

FILED & ENTERED

FEB 15 2023

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY bakchell DEPUTY CLERK

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

In re:

ART & ARCHITECTURE BOOKS OF
THE 21st CENTURY,

Debtor.

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

Chapter 11

Adv. No. 2:15-ap-01679-RK

Consolidated with Adv. No. 2:14-ap-01771-RK

**ORDER STAYING PROCEEDINGS IN
CONTESTED MATTER OVER OWNERSHIP
OF THE BANKSY ARTWORK IN LIGHT OF
PENDING SETTLEMENT AND FOR
POSTING OF BANKRUPTCY COURT'S
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON THE COURT'S
WEBSITE**

Status Conference

Date: February 14, 2023

Time: 2:00 p.m.

Place: Courtroom 1675

Roybal Federal Building

255 East Temple Street

Los Angeles, California 90012

SAM LESLIE, Plan Agent for Art &
Architecture Books of the 21st Century,

Plaintiff,

vs.

ACE GALLERY NEW YORK
CORPORATION, et al.,

Defendants.

Hearing conducted in-person and through
Zoom for Government

Pending in this adversary proceeding is the contested matter of ownership of,

1 and priority of liens in, the artwork purportedly created by the well-known street artist,
2 Banksy, on the premises owned by Defendant 400 South La Brea, LLC, which premises
3 had been leased by Defendant Ace Museum at the time the Banksy artwork was
4 created. The contested matter was initiated by the Application of Sam S. Leslie, Plan
5 Agent, for Issuance of Order Approving the Issuance of Writ of Execution and
6 Appointment of Plaintiff as Substitute Custodian for U.S. Marshal in Furtherance of
7 Execution of Writ and Notice of Levy; and for Order Approving Sale of Artworks Free
8 and Clear of Any Claim of Lien or Interest, Docket No. 713, filed on April 7, 2020. This
9 contested matter was extensively litigated, culminating in a four day court trial. Because
10 this contested matter involves claims arising under nonbankruptcy state law, the court
11 does not have jurisdiction to enter a final judgment in the matter since not all of the
12 parties to the contested matter have consented to this court entering a final judgment.
13 *See Executive Benefits Insurance Agency v. Arkison*, 573 U.S. 25 (2014)

14 Pursuant to 28 U.S.C. § 157 and Federal Rule of Bankruptcy Procedure 9033, on
15 the court issued and entered proposed findings of fact and conclusions of law, Docket
16 No. 1387, which were to be submitted to the United States District Court for *de novo*
17 review. Pursuant to Federal Rule of Bankruptcy Procedure 9033, on December 21,
18 2022, the parties filed objections to the proposed findings of fact and conclusions of law,
19 Docket No. 1395 by the Plan Agent, and Docket No. 1396, by Defendant 400 South La
20 Brea, LLC. On January 4, 2023, Defendant 400 South La Brea, LLC, filed its responses
21 to the Plan Agent's objections, Docket No. 1399. The court was preparing a notice of
22 submission of the matter to the United States District Court after reviewing the parties'
23 objections to its proposed findings of fact and conclusions of law and the responses
24 thereto.

25 On February 14, 2023, the court conducted a status conference in this adversary
26 proceeding. At this status conference, counsel for the parties reported to the court that
27 at the judicial settlement conference before the Honorable Gregg W. Zive, United States
28 Bankruptcy Judge, on February 8, 2023, that the parties reached a settlement of this

adversary proceeding, including all claims, such as Plaintiff's claim to ownership of the Banksy, which is disputed by Defendant 400 South La Brea, LLC.

Currently, the parties are documenting their settlement of the underlying adversary proceeding, and the court has issued a scheduling order which vacates a prior deadline for filing joint pretrial documents is vacated and continued the final pretrial conference is continued from March 15, 2023 at 1:30 p.m. to August 16, 2023 at 1:30 p.m.

Since the parties have settled the adversary proceeding, there is no need for further litigation of the contested matter over the Banksy artwork, one of many disputes in the adversary proceeding, and therefore, the court orders that the proceedings in the contested matter relating to the Banksy be stayed, pending further order of the court.

In light of the pending settlement between the parties, the court is not at this time submitting its proposed findings of fact and conclusions of law to the United States District Court for review. However, because the contested matter raises novel questions of law regarding the resolution of disputes of ownership of street art, such as the Banksy artwork, on leased premises involving competing claims of a landlord and a tenant, the court's views on these questions may be of interest to the bar and the general public, and therefore, the court orders that its proposed findings of fact and conclusions of law (Docket No. 1387) be posted on the judicial opinion webpage of the court's website. In doing so, the court also refers the bar and the general public to the learned discussions of these questions by counsel for the Plan Agent (Docket No. 1395) and Defendant 400 South La Brea, LLC (Docket No. 1396).

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1 Because the contested matter over ownership of the Banksy artwork is stayed by
2 this order, the posting of the proposed findings of fact and conclusions of law on the
3 court's website is only for informational purposes and does not represent further action
4 by the court in the contested matter and does not trigger any deadline for the parties to
5 act further in the contested matter.

6 IT IS SO ORDERED.

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Date: February 15, 2023



Robert Kwan
United States Bankruptcy Judge

ATTACHMENT

BANKRUPTCY COURT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF
LAW FOR THE CONTESTED MATTER REGARDING THE DISPUTES OVER
OWNERSHIP OF, AND LIEN PRIORITY IN, THE BANKSY ARTWORK

FILED & ENTERED

DEC 07 2022

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY bakchell DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

ART AND ARCHITECTURE BOOKS OF THE
21ST CENTURY,

Debtor.

SAM LESLIE, as Plan Agent for ART &
ARCHITECTURE BOOKS OF THE 21ST
CENTURY,

Plaintiff,

vs.

ACE GALLERY NEW YORK
CORPORATION, et al.,

Defendants.

400 S. LA BREA, LLC,

Cross-Complainant,

vs.

SAM LESLIE, et al.,

Cross-Defendants.

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

Adv. No. 2:15-ap-01679-RK

Chapter 11

Consolidated with Adv. No. 2:14-ap-01771-
RK and Adv. No. 2:15-ap-01680-RK

**BANKRUPTCY COURT'S PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
THE "BANKSY" DISPUTE; ORDER
THEREON**

Trial:

Date: December 16-17, 2021
January 13-14, 2022

Time: 9:00 a.m.

Place: Courtroom 1675
255 East Temple Street
Los Angeles, CA 90012
ZoomGov
[Hon. Robert N. Kwan]

[Relates to Dkt. No. 713]

TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, PLAINTIFF SAM LESLIE, PLAN AGENT FOR ART AND ARCHITECTURE BOOKS OF THE 21ST CENTURY, AND DEFENDANT 400 SOUTH LA BREA, LLC, PARTIES TO THE CONTESTED MATTER OF PLAINTIFF'S APPLICATION FOR WRIT OF EXECUTION AND APPOINTMENT AS SUBSTITUTE CUSTODIAN FOR THE SO-CALLED BANKSY ARTWORK:

I. INTRODUCTION

Pursuant to Federal Rule of Bankruptcy Procedure 9033, in this adversary proceeding in this bankruptcy case, the undersigned United States Bankruptcy Judge hereby issues the following proposed findings of fact and conclusions of law on the contested matter of the "Notice of Application and Application of Sam S. Leslie, Plan Agent, for Issuance of Order Approving the Issuance of Writ of Execution and Appointment of Plaintiff as Substitute Custodian for U.S. Marshal in Furtherance Of Execution Of Writ And Notice of Levy; and for Order Approving Sale of Artworks Free and Clear of Any Claim of Lien or Interest" involving a dispute of ownership of certain artwork referred to herein as the "Banksy" for de novo review by the United States District Court for the Central District of California. The application ("Application") can be found at Docket No. 713 in Adversary Proceeding No. 2:15-ap-01679-RK.

Over a four-day period on December 16 and 17, 2021, and January 13 and 14, 2022, in Courtroom 1675 (by Zoom.gov) the United States Bankruptcy Court ("Bankruptcy Court"), located in the Roybal Federal Building at 255 East Temple Street, Los Angeles, California 90012, the Honorable Robert N. Kwan, presiding, conducted a trial on the Application filed on April 7, 2020, by Sam S. Leslie, Plan Agent for the Post-Confirmation Bankruptcy Estate of Art and Architecture Books of the 21st Century ("Plan Agent"). In the Application, the Plan Agent seeks an order appointing him to be the substitute custodian for the U.S. Marshal so that he can, among other things, sell a piece of artwork that is purportedly by the artist known as "Banksy" known as "Guard on Duty, referring to a spraypainted mural of a security guard holding a balloon patrol dog on a leash.

The Application seeks Bankruptcy Court approval to execute on a judgment in the amount of \$3,187,539.80, plus fees and costs of \$47,201.04, that the Plan Agent has against Ace Museum, a defendant in this adversary proceeding, on his claims under California state law for relief, Twentieth Claim for Relief (for Money Had and Received), Twenty-First Claim for Relief (for

1 Money Lent), Twenty-Second Claim for Relief (for Open Book Account), Twenty-Third Claim for
2 Relief (for Account Stated) and Twenty-Fourth Claim for Relief (Breach of Contract). The judgment
3 ("Judgment") entered as a final judgment pursuant to Federal Rule of Civil Procedure 54(b) can be
4 found at Docket No. 620 in this adversary proceeding. In seeking to execute on this judgment, the
5 Plan Agent seeks to utilize post-judgment remedies available under California law, California Code
6 of Civil Procedure § 697.010 *et seq.*, which are applicable to this adversary proceeding pursuant to
7 Federal Rule of Bankruptcy Procedure 7069 and Federal Rule of Civil Procedure 69.

8 This artwork appeared around April 10, 2010, at the premises owned by 400 S. La Brea,
9 LLC, a California limited liability company ("400 SLB") and leased by Ace Museum, a California
10 nonprofit mutual benefit corporation ("Ace Museum"). This artwork known as "Guard on Duty" is
11 a spraypainted mural of a security guard with a toy balloon dog, which was removed from the wall
12 of a drywall pilaster upon which it was painted (hereafter referred to as the "Drywall Pilaster")¹, and
13 the resulting art object (which includes the paint as well as a portion of the Drywall Pilaster upon
14 which the paint appeared) is hereafter referred to as the "Banksy".

15 On April 24, 2020, Defendant 400 SLB filed an opposition to the Application of the Plan
16 Agent to the extent that the Plan Agent sought to execute his judgment levy against Ace Museum
17 on the Banksy. In its opposition, 400 SLB asserted that it owned the Banksy, and not Ace Museum.
18 Ownership of the Banksy is the subject of the dispute pending before the Bankruptcy Court.

19
20 ¹ The artwork was painted on a wall made of drywall that was part of a pilaster added to 400 SLB
21 premises by Douglas Christmas and/or his wholly owned entity, Ace Museum. Douglas Christmas
22 and Ace Museum are defendants in this adversary proceeding. The parties use different
23 nomenclature to describe the disputed feature that Christmas installed on the Premises which is a
24 pilaster made of drywall. The Plan Agent refers to the drywall pilaster as the "Drywall,"
25 apparently to emphasize the impermanence of the material used to construct the installed feature.
26 400 SLB refers to the drywall pilaster as the "Pilaster," apparently to emphasize the permanence
27 of the installed feature. 400 SLB made continuous objections to the Plan Agent's reference to the
28 drywall pilaster as "Drywall" on grounds that it was misleading because it also consisted of a
metal beam framing attached to the concrete floor and underlying cinderblock wall by power-
driven nails and bolted into the ceiling's soffit. The Bankruptcy Court somewhat agrees with 400
SLB's objection and will refer to the feature as the "Drywall Pilaster." Photographs of the Banksy
artwork known as "Guard on Duty" (the "Banksy") spray painted on the Drywall Pilaster as of
April 11, 2010 are accurately depicted in the online post, "Streets: Banksy in LA", posted by
"sleepboy," admitted into evidence as Exhibit D-2

1 Because of the opposition to the Application as to the Banksy, the Bankruptcy Court considers the
2 Application as to the Banksy to be a contested matter within the adversary proceeding as
3 enforcement of the Plan Agent's judgment on his claims against Ace Museum, which may fall within
4 the scope of Federal Rule of Bankruptcy Procedure 9014. The Bankruptcy Court may resolve third
5 party disputes regarding ownership of property subject to execution of judgment levy under
6 California law pursuant to Federal Rule of Bankruptcy Procedure 7069 and Federal Rule of Civil
7 Procedure 69 in issuing declaratory relief or quiet title relief as to ownership of disputed property.
8 *See City of Torrance v. Castner*, 46 Cal.App.3d 76 (1975). Since there are disputed issues of material
9 fact, the Bankruptcy Court set the Application as to the Banksy for a trial to take place on December
10 16 and 17, 2021, and January 13 and 14, 2022.

11 At the trial on the dates of December 16, 2021, and December 17, 2021, appearances were
12 made as follows: (a) Victor A. Sahn, Steven F. Werth, and David V. Sack of SulmeyerKupetz, A
13 Professional Corporation, on behalf of the Plan Agent, and (b) Brian L. Davidoff, Esq. and Keith P.
14 Banner, Esq. of Greenberg Glusker LLP, on behalf of 400 SLB. At the January 13, 2022, and
15 January 14, 2022, dates of the Hearing, appearances were made by (a) Steven F. Werth, and David
16 V. Sack of SulmeyerKupetz, A Professional Corporation, on behalf of the Plan Agent, and (b) Brian
17 L. Davidoff, Esq. and Keith P. Banner, Esq. of Greenberg Glusker LLP, on behalf of 400 SLB.

18 At the conclusion of the Hearing on January 14, 2022, the Bankruptcy Court set a further
19 hearing of January 20, 2022 so that Plan Agent and 400 SLB could present closing arguments. At
20 that January 20, 2022 hearing, Steven F. Werth and David V. Sack of SulmeyerKupetz, a
21 Professional Corporation, appeared on behalf of Plan Agent, and Brian L. Davidoff, Esq. and Keith
22 P. Banner, Esq. of Greenberg Glusker LLP appeared on behalf of 400 SLB. On January 21, 2022,
23 the Court entered an order that, among other things, set a deadline of March 15, 2022, for the parties
24 to lodge findings of fact and conclusions of law. On March 15, 2022, the Plan Agent lodged his
25 proposed findings of fact and conclusions of law. Adversary Proceeding Docket No. 1257. On
26 March 15, 2022, 400 SLB lodged its proposed findings of fact and conclusions of law. Adversary
27 Proceeding Docket No. 1258. On March 29, 2022, the Plan Agent filed his objections to 400 SLB's
28 proposed findings of fact and conclusions of law. Adversary Proceeding Docket No. 1261. On

March 29, 2022, 400 SLB filed its objections to the Plan Agent’s proposed findings of fact and conclusions of law. Adversary Proceeding Docket No. 1262.

Pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9033, upon consideration of the evidence presented at trial, the arguments of the parties, and proposed findings of fact and conclusions of law, and objections thereto submitted by the parties, the Bankruptcy Court has prepared the following proposed findings of fact and conclusions of law on this matter for de novo review by the United States District Court for the Central District of California.

II. FINDINGS OF FACT

A. Procedural History

<u>NO.</u>	<u>FACT</u>	<u>SUPPORTING EVIDENCE</u>
1.	On February 19, 2013 (the “Petition Date”), the Debtor Art & Architecture Books of the 21st Century, dba Ace Gallery (the “Debtor”) commenced the underlying bankruptcy case, Case No. 2-13-bk-14135-RK Chapter 11 (the “Bankruptcy Case”) by filing a voluntary petition under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”).	Main Bankruptcy Case (No. 2:13-bk-14135-RK) Docket No. 1
2.	On March 28, 2013, the United States Trustee appointed the Official Committee of Unsecured Creditors (the “Committee”) in the Bankruptcy Case.	Main Bankruptcy Case Docket No. 66
3.	On November 26, 2014, the Committee commenced an adversary proceeding against non-debtor Ace Museum, a California non-profit corporation (“Ace Museum”) Adversary Case No. 2:14-ap-01771-RK (the “Museum Adversary”) by filing their Complaint for: (1) Money Had and Received; (2) Money Lent; (3) Open Book Account; (4) Account Stated; (5) Breach of Contract; (6) Avoidance, recovery, and Preservation of Fraudulent Transfers; and (7) Turnover of Property of the Estate.	Ace Museum Adversary Proceeding (Adversary No. 2:14-ap-01771-RK) Docket No. 66 (“Ace Museum Adversary Proceeding Docket No.”)
4.	Ace Museum is not, and never was, a debtor in the Bankruptcy Case.	<i>See generally</i> , Main Bankruptcy Case Docket
5.	On December 12, 2015, the Committee, filed its Complaint for: (1) Avoidance, Recovery, and Preservation of Fraudulent Transfers; (2) Avoidance, Recovery, and Preservation of Preferential Transfers; (3) Turnover of Property; (4) Avoidance and Recovery of Transfers; (5) Avoidance and Recovery of Post-Petition Transfers to	Adversary Proceeding Docket No. 1

	Defendant Ace Gallery New York Corporation; and (6) Disallowance of Claims, commencing this adversary proceeding, Docket No. 1, Adv. No. 2:15-ap-01679-RK (this “Adversary Proceeding”).	
6.	On March 18, 2016, the Bankruptcy Court entered its Order Confirming Second Amended Plan of Reorganization of Official Committee of Unsecured Creditors as Modified (the “Confirmation Order”), which effectively dissolved the Committee and appointed the Plan Agent as successor plaintiff in this Adversary Proceeding and the Museum Adversary Proceeding.	Main Bankruptcy Case Docket No. 1873
7.	On July 8, 2016, 400 SLB commenced an unlawful detainer action against Ace Museum, as lessee, and Mr. Christmas, as guarantor, in the Superior Court of California for the County of Los Angeles, commencing Case No. BC626437 (the “UD Action”) on account of Ace Museum’s failure to pay rent due under the Lease (defined below).	Unlawful Detainer Complaint, Exhibit P-11
8.	On September 2, 2016, a Stipulation for Entry of Judgment and Judgment Thereon was filed in the UD Action in favor of 400 SLB against Ace Museum and Mr. Christmas, which provided that among other things, (1) 400 SLB was awarded possession of the La Brea Property (defined below) and (2) the Lease (defined below) was deemed forfeited.	Stipulation for Unlawful Detainer Judgment, Exhibit P-13
9.	On January 13, 2017, upon the Plan Agent’s Motion, the Bankruptcy Court entered an order consolidating the Museum Adversary with this Adversary Proceeding.	Adversary Proceeding Docket No. 65
10.	On January 25, 2017, the Plan Agent obtained a writ of attachment issued by the Bankruptcy Court against Ace Museum in this Adversary Proceeding.	Adversary Proceeding Docket Nos. 79 and 81
11.	On September 14, 2017, a “Judgment on Stipulation” in 400 SLB’s UD Action against Ace Museum and Mr. Christmas was filed in the Superior Court of California for the County of Los Angeles in which 400 SLB was awarded a money judgment against Ace Museum and Mr. Christmas in the amount of \$1,941,324.18, plus interest from September 7, 2016.	Judgment on Stipulation, filed on September 14, 2017, Exhibit A to Request for Judicial Notice in Support of 400 SLB Defendants’ Opposition to Plan Agent’s Motion for Entry of Final Judgment, Docket No. 599, filed on June 11, 2019; <i>see also</i> Plan Agent’s Trial Brief,

