, and because the parties are familiar with them, they need not be generally described here.

For the reasons set forth below, the court determines that Debtor contractually waived its right to relief from forfeiture of the Lease under both California Code of Civil Procedure § 1179 and California Civil Code § 3275 and therefore it may not assume the Lease after its termination. Accordingly, Debtor's request for relief from forfeiture and motion to assume the Lease should be denied.

Discussion

I. Debtor Waived its Right to Seek Relief from Forfeiture under California Code of Civil Procedure § 1179 and California Civil Code § 3275

A. There is No Statutory Prohibition of a Waiver of the Right to Seek Relief from Forfeiture under California Code of Civil Procedure § 1179 or California Civil Code § 3275 in a Commercial Lease, and the Waiver in a Commercial Lease Does Not Contravene a Public Purpose

In this case, Debtor seeks to invoke California law to request relief from forfeiture of the Lease after its termination, specifically, California Code of Civil Procedure § 1179 and California Civil Code § 3275. Landlord argues that Debtor may not rely upon these provisions for relief from forfeiture because Debtor had expressly waived all of its rights to request relief from forfeiture of the Lease after termination in Section 23.1 of the Lease. Thus, the issue before the court is whether or not Debtor had waived its rights to relief from forfeiture of the Lease as argued by Landlord. Waiver is generally understood as

1 “the intentional relinquishment or abandonment of a known right.” *Bickel v. City of*
2 *Piedmont*, 16 Cal. 4th 1040, 1048 (1997) (citations omitted), *abrogated with regard to its*
3 *construction of the Permit Streamlining Act as noted in DeBerard Properties, Ltd. v. Lim*,
4 20 Cal. 4th 659, 668 (1999). As stated by the Supreme Court of California, under
5 California law, a party may waive a statutory provision “if a statute does not prohibit doing
6 so,” the statute’s “public benefit . . . is merely incidental to [its] primary purpose,” and
7 “waiver does not seriously compromise any public purpose that [the statute was] intended
8 to serve.” *DeBerard Properties, Ltd. v. Lim*, 20 Cal. 4th at 668-669 (citations omitted).

9 1. No Other Statute Prohibits Waiver of the Right to Seek Relief from
10 Forfeiture in a Commercial Lease

11 The court will need to first address whether any statute prohibits the waiver of
12 rights under California Code of Civil Procedure § 1179 or California Civil Code § 3275.
13 Landlord argues that no California statute prohibits a commercial lease tenant from
14 waiving any right to seek relief from forfeiture under California Code of Civil Procedure §
15 1179 and California Civil Code § 3275, or otherwise, and that this is indicative of the
16 California Legislature’s express intent. *Landlord’s Proposed Findings of Fact and*
17 *Conclusions of Law* ¶ 49. The court agrees with Landlord that no California statute
18 specifically prohibits a commercial lease tenant from waiving its right to seek relief from
19 forfeiture under either California Code of Civil Procedure § 1179 or California Civil Code §
20 3275. If the California Legislature had intended either of these provisions to be non-
21 waivable for reasons of public policy, it could have adopted a statute expressly prohibiting
22 waivers of either or both of these provisions, but it did not. *See Pearl v. General Motors*
23 *Acceptance Corp.*, 13 Cal. App. 4th 1023, 1030 (1993). The court notes that the
24 Creditors’ Committee has specifically conceded that “[t]he Committee is aware that no
25 statute expressly states that the right to redeem a commercial lease may not be waived.”
26 *Memorandum of the Official Committee of Unsecured Creditors in Support of Debtor’s*
27 *Request for Relief from Forfeiture of Master Lease with AERC Desmond’s Tower, LLC*,
28 filed on March 21, 2014, at 14:21-22. Neither the court nor any of the parties were able

1 to identify an express statutory prohibition of any waiver of rights under either California
2 Code of Civil Procedure § 1179 or California Civil Code § 3275.

3 Accordingly, the court determines that there is no express statutory prohibition of
4 the right to waive California Code of Civil Procedure § 1179 or California Civil Code §
5 3275. Thus, the first of the three requirements enunciated by the Supreme Court of
6 California in *DeBerard Properties* permitting a party to waive a statutory provision “if a
7 statute does not prohibit doing so” is met here. *DeBerard Properties, Ltd. v. Lim*, 20 Cal.
8 4th at 668-669 (1999) (citations omitted).

9 2. Debtor’s Waiver of Its Rights Under California Code of Civil Procedure
10 § 1179 and California Civil Code § 3275 as a Commercial Tenant Does
Not Contravene Public Policy

11 The issue of whether the waiver provision in Section 23.1 of the Lease is
12 unenforceable as against settled California public policy is one that can be decided as a
13 matter of law. *Health Net of California, Inc. v. Department of Health Services*, 113 Cal.
14 App. 4th 224, 232 (2003) (“[T]he issue of whether a contractual provision is contrary to
15 public policy, or a statute which embodies such public policy, is a question of law that we
16 may independently determine”).

17 “Two provisions in the [California] Civil Code [i.e., §§ 3268 and 3513] appear to
18 allow waivers of statutory provisions, provided such waivers are not against public
19 policy.” *Pearl v. General Motors Acceptance Corp.*, 13 Cal. App. 4th at 1029.

20 California Civil Code § 3268 provides:

21 Except where it is otherwise declared, the provisions of the
22 foregoing titles of this part, in respect to the rights and
23 obligation of parties to contracts, are subordinate to the
24 intention of the parties, when ascertained in the manner
prescribed by the chapter on the interpretation of contracts;
*and the benefit thereof may be waived by any party entitled
thereto, unless such waiver would be against public policy.*

25 California Civil Code § 3268 (emphasis added). However, Civil Code § 3268 by its terms
26 is only applicable to “the provisions of the foregoing titles of this part” (i.e., Titles 1
27 through 15 of Part 4 (Obligations Arising from Particular Transactions) of Division 3
28 (Obligations) of the Civil Code, §§ 1738 through 3267), and does not apply to Code of

Civil Procedure § 1179 and Civil Code § 3275, as neither of these provisions is included in Titles 1 through 15 of Part 4 of Division 3 of the Civil Code. Thus, the court determines that Civil Code § 3268 is not applicable here because any waiver described therein refers to only Civil Code §§ 1738 through 3267, and does not refer to the provisions relied upon by Debtor, i.e., Code of Civil Procedure § 1179 and Civil Code § 3275.

The other provision permitting waiver of statutory rights, California Civil Code § 3513, provides:

Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.

California Civil Code § 3513. The court in *Azteca Construction, Inc. v. ADR Consulting, Inc.*, 121 Cal. App. 4th 1156, 1166 (2004) summarized the method of analysis for whether a waiver of statutory rights is permitted under California Civil Code § 3513 based on public policy concerns:

The full text of Civil Code section 3513 provides: “Anyone may waive the advantage of a law intended solely for his benefit. *But a law established for a public reason cannot be contravened by a private agreement.*” As our state Supreme Court pointed out, a literal construction of this statute would be unreasonable, for “it is difficult to conceive of a statutory right enacted *solely* for the benefit of private individuals that does not also have an incidental public benefit.” (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1049, fn. 4, 68 Cal.Rptr.2d 758, 946 P.2d 427. Therefore, a party may waive a statutory right where its “ ‘public benefit ... is merely incidental to [its] primary purpose,’ ” but a waiver is unenforceable where it would “ ‘seriously compromise any public purpose that [the statute was] intended to serve.’ ” (*DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668–669, 85 Cal.Rptr.2d 292, 976 P.2d 843, quoting *Bickel*, at pp. 1049–1050, 68 Cal.Rptr.2d 758, 946 P.2d 427.) Stated another way, Civil Code section 3513 prohibits a waiver of statutory rights where the “public benefit [of the statute] is one of its primary purposes.” (*DeBerard*, at p. 669, 85 Cal.Rptr.2d 292, 976 P.2d 843.)