		Docket No. 1179 at 42 (internal page citation 36)
12.	On June 5, 2019, a “Notice of Judgment Lien (Form JL1)” as to the personal property of Ace Museum based on the Judgment on Stipulation in 400 SLB’s UD Action against Ace Museum and Mr. Christmas was filed with the California Secretary of State.	Notice of Judgment Lien (Form JL1) against Ace Museum, filed with California Secretary of State on June 5, 2019, Exhibit B to Request for Judicial Notice in Support of 400 SLB Defendants’ Opposition to Plan Agent’s Motion for Entry of Final Judgment, Docket No. 599, filed on June 11, 2019; <i>see also</i> Plan Agent’s Trial Brief, Docket No. 1179 at 42 (internal page citation 36)
13.	On July 3, 2019, the Bankruptcy Court entered in the Adversary Proceeding a Final Judgment Against Ace Museum on the Twentieth, Twenty-First, Twenty-Second, Twenty-Third, and Twenty-Fourth Claims for Relief in the Fifth Amended Consolidation Complaint (the “Museum Judgment”), pursuant to which a money judgment in the amount of \$3,187,539.80 plus \$47,201.04 in fees and costs was entered against Ace Museum in favor of the Plan Agent.	Adversary Proceeding Docket Nos. 620 and 621
14.	On April 7, 2020, in the Adversary Proceeding, the Plan Agent filed his <i>Application of Sam S. Leslie, Plan Agent, for Issuance of Writ of Execution and Appointment of Plaintiff as Substitute Custodian for U.S. Marshal in Furtherance of Execution of Writ and Notice of Levy; and for Order Approving Sale of Artworks Free and Clear of Any Claim of Lien or Interest</i> (“Application”), commencing this contested matter.	Adversary Proceeding Docket No. 713
15.	The hearing on the Application was initially scheduled for April 28, 2020.	Adversary Proceeding Docket No. 714

16.	On April 24, 2020, 400 SLB filed its 400 SLB Defendants': (1) Opposition to Application of Sam S. Leslie, Plan Agent, for Issuance of Writ of Execution and Appointment of Plaintiff as Substitute Custodian for U.S. Marshal in Furtherance of Execution of Writ and Notice of Levy; and for Order Approving Sale of Artworks Free and Clear of Any Claim of Lien or Interest; and (2) Request to Continue Hearing Thereon; and (3) Request for Lease to Conduct Discovery on Contested Matter.	Adversary Proceeding Docket No. 719
17.	On April 24, 2020, the Bankruptcy Court issued a tentative ruling regarding the Application. In that tentative ruling, the Bankruptcy Court identified a certain California statute regarding the ability of a judgment creditor to sell personal property at execution sales free and clear of any liens.	
18.	On April 27, 2020, the Bankruptcy Court issued a second tentative ruling regarding the Application, in which the court took the April 28, 2020, hearing on the Application off calendar, to give Plan Agent time to file a reply to 400 SLB's opposition to the Application, and so that Plan Agent and 400 SLB (collectively, the "Parties") could address the issues raised in the Bankruptcy Court's April 24, 2020, tentative ruling.	
19.	On May 1, 2020, the Bankruptcy Court entered an order continuing the hearing on the Application to May 6, 2020.	Adversary Proceeding Docket No. 720
20.	On May 13, 2020, Plan Agent filed a status report regarding the remaining issues to be addressed in the Application, which had not been addressed at the May 6, 2020 hearing.	Adversary Proceeding Docket No. 724
21.	On May 13, 2020, Plan Agent lodged two scheduling orders regarding the Application.	Adversary Proceeding Docket Nos. 725 and 726
22.	On May 14, 2020, the Bankruptcy Court entered a scheduling order regarding the Application. In that order, the Bankruptcy Court set certain discovery cutoff dates and also set a technical pretrial conference on August 19, 2020 regarding the contested matter of the dispute between the	Adversary Proceeding Docket No. 729

	Plan Agent and 400 SLB regarding ownership of the Banksy artwork.	
23.	On August 19, 2020, the Bankruptcy Court held a technical pretrial conference regarding the Application as it related to the Banksy artwork. The Bankruptcy Court set a regular pretrial conference to be conducted on the contested matter of the Banksy pursuant to Local Bankruptcy Rule 7016-1 on September 2, 2020 and ordered the parties to file a joint pretrial stipulation by August 28, 2020.	Adversary Proceeding Docket No. 751
24.	At the pretrial conference on September 2, 2020 regarding the Banksy artwork, the Bankruptcy Court continued the pretrial conference to October 22, 2020. The Bankruptcy Court later continued this date to October 28, 2020.	Adversary Proceeding Docket Nos. 762 and 779
25.	On October 15, 2020, 400 SLB filed a status report and a unilateral pretrial statement regarding the alleged lack of cooperation of the Plan Agent in preparing for the pretrial conference in the contested matter of the Banksy artwork.	Adversary Proceeding Docket Nos. 773 and 774
26.	On October 26, 2020, Plan Agent filed the joint pre-trial statement of the parties regarding the Application (the " <u>Joint Pretrial Statement</u> ").	Adversary Proceeding Docket No. 782
27.	On October 28, 2020, the Bankruptcy Court entered an order approving the Joint Pretrial Statement in the contested matter of ownership of the Banksy artwork.	Adversary Proceeding Docket No. 786
28.	On November 5, 2020, at the request and agreement of the parties, the Bankruptcy Court entered an order in the contested matter of the Banksy artwork reopening discovery to be completed by December 31, 2020, setting a deadline for expert witness designation and reports and setting a further pretrial conference on January 13, 2021.	Adversary Proceeding Docket No. 791
29.	On February 1, 2021, upon agreement of the parties, the Bankruptcy Court entered an order setting a deadline for filing motions in limine regarding expert disclosures and filing briefing on the Bankruptcy Court's authority to enter a final judgment on the contested matter over the Banksy	Adversary Proceeding Docket Nos. 841 and 859

	and setting a further pretrial conference on March 17, 2021.	
30.	On March 12, 2021, the Bankruptcy Court entered an order granting the Plan Agent's motion to continue the further pretrial conference and hearing on motions in limine regarding expert disclosures to April 7, 2021.	Adversary Proceeding Docket Nos. 908, 919 and 934
31.	At the further pretrial conference on April 7, 2021, upon agreement of the parties, the Bankruptcy Court continued the pretrial conference to April 28, 2021 in light of the Plan Agent's request to designate a replacement expert witness for a prior designated expert witness who died.	Adversary Proceeding Docket No. 949
32.	At the further pretrial conference on May 6, 2021, upon agreement of the parties, the Bankruptcy Court set a schedule for filing and opposing motions in limine regarding expert disclosures and continued the pretrial conference to June 2, 2021.	Adversary Proceeding Docket Nos. 971 and 977
33.	At the further pretrial conference on June 2, 2021, upon agreement of the parties, the Bankruptcy Court continued the pretrial conference to July 8, 2021 because the parties had not completed the deposition of the Plan Agent's expert witness.	Adversary Proceeding Docket No. 997
34.	On July 8, 2021, 400 SLB filed the trial declaration of Douglas Christmas ("Christmas Declaration").	Adversary Proceeding Docket No. 1028
35.	At the further pretrial conference on July 8, 2021, upon agreement of the parties, the Bankruptcy Court continued the pretrial conference to August 18, 2021 because 400 SLB had recently filed a trial declaration of Douglas Christmas and the Plan Agent did not have time to respond to it and the expert report of 400 SLB's expert witness had not yet been completed and the Plan Agent needed time to depose the expert.	Adversary Proceeding Docket No. 1049
36.	At the further pretrial conference on August 18, 2021, upon agreement of the parties, the Bankruptcy Court set the contested matter of the Banksy artwork for trial on four days and set a further pretrial conference on October 27,	Adversary Proceeding Docket No. 1066

1		2022.	
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3	37.	Pursuant to further stipulation of the parties, on October 13, 2021, the Bankruptcy Court entered an order resetting the trial of the contested matter of the Banksy artwork for December 16 and 17, 2021, and January 13 and 14, 2022 due to witness unavailability.	Adversary Proceeding Docket Nos. 1120 and 1122
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7	38.	On October 15, 2021, 400 SLB filed the trial declaration of John. L. Pagliassotti (" <u>Pagliassotti Declaration</u> ").	Adversary Proceeding Docket No. 1123
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9	39.	On October 15, 2021, 400 SLB filed the trial declaration of Daryoush Dayan (" <u>Dayan Declaration</u> ").	Adversary Proceeding Docket No. 1125
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11	40.	On October 15, 2021, 400 SLB filed the trial declaration of Alberto Hernandez (" <u>Hernandez Declaration</u> ").	Adversary Proceeding Docket No. 1127
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14	41.	On October 15, 2021, 400 SLB filed the trial declaration of Kevin Dunne (" <u>Dunne Declaration</u> ").	Adversary Proceeding Docket No. 1129
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16	42.	On October 15, 2021, 400 SLB filed a request for judicial notice and declaration of Keith Patrick Banner ("400 SLB Request for Judicial Notice").	Adversary Proceeding Docket No. 1131
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19	43.	On October 15, 2021, Plan Agent filed the trial declaration of Professor James C. Smith (" <u>Smith Declaration</u> ").	Adversary Proceeding Docket No. 1124
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21	44.	On October 15, 2021, Plan Agent filed the trial declaration of Jesse Ottinger (the " <u>Ottinger Declaration</u> ").	Adversary Proceeding Docket No. 1126
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23	45.	On October 15, 2021, Plan Agent filed his own trial declaration (" <u>Leslie Declaration</u> ").	Adversary Proceeding Docket No. 1130
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25	46.	On October 15, 2021, Plan Agent filed a request for judicial notice in connection with the trial.	Adversary Proceeding Docket No. 1128
26			
27	47.	On October 19, 2021, the Bankruptcy Court entered an Amended Order Modifying Trial Procedures and Requiring Paper Copies of Exhibits.	Adversary Proceeding Docket No. 1140
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48.	On November 5, 2021, 400 SLB filed an objection to the Leslie Declaration.	Adversary Proceeding Docket No. 1154
49.	On November 5, 2021, 400 SLB filed an objection to the Smith Declaration.	Adversary Proceeding Docket No. 1155
50.	On November 5, 2021, 400 SLB filed an objection to the Ottinger Declaration. (the " <u>Ottinger Objection</u> ").	Adversary Proceeding Docket No. 1156
51.	On November 5, 2021, Plan Agent filed an objection to the Hernandez Declaration.	Adversary Proceeding Docket No. 1157
52.	On November 5, 2021, Plan Agent filed an objection to the Dayan Declaration.	Adversary Proceeding Docket No. 1158
53.	On November 5, 2021, Plan Agent filed an objection to the Dunne Declaration	Adversary Proceeding Docket No. 1159
54.	On November 5, 2021, Plan Agent filed an objection to the Christmas Declaration.	Adversary Proceeding Docket No. 1160
55.	On November 5, 2021, Plan Agent filed an objection to the Pagliassotti Declaration.	Adversary Proceeding Docket No. 1161
56.	On November 5, 2021, Plan Agent filed an objection to the Banner Declaration.	Adversary Proceeding Docket No. 1163
57.	On November 5, 2021, Plan Agent filed a motion in limine with respect to the Pagliassotti Declaration (the " <u>Motion in Limine</u> ").	Adversary Proceeding Docket No. 1165
58.	On November 19, 2021, Plan Agent filed his trial brief.	Adversary Proceeding Docket No. 1179
59.	On November 19, 2021, 400 SLB filed its trial brief.	Adversary Proceeding Docket No. 1182

60.	On December 15, 2021, 400 SLB filed an opposition to the Motion in Limine.	Adversary Proceeding Docket No. 1190
61.	On December 15, 2021, 400 SLB filed a supplement to the 400 SLB Request for Judicial Notice.	Adversary Proceeding Docket No. 1191
62.	On December 16, 2021, the Bankruptcy Court held day 1 of the trial. A transcript of that day's hearing can be found at Docket No. 1210 (the " <u>Day 1 or 12/16/21 Trial Transcript</u> ").	Adversary Proceeding Docket No. 1210
63.	On December 16, 2021, Plan Agent filed a reply to the Ottinger Objection.	Adversary Proceeding Docket No. 1193
64.	On December 17, 2021, the Bankruptcy Court held day 2 of the trial. A transcript of that day's hearing can be found at Docket No. 1218 (the " <u>Day 2 or 12/17/21 Trial Transcript</u> ").	Adversary Proceeding Docket No. 1218
65.	On January 13, 2022, the Bankruptcy Court held day 3 of the trial. A transcript of that day's hearing can be found at Docket No. 1237 (the " <u>Day 3 or 1/13/22 Trial Transcript</u> ").	Adversary Proceeding Docket No. 1237
66.	On January 14, 2022, the Bankruptcy Court held day 4 of the trial. A transcript of that day's hearing can be found at Docket No. 1238 (the " <u>Day 4 or 1/14/22 Trial Transcript</u> ").	Adversary Proceeding Docket No. 1238
67.	At the close of the evidence of the trial on January 14, 2022, the Bankruptcy Court set January 20, 2022 as a continued hearing for the Parties to make their closing arguments.	Adversary Proceeding Docket No. 1238
68.	On January 20, 2022, the Bankruptcy Court heard closing arguments of the parties. A transcript of that day's hearing can be found at Docket No. 1240 (1/20/22 Trial Transcript).	Adversary Proceeding Docket No. 1240
69.	At the hearing before the Bankruptcy Court on January 20, 2022, the Court set deadlines for the parties to submit additional briefing addressing certain issues, and also to submit findings of fact and conclusions of law.	Adversary Proceeding Docket No. 1240

70.	On February 3, 2022, Plan Agent filed a post-trial brief addressing issues discussed at the January 20, 2022 hearing.	Adversary Proceeding Docket No. 1235
71.	On February 3, 2022, 400 SLB filed a post-trial brief addressing issues discussed at the January 20, 2022 hearing.	Adversary Proceeding Docket No. 1236
72.	On February 17, 2022, Plan Agent filed a response to 400 SLB's post-trial brief filed on February 3, 2022.	Adversary Proceeding Docket No. 1248
73.	On February 17, 2022, 400 SLB filed a response to Plan Agent's post-trial brief filed on February 3, 2022.	Adversary Proceeding Docket No. 1249
74.	On March 15, 2022, the Plan Agent lodged his proposed findings of fact and conclusions of law.	Adversary Proceeding Docket No. 1257
75.	On March 15, 2022, 400 SLB lodged its proposed findings of fact and conclusions of law.	Adversary Proceeding Docket No. 1258
76.	On March 29, 2022, the Plan Agent filed objections to 400 SLB's proposed findings of fact and conclusions of law.	Adversary Proceeding Docket No. 1261
77.	On March 29, 2022, 400 SLB filed objections to the Plan Agent's proposed findings of fact and conclusions of law.	Adversary Proceeding Docket No. 1262

B. Lease Negotiation and Formation

<u>NO.</u>	<u>FACT</u>	<u>SUPPORTING EVIDENCE</u>
78.	On July 21, 2006, 400 SLB, as lessor, and Douglas Christmas ("Mr. Christmas"), as lessee, entered into an "AIR Commercial Real Estate Association Standard Industrial/Commercial Single-Tenant Lease-Net" dated as of July 20, 2006 (as subsequently amended or assigned, the "Lease").	Lease, Exhibit P-14, Exhibit D-10
79.	The Lease was drafted using a form lease issued by AIR CRE, fka AIR Commercial Real Estate Association ("AIR CRE"), Form No. STN-9-3/06E. The base language of the Lease is from the AIR CRE form lease, but certain language from the form lease was deleted and certain exhibits were	Lease, Exhibit P-14, Exhibit D-10

1		added as agreed to between the parties thereto.	
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3	80.	The Lease related to certain real property located at 400 S. La Brea Avenue, Los Angeles, California, sometimes also referred to as 420 S. La Brea Avenue (APN #5507-009-025) and 407 S. Sycamore Avenue, Los Angeles, California (APN #5507-009-023) (collectively, the "La Brea Property" or the "Premises").	Lease, Exhibit P-14, Exhibit D-10
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7	81.	During all times relevant to this contested matter, 400 SLB owned the La Brea Property.	Dayan Declaration, ¶ 2.
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10	82.	The "Premises" under the Lease means the La Brea Property	Lease, ¶ 1.2. Exhibit P-14, Exhibit D-10
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12	83.	The Lease dated July 20, 2006 that Mr. Christmas as lessee entered into had an accompanying option to purchase with respect to the Premises consisting of 90,790 square feet of area.	Christmas Declaration, ¶ 2; Dayan Declaration, ¶ 3; Lease, Exhibit P-14, Exhibit D-10; Joint Statement, 6:17-25
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16	84.	Mr. Daryoush Dayan ("Mr. Dayan") signed the Lease on behalf of 400 SLB, the lessor, and not in his personal capacity.	1/13/22 Trial Transcript at 111:11 (Dayan Testimony); Lease, Exhibit P-14
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20	85.	The Lease included an Addendum (" <u>Addendum</u> ") and an Exhibit B to the Addendum.	Lease, Exhibit P-14, Exhibit D-10
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22	86.	Concurrent with the execution of the Lease, 400 SLB and Mr. Christmas entered into the Addendum titled "Addendum to Standard Industrial/Commercial Single-Tenant Lease-Net".	Lease, Exhibit P-14, Exhibit D-10
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25	87.	Mr. Dayan signed the Addendum on behalf of 400 SLB and not in his personal capacity.	1/13/22 Trial Transcript at 113:7 (Dayan Testimony); Lease, Exhibit P-14, Exhibit D-10
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1	88.	Mr. Dayan signed Exhibit B to the Addendum on behalf of 400 SLB and not in his personal capacity.	1/13/22 Trial Transcript at 113:17 (Dayan Testimony); Lease, Exhibit P-14, Exhibit D-10
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5	89.	At the time that Mr. Christmas entered into the Lease, he was the sole officer of the art gallery business Art & Architecture Books of the 21 st Century, dba Ace Gallery (" <u>Debtor</u> "), the Debtor in this bankruptcy case.	Christmas Declaration, ¶ 3
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9	90.	Mr. Dayan is the manager and a member of 400 SLB, which owns the Premises.	Dayan Declaration, ¶ 2
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11	91.	Mike Smith (" <u>Mr. Smith</u> ") is an interest holder in 400 SLB and is one of Mr. Dayan's partners.	1/13/22 Trial Transcript at 98:22-99:3 (Dayan Testimony)
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14	92.	Mr. Christmas's intentions behind entering into the Lease with the accompanying purchase option was that the Premises would one day be utilized as a renowned contemporary art museum, which would not only contribute to the public good and the art world at large, but would enhance the brand and value of Debtor and also be the future location of Debtor on the ground floor.	Christmas Declaration, ¶ 3
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19	93.	At the time 400 SLB entered into the Lease, Mr. Dayan was well familiar with the terms of form commercial leases, as by that time he had negotiated at least approximately 50 commercial leases.	Dayan Declaration, ¶ 4
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23	94.	Mr. Dayan spoke with Mr. Christmas prior to entering into the Lease on behalf of 400 SLB. ²	1/13/22 Trial Transcript at 115:9
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² The Bankruptcy Court has considered and overrules 400 SLB's objections to the Plan Agent's proposed findings of fact nos. 64-76 on grounds of relevance, misleading contract and parol evidence. The Bankruptcy Court adopts the Plan Agent's proposed findings of fact nos. 64-76 as accurately reflecting the testimony and documentary evidence, and as relevant to the Plan Agent's claims of waiver and laches, but has modified the proposed findings of fact in light of 400 SLB's parol evidence objections.

		(Dayan Testimony)
95.	Mr. Dayan did not negotiate the terms of the Lease with Mr. Christmas for 400 SLB. Instead, that was done by Mr. Smith for 400 SLB.	1/13/22 Trial Transcript at 93:6-12 (Dayan Testimony)
96.	In Mr. Dayan's conversation with Mr. Christmas prior to his entering into the Lease on behalf of 400 SLB, Mr. Christmas informed Mr. Dayan that Mr. Christmas would be turning the Premises into an art museum or some kind of art space.	1/13/22 Trial Transcript at 115:13 (Dayan Testimony); Dayan Declaration, ¶ 6
97.	Prior to signing the Lease for 400 SLB, Mr. Dayan understood that there would be major alterations to the Premises by Mr. Christmas to convert the Premises from a car dealership to a space used for art.	Dayan Declaration, ¶ 7.
98.	Prior to signing the Lease for 400 SLB, Mr. Dayan understood that Mr. Christmas would be putting up walls at the Premises in constructing an art gallery or museum.	1/13/22 Trial Transcript at 116:6-11 (Dayan Testimony)
99.	In Mr. Dayan's conversation with Mr. Christmas prior to entering into the Lease, Mr. Christmas discussed with Mr. Dayan the actions he sought to take at the Premises identified in Exhibit B to the Addendum, which discussion must have taken place as Mr. Dayan signed the Addendum.	1/13/22 Trial Transcript at 119:22-124:6 (Dayan Testimony); Lease, Exhibit P-14, Exhibit D-10
100.	Prior to signing the Lease for 400 SLB, Mr. Dayan understood that as part of Mr. Christmas's art gallery business, it was customary to put up and take down interior, non-structural walls for temporary art exhibits, and consented to this if it was in the Lease.	1/13/22 Trial Transcript at 130:25-131:10 (Dayan Testimony); Lease, Exhibit P-14, Exhibit D-10, Addendum, § 3(a)
101.	Mr. Christmas was in the business of art, so he knew how to restore a wall with art on it, such as the Banksy, after that artwork had been removed from the wall.	1/14/22 Trial Transcript at 67:4-11 (Christmas Testimony)

102.	Prior to signing the Lease for 400 SLB, Mr. Dayan understood that as part of Mr. Christmas's art gallery business, it was customary to perform drywall finish and repair on interior, non-structural walls, and also make frames, and consented to it if it was in the Lease.	1/13/22 Trial Transcript at 131:12-22 (Dayan Testimony); Lease, Exhibit P-14, Exhibit D-10, Addendum, § 3(a)
103.	Mr. Dayan signed the Lease on behalf of 400 SLB that contained Exhibit B to the Addendum to the Lease, which indicated certain actions that Mr. Christmas planned to take on the leased premises, but Mr. Dayan understood that things could change, and there would be future plans for approval by 400 SLB.	1/13/22 Trial Transcript at 119:12-125:16 (Dayan Testimony)
104.	Prior to signing the Lease for 400 SLB, Mr. Dayan understood that Mr. Christmas would be taking down walls that are not structural, and that are used to showcase art for temporary exhibits, but such walls could not be removed without consent.	1/13/22 Trial Transcript at 174:24-175:18 (Dayan Testimony)
105.	Prior to signing the Lease for 400 SLB, Mr. Dayan understood that Mr. Christmas would be putting up a plate glass window on the Premises, but it would require permitted plans approved in writing by 400 SLB.	1/13/22 Trial Transcript at 126:5-127:16 (Dayan Testimony)
106.	The Lease and Addendum accurately reflected the agreement Mr. Dayan for 400 SLB and Mr. Christmas after the discussions they had prior to the Lease being signed.	1/13/22 Trial Transcript at 119:1-5 (Dayan Testimony)

C. **Relevant Lease Terms**

<u>NO.</u>	<u>FACT</u>	<u>SUPPORTING EVIDENCE</u>
107.	Paragraph 6.2(a) of the Lease states in part: "[...] The term "Hazardous Substance" as used in this Lease shall mean any product, substance, or waste whose presence, use, manufacture, disposal, transportation, or release, either by itself or in combination with other materials expected to be on the Premises, is either: (i) potentially injurious to the public health, safety or welfare, the environment or the Premises, (ii) regulated or monitored by any governmental authority, or (iii) a basis for potential liability of Lessor	Lease, ¶ 6.2(a), Exhibit P-14, Exhibit D-10

1		to any governmental agency or third party under any applicable statute or common law theory...." ³	
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3	108.	Paragraph 6.2(c) of the Lease states in part:	Lease, ¶ 6.2(c),
4		"(c) Lessee Remediation. Lessee shall ... take all investigatory and/or remedial action reasonably recommended, whether or not	Exhibit P-14,
5		formally ordered or required, for the cleanup of any contamination of, and for the maintenance, security and/or monitoring of the Premises	Exhibit D-10
6		or neighboring properties, that was caused or materially contributed to by Lessee, or pertaining to or involving any Hazardous Substance	
7		brought onto the Premises during the term of this Lease, by or for Lessee, or any third party."	
8			
9	109.	Paragraph 7.1(a) of the Lease, which details lessee's maintenance and repair obligations, provides in relevant part:	Lease, ¶ 7.1(a),
10		... Lessee shall, at lessee's sole expense, keep the Premises, Utility Installations (intended for Lessee's exclusive use, no matter where	Exhibit P-14,
11		located), and Alterations in good order, condition and repair (whether or not the portion of the Premises requiring repairs, or the means of	Exhibit D-10
12		repairing the same, are reasonably or readily accessible to Lessee, and whether or not the need for such repairs occurs as a result of	
13		Lessee's use, any prior use, the elements or the age of such portion of the Premises), including, but not limited to. all equipment or	
14		facilities, such as plumbing, HVAC equipment, electrical, lighting facilities, boilers, pressure vessels, fire protection system, fixtures,	
15		walls (interior and exterior), foundations, ceilings, roofs, roof drainage systems, floors, windows, doors, plate glass, skylights,	
16		landscaping, driveways, parking lots, fences, retaining walls, signs, sidewalks and parkways located in, on, or adjacent to the Premises.	
17		Lessee, in keeping the Premises in good order, condition and repair, shall exercise and perform good maintenance practices, specifically	
18		including the procurement and maintenance of the Service Contracts required by Paragraph 7.1(b) below. Lessee's obligations shall	
19		include restorations, replacements or renewals when necessary to keep the Premises and an improvement thereon or a part thereof in	
20		good order, condition and state of repair. Lessee shall, during the term of this Lease, keep the exterior appearance of the Building in a	
21		first-class condition (including, e.g. graffiti removal) consistent with the exterior appearance of other similar facilities of comparable age	
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³ The Bankruptcy Court overrules 400 SLB's objection to the Plan Agent's proposed finding of fact nos. 77, 78 and 83, which are adopted because the proposed findings are relevant to the Plan Agent's claim that Ace Museum as the tenant could properly remove the Drywall Pilaster as a "hazardous substance."

1		and size in the vicinity, including, when necessary, the exterior repainting of the Building.	
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3	110.	Paragraph 7.2 of the Lease states in part:	Lease, ¶ 7.2, Exhibit P-14, Exhibit D-10
4		"[...] It is intended by the Parties hereto that Lessor have no obligation, in any manner whatsoever, to repair and maintain the Premises, or the equipment therein, all of which obligations are intended to be that of the Lessee. It is the intention of the Parties that the terms of this Lease govern the respective obligations of the Parties as to maintenance and repair of the Premises, and they expressly waive the benefit of any statute now or hereafter in effect to the extent it is inconsistent with the terms of this Lease."	
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9	111.	The subject heading of Paragraph 7.3 of the Lease is "Utility Installations, Trade Fixtures; Alterations."	Lease, ¶ 7.3, Exhibit P-14, Exhibit D-10 at 123
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12	112.	Paragraph 7.3(a) of the Lease entitled "Definitions" states:	Lease, ¶ 7.3(a), Exhibit P-14, Exhibit D-10
13		"(a) Definitions. The term "Utility Installations" refers to all floor and window coverings, air and/or vacuum lines, power panels, electrical distribution, security and fire protection systems, communication cabling, lighting fixtures, HVAC equipment, plumbing, and fencing in or on the Premises. The term "Trade Fixtures" shall mean Lessee's machinery and equipment that can be removed without doing material damage to the Premises. The term "Alterations" shall mean any modification of the improvements, other than Utility Installations or Trade Fixtures, whether by addition or deletion. "Lessee Owned Alterations and/or Utility Installations" are defined as Alterations and/or Utility Installations made by Lessee that are not yet owned by Lessor pursuant to Paragraph 7.4(a)."	
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20	113.	Paragraph 7.3(b) of the Lease entitled "Consent" states:	Lease, ¶ 7.3(b), Exhibit P-14, Exhibit D-10 at 123-124
21		(b) Consent. Lessee shall not make any Alterations or Utility Installations to the Premises without Lessor's prior written consent. [four lines of text deleted from form Lease]. Lessee shall not make or permit any roof penetrations and/or install anything on the roof without the prior written approval of Lessor. Lessor may, as a precondition to granting such approval, require Lessee to utilize a contractor chosen and/or approved by Lessor. Any Alterations or Utility Installations that Lessee shall desire to make [deleted text from form Lease] shall be presented to lessor in written form with detailed plans. Consent shall be deemed conditioned upon Lessee's: (i) acquiring all applicable governmental permits, (ii) furnishing Lessor with copies of both the permits and the plans and	
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1		specifications prior to commencement of the work, and (ii)	
2		compliance with all conditions of said permits and other Applicable	
3		Requirements in a prompt and expeditious manner. Any Alterations	
4		or Utility Installations shall be performed in a workmanlike manner	
5		with good and sufficient materials. Lessee shall promptly upon	
6		completion furnish Lessor with as-built plans and specifications	
7		[deleted text from form Lease]. Lessor may condition its consent	
8		upon Lessee providing a lien and completion bond in an amount	
9		equal to 150% of the estimated cost of such Alteration or Utility	
10		Installation and/or upon Lessee's posting a [deleted word from form	
11		Lease] Security Deposit with Lessor.	
12	114.	The language from Paragraph 7.3(b) deleted by the parties from the	<i>Compare Lease,</i>
13		AIR CRE form lease is reflected below in bold :	¶ 7.3(b),
14			Exhibit P-14,
15		(b) Consent. Lessee shall not make any Alterations or Utility	Exhibit D-10,
16		Installations to the Premises without Lessor's prior written consent.	<i>with AIRCRE</i>
17		Lessee may, however, make non-structural Utility Installations to	<i>Standard Form</i>
18		the interior of the Premises (excluding the roof) without such	<i>Lease, ¶ 7.3(b),</i>
19		consent but upon notice to Lessor, as long as they are not visible	<i>Exhibit D-28</i>
20		from the outside, do not involve puncturing, relocating or	
21		removing the roof or any existing walls. will not affect the	
22		electrical, plumbing, HVAC, and/or life safety systems, and the	
23		cumulative cost thereof during this Lease as extended does not	
24		exceed a sum equal to 3 month's Base Rent in the aggregate or a	
25		sum equal to one month's Base Rent in any one year.	
26		Notwithstanding the foregoing, Lessee shall not make or permit any	
27		roof penetrations and/or install anything on the roof without the prior	
28		written approval of Lessor. Lessor may, as a precondition to granting	
		such approval, require Lessee to utilize a contractor chosen and/or	
		approved by Lessor. Any Alterations or Utility Installations that	
		Lessee shall desire to make and which require the consent of the	
		Lessor shall be presented to lessor In written form with detailed	
		plans. Consent shall be deemed conditioned upon Lessee's: (i)	
		acquiring all applicable governmental permits, (ii) furnishing Lessor	
		with copies of both the permits and the plans and specifications prior	
		to commencement of the work, and (ii) compliance with all	
		conditions of said permits and other Applicable Requirements in a	
		prompt and expeditious manner. Any Alterations or Utility	
		Installations shall be performed in a workmanlike manner with good	
		and sufficient materials. Lessee shall promptly upon completion	
		furnish Lessor with as-built plans and specifications. For work	
		which costs an amount in excess of one month's Base Rent, Lessor	
		may condition its consent upon Lessee providing a lien and	
		completion bond in an amount equal to 150% of the estimated cost of	
		such Alteration or Utility Installation and/or upon Lessee's posting an	
		additional Security Deposit with Lessor.	

1	115.	The language stricken from the form AIR CRE lease, as noted in Finding of Fact No. 112, reflects an agreement between the parties to the Lease to require the consent of lessor as to all “Alterations” and “Utility Installations”, without exception, as the stricken language provided a limited exception to the consent requirement.	
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4	116.	The subject heading of Paragraph 7.4 of the Lease is “Ownership; Removal; Surrender; and Restoration.”	Lease, ¶ 7.4, Exhibit P-14, Exhibit D-10
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7	117.	Paragraph 7.4(a) of the Lease entitled “Ownership” states:	Lease, ¶ 7.4(a), Exhibit P-14, Exhibit D-10
8		"(a) Ownership. Subject to Lessor's right to require removal or elect ownership as hereafter provided, all Alterations and Utility Installations made by Lessee shall be the property of Lessee, but considered a part of the Premises. Lessor may, at any time, elect in writing to be the owner of all or any specified part of the Lessee Owned Alterations and Utility Installations. Unless otherwise instructed per paragraph 7.4(b) hereof, all Lessee Owned Alterations and Utility Installations shall, at the expiration or termination of this Lease, become the property of the Lessor and be surrendered by Lessee with the Premises."	
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15	118.	Paragraph 7.4(b) of the Lease, entitled “Removal” states:	Lease, ¶ 7.4(b), Exhibit P-14, Exhibit D-10
16		(b) Removal. By delivery to Lessee of written notice from Lessor not earlier than 90 and not later than 30 days prior to the end of the term of this lease, Lessor may require that any or all Lessee Owned Alterations or Utility Installations be removed by the expiration or termination of this Lease. Lessor may require the removal at any time of all or any part of any Lessee Owned Alterations or Utility Installations made without the required consent.	
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21	119.	Paragraph 7.4(c) of the Lease entitled “Surrender; Restoration” states in part:	Lease, ¶ 7.4, Exhibit P-14, Exhibit D-10
22		"[...] Lessee shall completely remove from the Premises any and all Hazardous Substances brought onto the Premises by or for Lessee, or any third party (except Hazardous Substances which were deposited via underground migration from areas outside of the Premises, or if applicable, the Premises) even if such removal would require Lessee to perform or pay for work that exceeds statutory requirements. Trade Fixtures shall remain the property of Lessee and shall be removed by Lessee...."	
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28	120.	Paragraph 24(c) of the Lease states:	Lease, ¶ 24(c), Exhibit P-14,