Azteca Construction, Inc. v. ADR Consulting, Inc., 121 Cal. App. 4th at 1166 (emphasis in original).

i. Whether Public Benefit Was a Primary Purpose of Statutes

1 First, the court examines whether Debtor's statutory rights under California Code
2 of Civil Procedure § 1179 and California Civil Code § 3275 are not waivable on grounds
3 that the public benefit of these statutes is one of their primary purposes. *Id.*, citing,
4 *DeBerard Properties, Ltd. v. Lim*, 20 Cal. 4th at 668-669. In other words, as stated in
5 *Azteca Construction*, "a party may waive a statutory right where its public benefit . . . is
6 incident to its primary purpose." *Id.* Thus, the court examines whether the public benefit
7 of the statutes waived by Debtor in Section 23.1 of the Lease under California Code of
8 Civil Procedure §§ 1174 and 1179 and California Civil Code § 3275 was incidental to the
9 purposes of those statutes, or whether the public benefit of those statutes was one of
10 their primary purposes. *Bickel v. City of Piedmont*, 16 Cal. 4th at 1048-1049; see also
11 *DeBerard Properties, Ltd. v. Lim*, 20 Cal. 4th at 668-669.

12 Landlord argues that the second waiver requirement under *Bickel* and *DeBerard* is
13 met here because the statutory provision granting the right at issue exists for the benefit
14 of the waiving party rather than for a public purpose. *Landlord's Proposed Findings of*
15 *Fact and Conclusions of Law* § 47, citing, *Bickel v. City of Piedmont*, 16 Cal. 4th at 1049.
16 In support of its position, Landlord argues that Debtor has not met its "heavy burden of
17 proof" to avoid its waiver by showing that the waiver would be violation of the settled
18 public policy of this state, or injurious to the morals of its people." *Landlord's Proposed*
19 *Findings of Fact and Conclusions of Law* § 51-54, citing *inter alia*, *Brisbane Lodging, LP*
20 *v. Webcor Builders, Inc.*, 216 Cal. App. 4th 1249, 1261 (2013). However, this argument
21 does not precisely address the question of whether the public benefit of the statutes
22 waived were incidental to their primary purposes or one of their primary purposes.
23 Neither does Debtor address this precise question because it argues that the public
24 policy of California against permitting forfeitures is no less important than the public policy
25 to enable and enable freedom of contract by parties to commercial real property leases.
26 *Debtor's Proposed Findings of Fact and Conclusions of Law* § 25.

27 The court analyzes the purpose of the statutes which were the subject of Debtor's
28 waiver in order to determine whether or not the public benefit of those statutes was one

1 of their primary purposes, or incidental to those purposes. *Bickel v. City of Piedmont*, 16
2 Cal. 4th at 1048-1049; *see also DeBerard Properties, Ltd. v. Lim*, 20 Cal. 4th at 668-669.
3 A leading commentary on real estate law, Miller and Starr, *California Real Estate 3d*, has
4 described the purpose of these statutes as follows:

5 Under appropriate circumstances, a person can be relieved
6 from a forfeiture. There are three separate statutes that may
7 justify equitable relief to a tenant who has defaulted under the
8 terms of the lease. Each of these statutes applies after a
judgment has been rendered in favor of the landlord that
declares a termination of the lease.

9 Miller and Starr, *California Real Estate 3rd*, § 19:240 (Database updated September
10 2014) (footnote omitted) *citing* California Code of Civil Procedure §§ 1174 and 1179 and
11 California Civil Code § 3275; ¹ *see also*, 12 Witkin, *Summary of California Law*, Real
12 Property, Landlord Tenant Relationship, Relief from Forfeiture, § 670 at 786 (10th ed.
13 2005 and 2014 Supp.) (“The general statutory declaration of the right to relief from
14 forfeiture (C.C. 3275) is supplemented by C.C.P. 1179, establishing a special proceeding
15 for the relief of a defaulting tenant.”). As such, the primary beneficiary of these statutes
16 is a tenant in a real property lease, and not the general public, and the primary purpose
17 of these statutes is to mitigate the private harm to a real property tenant upon forfeiture of
18 a lease upon termination.² In this case, Debtor as a commercial lease tenant might have
19 benefitted under these statutes to relieve its forfeiture of its tenancy after termination of
20 the lease, which would be a private benefit rather a benefit to the general public. See
21 *Debtor’s Proposed Findings of Fact and Conclusions of Law* ¶¶ 15-16 (Debtor’s art
22 gallery and headquarters are located on the premises governed by the Lease, and

23 ¹ Although California Code of Civil Procedure § 1174 was specifically listed as one of the provisions in
24 Section 23.1 of the Lease as was California Code of Civil Procedure § 1179, Debtor does not argue that §
25 1174 was not waived in its proposed findings of fact and conclusions of law. *Debtor’s Proposed Findings of*
Fact and Conclusions of Law ¶¶ 18-26. Although not specifically argued, the analysis in this memorandum
decision applicable to § 1179 applies to § 1174.

26 ² This analysis is similar to the somewhat brief analysis done by the California Supreme Court in *Bickel*,
27 there determining that any public benefit from a statute which expedited government decisions on permit
28 applications was merely incidental to the legislation’s primary purpose because the “primary beneficiary” of
the legislation was the applicant. *Bickel v. City of Piedmont*, 16 Cal. 4th at 1048.

1 forfeiture would impose financial hardship on Debtor in losing the valuable Lease and
2 related purchase option and its headquarters, gallery and subleasing business). Based
3 on these circumstances, the court determines that because the primary purpose of the
4 relief from forfeiture statutes was to mitigate private harm from such forfeitures, the public
5 benefit was not the primary purpose of the statutes, and any benefit to the general public
6 was incidental at most.

7 ii. Whether the Waiver Seriously Compromises the Public Purpose of a
8 Statute

9 Determination of whether the provision in Section 23.1 in the Lease for waiver of
10 Debtor's statutory rights to request relief from forfeiture violates "a law established for a
11 public reason" under California Civil Code § 3513 also depends on whether the waiver
12 "seriously compromise[s] any public purpose that [the statute was] intended to serve."
13 California Civil Code § 3513; *Azteca Construction, Inc. v. ADR Consulting, Inc.*, 121 Cal.
14 App. 4th at 1166, *citing, DeBerard Properties, Ltd. v. Lim*, 20 Cal. 4th at 668-669. This
15 determination requires the court to consider two apparently competing and long-standing
16 California public policies: the policy in favor of freedom of contract in commercial real
17 property leases and the policy that equity abhors forfeiture. This is not a novel situation,
18 and tension between these policies has been considered by the courts in the past. See,
19 *e.g., Harbor Island Holdings, L.L.C. v. Kim*, 107 Cal. App. 4th 790, 799 (2003). The
20 California Court of Appeal in *Harbor Island Holdings, L.L.C. v. Kim* summarized the
21 problem well when it noted that "[i]t is the public policy of the state and fundamental to the
22 commerce and economic development of the state to enable and facilitate freedom of
23 contract by the parties to commercial real property leases . . . it is no less the policy of
24 this state that any provision for the forfeiture of money or property without regard to the
25 actual damage suffered constitutes an unenforceable penalty." 107 Cal. App. 4th at 799,
26 *citing, Ridgley v. Top Thrift & Loan Association*, 17 Cal. App. 4th 970, 977-978 (1998).