1		"THE PARTIES AGREE THAT THE TERMS OF THIS LEASE SHALL GOVERN WITH REGARD TO ALL MATTERS RELATED THERETO AND HEREBY WAIVE THE PROVISIONS OF ANY PRESENT OR FUTURE STATUTE TO THE EXTENT THAT SUCH STATUTE IS INCONSISTENT WITH THIS LEASE."	Exhibit D-10
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6	121.	Paragraph 41 of the Lease states: "Security Measures. Lessee hereby acknowledges that the Rent payable to Lessor hereunder does not include the cost of guard service or other security measures, and that Lessor shall have no obligation whatsoever to provide same. Lessee assumes all responsibility for the protection of the Premises, Lessee, its agents and invitees and their property from the acts of third parties."	Lease, ¶ 41, Exhibit P-14, Exhibit D-10
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11	122.	Paragraph 3 of the Lease Addendum added certain terms to Paragraph 7.3(b) of the Lease, including the following: ...Lessee has informed Lessor that in Lessee's art gallery business, it is customary that frequent construction work will be necessary to construct and remove interior, nonstructural walls (and perform related drywall finish and repair) as necessary to accommodate exhibitions and showings. With respect to such customary work, if permitted by Applicable Requirements (including, without limitation, the California Contractor's State Licensing Law), Lessee shall have the right to have its own employees experienced in such work perform such work. Subject to Applicable Requirements and all of the other terms and conditions of the Lease pertaining to construction and insurance rules and procedures, Lessor acknowledges that Lessee intends to initially make certain improvements, modifications and alterations to Premises ("Tenant's Work") and Lessor hereby conceptually approves such Tenant's Work as evidenced by the hand-marked plans and specifications attached hereto as Exhibit "B"; provided, however, this approval shall not (i) be deemed to permit Lessee to make any structural modifications or alterations to the Premises, (ii) create any liability on the part of Lessor; or (ii) relieve Lessee of any of its obligations. or duties under the Lease with respect to its duties and obligations regarding construction and insurance, nor waive any requirement or right for the benefit of Lessor pertaining thereto, including without limitation, the provisions of Paragraph 7 of the Lease as modified by this Addendum.	Lease, Addendum, ¶ 3, Exhibit P-14, Exhibit D-10
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26	123.	Paragraph 15 of the Lease Addendum states in part: "[...] Lessor hereby grants to Lessee right to purchase the premises, on an "AS-IS" "WHERE-IS" basis at the price and on all of the terms and conditions set forth in that certain Standard Offer, Agreement and	Addendum, Lease, Exhibit P-14, Exhibit D-10
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1		Escrow Instructions for Purchase of Real Estate (the "Agreement"), the form of which is attached hereto as Exhibit "A"...."	
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3	124.	The copy of the Lease submitted by the Plan Agent, admitted as Exhibit P-14 (commencing at page 91), attaches a letter dated July 20, 2006 on Ace Gallery Los Angeles letterhead signed by lessor and lessee (the "July 20, 2006 Letter"), which purports to describe work to be performed at the La Brea Property, which includes the following: This written description is to accompany the set of red-lined drawing for the main floor of 400 S. La Brea. All work will be done per the City of Los Angeles requirements with Permits Any specialized automobile equipment will be removed The red lines on the plans indicate new walls All venting will be removed Throughout the 1st and 2nd floors all dropped ceiling will be removed All partition walls will be removed ... Along the La Brea Side of the façade there might be a glass wall from ground to new ceiling height running the entire length of La Brea. Approximately two and a half feet east of that glass wall running parallel to the glass wall could be a wall and/or we might build a stucco wall to run the full length ... This description, along with the floor plan for the 1st and 2nd floor is a possibility for our immediate development of the property. It is not impossible that we might elect to do a much more comprehensive development with a high level architect. This will be decided in the coming months, as we are able to research the potential of property for our needs.	Lease, Exhibit P-14
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19	125.	The "hand marked" or "redlined" referenced in the Lease Addendum and the July 20, 2006 Letter have not been submitted into evidence.	See Addendum, Lease, Exhibit P-14 at 91-92, Exhibit D-10
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23	126.	The July 20, 2006 Letter is signed by Mr. Christmas and Mr. Dayan for 400 SLB, which is Exhibit B to the Addendum, and states in part: "This written description is to accompany the set of red-lined drawings for the main floor and 2 nd floor of 400 S. La Brea.... All partition walls will be removed ... Along the La Brea side of the façade there might be a glass wall from ground to new ceiling height running the entire length of La Brea. Approximately two and a half feet east of that glass wall running parallel to the glass wall could be a wall and/or we might build a stucco wall to run the full length....	Addendum, Lease, Exhibit P-14 at 91-92
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	This description, along with the floor plan for the 1 st and 2 nd floor is a possibility for our immediate development of the property. It is not impossible that we might elect to do a much more comprehensive development with a high level architect. This will be decided in the coming months, as we are able to research the potential of the property for our needs."	
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D. Management of Premises

<u>NO.</u>	<u>FACT</u>	<u>SUPPORTING EVIDENCE</u>
127.	400 SLB used Fortuna Management Company (" <u>Fortuna</u> ") as its third-party management company to manage the Premises.	1/13/22 Trial Transcript at 71:3-23 (Dayan Testimony)
128.	Many people probably viewed the construction at the Premises after the Lease was signed, which could have been thousands as Mr. Dayan speculated, including construction workers and Fortuna's employees.	1/13/22 Trial Transcript at 76:10-14. 78:19 (Dayan Testimony)
129.	After the Lease was signed, Mr. Dayan occasionally drove by the Premises because he used to go to the Paprika Restaurant, a block away.	1/13/22 Trial Transcript at 100:18-103:14 (Dayan Testimony).
130.	Mr. Dayan could not remember how many times he drove by the Premises in 2010 and 2011.	1/13/22 Trial Transcript at 99:15-103:15. 106:12-107:8 (Dayan Testimony)

E. The Renovation Project

<u>NO.</u>	<u>FACT</u>	<u>SUPPORTING EVIDENCE</u>
131.	The record reflects that it was Mr. Christmas's intention upon leasing the La Brea Property to renovate the entire space and convert it from a car dealership operated by the previous tenant into a contemporary museum space (the "Renovation Project").	Christmas Declaration, ¶¶ 6-10, 14; Lease, Exhibit P-14, at 91-92, Exhibit D-10; Building Permit, Exhibit D-6
132.	In connection with the Renovation project, Mr. Christmas obtained a building permit No. 08016-10000-1523 dated September 15, 2009 (the "Building Permit") which described the Renovation Project in the Description of Work as "Proposed change of use from an existing auto	Christmas Declaration, ¶ 7; Building Permit, Exhibit D-6.

	dealership to art gallery and addition of ticket booth new walls inside of the existing, new rooftop also.”	
133.	In connection with the Renovation Project, Mr. Christmas’s created or otherwise commissioned the creation of: (1) detailed architectural plans (the “Museum Plans”; Exhibit D-12); (2) an illustrated brochure containing computer-generated images and floorplans (the “Image Book”; Exhibit D-13); and (3) a physical scale model of the La Brea Property (the “Model”; Exhibit D-9).	Christmas Declaration, ¶¶ 8-9; Building Permit, Exhibit D-6; Museum Plans, Exhibit D-9; Museum Plans, Exhibit D-12; Image Book, Exhibit D-13.
134.	Though Mr. Christmas never completed the Renovation Project, including the installation of a plate glass window and/or the wall which was to hold a Robert Irwin light sculpture (both of which were to be constructed along the first floor of the La Brea Property facing La Brea Avenue) comparing exterior photographs of the La Brea Property from July 2007 (Exhibit D-4) and May 2009 (Exhibit D-14) indicates that the building underwent substantial renovation, including the removal of the previous car dealership façade and the construction of a uniform grey and white façade facing La Brea Avenue. The Plan Agent’s expert similarly testified that the construction progress between July 2007 and May 2009 appeared to reflect a “uniform feeling” of the building.	Compare July 2007 Google Maps image, Exhibit D-4 at 10 with Sept. 2008 Google Maps image, Exhibit D-19 at 2; Christmas Declaration, ¶ 13; 1/13/22 Trial Transcript at 32:11-33:13 (Ottinger Testimony)
135.	From approximately 2011 until approximately 2017 Alberto Hernandez performed construction work at the La Brea Property relating to the Renovation Project; on a part-time basis from 2011-2014 and on a near-full time basis from 2014-2017.	Hernandez Declaration, ¶¶ 5, 13.
136.	The evidence indicates that there were interior gallery rooms constructed on the first floor by Mr. Hernandez using metal beams attached to the concrete floor and ceiling, with drywall installed thereon. Such gallery rooms were used during an Andrew Holmes exhibition held in or around October 2016, pictures of which have been admitted into evidence as Exhibit D-18.	Hernandez Declaration, ¶ 14; Andres Holmes Exhibition Photos, Exhibit D-18; 1/14/22 Trial Transcript at 127:3-128:19 (Hernandez Testimony)
137.	The evidence indicates that as of May 2013 there were also large gallery spaces constructed on the second floor using metal beams attached to the concrete floor and ceiling, with drywall installed thereon and there were also unfinished	Photos of Premises, Exhibits P-19 through P-26.

	rooms on the second floor consisting of metal beam framing.	
138.	Mr. Hernandez testified that after May 2013, he performed further construction work on the second floor of the La Brea property, so that by 2017 many of the unfinished rooms shown in Exhibits P-19 to P-26 were fully constructed and approximately 50% of the second-floor space was complete, including all drywall and electrical installation.	Hernandez Declaration, ¶¶ 13, 15; 1/14/22 Trial Transcript at 129:15-133:25 (Hernandez Testimony).
139.	Mr. Hernandez testified that no walls constructed by the lessee at the La Brea Property were ever demolished or taken down (other than the Drywall Pilaster holding the Banksy, as defined and addressed below) and there is no evidence in the record of any walls, other than the Drywall Pilaster, being demolished or taken down by the lessee.	1/14/22 Trial Testimony at 125:20-126:4 (Hernandez Testimony)

F. Construction and Installation of the Drywall Pilaster

<u>NO.</u>	<u>FACT</u>	<u>SUPPORTING EVIDENCE</u>
140.	Sometime between July 2007 and September 2008, as part of the Renovation Project, Mr. Christmas, who at the time was the lessee of the La Brea Property under the Lease, directed the installation of a vertical, furred, boxed-out pilaster (the “Drywall Pilaster”) against a cinderblock wall located on the first floor, northwest corner of the La Brea Property or Premises, which is identified by a red-orange vertical rectangle in the photograph of the Premises in Exhibit D-1.	Sept. 2009 Northwest Corner Photo, Exhibit D-1 at 2; compare July 2007 Google Maps image, Exhibit D-4 with Sept. 2008 Google Maps image, Exhibit D-19; Christmas Declaration, ¶ 13; 1/13/22 Trial Transcript at 195:21-196:19 (Christmas Testimony)
141.	The Drywall Pilaster was a three-sided column made of drywall, which all situated in the north-west corner of the ground floor of the Premises, and the three-sided column ran from the concrete floor of the Premises to the ceiling – the Drywall Pilaster.	Sept. 2009 Northwest Corner Photo, Exhibit D-1; Ottinger Declaration, at 8:8, 12:14; 12/17/21 Trial Transcript at 65:24-66:4 (Hernandez Testimony)
142.	The Drywall Pilaster was precisely carved into, or “scribed” into the uneven surface of the cinderblock wall	Pagliassotti Declaration, Exhibit 1

	to which it was attached so that there are no gaps between the rough surface of the block and even edge of the Drywall Pilaster.	at 15.
143.	Around the same time the Drywall Pilaster was installed, a substantially identical pilaster (the "Opposite Pilaster") was installed against a split face cinderblock wall directly opposite of the Drywall Pilaster, on the first floor, southwest corner of the La Brea Property.	Sept. 2009 Northwest Corner Photo, Exhibit D-1; Christmas Declaration, ¶ 13.
144.	The Pilaster and the Opposite Pilaster were intended by Mr. Christmas to function as part of a display of the Robert Irwin light sculpture running the entire first floor of the La Brea Property visible from La Brea Avenue, and be enclosed on the exterior side closest to La Brea Boulevard by large plate glass window running parallel to La Brea Avenue, behind which the Robert Irwin light sculpture would be installed, supported by the two pilasters.	Christmas Declaration, ¶¶ 11-13; 1/13/22 Trial Transcript at 207:10-218:18 (Christmas Testimony)
145.	The two pilasters, the Drywall Pilaster and the Opposite Pilaster, were to physically support a light sculpture by the artist Robert Irwin, which was a 300-foot long wall with over 300 light fixtures on it.	1/13/22 Trial Transcript at 209:2-218:18 (Christmas Testimony); Christmas Declaration, ¶¶ 11-12
146.	The Robert Irwin light sculpture supported by the two pilasters, the Drywall Pilaster and the Opposite Pilaster, was a sculpture wall which was to function as a secondary security wall to keep intruders out of the Ace Museum premises if somehow there was a breach of the exterior glass wall to be installed at the museum.	1/13/22 Trial Transcript at 211:4-213:2 (Christmas Testimony); Christmas Declaration, ¶¶ 11-12
147.	The September 2009 Northwest Corner Photo, Exhibit D-1, accurately shows how the Drywall Pilaster appeared in 2009 when the photograph was taken after it was constructed about 2007.	1/13/22 Trial Transcript, 36:8 (Ottinger Testimony); Sept. 2009 Northwest Corner Photo, Exhibit D-1
148.	The Drywall Pilaster 's three sides consisted of drywall panels.	Ottinger Declaration, Exhibit 1 at 26

1			
2	149.	The Drywall Pilaster's panels were regular drywall, which is not water resistant, as opposed to green drywall, which is water resistant.	12/17/22 Trial Transcript at 72:3-21 (Hernandez Testimony)
3			
4			
5	150.	The drywall strips used to build the Drywall Pilaster were approximately four feet long by two feet wide.	12/17/21 Trial Transcript at 92:22 (Hernandez Testimony)
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8	151.	The Drywall Pilaster's front panel was approximately 42 inches wide.	Ottinger Declaration, Exhibit 1 at 26
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10	152.	The Drywall Pilaster's side panels were approximately four and a half inches wide.	12/17/21 Trial Transcript at 67:24 (Hernandez Testimony)
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13	153.	The Drywall Pilaster was approximately 17 feet tall.	12/17/21 Trial Transcript at 71:3 (Hernandez Testimony)
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16	154.	The Drywall Pilaster's panels were connected to each other by metal studs that ran inside the front corners of the Drywall Pilaster.	Ottinger Declaration, Exhibit 1 at 27
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18			
19	155.	The studs inside the Drywall Pilaster were 18-gauge metal studs.	12/17/21 Trial Transcript at 69:9 (Hernandez Testimony)
20			
21	156.	The front panel of the Drywall Pilaster was bolted to three studs—one at each of its edges, to which the side panels were attached, and a third that ran down the inside, which was attached to nothing but the front panel.	Condition Report, Exhibit P-6
22			
23			
24			
25	157.	The studs inside the Drywall Pilaster were approximately 3 and 1/2 inches away from the Cinderblock Wall.	12/17/21 Trial Transcript at 69:3 (Hernandez Testimony)
26			
27			
28	158.	The Drywall Pilaster was connected to the ceiling by bolts, was connected to the Cinderblock Wall by nails, and was	12/17/21 Trial Transcript, 67:2-19,

1		connected to the concrete floor upon which it rested by nails.	69:12-70:15 (Hernandez Testimony)
2			
3	159.	Mr. Christmas has no personal knowledge of how the Drywall Pilaster was built.	1/14/22 Trial Transcript at 64:13-17 (Christmas Testimony)
4			
5			
6	160.	The July 2007 Google Maps image, Exhibit D-4, is a true and accurate representation of the western side of the Premises after the Lease was signed, but before Mr. Christmas commenced construction at the Premises.	July 2007 Google Maps image, Exhibit D-4; Christmas Declaration, ¶ 15; Dayan Declaration, ¶ 5; 1/14/22 Trial Transcript at 55:7-18 (Christmas Testimony)
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12	161.	The construction on the Drywall Pilaster was similar to what Mr. Alberto Hernandez constructed later at the Premises when he began working there.	12/17/21 Trial Transcript at 64:12 (Hernandez Testimony)
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14			
15	162.	In connection with Mr. Christmas's and Ace Museum's plans to build out the Premises (the " <u>Renovation Project</u> "), Ace Museum obtained Permit #08016-1000-15253 from the City of Los Angeles Department of Building and Safety (the " <u>Permit</u> ").	Christmas Declaration, ¶ 7; Building Permit, Exhibit D-6
16			
17			
18			
19	163.	The Permit is dated September 15, 2009.	Building Permit, Exhibit D-6
20			
21	164.	Mr. Christmas had the Drywall Pilaster built prior to obtaining the Permit.	Building Permit, Exhibit D-6; Sept. 2008 Google Maps image, Exhibit D-19
22			
23			
24	165.	In connection with the Renovation Project, under the moniker "Projects in Architecture" Mr. Christmas worked with an outside architect to develop detailed architectural plans dated April 14, 2009 (the " <u>Plans</u> ") based upon Mr. Christmas's detailed instructions regarding his visions for the museum and the future home of the Debtor.	Christmas Declaration, ¶ 8, Museum Plans, Exhibit D-12
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1	166.	Mr. Christmas had the Drywall Pilaster built prior to completing the Plans.	Christmas Declaration, ¶ 8, Sept. 2008 Google Maps image, Exhibit D-19
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3			
4	167.	The Plans contain detailed floorplans of the Premises as Mr. Christmas intended those floorplans to appear in connection with the Renovation Project.	Museum Plans, Exhibit D-12; Christmas Declaration, ¶ 8
5			
6			
7	168.	The Drywall Pilaster appears nowhere in the Plans.	Museum Plans, Exhibit D-12; 1/14/22 Trial Transcript at 76:24-77:18 (Christmas Testimony)
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10			
11	169.	The Drywall Pilaster was placed against a wall where, in the Plans, a door was to be built which would swing onto that portion of the wall.	Museum Plans, Exhibit D-12; 1/14/22 Trial Transcript at 54:17 (Christmas Testimony)
12			
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14			
15	170.	Mr. Christmas gave the Plans to Fortuna in 2009 or 2010, and Fortuna then forwarded the Plans to Mr. Dayan.	1/13/22 Trial Transcript at 95:7-21 (Dayan Testimony)
16			
17			
18	171.	At the time he received the Plans, Mr. Dayan understood the Plans to represent how the finished Renovation Project would look.	Dayan Declaration, ¶ 10
19			
20			
21	172.	Mr. Dayan approved of the Plans and Ace Museum's proposed construction as reflected in the Plans.	1/13/22 Trial Transcript at 96:8-12 (Dayan Testimony)
22			
23	173.	Projects in Architecture also prepared a brochure which contains computer generated images and floorplan illustrations (" <u>Image Book</u> ") to reflect what the Renovation Project would look like upon completion.	Christmas Declaration, ¶ 9, Image Book, Exhibit D-13
24			
25			
26	174.	Projects in Architecture also prepared a physical scale model (" <u>Model</u> ") which further reflected what the Renovation Project would look like upon completion.	Christmas Declaration, ¶ 9, Model Photos, Exhibit D-9
27			
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175.	The Plans, Image Book, and Model accurately reflected Mr. Christmas's overall vision for the Renovation Project.	Christmas Declaration, ¶ 10
176.	The Image Book contains no image of the Drywall Pilaster.	Image Book, Exhibit D-13
177.	Although not specifically identified in the Museum Plans, the installation of the Pilaster and Opposite Pilaster appears to be consistent with the overall Renovation Project reflected in the Museum Plans, the Image Book and the Model.	Christmas Declaration ¶¶ 8-9; Model Photos, Exhibit D-9; Museum Plans, Exhibit D-12; Image Book Exhibit D-13.
178.	Mr. Christmas gave Mr. Dayan the Image Book.	Dayan Declaration, ¶ 10
179.	Mr. Dayan first saw the Model after the Bankruptcy Court authorized 400 SLB to retake possession of the Premises in 2017.	1/13/22 Trial Transcript at 94:12-25; 88:24 (Dayan Testimony)
180.	As reflected in the Plans, the Image Book, and the Model, the Renovation Project included a storefront glass wall in front of existing support columns running roughly the entire first-floor western portion of the Premises, parallel with La Brea Avenue.	Christmas Declaration, ¶ 11; 1/13/22 Trial Transcript at 207:10-218:18 (Christmas Testimony)
181.	Behind the glass wall would be an approximately 3-4 foot enclosed space (" <u>Service Corridor</u> ") between the exterior glass wall and a light sculpture by preeminent world class artist Robert Irwin.	Christmas Declaration, ¶ 11; 1/13/22 Trial Transcript at 207:10-218:18 (Christmas Testimony)
182.	The storefront glass wall would enclose the Robert Irwin light sculpture (which would be viewed from La Brea Avenue) and enclose all interior first floor galleries on the western side of the building (so that the galleries would be protected from sun and could not be seen from La Brea Avenue).	Christmas Declaration, ¶ 11; 1/13/22 Trial Transcript at 207:10-218:18 (Christmas Testimony)
183.	The Service Corridor was space so that one could service the Robert Irwin light fixtures. This was all reflected in the Plans and the Image Book at pages 2-3.	Christmas Declaration, ¶ 11; 1/13/22 Trial Transcript at 207:10-218:18 (Christmas

		Testimony)
184.	Other than featuring the Robert Irwin light sculpture, the western portion of the building would feature a uniform grey and white façade, intended to accent the light sculpture. This part of the Renovation Project was designed to meet the exact specifications from Robert Irwin for installation of the light sculpture, and was intended to be a permanent part of the Renovation Project for the anticipated museum.	Christmas Declaration, ¶ 12
185.	The Drywall Pilaster was decorative as well as structural.	Pagliassotti Declaration, at "Exhibit 2 – Page 31" (bottom) to "Exhibit 2 – Page 32" (top); 1/13/22 Trial Transcript at 207:10-218:18 (Christmas Testimony).
186.	The northwestern portion of the Service Corridor abutted against a load bearing cinderblock wall (the " <u>Cinderblock Wall</u> ").	Christmas Declaration, ¶ 13
187.	The images contained in the Self-Contained Appraisal Report prepared by CBRE from April 2009 are true and accurate representations of the Premises after completion of an early phase of the Renovation Project.	Christmas Declaration, ¶ 15; Sept. 2007 CBRE Appraisal Report, Exhibit D-7
188.	Around 2009 Mr. Dayan observed that substantial renovations were performed at the Premises.	Dayan Declaration, ¶ 12
189.	The Google Maps Image from May 2009, Exhibit D-14, accurately reflects the exterior view of the renovations Mr. Dayan observed at the Premises around 2009.	Dayan Declaration, ¶ 12; May 2009 Google Maps image, Exhibit D-14
190.	Mr. Dayan did not recall seeing the Drywall Pilaster, ever, at the Premises.	1/13/22 Trial Transcript at 85:25 (Dayan Testimony)

191.	No one at Fortuna ever informed Mr. Dayan that the Drywall Pilaster was constructed.	1/13/22 Trial Transcript at 87:6 (Dayan Testimony)
192.	In 2009 Mr. Dayan understood that Mr. Christmas intended to exercise the option in the Lease to acquire the Premises.	Dayan Declaration, ¶ 12
193.	The Drywall Pilaster would have been located between the end of the plate glass window, and the end of the Robert Irwin light sculpture, had those items been installed at the Premises.	1/14/22 Trial Transcript at 58:18-22 (Christmas Testimony)
194.	The plate glass window was intended to have been installed at the Premises, was never put in.	1/14/22 Trial Transcript at 59:25; 78:1 (Christmas Testimony)
195.	The Robert Irwin light sculpture, had it been installed, would have run along the right-hand side of the Drywall Pilaster, and would have run straight into the Cinderblock Wall.	1/14/22 Trial Transcript at 81:15-23 (Christmas Testimony)
196.	Nothing was ever attached to the Drywall Pilaster, apart from it being attached to the ceiling and floor of the Premises.	1/14/22 Trial Transcript at 78:24 (Christmas Testimony)
197.	Mr. Christmas testified that he intended that the Pilaster, Opposite Pilaster, the plate glass window, and the Robert Irwin light sculpture would be permanent additions to the La Brea Property. Mr. Christmas testified that he had already acquired the light fixtures required for the Robert Irwin light sculpture.	1/14/22 Trial Transcript at 52:6-59:18 (Christmas Testimony); Christmas Declaration, ¶¶ 11-13.

G. Lease Amendment

<u>NO.</u>	<u>FACT</u>	<u>SUPPORTING EVIDENCE</u>
198.	On June 8, 2009, Mr. Christmas caused the formation of Ace Museum, a California nonprofit 501(c)(2) corporation with the intention that Ace Museum would be the non-profit entity operating a museum at the Premises and would also one day own the Premises through exercising the purchase option and lease	Christmas Declaration, ¶ 4

	the ground floor of the Premises to Debtor.	
199.	Mr. Christmas was the sole officer of Ace Museum.	Christmas Declaration, ¶ 4
200.	On August 28, 2009, with the consent of 400 SLB, Mr. Christmas assigned his leasehold interest in the Lease and his rights to the accompanying purchase option to Ace Museum.	Christmas Declaration, ¶ 5; Dayan Declaration, 8; First Lease Amendment, Exhibit P-15; Exhibit D-11 Joint Statement, 6:28-7:4
201.	On August 28, 2009, 400 SLB, Mr. Christmas, and Ace Museum entered into an "Assignment and First Amendment to Standard Industrial/Commercial Single Tenant Lease-Net" (the "Lease Assignment" or "First Lease Amendment") pursuant to which Mr. Christmas assigned his rights as lessee under the Lease to Ace Museum.	First Lease Amendment, Exhibit P-15, Exhibit D-11
202.	Mr. Dayan on behalf of 400 SLB directly negotiated with Mr. Christmas regarding the First Lease Amendment.	1/13/22 Trial Transcript at 96:25 – 97:2 (Dayan Transcript)
203.	Mr. Dayan signed his initials on behalf of 400 SLB and not in his personal capacity to the First Lease Amendment.	1/13/22 Trial Transcript at 114:19 (Dayan Transcript); First Lease Amendment, Exhibit P-15; Exhibit D-11
204.	Section 7 of Assignment & Assumption Terms of the First Lease Amendment under the heading of "Continuing Liability" states: Notwithstanding the assignment of the Lease or Lessor's consent thereto, Original Lessee [i.e., Christmas] shall be and remain	First Lease Amendment, Exhibit P-15; Exhibit D-11

	primarily and fully liable for the performance of all of the [] terms, covenants, duties, obligations and conditions of the Lease to be performed by "Lessee" [i.e., Ace Museum] during the Term (as may be extended). In the event of any Default or Breach by Lessee under the Lease, Lessor may proceed directly against Lessee or Original Lessee without first pursuing or exhausting Lessor's remedies against any other person or entity liable under the Lease to Lessee.	
205.	Section 3(a) of Amendment Terms of the First Lease Amendment states in part: Subject to satisfaction of all of the terms and conditions of Paragraph 7.3 of the Form Lease (as modified by Paragraph 3 of the Addendum), including Lessor's prior written approval of construction plans and specifications therefor (which approval Lessor shall provide within five (5) business days after request and which lessor shall not unreasonably withhold, condition or delay), Lessor hereby agrees that Lessee shall have the right to perform Alterations and/or Utility Installations to the Premises as currently contemplated by Lessee, including, but not limited to certain structural improvements and improvements affecting the building systems (the "Premises Improvements")....	First Lease Amendment, Exhibit P-15; Exhibit D-11
206.	Also on August 28, 2009, 400 SLB and Mr. Christmas entered into an "Assignment Of And First Amendment To Standard Offer, Agreement And Escrow Instructions For Purchase Of Real Estate" (the " <u>Purchase Option Amendment</u> ").	First Lease Amendment, Exhibit P-15, Exhibit D-11
207.	Recital B to the Purchase Option Amendment states in part: "WHEREAS, Pursuant to Paragraph 15 of the Lease Addendum (Paragraph 52 of the Form Lease), Original Buyer, as "Lessee", exercised its Purchase Option (as defined therein) to purchase the Property...."	First Lease Amendment, Exhibit P-15, Exhibit D-11
208.	Recital C to the Purchase Option Amendment states: "WHEREAS, Pursuant to the terms of the Agreement, Seller and Original Buyer have opened an escrow with Commerce Escrow Company ("Escrow Holder"), Attention: Helen Wong under Escrow No. 09-54341-HW."	First Lease Amendment, Exhibit P-15, Exhibit D-11

H. Appearance and Removal of the Banksy

<u>NO.</u>	<u>FACT</u>	<u>SUPPORTING EVIDENCE</u>
209.	Due to his well-known reputation in the art world, Mr. Christmas was personally familiar with the renowned anonymous street artist known only as "Banksy" and his organization Pest Control.	Christmas Declaration, ¶ 16
210.	In early 2010, Mr. Christmas learned from Pest Control, the organization of the anonymous street artist "Banksy," that Banksy and representatives of Pest Control would be in the Los Angeles area in April 2010 for the Los Angeles premiere of Banksy's documentary "Exit Through the Gift Shop."	Christmas Declaration, ¶¶ 16 and 17.
211.	Prior to Banksy's planned arrival in the Los Angeles area in April 2010, Mr. Christmas had been working with Pest Control regarding Banksy possibly holding an exhibition at the La Brea Property.	Christmas Declaration, ¶ 17.
212.	On or about April 9, 2010, Mr. Christmas had a key delivered to Pest Control staff so the anonymous artist could discretely access the premises in the evening to assess whether to hold an exhibition at the La Brea Property.	Christmas Declaration, ¶ 17.
213.	On or about April 10, 2010, Mr. Christmas went to lunch with representatives from Pest Control during which they discussed the upcoming movie premiere and a potential Banksy exhibition at the La Brea Property. At no point during lunch did they discuss Banksy spray painting an artwork directly on the La Brea Property.	Christmas Declaration, ¶ 18.
214.	Upon Mr. Christmas's return from lunch on or about April 10, 2010, he discovered that, unbeknownst to him, what appeared to be an artwork created by the anonymous artist Banksy had been spray painted on the Drywall Pilaster.	Christmas Declaration, ¶ 18; 1/14/22 Trial Transcript at 67:17-68:8 (Christmas Testimony)
215.	Photographs of the Banksy artwork known as "Guard on Duty" (the "Banksy") spray painted on the Drywall Pilaster as of April 11, 2010 are reflected in the online post, "Streets: Banksy in LA", posted by "sleepboy," admitted into evidence as Exhibit D-2. The	Christmas Declaration, ¶ 18; "Streets: Banksy in LA"

1		photographs of the Banksy in the post, "Streets: Banksy in LA",	online post,
2		Exhibit D-2, accurately depicts the Drywall Pilaster with the	Exhibit D-2
3	216.	Mr. Christmas believed that the appearance of the Banksy was	1/14/22 Trial
4		wonderful for him "because I realized that he [i.e., the artist	Transcript at
5		Banksy] was basically saying to me, I like this space and where I	67:25-68:8
6		am going to do a museum show here."	(Christmas
7			Testimony)
8	217.	Mr. Christmas stated that the statement in Ace Museum's draft	Draft Press
9		press release that the Banksy was painted on Ace Museum's	Release, Exhibit
10		property read correctly.	P-9; 1/14/22
11			Trial Transcript
12			at 73:9-74:6
13			(Christmas
14			Testimony)
15	218.	On April 12, 2010, Mr. Christmas attended the premiere of "Exit	Christmas
16		Through the Gift Shop" and spoke with Holly Cushing of Pest	Declaration
17		Control. Consistent with Mr. Christmas's understanding of the	¶ 19
18		protocol of Pest Control, Ms. Cushing could neither confirm nor	
19		deny that the "Banksy" artwork had been painted by the artist.	
20	219.	Pest Control has never authenticated the Banksy.	12/16/21 Trial
21			Transcript at
22			90:8 (Leslie
23			Testimony)
24	220.	The appearance of the "Banksy" on the Drywall Pilaster caused	Christmas
25		much public interest and Mr. Christmas was forced to immediately	Declaration,
26		hire a 24-hour security guard to protect the artwork. Fearing that	¶ 20.
27		the potentially valuable artwork could be damaged or stolen from	
28		the Premises, which was still under construction, on or about April	
		14, 2010, Mr. Christmas instructed his staff to cut out that portion	
		of the Drywall on which the Banksy was painted and move it to	
		storage. This process is accurately reflected in the YouTube video	
		"Banksy Art Heist – Exclusive Footage"	
		(https://www.youtube.com/watch?v=2LFop1S5ewc).	
	221.	A different video showing the removal of the Banksy is Exhibit D-	YouTube video
		27. The http address for this video is	on Banksy
		https://www.youtube.com/watch?v=rZXVL0k9dSI . This video	removal,
		posted to YouTube on April 18, 2010, which has been admitted	

1		into evidence as Exhibit D-27, shows the process of the Banksy's removal, which involved the use of a reciprocal saw and other tools to cut through the drywall and underlying metal beams of the Pilaster so that the portion of the Pilaster on which the Banksy was painted could be extracted from the Pilaster.	Exhibit D-27
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4			
5	222.	Following removal of the Banksy, pictures of the LA Brea Property admitted into evidence show that portions of the Pilaster above and on the sides of where the Banksy was cut out did not collapse or fall due to the Banksy's removal and remained affixed to the La Brea Property.	YouTube video on Banksy removal, Exhibit D-3, Google Maps Street View Image of NW portion of 400 S. La Brea , May 2009, Exhibit D-14, Google Maps Street View Image of NW portion of 400 S. La Brea , February 2011, Exhibit D-20, YouTube video on Banksy removal, Exhibit D-27
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19	223.	Following removal of the Banksy, at Mr. Christmas's instruction, his staff moved it to a storage facility (the "Storage Facility").	Christmas Declaration, ¶ 20
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21			
22	224.	After the Banksy appeared on the Drywall Pilaster, but before it was removed, one of the guards Mr. Christmas hired to guard the Banksy said that he had been accosted the night before by people who wanted to tie him up, and they were willing to give him money for him to allow them to tie him up.	1/14/22 Trial Transcript at 66:24-67:2 (Christmas Testimony)
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26	225.	Mr. Christmas removed the Banksy because there was the definite possibility of theft.	1/14/22 Trial Transcript at 66:17-23 (Christmas Testimony)
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2	226.	Mr. Christmas testified that it was expensive and not feasible for a 24-hour guard to protect the artwork on a long term basis. Thus, in order to protect the Banksy, on or about April 14, 2010 Mr. Christmas instructed his staff to cut out that portion of the Drywall Pilaster on which the Banksy was painted.	1/14/22 Trial Transcript at 31:24-32:9; 66:17-67:11 (Christmas Testimony)
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6	227.	Sometime after the removal of the Banksy from the La Brea Property, Mr. Christmas had a "Press Release" prepared by his staff, on which he edited and made handwritten notations. Among other things, the Press Release indicated that: (1) the Banksy would be reinstalled in the exact place from whence it was removed; and (2) the reason the Banksy was removed was to protect it.	Draft Press Release, Exhibit P-9; 1/14/22 Trial Transcript at 36:9-15, 42:18-43:3 (Christmas Testimony).
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12	228.	As to the removal of the Banksy, Mr. Christmas further testified at trial that the "Banksy was put in a safe zone, so that it could be replaced to where it was removed the moment the window was put in and the building was secure".	1/14/22 Trial Transcript at 43:24-44:1 (Christmas Testimony)
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16	229.	The Press Release contained the following: "[the] Banksy, is now technically owned by Ace Museum" In place of "technically owned" there is a handwritten note by Mr. Christmas with the phrase "under the care of" with "care" replaced by "watch", which was also deleted and as to which no further notation was made. The Press Release also stated: "Since it was created on Ace Museum's property, it became the responsibility of the museum to protect, care and preserve the work."	Draft Press Release, Exhibit P-9
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21	230.	In the draft press release prepared by Mr. Christmas's staff and edited by him, the press release referred to the Banksy as graffiti and/or street art, stating that "Graffiti as a highly visual street language and environmental form of art, is communal, the reverse of the art market's value placed on the original masterpiece to be acquired and privately enjoyed by an individual of privilege."	Draft Press Release, Exhibit P-9
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26	231.	Mr. Christmas testified at trial that he considered the Banksy to be a "wonderful artwork," distinguishing it from: "Graffiti that you usually see on the street, 95-percent of it is usually very low-level art, or attempts at art, if not 98-percent."	1/14/22 Trial Transcript at 72:1-7 (Christmas
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		Testimony)
232.	In the draft press release prepared by Mr. Christmas's staff and edited by him, it stated that Ace Museum decided that it should not repair the wall where the Banksy had been cut out but leave it for the return of the Banksy under adequate protection.	Draft Press Release, Exhibit P-9
233.	In the Press Release, there is no claim that Ace Museum owned the Banksy.	Draft Press Release, Exhibit P-9
234.	There is no evidence in the record indicating whether or not the Press Release was disseminated to the public, and Mr. Christmas testified that he did not know whether it was disseminated to the public.	1/14/22 Trial Transcript at 36:16-20 (Christmas Testimony)
235.	After removing the Banksy from the Premises, Mr. Christmas testified that he had not considered whether the Banksy belonged to 400 SLB as the landlord since his intention was to preserve it and return it and open the museum on the Premises that he would own.	1/14/22 Trial Transcript at 30:6-31:8 (Christmas Testimony)
236.	Mr. Christmas testified that he never attempted to, nor did he ever intend to sell the Banksy.	1/14/22 Trial Transcript at 27:20-28:15; 29:12-16 (Christmas Testimony)
237.	Mr. Christmas had no memory of ever telling 400 SLB of the Banksy's existence.	1/14/22 Trial Transcript at 33:9 (Christmas Testimony)
238.	Mr. Christmas did not inform Mr. Dayan or any other representative of 400 SLB of the appearance of the Banksy, the extraction and removal of the Banksy from the La Brea Property and/or the moving of the Banksy to the Storage Facility.	Christmas Declaration, ¶ 22; Dayan Declaration, ¶ 16
239.	According to Mr. Christmas, it was generally known, by everyone that was associated or close to the art world and the museum, and	1/14/22 Trial Transcript at 34:3 (Christmas

	in internet publicity, that the Banksy was at the Premises.	Testimony)
240.	Mr. Dayan had not learned from Fortuna, the building manager, that the Drywall Pilaster had a portion removed from it.	1/13/22 Trial Transcript at 149:13 (Dayan Testimony)
241.	The Plan Agent has failed to present sufficient evidence demonstrating that 400 SLB ever knew about the Banksy prior to the Plan Agent's filing of the Application. Mr. Dayan has testified that he never knew about the Banksy and the emails the Plan Agent has submitted into evidence in this regard (Emails between Daryoush Dayan and Angela Hui, Exhibits P-32-P-34) reflect only that Mr. Dayan was confused and did not show a clear understanding that the Banksy had appeared at the La Brea Property.	Dayan Declaration, PP 14-16; 1/13/22 Trial Transcript at 150:9-165:14 (Dayan Testimony); Email from Daryoush Dayan to Angela Hui, Exhibit P-32 (D-16); Email from Daryoush Dayan to Angela Hui, Exhibit P-33 (D-17); Email from Angela Hui to Daryoush Dayan, Exhibit P-34 ⁴ .
242.	According to the Plan Agent, the Banksy's value could be in a range of \$10,000 to \$250,000, but the Plan Agent has not been qualified as a fine art appraiser to render an expert opinion of its value. The court does not consider the Plan Agent's opinion to be evidence of value of the Banksy.	12/16/21 Trial Transcript at 90:23 (Leslie Testimony)
243.	The Plan Agent contends that it should be found that the Drywall Pilaster had already begun to deteriorate before the Banksy was removed from it. However, the Bankruptcy Court finds the	Plan Agent's Proposed Finding of Fact No. 174, citing