27 Freedom of contract in commercial real property leases is well established in
28 California law. The California legislature enacted Civil Code § 1995.270(a)(1) to declare

1 it the public policy of the State of California to “enable and facilitate freedom of contract
2 by the parties to commercial real property leases.” California Civil Code §
3 1995.270(a)(1); *see also*, *250 L.L.C. v. PhotoPoint Corp (USA)*, 131 Cal. App. 4th 703,
4 718 (2005) *quoting*, California Civil Code § 1995.270(a)(1).³ Consistent with this public
5 policy, California courts have generally held that commercial tenants may waive their
6 rights under the California Civil Code. *250 L.L.C. v. PhotoPoint Corp. (USA)*, 131 Cal.
7 App. 4th at 718, *citing, e.g., Lee v. Placer Title Co.*, 28 Cal.App.4th 503, 512-513 (1994)
8 (right to quiet enjoyment) and *Folberg v. Clara G.R. Kinney Co.*, 104 Cal.App.3d 136, 140
9 (1980) (right to notice of rent default).

10 The public policy that equity abhors forfeiture is also well represented in California
11 law. California Civil Code § 1442; *Petersen v. Hartell*, 40 Cal. 3d 102, 112 (1985); *Reed*
12 *v. South Shore Foods, Inc.*, 29 Cal. App. 2d 705 (1964); *Deutsch v. Phillips Petroleum*
13 *Co.*, 56 Cal. App. 3d 586 (1976). California Civil Code § 1442 specifically provides: “A
14 condition involving a forfeiture must be strictly interpreted against the party for whose
15 benefit it is created.” The policy of abhorring forfeitures has been followed in the case
16 law wherein courts have strictly construed the language of contracts to avoid forfeiture.
17 *See, e.g., Randol v. Scott*, 110 Cal. 590, 595-596 (1895) (strictly construing language of
18 a contract calling for forfeiture of a lease upon the assignment by the co-lessees not to be
19 triggered upon an assignment by operation of law by the bankruptcy of one co-lessee;
20 opinion stating that forfeiture clauses are to be “restrain[ed] . . . to the most technical
21 limits of the terms and conditions upon which the right is to be exercised”).

22
23
24 ³ Although the contract in *PhotoPoint* involved an assignment of a lease and California Civil Code §
25 1995.270 is located in a chapter of the California Civil Code entitled “Assignment and Sublease,” the court
26 can see no good reason to limit the broad policy language in Civil Code § 1995.270 to govern only lease
27 assignments and subleases. *e.g. Gregory v. Albertson’s, Inc.*, 104 Cal. App. 4th 845, 855 (2002) (applying
28 the language of Civil Code § 1995.270(a)(1) to a commercial lease in general in the situation not involving
a lease assignment or a sublease where a third party community member asserted claims for urban blight
based on California’s unfair business practice law against a landlord and a tenant for leaving vacant a large
retail space in a shopping mall).

1 However, courts have also held that California Civil Code § 1442 does not warrant
2 a strained or overly technical construction or artificial distinction where forfeiture is plainly
3 required by the express language of a written instrument. In *In re Kitchen*, 192 Cal. 384
4 (1923), the California Supreme Court upheld a provision in a decedent's will requiring
5 forfeiture of a bequest to a specific legatee who sued the executor or any other legatee
6 from recovering or enjoying their gifts under the will, despite the specific legatee's claim
7 that the provision violated California public policy against forfeitures. *Id.* at 387-391. The
8 specific legatee who had sued the estate for payment of a claim under an alleged oral
9 contract and lost nevertheless asserted her right to a bequest under the will, which
10 according to the forfeiture provision went instead to the residuary legatee. *Id.* The trial
11 court rejected the specific legatee's argument that another will provision for payment of
12 all the deceased's "just debts" overrode the forfeiture provision and enforced the
13 forfeiture of the bequest pursuant to the express provisions of the will. *Id.* at 391-392. As
14 to the effect of the rule to strictly construe a forfeiture provision in an instrument, the
15 California Supreme Court in *Kitchen* said:

16 The rule that a forfeiture clause is to be strictly construed
17 means simply that no wider scope is to be given to the
18 language employed than is plainly required. It does not
19 require the court to put a strained or overtechnical construction
20 upon the language employed, ignoring the essence of the
21 condition imposed upon the legacy and refusing to give effect
22 to the lawful intention of the testatrix, to enable a legatee to
23 affirm a will so far as it is to her own profit and at the same
24 time repudiate the validity of its provisions which are for the
25 benefit of others. No artificial distinctions are to be taken
26 advantage of or quibbling indulged in to the end that a person
27 plainly and palpably coming within the scope of the forfeiture
28 clause may by "some hook or crook" escape the penalty of
forfeiture.

24 *Id.* at 389-390. Thus, the court in *Kitchen* upheld the trial court's judgment holding that
25 the specific legatee forfeited her bequest under the terms of the will "for the reason that
26 the intent of the testatrix is so clearly and definitively expressed in the forfeiture clause as
27 to allow no room for any other construction than it was her intent, in the event any suit
28 were brought by a legatee under the will, for any purpose whatsoever, including even the

1 collection of a ‘just debt’, that the legacy of such beneficiary should thereby become fully
2 and utterly void.” *Id.* at 391-392. To hold otherwise, as the California Supreme Court
3 said in *Kitchen*, “would be allowing the plain intent of the testatrix to be overthrown by
4 indulgence in an overrefinement of reasoning.” *Id.* at 391. The language from the
5 California Supreme Court’s opinion from *Kitchen* regarding the effect of the California rule
6 that a forfeiture clause is to be strictly construed was quoted at length by the Ninth Circuit
7 in a case upholding the express language of a commercial lease setting forth conditions
8 of forfeiture over the general California public policy abhorring forfeitures embodied in
9 California Civil Code § 1442 in *Urban Properties Corp. v. Benson, Inc.*, 116 F.2d 321, 323
10 (9th Cir. 1940), *quoting, In re Kitchen*, 192 Cal. at 389.

11 i. Application to the Waiver Clause

12 Section 23.1 of the Lease contains the so-called Waiver Clause and provides:

13 **Tenant hereby waives** for Tenant and all those claiming
14 under Tenant **all right [sic] now or hereafter existing**
15 including, without limitation, any rights under California Code
16 of Civil Procedure Sections 1174 and 1179 and Civil Code
17 Section 1950.7 **to redeem by order or judgment of any**
court or by any legal process or writ, Tenant’s right of
occupancy of the Premises after any termination of this
Lease.

18 Lease § 23.1 (emphasis added). The admissibility of the Lease into evidence is not
19 disputed. *Trial Exhibit 1, Lease*.

20 Landlord argues that no public purpose prevents a commercial tenant from
21 voluntarily waiving any right to relief from forfeiture in a commercial lease. *Landlord’s*
22 *Proposed Findings of Fact and Conclusions of Law* ¶ 51. Landlord further argues that
23 there is a long established policy in California in favor of freedom of contract in
24 commercial leases. *Landlord’s Proposed Findings of Fact and Conclusions of Law* ¶ 53.
25 In opposition, Debtor argues that the public policy of California against permitting
26 forfeitures is set forth in California Code of Civil Procedure § 1179, California Civil Code
27 §§ 1670, 1671, 3275, 3294, 3369, and applicable case law. *Debtor’s Proposed Findings*
28 *of Fact and Conclusions of Law* ¶ 25. As noted previously, the California Supreme Court

1 in *DeBerard Properties* stated that a waiver is permitted if it “does not seriously
2 compromise any public purpose that [the statute was] intended to serve.” *DeBerard*
3 *Properties, Ltd. v. Lim*, 20 Cal. 4th at 668-669 (citations omitted).

4 Although it is a rule of equity that forfeitures are abhorred and a court has a duty
5 to interpret an agreement to avoid forfeiture where it is reasonable to do so, it would not
6 be reasonable for the court to interpret Section 23.1 of the Lease to avoid forfeiture in this
7 case because the court also has the duty to interpret the Lease as a contract in
8 accordance with the rules of contractual interpretation under applicable California law.
9 Specifically, California Civil Code § 1638 provides: “The language of a contract is to
10 govern its interpretation, if the language is clear and explicit, and does not involve an
11 absurdity.” See also, *Pierce v. Merrill* (1900) 128 Cal. 464, 472 (1900); *Apra v. Aureguy*,
12 55 Cal. 2d 827, 830 (1961); 1 Witkin, *Summary of California Law*, Contracts, § 741
13 (Nature of Interpretation) (10th ed. 2005 and 2014 Supp.).

14 In this court’s judgment, the language employed in Section 23.1 of the Lease is
15 clear and explicit and it would not create an absurdity to determine that Debtor has given
16 up its right to avoid forfeiture after termination of the Lease through an express waiver of
17 the right to avoid forfeiture (“**Tenant hereby waives** for Tenant and all those claiming
18 under Tenant **all right [sic]** now or hereafter existing **including, without limitation**, any
19 rights under California Code of Civil Procedure §§ 1174 and 1179 and Civil Code §
20 1950.7 **to redeem** by order or judgment of any court or by any legal process or writ,
21 **Tenant’s right of occupancy of the Premises after any termination of this Lease**”)
22 (emphasis added).

23 This express contractual waiver of the *right* to relief from forfeiture in Section 23.1
24 of the Lease, not just the specific California Code of Civil Procedure or Civil Code
25 sections cited, is not inconsistent with the public policy declared by the state legislature in
26 Civil Code § 1995.270 encouraging freedom of contract in commercial real property
27 leases and the general public policy to allow contractual waivers of statutory rights as
28 part of the freedom to contract in California as set forth in Civil Code §§ 3268 and 3513.

1 In this court's view, strict construction of the Lease as a contract under California Civil
2 Code § 1442 to nullify the effect of the Waiver Clause in Section 23.1 of the Lease would
3 effectively read it out of the contract made by the parties and goes beyond what is
4 required by Section 1442 in furtherance of the public policy of abhorring forfeitures, which
5 would be inconsistent with the principle of California Civil Code § 1638 to interpret a
6 contract in accordance with its clear and explicit language. *In re Kitchen*, 192 Cal. at
7 389-391; *In re Urban Properties Corp. v. Benson, Inc.*, 116 F.2d at 323.

8 Short of listing each section of the California Code of Civil Procedure and Civil
9 Code which mention forfeiture, it would be difficult or impossible for parties to more
10 comprehensively waive the right to relief from forfeiture. The use of the phrase
11 "***including, without limitation***" shows that the waiver of the right to relief from forfeiture
12 of the lease is without limitation, and the statutes cited in Section 23.1 of the Lease,
13 including California Code of Civil Procedure § 1179, are illustrative rather than limiting.
14 Thus, the absence of a reference to California Civil Code § 3275 in Section 23.1 does not
15 prevent the court from determining that Debtor also waived that, or any other, statutory
16 provision which would otherwise provide a basis for relief from forfeiture of the Lease.

17 California case law further supports that a specific citation to the particular statute
18 in the language of a contractual waiver is not necessarily required for an enforceable
19 waiver, that is, a specific statement of the right being waived would be enough to waive
20 the statutory right. *Pearl v. General Motors Acceptance Corp.*, 13 Cal. App. 4th at 1030.
21 As the court in *Pearl v. General Motors Acceptance Corp.* explained,

22
23 On its face, this provision makes no mention of section 2815
24 by name. [Citations omitted]. Further, it does not specifically
25 state Pearl may not revoke the continuing security interest at
26 any time as to future advances made by GMAC to Palomar.
27 [Citations omitted]. *Such a specific provision presumably*
28 *would have effectively waived the rights afforded Pearl by*
section 2815.

1 *Id.* at 1031-1032 (emphasis added).⁴ Based on the circumstances recited above, the
2 court determines that the waiver is permitted here because “waiver does not seriously
3 compromise any public purpose that [the statute was] intended to serve.” *DeBerard*
4 *Properties, Ltd. v. Lim*, 20 Cal. 4th at 668-669 (citations omitted). As discussed above,
5 the public policy of abhorring forfeitures set forth in California Civil Code § 1442 and the
6 case law is not an absolute and would not be seriously compromised here because there
7 are other public policies which may be recognized as governing here to enable and
8 facilitate freedom of contract among private parties on matters generally concerning
9 private benefit as here. California Civil Code § 3513; *DeBerard Properties, Ltd. v. Lim*,
10 20 Cal. 4th at 668-669 (citations omitted); *see also, In re Kitchen*, 192 Cal. at 389-391; *In*
11 *re Urban Properties Corp. v. Benson, Inc.*, 116 F.2d at 323.

12 Citing *Indusco Management Corp. v. Robertson*, 40 Cal. App. 3d 456 (1974), the
13 Creditors’ Committee argues that the phraseology relied upon by Landlord, i.e., “all
14 right[s]” and “including, without limitation” does not mean that rights under California Civil
15 Code §3275 were waived, “particularly when that statute is not included among those
16 listed in the Waiver Clause and given the need for narrow – not broad – construction of
17 the clause.” *Responsive Supplemental Brief of Creditors’ Committee*, filed on May 6,
18 2014, at 6. In *Indusco Management Corp.*, the court addressed whether a guarantor
19 waived the right to assert a defense under the anti-deficiency provisions of California
20 Code of Civil Procedure § 580d in a real estate loan contract providing for a waiver of “all
21 suretyship defenses and defenses in the nature thereof” before the lender made the
22 election of the remedy of nonjudicial foreclosure of the security, thereby destroying the
23 guarantor’s subrogation rights and right to proceed against the principal obligor for
24 reimbursement. 40 Cal. App. 3d at 461-462. The court in *Indusco Management Corp.*
25 held that such waiver was not specific enough to waive the defense based on the anti-

26
27 ⁴ Because the provision at issue in *Pearl* did not include a specific statement of the right being waived, and
28 did not mention Civil Code § 2815 by name, the court was required to consider whether an implicit waiver
could be found under the agreement and concluded that it could not so find. *Id.* at 1032-1033.

1 deficiency provisions of California Code of Civil Procedure § 580d as to the guarantor,
2 stating that “[i]n the absence of an explicit waiver, we will not strain the instrument to find
3 that waiver by implication.” *Id.* As observed by the court in *Cathay Bank v. Lee*, 14 Cal.
4 App. 4th 1533, 1537-1538 (1993), the analysis in *Indusco Management Corp.* on why the
5 waiver was not sufficiently specific was rather limited, and offered little elaboration to
6 explain the court’s reasoning. The *Indusco* court only stated that the language employed
7 in the waiver could not “fairly be construed to be a specific waiver of the guarantor’s
8 defense” and footnoted its conclusion with a quotation from a CEB (i.e., California
9 Continuing Education of the Bar) treatise which stated the necessity for a “creditor’s
10 standard form waiver [to] contain a specific waiver based on the creditor’s creation of a
11 CCP 580d deficiency bar in favor of the debtor.” *Cathay Bank v. Lee*, 14 Cal. App. 4th at
12 1537-1538, *citing, Indusco Management Corp. v. Robertson*, 40 Cal. App. 3d at 459-462
13 and n. 4. As the court in *Cathay Bank v. Lee* put it, the task is to determine whether or
14 not the purported waiver provision constitutes an “express” or “explicit” waiver of the
15 defense involved. 14 Cal. App. 4th at 1537. That is, the court must answer the question
16 “what is it, *precisely*, that the [waiving party] is being asked to waive?” 14 Cal. App. 4th at
17 1538. As discussed in detail above, Debtor’s waiver in Section 23.1 of the Lease in this
18 case was explicit enough to constitute an effective waiver of its rights to request relief
19 from forfeiture of the lease, and the answer to the question of what it was being asked to
20 waive is precisely that it was waiving all rights to redeem occupancy of the premises after
21 termination of the lease. Thus, *Indusco Management’s* holding that a waiver of the
22 guarantor’s defense of estoppel where the lender elected the nonjudicial foreclosure
23 remedy with no recourse against the principal obligor under the anti-deficiency provisions
24 of California Code of Civil Procedure § 580d was insufficiently explicit is factually and
25 legally distinguishable from this case, and thus inapplicable here.