⁴ As stated on the record, only the picture of Exhibit P34 was admitted into evidence, and all text contained therein was excluded.

	evidence is insufficient to support such a finding.	Ottinger Declaration, 5:24-27
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I. Removal of the Remaining Drywall Pilaster and Installation of a Replacement Drywall Pilaster Without the Banksy

<u>NO.</u>	<u>FACT</u>	<u>SUPPORTING EVIDENCE</u>
244.	From approximately 2011 through 2017, Mr. Alberto Hernandez was employed by various entities controlled by Mr. Christmas to perform various construction work and miscellaneous labor.	Hernandez Declaration, ¶ 3; 12/17/21 Trial Transcript at 59:12-61:16 (Hernandez Testimony)
245.	During this time, Mr. Hernandez was an employee of Mr. Christmas and his companies, and was not an independent contractor.	12/17/21 Trial Transcript at 59:12-60:25 (Hernandez Testimony)
246.	From approximately 2011 through 2014, Mr. Hernandez was employed by Ace Gallery, during which time he would perform various labor-related tasks, such as building shelves, preparing exhibitions, and completing necessary minor construction and labor tasks. During this time, he also did work for Ace Museum at the Premises.	Hernandez Declaration, ¶ 4
247.	Mr. Christmas personally gave Mr. Hernandez directions regarding what to work on at the Premises.	12/17/21 Trial Transcript at 59:13-61:3 (Hernandez Testimony)
248.	Whenever Mr. Hernandez needed materials to perform work at the Premises, Mr. Christmas arranged to get Mr. Hernandez those materials.	12/17/21 Trial Transcript at 62:15-18 (Hernandez Testimony)

1	249.	From approximately 2011 through 2014, while doing work at Ace Museum, Mr. Hernandez visited the Premises on a regular basis; on average approximately three times per week. While there, he engaged primarily in construction work, including the building of many large 17-foot-high walls for galleries on the second floor, and construction of exhibition space on the first and second floors.	Hernandez Declaration, ¶ 5
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6	250.	Mr. Hernandez had no involvement in putting up the Drywall Pilaster that occurred before he first saw the Premises.	12/17/21 Trial Transcript at 63:24, 65:4 (Hernandez Testimony)
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10	251.	In addition to construction, Mr. Hernandez would perform various other jobs at Ace Museum, including interior/exterior painting, graffiti removal, and trash removal.	Hernandez Declaration, ¶ 6
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13	252.	In early 2011, when Mr. Hernandez first visited the Premises, he saw that on the northwest side of the Premises, on the street side running along La Brea Avenue, a large floor-to-ceiling pilaster column appeared to have a large section cut out. Mr. Hernandez estimated that the cut-out section was about seven feet from the floor and ran the entire width of the column. The portion of the pilaster column that was cut out included removed drywall and metal beams that attached the pilaster column to the underlying cinder block wall.	Hernandez Declaration, ¶ 7; 12/17/21 Trial Transcript at 64:23 (Hernandez Testimony)
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19	253.	The February 2011 Google Maps image, Exhibit D-15, accurately reflects how Mr. Hernandez remembers the condition of the Premises and the cut-out section of the Drywall Pilaster from when he first visited the Premises in early 2011.	Hernandez Declaration, ¶ 7, February 2011 Google Maps image, Exhibit D-15
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23	254.	Sometime between February 2011 and July 2011, Mr. Christmas directed Mr. Hernandez to repair the Drywall Pilaster, which had a large hole in it where the Banksy had been cut out.	Christmas Declaration, ¶ 21; Hernandez Declaration, ¶ 8; Compare February 2011 Google Maps image, Exhibit D-15 with July
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		2011 Google Maps image, Exhibit D-5.
255.	Mr. Hernandez decided, based on his observations of the remaining portions of the Drywall Pilaster, that he could not repair the Pilaster, but needed to rebuild it, as all the underlying metal support beams of the Drywall Pilaster had been cut out and thus the Drywall Pilaster was too damaged to repair.	Hernandez Declaration, ¶ 9.
256.	Mr. Hernandez did not believe that the remaining portion of the Drywall Pilaster could be repaired, so he removed the entire remaining Drywall Pilaster from floor to ceiling, including all remaining metal beams, and reconstructed the entire column using new metal beams and entirely new drywall.	Hernandez Declaration, ¶ 9, ¶ 10; 12/17/21 Trial Transcript, 66:5-14, 95:4-19 (Hernandez Testimony)
257.	In order to remove the remainder of the drywall board in the Drywall Pilaster, all Mr. Hernandez had to do to unattach the wall board from the rest of the Drywall Pilaster (i.e., the stud framing) was remove screws.	12/17/21 Trial Transcript at 86:3-13 (Hernandez Testimony)
258.	Mr. Hernandez removed the entire remaining Pilaster from floor to ceiling, including all remaining metal beams, and constructed a new pilaster (the "Replacement Pilaster") in the same manner as the Pilaster, including that (1) metal beams supporting the pilaster were attached by use of power driven nails into the concrete floor and into the underlying split face cinderblock wall; (2) the 17 ft. tall metal beams were connected to the ceiling soffit by bolts; and (3) every three feet lateral steel beams were installed to support the Replacement Pilaster.	12/17/21 Trial Transcript at 66:8-73:7 (Hernandez Testimony); 1/14/22 Trial Transcript at 118:11 – 119:10; 120:8-19 (Hernandez Testimony)
259.	Mr. Hernandez testified that he attached the Replacement Pilaster to the La Brea Property in a similar manner as the Pilaster, but that he used stronger gauge steel beams.	12/17/21 Trial Transcript at 66:8-73:7 (Hernandez Testimony)

1	260.	When Mr. Hernandez reconstructed the Drywall Pilaster, he used stronger materials. Specifically, he rebuilt the Drywall Pilaster using green drywall which is water-resistant.	12/21/21 Trial Transcript at 66:23, 72:12-25 (Hernandez Testimony)
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5	261.	According to the record, the Banksy was never attached to Replacement Pilaster and was not otherwise reinstalled at the La Bea Property.	July 2011 Google Maps image, Exhibit D-5
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8	262.	When Mr. Hernandez removed the remainder of the Drywall Pilaster from the Cinderblock Wall, he saw that there was no damage to the Cinderblock Wall where the Drywall Pilaster had previously stood. As a result, he did not need to repair the Cinderblock Wall.	12/17/21 Trial Transcript at 87:12-18 (Hernandez Testimony)
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12	263.	When Mr. Hernandez removed the Drywall Pilaster, he saw that there was no damage to the floor of the Premises, where the Drywall Pilaster had stood.	12/17/21 Trial Transcript at 88:10 (Hernandez Testimony)
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15	264.	When Mr. Hernandez removed the Drywall Pilaster, he saw that there was no damage to the ceiling of the Premises, where the Drywall Pilaster had been bolted.	12/17/21 Trial Transcript at 88:20 (Hernandez Testimony)
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19	265.	While the Replacement Pilaster may have remedied the physical damage from the removal of the Drywall Pilaster, the Replacement Pilaster did not include the Banksy.	July 2011 Google Maps image, Exhibit D-5
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21			
22	266.	During the time period between the Banksy being removed, and the date Mr. Hernandez removed the entire remaining Drywall Pilaster and rebuilt it, Mr. Dayan never drove past the Property to see the Drywall Pilaster with the Banksy cut out from it, as reflected in the laist.com article in Exhibit D-20.	1/13/22 Trial Transcript at 148:25-149:2 (Dayan Testimony); 4/14/10 article from laist.com Exhibit D-20.
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28	267.	Mr. Dayan had no knowledge of any damage caused to the	1/13/22 Trial

	Cinderblock Wall, due to the construction or removal of the Drywall Pilaster.	Transcript at 146:8-147:6 (Dayan Testimony)
268.	By the time Mr. Hernandez stopped work at the Premises in 2017 about 50% of the second-floor space was finished, including a total of five rooms on the north side of the Premises (three galleries, a bathroom, and two offices).	Hernandez Declaration, ¶ 15
269.	The Replacement Pilaster remained as part of the La Brea Property until approximately 2021.	1/13/22 Trial Transcript at 33:14-34:17 (Ottinger Testimony)

J. Subsequent Communications

<u>NO.</u>	<u>FACT</u>	<u>SUPPORTING EVIDENCE</u>
270.	On August 4, 2010, Mr. Dayan received an email from Angela Hui (the " <u>Angela Hui Email</u> ") from Cathay bank, in which she recommended Mr. Dayan check out a link that "talks about your property at 400 S. La Brea." Mr. Dayan briefly reviewed the linked article.	Dayan Declaration, ¶ 14; Angela Hui Email, Exhibit P-32, Exhibit D-16; 1/13/22 Trial Transcript at 151:8-10 (Dayan Testimony)
271.	Mr. Dayan clicked on the link contained in the Angela Hui Email and saw an image of a painting on a brick wall, reflected in the Brick Wall Painting Photo, Exhibit D-34, which is not a depiction of the Premises at 400 South La Brea.	1/13/22 Trial Transcript at 156:1-24 (Dayan Testimony); Brick Wall Painting Photo, Exhibit D-34
272.	After clicking on the link contained in the Angela Hui Email and seeing the picture there, Mr. Dayan did not read the text beneath the picture.	1/13/22 Trial Transcript at 158:1-8 (Dayan Testimony)
273.	On December 13, 2011, Mr. Dayan received an email from Mike Smith (the " <u>Mike Smith Email</u> ") in which Mr. Smith forwarded an article regarding a large Vladimir Lenin head	Dayan Declaration, ¶ 15; Exhibit P-33.

	that appeared at the Premises.	
274.	Mr. Dayan read the Mike Smith Email.	Dayan Declaration, ¶ 15.
275.	Mr. Dayan forwarded the Mike Smith Email to Cathay Bank, as he knew it related to the Premises.	1/13/22 Trial Transcript at 163:11 (Dayan Testimony).

K. Graffiti at the Premises

<u>NO.</u>	<u>FACT</u>	<u>SUPPORTING EVIDENCE</u>
276.	Mr. Dayan saw graffiti on the Premises during the time the Lease was in effect.	1/13/22 Trial Transcript at 107:17 (Dayan Testimony)
277.	Graffiti regularly appeared on the Premises.	1/14/22 Trial Transcript at 7:5 (Christmas Testimony)
278.	Mr. Christmas's staff would clean graffiti at the Premises every single day.	1/14/22 Trial Transcript at 7:9-14 (Christmas Testimony)
279.	Mr. Christmas never asked permission to remove graffiti at the Premises.	1/14/22 Trial Transcript at 7:18 (Christmas Testimony)
280.	Mr. Christmas did not need permission to remove graffiti at the Premises.	1/14/22 Trial Transcript at 7:2-8:8 (Christmas Testimony)
281.	When Mr. Dayan saw graffiti on the Premises during the time the Lease was in effect, he contacted Fortuna and told Fortuna to take care of it.	1/13/22 Trial Transcript at 107:20 (Dayan Testimony)
282.	The business practice of Fortuna when graffiti appears is to inform the tenant of the property to clean up the graffiti.	1/13/22 Trial Transcript at 108:22 - 109:1

		(Dayan Testimony)
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L. Plan Agent's Custody of the Banksy

<u>NO.</u>	<u>FACT</u>	<u>SUPPORTING EVIDENCE</u>
283.	After the Plan Agent's appointment in April 2016, he learned of the existence of the Banksy, which at that point was being stored at 12695 S. Cochran Avenue in Los Angeles (the " <u>Cochran Location</u> "), where other artwork of Debtor had been stored, and he took possession of the Banksy stored therein. Thereafter, the Plan Agent moved the Banksy to a storage location secured by him.	12/16/21 Trial Transcript at 120:17-122:18 (Leslie Testimony)
284.	While in possession of the Banksy, the Plan Agent attempted to authenticate the Banksy artwork.	12/16/21 Trial Transcript at 90:3-10 (Leslie Testimony)
285.	While in possession of the Banksy, the Plan Agent also attempted to value the Banksy with an appraiser.	12/16/21 Trial Transcript at 90:11-24 (Leslie Testimony)
286.	Although the attempt to value the Banksy with an appraiser was not completed, Mr. Leslie testified that he believed the Banksy is worth somewhere between \$10,000 to \$250,000.	12/16/21 Trial Transcript at 90:11-24 (Leslie Testimony)
287.	While in possession of the Banksy, the Plan Agent directed his staff to prepare a detailed "Condition Report" dated May 8, 2019, which has been admitted into evidence as Exhibit P6, describing the Banksy and containing numerous pictures of the artwork. The Plan Agent testified that the preparation of the Condition Report was "standard operating procedure" and prepared for all artworks in his possession.	Condition Report, Exhibit P-6; 12/16/21 Trial Transcript at 132:13-133:11 (Leslie Testimony)
288.	The Banksy remains in the custody of the Plan Agent at a storage location located in Vernon, California as of the date of the trial.	Ottinger Declaration, ¶ 6.
289.	The Plan Agent has not shown that he had informed 400 SLB of his custody of the Banksy before the filing of his	See Leslie Declaration; Plan Agent's Objection

1	Application.	to 400 SLB's Proposed
2		Finding of Fact No. 92
3		

III. CONCLUSIONS OF LAW

ANALYSIS

Overview

The matter before the Bankruptcy Court is the Application whereby the Plan Agent seeks a writ of execution to execute on a money judgment against Defendant Ace Museum that he obtained in this consolidated adversary proceeding against the Banksy artwork, which he contends is leviable property owned by the judgment debtor, Ace Museum, pursuant to California post-judgment collection law in California Code of Civil Procedure §§ 701.530 and 700.040 through Federal Rule of Bankruptcy Procedure 7069, which makes Federal Rule of Civil Procedure 69(a) applicable to this adversary proceeding. Application, Docket No. 713 at 1-5.

Federal Rule of Civil Procedure 69(a)(1) states:

A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution---and in proceedings supplementary to and in aid of judgment or execution---must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

Pursuant to this rule, post-judgment enforcement proceedings must comply with California law where the court is located in California. *Credit Suisse v. United States District Court*, 130 F.3d 1342, 1344 (9th Cir. 1997).

By the Application to utilize California post-judgment collection remedies, the Plan Agent requests the issuance of a writ of execution on the Banksy artwork he contends is owned by Ace Museum pursuant to California Code of Civil Procedure § 699.510(a). Once the Banksy artwork has been levied upon the Plan Agent as judgment creditor pursuant to California Code of Civil Procedure § 700.040, the Plan Agent intends to sell it pursuant to California Code of Civil Procedure § 701.530.

400 SLB opposes the Application on grounds that it owns the Banksy because it was created on its property as the landlord of the premises which had been leased by Ace Museum and its

1 principal, Douglas Christmas. Because the Plan Agent's Application is opposed by 400 SLB as to
2 the Banksy, it is a contested matter within the meaning of Federal Rule of Bankruptcy Procedure
3 9014.

4 The Plan Agent, through his Application, is asserting a right to execute on the Banksy as
5 property of Ace Museum, and 400 SLB, though its opposition, asserts an adverse ownership claim
6 to the Banksy. California law recognizes alternative remedies to resolve disputes arising from
7 claims of ownership to property subject to enforcement of a writ of execution of a judgment, such
8 as statutory third-party claim procedures under California Code of Civil Procedure § 720.010 et
9 seq., actions for injunctive relief, to quiet title, for declaratory relief, to recover possession or for
10 damages and intervention in an examination proceeding. *See Ahart, Rutter Group California*
11 *Practice Guide: Enforcing Judgments & Debts*, ¶¶ 6:1607-6:1613 (online edition, June 2022
12 update), *citing inter alia*, *First National Bank of Santa Ana*, 8 Cal.2d 339, 345 (1937) (quiet title);
13 *Regency Outdoor Advertising, Inc. v. Carolina Lanes, Inc.*, 3 Cal.App.4th 1323, 1329 (1995) (quiet
14 title and declaratory relief); *City of Torrance v. Castner*, 46 Cal.App. 3d 76, 77 (1975) (declaratory
15 relief). The Bankruptcy Court determines that the contested matter should proceed as an action to
16 quiet title and/or for declaratory relief. *See also*, California Code of Civil Procedure § 760.010
17 (quiet title); California Code of Civil Procedure § 1060 (declaratory relief).