26 In objecting to Landlord’s proposed findings of fact and conclusions of law
27 asserting that California Civil Code § 3513 provides that waiver of relief from forfeiture is
28 enforceable and citing Civil Code § 3509 (“The maxims of jurisprudence hereinafter set

1 forth are intended not to qualify any of the foregoing provisions in this code, but to aid in
2 their just application.”), Debtor argues that Civil Code § 3513 “is a mere maxim to aid in
3 the construction of California’s statutes, and does not qualify these other anti-forfeiture
4 statutes” (e.g., Civil Code § 3275 and Code of Civil Procedure § 1179). *Debtor’s*
5 *Objections to Landlord’s Proposed Findings of Fact and Conclusions of Law*, filed on May
6 20, 2014, at 6 (Civil Code § 3513 cited incorrectly as “Section 3515”). The language of §
7 3513 is fairly close to the statement of the California Supreme Court in *Bickel v. City of*
8 *Piedmont* describing the California jurisprudence of the doctrine of waiver:

9 The term “waiver” means the intentional relinquishment or
10 abandonment of a known right. A person may waive the
11 advantage of a law intended for his or her benefit, but “a law
12 established for a public reason cannot be waived or
13 circumvented by a private act or agreement.” “The doctrine of
14 waiver is generally applicable to all of the rights and privileges
15 to which a person is legally entitled, including those conferred
16 by statute unless otherwise prohibited by specific statutory
17 provisions.”

18 *Bickel v. City of Piedmont*, 16 Cal.4th at 1048-1049 and n. 4, *citing and discussing inter*
19 *alia*, California Civil Code § 3513 and California case law, including *Covino v. Governing*
20 *Board*, 76 Cal. App. 3d 314, 322 (1977) and *Outboard Marine Corp. v. Superior Court*, 52
21 Cal. App. 3d 30, 41 (1975). Debtor’s characterization and discounting of California Civil
22 Code § 3513 as a “mere maxim” does not change the analysis here, and as discussed
23 herein, it is this court’s view that under the applicable California jurisprudence on the
24 doctrine of waiver, Debtor expressly and validly waived its rights to request relief from
25 forfeiture of the Lease after its termination.

26 The court notes that none of the cases cited by Debtor or the Creditors’ Committee
27 held that a waiver of redemption rights is *per se* invalid as contrary to public policy in
28 California. Moreover, as discussed herein, there is no express statutory prohibition
against waivers of rights to relief from forfeiture of leases under California Code of Civil
Procedure § 1179 and California Civil Code § 3275. As such, and in addition to the
reasoning herein, the court determines that Debtor has not shown that the public welfare
would be adversely affected by allowing waivers of Code of Civil Procedure § 1179 and

Civil Code § 3275 between parties to a commercial lease. As it is the expressed public policy of the State of California to “enable and facilitate freedom of contract by the parties to commercial real property leases” as set forth in California Civil Code § 1995.270(a)(1), the court determines that parties to a commercial lease should generally be free to contract with each other upon such terms as they agree, and accordingly, the court further determines that if two contracting parties in a commercial lease desire to waive specific provisions of the Civil Code, as is the case here, they generally should be free to do so.⁵ *Pearl v. General Motors Acceptance Corp.*, 13 Cal. App. 4th at 1030; *250 L.L.C. v. PhotoPoint Corp (USA)*, 131 Cal. App. 4th at 718, *quoting*, California Civil Code § 1995.270(a)(1).

Based on the above analysis, the court determines that in Section 23.1 of the Lease, Debtor expressly waived all of its *rights* to redeem its occupancy after termination of the Lease, and was not waiving only its rights under the statutory provisions specifically cited in Section 23.1.

iii. A Grammatical Analysis Further Supports that Debtor Waived its Right to Seek Relief from Forfeiture

Analyzing the waiver clause of Section 23.1 of the Lease in terms of grammar, it is evident to the court that Debtor had waived all *rights* to redeem its right of occupancy after termination of the Lease. As discussed in *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. 2012), the court has found grammatical analysis to be a useful aid in statutory interpretation, and similarly, in this case, grammatical analysis would be an aid in interpreting the language of a contract. In this regard, the court had said about looking at the grammatical structure of a sentence in *Arnold*:

“To be a sentence, a group of words must [h]ave a *subject* (noun or pronoun), [h]ave a *predicate* (verb or verb phrase) [and e]xpress a *complete thought*.” Laurie Rozakis, *English*

⁵ The court expresses no opinion on the ability to waive provisions of the Civil Code in non-commercial leases, which are not the subject of California Civil Code § 1995.270(a)(1). cf. California Civil Code § 1953 (declaring certain lease provisions void as contrary to public policy in residential leases, including a residential tenant’s waiver of statutory, procedural and other rights).

1 *Grammar for the Utterly Confused* at 116 (2003). (italics in
2 original). “A *sentence* has two parts: a *subject* and a
3 *predicate*. The *subject* includes the noun or pronoun that tells
4 what the subject is about.” *Id.* (italics in original). “The
5 *predicate* includes the verb that describes what the subject is
6 doing.” *Id.* (italics in original).

7 In order to understand a subject and a predicate, parts of
8 speech, i.e., noun or pronoun, and verb, must be defined: “A
9 *noun* is a word that names a person, place, or thing. . . . A
10 *pronoun* is a word used in place of a noun or another
11 pronoun. . . . *Verbs* name an action or describes a state of
12 being.” *Id.* at 8-9, 12. (italics in original). One type of verb is
13 an *action verb*, which “tell[s] what the subject does.” *Id.* at 12.
14 “An action verb can be *transitive* or [*intransitive*]. *Transitive*
15 *verbs* need a direct object. . . . *Intransitive verbs* do not need
16 a direct object.” *Id.* (italics in original). “A *direct object* is a
17 noun or pronoun that receives the action.” *Id.* at 21.

18 *In re Arnold*, 471 B.R. at 599-600.

19 Using this method of grammatical analysis in this case, the court determines the
20 subject of the sentence in the so-called Waiver Clause in Section 23.1 of the Lease is
21 “Tenant.” An adjectival phrase modifying “Tenant” is the phrase “for Tenant and all those
22 claiming under Tenant.” The court next determines the verb of the sentence as part of
23 the predicate of the sentence is “waives.” According to the Merriam-Webster Online
24 Dictionary, the word “waive” is a transitive verb, and two of its meanings relevant here
25 are: “4 a: to relinquish voluntarily (as a legal right) <waive a jury trial>” and “[4] b: to refrain
26 from pressing or enforcing (as a claim or rule): FORGO <waive the fee>.” Merriam-
27 Webster Online Dictionary, www.merriam-webster.com/dictionary/waive (2014); *see also*,
28 *Cathay Bank v. Lee*, 14 Cal. App. 4th at 1539 (“Waiver is the intentional relinquishment of
29 a *known* right.”) (emphasis in original; citation omitted). As noted in *Arnold*, a transitive
30 verb requires a direct object, or the thing that receives the action/verb, which is here: “All
31 right[s] . . . to redeem by order or judgment of any court or by any legal process or writ,
32 Tenant’s right of occupancy of the Premises after any termination of this Lease.” The
33 adjectival phrase “now or hereafter existing” modifies the direct object. The adjectival
34 phrase “including, without limitation, any rights under California Code of Civil Procedure
35 §§ 1174 and 1179 and Civil Code Section § 1950.7” also modifies the direct object.

1 Thus, boiled down to its essence, the sentence with the Waiver Clause in the Lease may
2 be understood to read as follows: “Tenant (the subject), hereby waives (predicate), all
3 right[s] . . . to redeem . . . tenant’s right of occupancy of the Premises after any
4 termination of [the] lease (thus, expressing a complete thought).”

5 Debtor does not disagree with the method of grammatical analysis as it had at trial
6 submitted two charts analyzing the structure of the sentence containing the Waiver
7 Clause in a similar manner, but reached a different conclusion in reading the sentence as
8 not constituting a waiver of its rights to redeem its right of occupancy on grounds that the
9 adjectival phrase of “including, without limitation, any rights under California Code of Civil
10 Procedure §§ 1174 and 1179 and Civil Code § 1950.7” which modifies the direct object in
11 the sentence, i.e., all rights to redeem occupancy (shortened here), was ambiguous. The
12 court finds that this adjectival phrase and the sentence as a whole are not ambiguous.
13 As discussed in this decision, the sentence is clear that Debtor as Tenant waived all
14 rights to redeem occupancy of the premises upon termination of the Lease, whether
15 specifically enumerated or not.

16 Thus, a grammatical analysis of the contractual language in Section 23.1 of the
17 Lease reinforces the court’s interpretation of the Waiver Clause in Section 23.1 of the
18 Lease that Debtor clearly and explicitly waived all rights to redeem its right of occupancy
19 of the leased premises after termination of the Lease, and not just the rights under the
20 specifically listed California code provisions.

21 iv. The Scope of Lease Section 23.1 Does Not Relate Only to Debtor’s Right of
22 Occupancy of the Premises, But Also to Debtor’s Right to Relief from
Forfeiture of the Lease

23 Debtor argues the scope of waiver language in Section 23.1 of the Lease at most
24 relates to its right to redeem its right of occupancy of the premises, but it does not relate
25 to its right to relief from forfeiture of the Master Lease. *Debtor’s Proposed Findings of*
26 *Fact and Conclusions of Law* ¶ 19. However, the court does not agree with Debtor’s
27 argument that there is a difference between the right to occupancy and the right to relief
28 from forfeiture. As discussed above, Section 23.1 of the Lease expressly provides that in

Moreover, California Code of Civil Procedure § 1179, which was specifically cited in Section 23.1 of the Lease is a provision *for relief from forfeiture*, not a provision for the right to redeem a right of occupancy. Section 1179 provides:

The court may *relieve a tenant against a forfeiture* of a lease or rental agreement, whether written or oral, and whether or not the tenancy has terminated, and restore him or her to his or her former estate or tenancy, in case of hardship, as provided in Section 1174. The court has the discretion to relieve any person against forfeiture on its own motion.

California Code of Civil Procedure § 1179. (emphasis added). The express inclusion of Section 1179 of California Code of Civil Procedure in Section 23.1 of the Lease thus undermines Debtor's argument that there is a distinction to be drawn between the right to occupancy and the right to relief from forfeiture. Accordingly, the court must reject Debtor's argument that the scope of waiver language in Section 23.1 only "at most" relates to its right to redeem its right of occupancy of the premises, and not to its right to relief from forfeiture of the Lease.

v. California Civil Code § 3268 Does Not Support Debtor's Argument that California Code of Civil Procedure § 1179 and California Civil Code § 3275 are Non-Waivable

Finally, Debtor argues that California Code of Civil Procedure § 1179 and California Civil Code § 3275 are non-waivable because while California Civil Code § 3268 expressly provides that certain Civil Code lease-related provisions are ones that may be waived or modified by agreement, it did not similarly provide that California Code of Civil Procedure § 1179 or California Civil Code §§ 1670, 1671, 3275, 3294, and 3369 are waivable. *Debtor's Proposed Findings of Fact and Conclusions of Law* ¶ 26. Thus, it appears that Debtor is arguing that because the California legislature designated certain commercial lease-related statutes as waivable pursuant to California Civil Code § 3268 and did not similarly provide that other provisions, such as Code of Civil Procedure § 1179 and Civil Code § 3275 are waivable, such provisions are not waivable as a matter of public policy. However, the court's reading of Civil Code § 3268 does not support Debtor's argument.

Civil Code § 3268 states: “Except where it is otherwise declared, the *provisions of the foregoing titles* of this part, in respect to the rights and obligation of parties to contracts, are subordinate to the intention of the parties, when ascertained in the manner prescribed by the chapter on the interpretation of contracts; and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy.” California Civil Code § 3268 (emphasis added). As previously noted, Section 3268 applies to the “foregoing titles of this part,” which refers to statutes preceding that provision (i.e. Titles 1 to 15 of Part 4 of Division 3 of the Civil Code, §§ 1738 through 3267), but the legislature’s silence as to statutes following Section 3268 does not necessarily mean the rights conferred by statutes following Section 3268 or in a different state code, i.e., California Code of Civil Procedure § 1179, are non-waivable. In this court’s view, given the wording of Section 3268 as being applicable to the “foregoing titles of this part,” this only means that the section is only applicable to the statutes in those titles and has no applicability to other statutes. Thus, the court is compelled to reject Debtor’s argument that the rights conferred by Code of Civil Procedure § 1179 and Civil Code § 3275 are not waivable because Civil Code § 3268 did not specifically provide that the rights under those statute are waivable as not supported by the express language of the section.

vi. Conclusion

Accordingly, the court concludes that Debtor’s rights under California Code of Civil Procedure § 1179 and California Civil Code § 3275 to seek relief from forfeiture of the Lease are waivable because: (1) no statute prohibits waiver of such rights, (2) a waiver of such rights does not contravene public policy, and (3) the public policy of freedom of contract in commercial leases declared in Civil Code § 1995.270(a)(1) supports that the rights to relief from forfeiture of a lease under Code of Civil Procedure § 1179 and Civil Code § 3275 are waivable. Although the court recognizes the general equitable principle that forfeiture clauses must be strictly interpreted against the party for whose benefit it is created, it would not be reasonable for this court to interpret Section 23.1 of the Lease as

1 not expressly waiving Debtor's right to relief from forfeiture of the Lease under both
2 California Code of Civil Procedure § 1179 and California Civil Code § 3275 based on the
3 language of the parties' contract and the absence of any statutory prohibition or public
4 policy against such waiver. Because the court concludes that Debtor's waiver of its rights
5 to relief from forfeiture of the Lease is not prohibited by statute and does not contravene
6 public policy, the court must next determine whether the waiver of such rights was
7 "knowing and intelligent" in order to be valid and enforceable.

8 B. Debtor's Waiver of the Right to Relief from Forfeiture Was a "Knowing and
9 Intelligent" Waiver.

10 As previously noted, waiver has been defined as "the intentional relinquishment or
11 abandonment of a known right." *Bickel v. City of Piedmont*, 16 Cal. 4th at 1048 (citations
12 omitted). "Waiver requires a voluntary act, knowingly done, with sufficient awareness of
13 the relevant circumstances and likely consequences" and "[t]he burden is on the party
14 claiming a waiver to prove it by evidence that does not leave the matter doubtful or
15 uncertain and the burden must be satisfied by clear and convincing evidence that does
16 not leave the matter to speculation." *In re Marriage of Moore*, 113 Cal. App. 3d 22, 27
17 (1980). "To constitute a waiver, there must be an existing right, knowledge of the right,
18 and an actual intention to relinquish the right." *Bickel v. City of Piedmont*, 16 Cal. 4th at
19 1053 (citation omitted). "The waiver may be either express, based on the words of the
20 waiving party, or implied, based on the conduct indicating an intent to relinquish the
21 right." *Id.* (citation omitted).