18 Jurisdiction

19 This United States Bankruptcy Court has specifically retained post-confirmation jurisdiction
20 in this bankruptcy case under Chapter 11 of the Bankruptcy Code, 11 U.S.C, over the three adversary
21 proceedings that were consolidated within the above-captioned adversary proceeding pursuant to
22 Section 16.1 of the Modified Second Amended Plan of Reorganization of Official Committee of
23 Unsecured Creditors, confirmed by order entered on March 18, 2016. Bankruptcy Case Docket No.
24 1858. The judgment which the Plan Agent obtained against Ace Museum and now seeks to enforce
25 was entered in this adversary proceeding, No. 2:15-ap-01679-RK.

26 The Plan Agent's Application asserting claims for declaratory relief or to quiet title as to the
27 Banksy artwork are non-core matters arising under nonbankruptcy state law. *See* 28 U.S.C. §
28 157(b)(2); *In re Harris Pine Mills*, 44 F.3d 1431, 1434-1435 (9th Cir. 1995). Pursuant to 28 U.S.C.

1 §§ 157(c) (1) and 1334(b), the Bankruptcy Court may hear a noncore proceeding which is otherwise
2 related to a bankruptcy case, and accordingly, the Bankruptcy Court has “related to” jurisdiction
3 over the contested matter of the dispute over ownership of the Banksy between the Plan Agent and
4 400 SLB arising from the Plan Agent’s Application.

5 However, because the Plan Agent’s claims are noncore state law claims, the Bankruptcy
6 Court lacks jurisdiction to enter a final judgment on the noncore claims absent consent of the parties,
7 and consent is lacking here. 28 U.S.C. § 157(c)(1); *Executive Benefits Insurance Agency v. Arkison*,
8 573 U.S. 25, 37-40 (2014); *In re Harris Pine Mills*, 44 F.3d at 1434-1435. However, the Bankruptcy
9 Court may hear the claims, but must issue proposed findings of fact and conclusions of law for de
10 novo review and entry of final judgment by the United States District Court. *Id.*; *see also*, Federal
11 Rule of Bankruptcy Procedure 9033.

12 Having heard the Plan Agent’s claims at trial, pursuant to Federal Rule of Bankruptcy
13 Procedure 9033, the Bankruptcy Court now issues these proposed findings of fact and conclusions
14 of law, and respectfully submits these findings of fact and conclusions of law to the United States
15 District Court for de novo review and entry of final judgment pursuant to Federal Rule of Civil
16 Procedure 54(b), made applicable to this adversary proceeding by Federal Rule of Bankruptcy
17 Procedure 7054.

18 Factual Analysis

19 In the Application, the Plan Agent asserts that he may properly levy and sell the Banksy
20 artwork as property of the judgment debtor, Ace Museum, and is entitled to quiet title and
21 declaratory relief that Ace Museum is the owner of the Banksy and that the Application for issuance
22 of a writ of execution on the Bankruptcy and his designation as the substitute levy officer should be
23 granted. 400 SLB opposes the Application on grounds that it owns the Banksy and its claim of
24 ownership should be upheld, and therefore, the Plan Agent may not levy upon the Banksy and sell
25 it.

26 The facts are not largely in dispute. *See* Plan Agent’s Trial Brief, Docket No. 1179 at 8
27 (internal page citation 2) (“The facts of this case are largely undisputed.”); *see also*, 400 S. La Brea,
28 LLC’s Trial Brief re: “Banksy” Contested Matter, Docket No. 1182 at 7-9. The Banksy artwork

1 was created on or about April 10, 2010 when it was painted on the Drywall Pilaster installed at the
2 premises leased by Ace Museum and owned by 400 SLB at 400 South La Brea Boulevard in Los
3 Angeles, California. In 2006, Douglas Christmas and 400 SLB entered into the Lease of the
4 premises. Christmas entered the lease with an option to purchase the premises and intended to
5 exercise the option so he could renovate the premises to open and operate an art museum named
6 Ace Museum. In 2009, Christmas assigned his interest in the Lease to a new nonprofit corporation,
7 Ace Museum, of which he was the principal, and Ace Museum and 400 SLB entered a first amended
8 lease. Ace Museum and 400 SLB entered into further amended leases. The original lease and the
9 amended leases are referred to as the Lease.

10 Sometime in 2006 to 2007, Christmas directed his staff to make renovations of the premises
11 in anticipation of his intended exercise of the option to purchase the premises, and thus, directed his
12 staff to construct and install the Drywall Pilaster at the northwest corner of the building and a similar
13 drywall pilaster at the southwest corner of the building. The drywall pilasters were constructed of
14 drywall board which were supported by vertical metal beams and horizontal metal studs which were
15 attached to the floor and ceiling of the premises by bolts and nails.

16 The drywall pilasters were installed to support a light sculpture by the artist Robert Irwin
17 which was to be a permanent installation at Ace Museum, and the Robert Irwin light sculpture was
18 to be both decorative and functional. The Robert Irwin light sculpture was also to serve part of the
19 exterior barrier between the museum interior area and the street behind a glass wall on the outside
20 of the premises and providing lighting inside and outside the premises. The Drywall Pilaster and a
21 similarly constructed pilaster were to hold the light sculpture up it as physical support at opposite
22 ends of the building fronting La Brea Avenue.

23 On or about April 10, 2010, Christmas met with representatives of Pest Control, the agency
24 that represents the famed street artist, Banksy, to discuss Banksy's involvement with Ace Museum.
25 Christmas provided the Pest Control representatives with a key to the premises for the purpose of
26 allowing Banksy the artist to look over the space to draw his interest in having a show of his work
27 at the prospective museum site. Christmas and Pest Control representatives went out for lunch, and
28 when they returned, they noticed that a new artwork was spray-painted on the Drywall Pilaster in

1 the northwest corner of the Premises, presumably painted by Banksy while Christmas and the Pest
2 Control representatives were having lunch. The artwork presumably by Banksy (referred to herein
3 as the “Banksy”) drew widespread public attention and visitors to the premises to see it. Because
4 of the large number of visitors coming to see the Banksy, Christmas was concerned about the safety
5 and security of the Banksy over vandalism or theft. Christmas directed his staff to remove the Banksy
6 by cutting out the drywall board from the Drywall Pilaster on which it had been spray-painted.
7 Removal of the Banksy and the drywall board behind it required cutting out the drywall board from
8 the Drywall Pilaster and cutting off the metal studs that held up the drywall board and left an open
9 hole in the Drywall Pilaster. Christmas had the Banksy placed into storage.

10 Later, Christmas asked one of his workers, Alberto Hernandez, to repair the Drywall Pilaster
11 since there was an open hole in it. After viewing the damaged Drywall Pilaster, Hernandez decided
12 to replace it with a new drywall pilaster by removing what was left of the existing pilaster and
13 constructing a new one with the same type of materials, drywall board, metal beams and studs and
14 attaching them to the ceiling and floor with nails and bolts. The new drywall board on the
15 replacement pilaster was the green weatherproof type, while the original drywall board was the
16 regular nonweatherproof type.

17 Christmas and Ace Museum never exercised the option to purchase the premises under the
18 Lease, and eventually, in 2016, 400 SLB filed an unlawful detainer lawsuit, and obtained a judgment
19 against Ace Museum from the premises for defaulting on its rent obligations under the Lease.
20 Pursuant to the unlawful detainer judgment, 400 SLB evicted Ace Museum from the premises.

21 The Robert Irwin light sculpture was never installed on the premises. Thus, the Drywall
22 Pilaster, its replacement pilaster, and the opposite pilaster were not used for the function of
23 physically supporting the Robert Irwin light sculpture that they were installed. Although Ace
24 Museum was evicted from the premises, the Banksy was not restored to the premises as Christmas
25 and Ace Museum remained in possession of the Banksy until the Plan Agent took over custody of
26 artwork, including the Banksy, at Christmas’s storage facility on Cochran Avenue in Los Angeles,
27 California.

1 Lease Provisions and Statutory Law

2 The parties make competing arguments in support of their claims of ownership of the
3 Banksy. They assert ownership rights under the Lease and under general California law. 400 SLB
4 asserts its ownership rights as the lessor under the Lease. The Plan Agent asserts ownership rights
5 through its judgment debtor, Ace Museum, the lessee under the Lease.

6 The parties agree that since Ace Museum and 400 SLB entered into the Lease as amended,
7 they are bound by the terms of the Lease as applicable. *Realty Dock & Improvement Corp. v.*
8 *Anderson*, 174 Cal. 672, 676 (1917). The Plan Agent taking any ownership rights through Ace
9 Museum is subject to the effect of the Lease if it applies. When an express provision in a lease
10 unambiguously indicates whether a tenant may or may not remove an article affixed to the premises,
11 or fixture, that demonstrates the intent of the parties, and the court need not look at other factors. *R.*
12 *Barcroft & Sons Co. v. Cullen*, 217 Cal. 708, 712 (1933). If the Lease is not applicable, each party
13 asserts ownership rights to the Banksy pursuant to general California law.

14 Lease Provisions Pertaining to Ownership and Disposition of Alterations

15 As identified by the parties, the Lease, particularly paragraphs 7.1(a), 7.2, 7.3(a), 7.4(a) and
16 7.4(c) contain language directly addressing the ownership and disposition of alterations made to the
17 Premises. Plan Agent's Proposed Conclusion of Law No. 226; 400 SLB's Proposed Conclusions
18 of Law Nos. 4-11. These provisions of the Lease are the heart of the dispute between the parties
19 over the ownership of the Drywall Pilaster and the Banksy artwork removed by Christmas and Ace
20 Museum. Paragraph 7.1(a) pertains to the Lessee's obligations under the Lease in general.
21 Paragraph 7.2 pertains to the Lessor's obligations under the Lease. Paragraph 7.3(a) defines the
22 terms utility installations, trade fixtures, alterations and lessee owned alterations. Paragraph 7.4(a)
23 pertains to ownership of alterations and improvements. Paragraph 7.4(c) pertains to surrender and
24 restoration or repair obligations of the Lessee.

25 Parties' Arguments re: Drywall Pilaster as Utility Installation, Trade Fixture or Alteration
26 under the Lease

27 The Plan Agent argues that when the Drywall Pilaster was constructed on behalf of
28 Christmas, then the Lessee, in 2007, it was one of the following: (1) a "Utility Installation;" (2) a

1 “Trade Fixture;” or (3) an “Alteration” as those terms are defined in paragraph 7.3(a). Plan Agent’s
2 Proposed Conclusion of Law No. 227.

3 The Plan Agent specifically argues that the Drywall Pilaster met the definition of a “Utility
4 Installation” under paragraph 7.3(a) because it was installed to be part of an electrical distribution
5 system that would hold electrical cables and provide electricity to the Robert Irwin light sculpture.
6 Plan Agent’s Proposed Conclusion of Law No. 231. However, the Plan Agent has not cited to any
7 evidence in the record that would support a finding of fact that the Drywall Pilaster would hold
8 electrical cables and provide electricity to the light sculpture.

9 The Plan Agent also specifically argues that the Drywall Pilaster met the definition of a
10 “Trade Fixture” under paragraph 7.3(a) because it was an object built on behalf of Christmas using
11 goods that he owned or controlled for the purposes of conducting his business on the Premises, and
12 thus, meeting the definition of equipment under California Commercial Code §9102(a)(33). Plan
13 Agent’s Proposed Conclusion of Law No. 232.

14 Alternatively, the Plan Agent also argues that the Drywall Pilaster met the definition of an
15 “Alteration” under paragraph 7.3(a) because it was a modification of the Premises by addition unless
16 the Drywall Pilaster is determined to be a Utility Installation or a Trade Fixture. Plan Agent’s
17 Proposed Conclusion of Law No. 233.

18 The Plan Agent argues that because the parties bargained in the Lease for specific treatment
19 regarding ownership of a Utility Installation, a Trade Fixture and an Alteration constructed on the
20 Premises by the tenant, the California accession statutes do not apply to determine whether 400 SLB
21 as lessor or Christmas as lessee owned the Drywall Pilaster upon construction. Plan Agent’s
22 Proposed Conclusion of Law 234.

23 In opposition, 400 SLB specifically argues that the Drywall Pilaster did not constitute a
24 “Utility Installation” under paragraph 7.3(a) of the Lease because it cannot be reasonably viewed as
25 “machinery or equipment” as required under the Lease to be a Utility Installation because: (1) it was
26 consistent, and appeared integrated into, Christmas’s Renovation Project; (2) it lost any individual
27 identity outside of such purpose when it was attached to the real property; and (3) it did not actively
28 perform any function or service other than serving as an element of the real property’s construction.

1 400 SLB's Conclusion of Law No. 5.

2 400 SLB also specifically argues that the Drywall Pilaster did not constitute a "Trade
3 Fixture" under paragraph 7.3(a) of the Lease because it cannot be reasonably viewed as "machinery
4 or equipment" as required under the Lease to be a Trade Fixture because: (1) it was consistent with,
5 and appeared integrated into, Christmas's Renovation Project; (2) it lost any individual identity
6 outside of such purpose when it was attached to the real property; and (3) it did not actively perform
7 any function or service other than serving as an element of the real property's construction. 400
8 SLB's Conclusion of Law No. 5.

9 Alternatively, 400 SLB argues that the Drywall Pilaster was an "Alteration" under paragraph
10 7.3(a) of the Lease because it is not a "Trade Fixture" or "Utility Installation," and because it was a
11 "modification of improvements [of the Premises] . . . whether by addition or deletion" and was also
12 a "Lessee Owned Alteration" as it was an "Alteration" made by the lessee. 400 SLB's Conclusions
13 of Law Nos. 7 and 8.

14 400 SLB further argues that pursuant to paragraph 7.4(a) of the Lease, although Ace
15 Museum as lessee held certain ownership rights to the Drywall Pilaster as a "Lessee Owned
16 Alteration," it was at all times contractually deemed "part of the Premises," i.e., part of the La Brea
17 Property owned by 400 SLB. 400 SLB's Conclusion of Law No. 9. 400 SLB further argues that
18 because under paragraph 7.4(a) of the Lease, the Drywall Pilaster was considered part of the
19 Premises, any ownership rights of Ace Museum as lessee in the Drywall Pilaster were subject to the
20 ownership rights of 400 SLB in the Premises, or La Brea Property. 400 SLB's Conclusion of Law
21 No. 10. Thus, according to 400 SLB, when the Lease terminated, which occurred no later than the
22 date of entry of the unlawful detainer judgment on September 2, 2016, any rights that Ace Museum
23 as lessee may have held in "Lessee Owned Alterations," such as the Pilaster Drywall, were forfeited
24 and all "Lessee Owned Alterations" became the sole property of 400 SLB as lessor pursuant to
25 paragraph 7.4(a) of the Lease. 400 SLB's Conclusion of Law No. 11.

26 Alternatively, regarding the Banksy as opposed to the Drywall Pilaster, 400 SLB argues that
27 the Banksy when painted on the Drywall Pilaster was an "Alteration" as it was a "modification of
28 the improvements [of the La Brea Property] . . . whether by addition or deletion" pursuant to

1 paragraph 7.3(a) of the Lease. 400 SLB's Conclusion of Law No. 12. 400 SLB then argues that the
2 Banksy did not constitute a "Lessee Owned Alteration" as it was not affixed to the La Brea Property
3 by Ace Museum as lessee pursuant to paragraph 7.3(a) of the Lease. 400 SLB's Conclusion of Law
4 No. 13. Thus, because the Drywall Pilaster was deemed part of the Premises as defined as the La
5 Brea Property pursuant to paragraph 7.4(a) of the Lease, the Banksy which was affixed to the
6 Drywall Pilaster via spray paint was in turn deemed part of the La Brea Property upon affixation.
7 400 SLB's Conclusion of Law No. 14. Accordingly, in 400 SLB's view, it had ownership rights in
8 the Banksy as part of the La Brea Property, and any rights that Ace Museum as lessee had in the
9 Drywall Pilaster were forfeited upon termination of the Lease, and the Banksy along with the
10 Drywall Pilaster became the sole property of 400 SLB.

11 In its opposing argument, 400 SLB heavily relies upon so-called "Industry Standards," as
12 testified to by its expert witness, John Pagliassotti, a member of the contracts drafting committee of
13 the AIR Commercial Real Estate Association (AIR CRE), the Drywall Pilaster and the Banksy under
14 the form AIR CRE lease entered into by the parties are property owned by 400SLB as the lessor
15 under the Lease. According to 400 SLB based on Mr. Pagliassotti's testimony, under applicable
16 "Industry Standards," a principal purpose of paragraph 7.4(a) of the Lease, which deems "Lease
17 Owned Alterations" to be "property of the Lessee, but considered part of the Premises" was to shift
18 the insurance obligation for Lessee Owned Alterations from the lessor under paragraphs 1.8 and 8.3
19 of the form lease to the lessee under paragraph 8.4, but in doing so, the form lease did not intend
20 that paragraph 7.3(a) would give the lessee a right of possession for any Alterations. According to
21 400 SLB, based on Mr. Pagliassotti's testimony, applicable "Industry Standards" means that
22 improvements such as walls are considered a permanent part of the real property, and therefore, it
23 is not within "Industry Standards" for a lessee to remove drywall from the real property as drywall
24 is considered a permanent improvement or fixture. According to 400 SLB, "Industry Standards"
25 means furnishings, equipment and trade fixtures have a standalone value and retain an intrinsic value
26 separate and apart from the real property and can be reinstalled in other locations to be used again,
27 and in contrast, removal of a permanent improvement cannot be done without damage to the
28

1 improvement itself.⁵

2 The parties dispute whether the Drywall Pilaster was a Utility Installation, a Trade Fixture
3 or a Lessee-Owned Alteration.

4 Regarding the tenant's "Trade Fixtures," paragraph 7.3(a) of the Lease provides: "The term
5 'Trade Fixtures' shall mean Lessee's machinery and equipment that can be removed without doing
6 material damage to the Premises." Also, regarding the tenant's "Trade Fixtures," paragraph 7.4(c)
7 of the Lease entitled "Surrender; Restoration" states: "Trade Fixtures shall remain the property of
8 Lessee and shall be removed by Lessee...."