22 Landlord argues that Debtor's waiver of its rights to relief from forfeiture was both
23 knowing and voluntary because numerous drafts of the Lease were exchanged prior to its
24 execution, Section 23.1 of the Lease was among the provisions that were revised by
25 Debtor's counsel in the various drafts of the Lease, and the Lease was signed by
26 Debtor's principal, Douglas Christmas. *Landlord's Proposed Findings of Fact and*
27 *Conclusions of Law* ¶ 58. In response, Debtor argues that Landlord has failed to prove
28 that it understood its rights under California Code of Civil Procedure § 1179 and § 3275.

1 *Debtor's Proposed Findings of Fact and Conclusions of Law* ¶ 23, citing, *Trial Transcript*,
2 August 30, 2013, at page 124, lines 11-14, page 125, lines 8-22);⁶ *Debtor's Proposed*
3 *Findings of Fact and Conclusions of Law* ¶ 22.

4 The court finds that Landlord has established by clear and convincing evidence,
5 and thus meeting its burden, in showing that Debtor made a "knowing and intelligent"
6 waiver of all of its rights to redeem its right of occupancy of the premises after any
7 termination of the Lease, including California Code of Civil Procedure § 1174 and 1179
8 and California Civil Code § 3275. The court specifically observes that there is no factual
9 dispute that the Lease "was heavily negotiated by the Debtor and the Landlord, both of
10 whom were represented by their respective experienced and sophisticated real estate
11 counsel in connection with such negotiations" and "[n]umerous drafts of the Master Lease
12 were exchanged prior to its execution." *Landlord's Proposed Findings of Fact and*
13 *Conclusions of Law* ¶ 58; *Debtor's Proposed Findings of Fact and Conclusions of Law* ¶
14 3; see also, *Trial Exhibit 1, Lease*, § 31.7 ("The parties hereto acknowledge and agree
15 that each has participated in the negotiation and drafting of this Lease . . ."). Thus,
16 because the Lease was a commercial lease negotiated by the parties represented by
17 experienced and sophisticated real estate counsel, there were numerous drafts of the
18 Lease circulated among the parties, including numerous revisions to Section 23.1, the
19 specific provision at issue in this matter, and the Lease was signed by Mr. Christmas,

20 ⁶ The court has reviewed the transcript from the trial conducted on August 30, 2013, and the pages Debtor
21 cited to in paragraph 23 of its proposed findings of fact and conclusions of law relate to testimony regarding
22 Debtor's receipt of subtenant rents on its monthly operating report for March 2013, not to any testimony
23 regarding the negotiations of the Lease and waiver of rights to request relief from forfeiture California Code
24 of Civil Procedure § 1179. See *Trial Transcript of August 30, 2013* at 124-125, ECF 334 at 128-129. Upon
25 further research, it turns out that the citation should have been to the *Trial Transcript of August 19, 2013* at
26 124-125, ECF 332 at 129-130. The court has reviewed the transcript of Mr. Christmas' testimony on his
27 experience in negotiating real estate leases, including the Lease which is the subject of this litigation, and
28 his familiarity with Section 23.1 of the Lease, including the Waiver Clause. *Trial Transcript of August 19,*
2013 at 122-125, ECF 332 at 127-130 (cited correctly in *Debtor's Objections to Landlord's Proposed*
Findings of Fact and Conclusions of Law at 7). Mr. Christmas testified that when he signed the Lease on
behalf of Debtor, he did not have familiarity with the rights that exist under Sections 1174 and 1179 of
California Code of Civil Procedure, and upon further examination of counsel, his recollection was not
refreshed on that point. *Id.* The court does not give much weight to this testimony in isolation because the
totality of the circumstances as discussed herein indicate that Debtor's waiver of rights set forth in Section
23.1 was knowing and voluntary by clear and convincing evidence.

1 Debtor's principal, the court finds that Landlord has met its burden in showing that
2 Debtor's waiver of its right to redeem its right of occupancy of the premises after any
3 termination of the Lease was knowing and voluntary. *Landlord's Proposed Findings of*
4 *Fact and Conclusions of Law* ¶ 58, *citing inter alia, Trial Exhibit 1, Lease, § 31.7, Terms*
5 *and Headings* ("The parties hereto acknowledge and agree that each has participated in
6 the negotiation and drafting of this Lease;"), *Stipulated Joint Pre-Trial Order re:*
7 *Motion to Assume Master Lease*, ECF 305 at 2 ¶ 4 ("The Master Lease was heavily
8 negotiated by the Debtor and the Landlord, both of whom were represented by their
9 respective experienced and sophisticated real estate counsel in connection with such
10 negotiations. Numerous drafts of the Master Lease were exchanged prior to its
11 execution."), *Direct Testimony of Bradley A. Van Auken in Support of Landlord's*
12 *Opposition to Debtor's Motion to Assume Master Lease*, ECF 272 at 7-8, ¶¶ 19-20
13 (testifying as Landlord's representative in negotiations of the Lease that Debtor made
14 changes in Section 23.1 of the Lease, but executed the Lease with the Waiver Clause in
15 Section 23.1), *Declaration of Sidney P. Levinson in Support of Landlord's Opening Brief*
16 *on Remand*, ECF 500, ¶ 4, Exhibit B, *Excerpt of Trial Exhibit 102* (redlined draft of Lease
17 showing changes in Section 23.1), *Trial Exhibit 1, Lease*, at 27 and *Trial Testimony of*
18 *Douglas Christmas*, August 19, 2013, ECF 332 at 122:24 – 123:12 (testimony of Douglas
19 Christmas that he had experience negotiating real estate leases and was personally
20 involved in the negotiation of the Lease and was represented by a lawyer in that
21 negotiation); *see also, Debtor's Proposed Findings of Fact and Conclusions of Law* ¶ 3
22 ("The Master Lease was heavily negotiated by the Debtor and the Landlord, both of
23 whom were represented by their respective experienced and sophisticated real estate
24 counsel in connection with such negotiations. Numerous drafts of the Master Lease were
25 exchanged prior to its execution."). In this regard, the court notes that the public policy
26 concerns that may apply to the unequal bargaining positions of residential tenants and
27 landlords do not apply to a commercial lease. *See, e.g., California Civil Code § 1953*
28 (declaring certain lease provisions void as contrary to public policy in residential leases,

1 including a residential tenant's waiver of statutory, procedural and other rights);
2 *Schulman v. Vera*, 108 Cal. App. 3d 552, 561 (1980) (stating that under a commercial
3 lease, "parties are more likely to have equal bargaining power" than is the case under a
4 residential lease). The evidentiary record of the history of this commercial lease and its
5 negotiation and approval by experienced and sophisticated business parties (including
6 Debtor by its principal, Mr. Christmas), which negotiated and signed the lease with the
7 assistance of specialized real estate counsel, and after exchanging numerous drafts, is
8 ample to show by clear and convincing evidence that Debtor's waiver of the rights to
9 request relief from forfeiture of the lease was both knowing and intelligent.

10 The technical requirements of a waiver as stated by the California Supreme Court
11 in *Bickel v. City of Piedmont* are: (1) there must be an existing right; (2) knowledge of the
12 right, and (3) an actual intention to relinquish the right. *Bickel v. City of Piedmont*, 16 Cal.
13 4th at 1053 (citation omitted). "The waiver may be . . . express, based on the words of
14 the waiving party" *Id.* Here, these requirements are met and shown primarily by the
15 written expression of Debtor in negotiating and signing the Lease, which included the
16 waiver provision in Section 23.1. *Trial Exhibit 1, Lease*, § 23.1 and Signature Pages;
17 *Trial Exhibit 1, Lease*, § 31.7, Terms and Headings ("The parties hereto acknowledge
18 and agree that each has participated in the negotiation and drafting of this Lease; . . ."),
19 *Stipulated Joint Pre-Trial Order re: Motion to Assume Master Lease*, ECF 305 at 2 ¶ 4
20 ("The Master Lease was heavily negotiated by the Debtor and the Landlord, both of
21 whom were represented by their respective experienced and sophisticated real estate
22 counsel in connection with such negotiations. Numerous drafts of the Master Lease were
23 exchanged prior to its execution."); *see also, Palmquist v. Mercer*, 43 Cal. 2d 92, 98
24 (1954) *quoting, Smith v. Occidental & Oriental Steamship Co.*, 99 Cal. 462, 470-471
25 (1893) ("The general rule is that when a person with the capacity of reading and
26 understanding an instrument signs it, he is, in the absence of fraud and imposition, bound
27 by its contents, and is estopped from saying that its provisions are contrary to his
28 intentions or understanding").

1 The express language of Section 23.1 of the Lease demonstrates that Debtor as
2 the tenant under the Lease had the rights to redeem by order or judgment of any court or
3 by any legal process or writ its right of occupancy of the premises after termination of the
4 Lease, including without limitation, any rights under California Code of Civil Procedure §§
5 1174 and 1179 and California Civil Code § 1950.7. *Id.* As previously discussed herein,
6 the court has determined that Debtor also had rights to redeem occupancy of the
7 premises after termination of the Lease pursuant to California Civil Code § 3275.
8 Debtor's knowledge of its rights to redeem occupancy of the premises after termination of
9 the Lease is demonstrated by the express reference to these rights in the Lease, which
10 Debtor negotiated and signed, in Section 23.1. *Trial Exhibit 1, Lease*, §§ 23.1 and §
11 31.7, *Stipulated Joint Pre-Trial Order re: Motion to Assume Master Lease*, ECF 305 at 2
12 ¶ 4. Debtor's actual intention to relinquish these rights is manifested and shown in the
13 Lease, which it negotiated and signed, in Section 23.1 as indicated in the words
14 employed in that section, specifically the words, "Tenant hereby waives for Tenant and all
15 those claiming under Tenant." *Id.* The facts that both parties, Landlord and Tenant,
16 were represented in the negotiations by experienced and sophisticated real estate
17 counsel, that numerous drafts were exchanged in the negotiations and that Debtor's
18 principal, Mr. Christmas, who signed the Lease for Debtor, had experience negotiating
19 leases and had personally participated in the negotiation of the Lease further supports
20 the court's determination that the waiver in Section 23.1 was knowing and intentional.
21 *Stipulated Joint Pre-Trial Order re: Motion to Assume Master Lease*, ECF 305 at 2 ¶ 4;
22 *Direct Testimony of Bradley A. Van Auken in Support of Landlord's Opposition to*
23 *Debtor's Motion to Assume Master Lease*, ECF 272 at 7-8, ¶¶ 19-20; *Declaration of*
24 *Sidney P. Levinson in Support of Landlord's Opening Brief on Remand*, ECF 500, ¶ 4,
25 Exhibit B, *Excerpt of Trial Exhibit 102; Trial Exhibit 1, Lease*, at 27 and *Trial Testimony of*
26 *Douglas Christmas*, August 19, 2013, ECF 332 at 122:24 – 123:12. Based on these
27 circumstances, the court determines that Landlord has established by clear and
28 convincing evidence, and thus meeting its burden, in showing that Debtor made a

1 “knowing and intelligent” waiver of all of its rights to redeem its right of occupancy of the
2 premises after any termination of the Lease, including California Code of Civil Procedure
3 § 1174 and 1179 and California Civil Code § 3275.

4 1. The Waiver of California Code of Civil Procedure § 1179 Is Not an
5 Unenforceable Penalty

6 An additional argument made by the Creditors’ Committee, but not made by
7 Debtor, is that the Waiver Clause of Section 23.1 of the Lease is invalid and
8 unenforceable because it is an illegal penalty. Specifically, the Creditors’ Committee
9 argues that the Waiver Clause is an unenforceable penalty because: (1) it is designed
10 simply to secure payment of rent; (2) it compels forfeiture; and (3) it purports to take
11 effect under all circumstances, without regard to the basis for termination, the nature of
12 the default, or the actual damages suffered by the aggrieved party. *Memorandum of the*
13 *Official Committee of Unsecured Creditors in Support of Debtor’s Request for Relief from*
14 *Forfeiture of Master Lease with AERC Desmond’s Tower, LLC*, filed on March 21, 2014,
15 at 10-14.

16 In response, Landlord responds that the Creditors’ Committee’s argument
17 confuses the termination of the Lease with the waiver of the right to relief from forfeiture –
18 the waiver is not itself a forfeiture, penalty or other consequence of termination, but rather
19 a waiver of a right to seek relief from forfeiture; thus, the law applicable to penalties is
20 inapposite. *Landlord’s Responsive Brief on Remand*, filed on April 8, 2014, at 11-12. On
21 this point, the court agrees with Landlord and concludes that the Waiver Clause is an
22 unenforceable penalty. The Waiver Clause itself does not impose any monetary penalty
23 upon Debtor as a consequence of its default under the Lease, and its purpose and effect
24 are not to secure payment of rent, but to insure termination of the Lease on the tenant’s
25 default. Moreover, the Waiver Clause did not compel any forfeiture by Debtor; rather, the
26 forfeiture in this case was caused by Debtor’s default under the Lease, which constituted
27 grounds for termination of the Lease as reflected in the District Court Judgment and
28 related orders.

1 C. Conclusion

2 Accordingly, for the foregoing reasons, the court determines that the Debtor validly
3 and expressly waived its rights to seek relief from forfeiture of the Lease under both
4 California Code of Civil Procedure § 1179 and California Civil Code § 3275.

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6 **II. The Court Need Not Reach the Issues of Whether Debtor is Substantively**
7 **Entitled to Relief from Forfeiture Under California Code of Civil Procedure §**
8 **1179 or California Civil Code § 3275 or Whether Debtor Can Satisfy 11 U.S.C.**
9 **§ 365(b)(1).**

10 Because Debtor validly waived its rights under California Code of Civil Procedure
11 § 1179 and California Civil Code § 3275 to request relief from forfeiture of the Lease, the
12 court need not determine Debtor's claims that it is substantively entitled to relief from
13 forfeiture under those provisions. Thus, because it is the law of the case as set forth in
14 the District Court Judgment that the Lease was terminated on Debtor's default and this
15 court has now determined on remand that Debtor may not obtain relief from forfeiture
16 under either California Code of Civil Procedure § 1179 and California Civil Code § 3275,
17 the court does not reach Debtor's claim that it may assume the Lease if it cures the rent
18 arrearages and provides adequate assurance of future performance as required by 11
19 U.S.C. § 365. *See, In re Windmill Farms, Inc.*, 841 F.2d at 1469, 1471-1472 (if a lease is
20 terminated under California law, there is nothing to assume unless it can be saved from
21 forfeiture under the anti-forfeiture provisions of California law). Accordingly, Debtor's
22 motion to assume the Lease under 11 U.S.C. § 365 should be denied.

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1 **III. Conclusion**

2 For the foregoing reasons, Debtor's request for relief from forfeiture of the Lease
3 and its motion to assume the Lease under 11 U.S.C. § 365 should be denied. This
4 memorandum decision constitutes the court's findings of fact and conclusions of law.
5 Counsel for Landlord is ordered to submit a proposed judgment consistent with this
6 decision.

7 IT IS SO ORDERED.

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23 Date: September 18, 2014



24 _____
25 Robert Kwan
26 United States Bankruptcy Judge
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