9 The Plan Agent argues that the Drywall Pilaster met the definition of a "Trade Fixture" under
10 paragraph 7.3(a) because it was an object built on behalf of Christmas using goods that he owned or
11 controlled for the purposes of conducting his business on the Premises, and thus, meeting the
12 definition of equipment under California Commercial Code § 9102(a)(33).⁶ Plan Agent's Proposed

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14
15 ⁵ While Mr. Pagliassotti's testimony as an expert witness on "Industry Standards" is interesting,
16 the court does not rely upon it as the contract at issue, the Lease, is not ambiguous, and the court
17 should be interpret it as it is written, applying California Civil Code § 1638, which states: "The
language of a contract is to govern its interpretation, if the language is clear and explicit, and does
not involve an absurdity."

18 ⁶ California Commercial Code § 9102(a)(33), (41) and (44) provides:

19 (a) In this division:

20 ***

21 (33) "Equipment" means goods other than inventory, farm products, or consumer goods.

22 ***

23 (41) "Fixtures" means goods that have become so related to particular real property that an
interest in them arises under real property law.

24 ***

25 (44) "Goods" means all things that are movable when a security interest attaches. The
term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or
contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown,
even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term
also includes a computer program embedded in goods and any supporting information provided in
connection with a transaction relating to the program if (i) the program is associated with the
goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the
(footnote continued)

1 Conclusion of Law No. 232.

2 400 SLB argues that the Drywall Pilaster did not constitute a “Trade Fixture” under
3 paragraph 7.3(a) of the Lease because it cannot be reasonably viewed as “machinery or equipment”
4 as required under the Lease to be a Trade Fixture because: (1) it was consistent with, and appeared
5 integrated into, Christmas’s Renovation Project; (2) it lost any individual identity outside of such
6 purpose when it was attached to the real property; and (3) it did not actively perform any function
7 or service other than serving as an element of the real property’s construction. 400 SLB’s
8 Conclusion of Law No. 5.

9 Given the rather sparse definition of the term, “Trade Fixture,” under the Lease as “Lessee’s
10 machinery and equipment that can be removed without doing material damage to the Premises,” the
11 Plan Agent’s argument has merit. The terms, “machinery” and “equipment” are not defined in the
12 Lease. A plain language definition of the term, “machinery,” is set forth in the Merriam-Webster
13 Dictionary that machinery, a noun, means “machines in general or as a functioning unit” or “the
14 working parts of a machine” and that the word, “machine,” referred to in the definition of
15 “machinery” means “a mechanically, electrically, or electronically operated device for performing
16 a task”. Merriam-Webster Dictionary (online edition accessed on November 17, 2022 at
17 <https://www.merriam-webster.com/dictionary/machinery> and [https://www.merriam-](https://www.merriam-webster.com/dictionary/machine)
18 [webster.com/dictionary/machine](https://www.merriam-webster.com/dictionary/machine)). The Drywall Pilaster does not meet this plain language definition
19 of “machinery” because it does not have working parts or is not mechanically, electrically or
20 electronically operated.

21 However, a plain language definition of the term, “equipment,” is set forth in the Merriam-
22 Webster Dictionary that equipment, a noun, means “the set of articles or physical resources serving
23

24 _____
25 owner of the goods, a person acquires a right to use the program in connection with the goods.
26 The term does not include a computer program embedded in goods that consist solely of the
27 medium in which the program is embedded. The term also does not include accounts, chattel
28 paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments,
investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals
before extraction.

1 to equip a person or thing: such as (1) : the implements used in an operation or activity :
2 APPARATUS | sports equipment; (2): all the fixed assets other than land and buildings of a business
3 enterprise; or (3) the rolling stock of a railway.” Merriam-Webster Dictionary (online edition
4 accessed on November 17, 2022 at <https://www.merriam-webster.com/dictionary/equipment>).
5 Under this definition, the Drywall Pilaster could be considered “equipment” within this plain
6 meaning definition of “equipment” as “the set of articles or physical resources serving to equip a
7 person or thing” or “implements used in an operation or activity,” or “apparatus,” because the
8 Drywall Pilaster was installed to physically support the Robert Irwin light sculpture, which was
9 planned to act as a security barrier between the exterior and interior of the premises of Ace Museum
10 and as a permanently installed piece of decorative artwork of Ace Museum. Thus, the Drywall
11 Pilaster meets the definition of the Lessee’s equipment. Moreover, the evidence indicates that Ace
12 Museum at Christmas’s direction removed a portion of the Drywall Pilaster with the Banksy to
13 protect it and later removed the remaining portion of the Drywall Pilaster, which did not cause
14 damage to the Premises, that is, the floor, ceiling or cinderblock wall to which the Drywall Pilaster
15 was attached. Given the sparse definition of “Trade Fixture,” the Drywall Pilaster meets that
16 definition because it was equipment to support the Robert Irwin light sculpture, the museum’s
17 artwork.

18 400 SLB’s argument that the Drywall Pilaster did not constitute a “Trade Fixture” under
19 paragraph 7.3(a) of the Lease because it cannot be reasonably viewed as “machinery or equipment”
20 as required under the Lease to be a Trade Fixture because: (1) it was consistent, and appeared
21 integrated into, Christmas’s Renovation Project; (2) it lost any individual identity outside of such
22 purpose when it was attached to the real property; and (3) it did not actively perform any function
23 or service other than serving as an element of the real property’s construction is supported by the
24 evidence. 400 SLB’s Conclusion of Law No. 5. That is, the relevant testimony on the issue was
25 Mr. Christmas’s testimony that the Drywall Pilaster was part of the permanent installation of the
26 Robert Irwin light sculpture that would serve as a security barrier between the exterior and interior
27 of the Premises of Ace Museum. Mr. Christmas credibly testified on this point that if Ace Museum
28 had to vacate the Premises, the Robert Irwin light sculpture would be left behind as a permanent

1 part of the Premises. This makes sense because Ace Museum, if vacating the Premises, would not
2 have removed the Robert Irwin light sculpture and the Drywall Pilaster, as that would have left a
3 gaping hole in the exterior of the Premises facing La Brea Avenue once the Robert Irwin light
4 sculpture had been installed. If the Robert Irwin light sculpture had been installed, the Drywall
5 Pilaster is not Ace Museum's Trade Fixture that it would have taken elsewhere upon termination of
6 the Lease. To do so, Ace Museum would have removed the Robert Irwin light sculpture, and in
7 doing so, it would have damaged the Drywall Pilaster which would not be removable as a Trade
8 Fixture without being damaged as shown by its removal for the Banksy artwork and its eventual
9 replacement by a new pilaster. However, the Robert Irwin light sculpture was never installed, and
10 the Drywall Pilaster was not set permanently in place to hold up the light sculpture, and otherwise,
11 at the time it was removed, the Drywall Pilaster met the definition of "Trade Fixture" under the
12 Lease. The installation of the Drywall Pilaster was preparatory of a permanent installation of the
13 Robert Irwin light sculpture, and since the Robert Irwin light sculpture was not finally or
14 permanently installed, the Drywall Pilaster could be repaired and replaced, for example, by putting
15 in weatherproof wallboard instead of nonweatherproof wallboard. The Drywall Pilaster had no
16 functional purpose other than as Ace Museum's equipment for holding up the Robert Irwin light
17 sculpture, and was thus a "Trade Fixture" within the meaning of the Lease, that is, at least until the
18 Robert Irwin light sculpture was permanently installed.

19 Alternatively, the Drywall Pilaster was a "Utility Installation." As defined by paragraph
20 7.3(a) of the Lease, the term "Utility Installations" refers to "all floor and window coverings, air
21 and/or vacuum lines, power panels, electrical distribution, security and fire protection systems,
22 communication cabling, lighting fixtures, HVAC equipment, plumbing, and fencing in or on the
23 Premises." Arguably, the Drywall Pilaster was a Utility Installation within the meaning of the Lease
24 because it was installed with the other pilaster at the other end of the building to provide physical
25 support for the Robert Irwin light sculpture which was planned to provide exterior lighting for Ace
26 Museum as well as function as a security barrier from the outside and having intrinsic value as a
27 work of art. The Plan Agent also asserted that the Drywall Pilaster was intended to house electrical
28 wiring for the Robert Irwin light sculpture, but there was no evidence in support of this assertion.

1 The relevant testimony was from Douglas Christmas who said that he could not say that the Drywall
2 Pilaster was to house electrical wiring because that would have been up to an electrical contractor
3 to plan that. Nevertheless, the Drywall Pilaster had utility functions in providing lighting and
4 security for Ace Museum by physically supporting the light sculpture as a lighting fixture and can
5 be considered an integral part of the light sculpture as a lighting fixture. Accordingly, the court
6 determines the Drywall Pilaster was a Utility Installation within the meaning of the Lease as defined
7 in paragraph 7.3(a).

8 Regarding "Alterations," paragraph 7.3(a) of the Lease provides: "The term 'Alterations'
9 shall mean any modifications of the improvements, other than Utility Installations or Trade Fixtures,
10 whether by addition or deletion." Also, paragraph 7.3(a) of the Lease further states "'Lessee Owned
11 Alterations and/or Utility Installations' are defined as Alterations and/or Utility Installations made
12 by the Lessee that are not yet owned by Lessor pursuant to Paragraph 7.4(a)." Paragraph 7.3(b) of
13 the Lease states in part: "Lessee shall not make any Alterations or Utility Installations without
14 Lessor's prior consent. . . ." Paragraph 7.4(a) of the Lease states, "Subject to Lessor's right to require
15 removal or elect ownership as hereafter provided, all Alterations and Utility Installations made by
16 Lessee shall be the property of Lessee, but considered a part of the Premises. Lessor may, at any
17 time, elect in writing to be the owner of all or any specified part of the Lessee Owned Alterations
18 and Utility Installations. Unless otherwise instructed per paragraph 7.4(b) hereof, all Lessee Owned
19 Alterations and Utility Installations shall, at the expiration or termination of this Lease, become the
20 property of the Lessor and be surrendered by Lessee with the Premises."

21 Under these provisions of the Lease, if the Drywall Pilaster was not a Utility Installation,
22 alternatively, it is a Lessee Owned Alteration as it was made by the lessee, Christmas, which was a
23 modification of the improvements by addition. While it does not appear that Christmas obtained 400
24 SLB's consent to build the Drywall Pilaster, the lack of consent did not affect the ownership rights
25 of Christmas and Ace Museum as lessees and 400 SLB as lessor under the Lease. Lacking consent,
26 the Drywall Pilaster, if not a Utility Installation, was a Lessee Owned Alteration within the meaning
27 of paragraph 7.3(a) of the Lease, and pursuant to paragraph 7.4(a) of the Lease, Ace Museum owned
28 it during the pendency of the Lease.

1 However, even if the Drywall Pilaster were considered a Utility Installation or Lessee
2 Owned Alteration, paragraph 7.4(a) of the Lease entitled “Ownership” provided that upon expiration
3 or termination of the Lease, it became property of the landlord, 400 SLB, to be surrendered by the
4 tenant, Ace Museum, with the Premises unless instructed by the landlord otherwise pursuant to
5 paragraph 7.4(b), and there was no such instruction otherwise. Thus, the court must consider
6 whether the Drywall Pilaster as a Utility Installation or a Lessee Owned Alteration was properly
7 removed by Ace Museum as the lessee in 2010 and 2011 prior to the termination of the Lease in
8 2016 pursuant to the terms of the Lease and/or applicable California law.

9 Commenting on provisions prohibiting tenant removal of lease improvements, Miller and
10 Starr on California Real Estate has stated:

11 Leases frequently provide that all alterations, additions, and improvements by the tenant
12 shall remain on the premises on the expiration of the lease and become the property of the
13 landlord. This type of provision prevents the tenant from removing items that otherwise
14 would be removable as trade fixtures. The terms used are broader and more inclusive than
“fixtures” and, therefore, encompass every improvement or other annexation that the tenant
makes to the demised premises.

15 3 Miller and Starr, *California Real Estate*, § 9.47 (4th edition online, September 2022 update), *citing*
16 *inter alia*, *Peiser v. Mettler*, 50 Cal.2d 594, 609 (1958). The case law has strictly construed and
17 upheld these provisions in favor of the landlord in a long line of cases starting with *Realty Dock and*
18 *Import Corp. v. Anderson*, 174 Cal. 672, 677 (1917). *See Peiser v. Mettler*, 50 Cal.2d at 609.

19 In this case, if the Drywall Pilaster was a Utility Installation or a Lessee-Owned Alteration
20 as argued by the Plan Agent, under the above-cited terms of the Lease, it became property of the
21 landlord, 400 SLB, upon termination of the lease with the tenant, Ace Museum, when the stipulated
22 judgment was entered in 400 SLB’s unlawful detainer action in 2016.

23 Based on the express terms of the Lease and the applicable case law, if the Drywall Pilaster
24 was a Utility Installation or a Lessee-Owned Alteration, it became property of 400 SLB upon
25 termination of the Lease in 2016. That is, pursuant to paragraph 7.4(a) of the Lease, subject to the
26 right of 400 SLB as the lessor to require removal or elect ownership of the Drywall Pilaster as a
27 Utility Installation made by Ace Museum as lessee, the Drywall Pilaster was the property of Ace
28 Museum as the lessee, but it was considered part of the Premises. However, pursuant to paragraph

1 7.4(a) of the Lease, 400 SLB as the lessor may at any time elect in writing to be the owner of all or
2 any specific part of the Lessee-Owned Alterations or Utility Installations. In this case, there was no
3 evidence that 400 SLB exercised its right in writing to be the owner of the Drywall Pilaster, whether
4 characterized as a Utility Installation or a Lessee-Owned Alteration.

5 Paragraph 7.4(a) of the Lease further provided that unless otherwise instructed in paragraph
6 7.4(b), that is, if 400 SLB instructed Ace Museum, as its tenant, to remove any Utility Installation
7 or Lessee-Owned Alteration at the expiration or termination of the Lease or any unauthorized Utility
8 Installation or Lessee-Owned Alteration at any time, "all Lessee Owned Alterations and Utility
9 Installations shall, at the expiration or termination of this Lease, become the property of the Lessor
10 and be surrendered by Lessee with the Premises." Based on this express provision of the Lease, all
11 Lessee Owned Alterations or Utility Installations became the property of 400 SLB as the lessor and
12 had to be surrendered by Ace Museum as the lessee upon termination of the Lease. Based on this
13 language, if the Drywall Pilaster was a Utility Installation or a Lessee Owned Alteration, it became
14 property of 400 SLB as the lessor upon termination of the lease and Ace Museum as tenant was
15 obligated to surrender it to 400 SLB. That is, there is some other provision of the Lease that
16 permitted the removal of the Drywall Pilaster.

17 400 SLB argues that removal of the Drywall Pilaster was destructive to it and thus
18 impermissible because it became part of the Premises, but that would not be so if it were a Trade
19 Fixture as the Lessee's equipment, which is not defined under the Lease as part of the Premises. If
20 the Drywall Pilaster was a Trade Fixture, then it was unqualifiedly property of the lessee, Ace
21 Museum, which had the right to remove it.

22 Arguably, the result is different if the Drywall Pilaster is considered a Lessee Owned
23 Alteration or Utility Installation rather than a Trade Fixture in light of the destructive removal of the
24 Banksy painting and then to replace the Drywall Pilaster with a new pilaster of similar construction.
25 The Drywall Pilaster, if it was a Lessee Owned Alteration or Utility Installation, would be
26 considered part of the Premises under the Lease, and its destructive removal literally damaged it as
27 part of the Premises. Nevertheless, during the pendency of the Lease, any Lessee Owned Alteration
28 or Utility Installation is considered under the Lease as property owned by Ace Museum as lessee,

1 and Ace Museum had the incidents of ownership and could repair and replace any Lessee Owned
2 Alteration or Utility Installation during the term of the Lease as long as it did not damage the
3 surrounding Premises or repaired and replaced such improvements to their original condition.

4 The evidence indicates that the Drywall Pilaster was removed and replaced with a pilaster
5 of similar construction, and that upon termination of the Lease, there was no damage to the Premises
6 from the replacement. Upon termination of the Lease, 400 SLB got the Premises, including the
7 replacement pilaster, which had the same function as the original Drywall Pilaster, that is, to support
8 the Robert Irwin light sculpture. 400 SLB relies on the testimony of its expert witness, Mr.
9 Pagliassotti, that the provisions of the Lease relating to Lessee Owned Alterations was to shift the
10 burden of insurance on such improvements on the lessee and impliedly did not give any ownership
11 rights to the lessee. However, the court disregards Mr. Pagliassotti's testimony on this point because
12 the express provisions of the Lease state that the Lessee Owned Alterations are property of the lessee
13 during the term of the Lease and that the lessee had ownership rights during this time. As Miller
14 and Starr in *California Real Estate*, property is comprised of a "bundle of rights" that may be
15 exercised in reference to it, and property rights in a physical thing include the right to acquire, use,
16 possess, and dispose of the object or interest. 3 Miller and Starr, *California Real Estate*, § 9.2, citing
17 *Callahan v. Martin*, 3 Cal. 2d 110, 118, 43 P.2d 788 (1935); *Horne v. Department of Agriculture*,
18 135 S. Ct. 2419, 2428, 192 L. Ed. 2d 388 (2015); *Loretto v. Teleprompter Manhattan CATV Corp.*,
19 458 U.S. 419, 435, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); *U.S. v. General Motors Corporation*,
20 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311 (1945).

21 The alleged loss from the removal of the Drywall Pilaster is the "loss" of the Banksy. The
22 Drywall Pilaster removed from the Premises has no intrinsic value of its own as it was constructed
23 to support the Robert Irwin light sculpture, which was never installed on the Premises, and had no
24 other function. The Drywall Pilaster was damaged when it was removed from the Premises, so Mr.
25 Christmas had Mr. Hernandez repair it, but Mr. Hernandez found that the Drywall Pilaster could not
26 be repaired and instead built a replacement pilaster of similar construction. Thus, there is no
27 diminishment of functionality or value of the Drywall Pilaster itself upon its removal and
28 replacement. The only reason the Drywall Pilaster has value is not because it was a Utility

1 Installation to support a light sculpture/utility that was never installed, but because the Banksy was
2 painted on it. Accordingly, the court considers whether Ace Museum properly removed the Banksy
3 under the Lease, and who gets the windfall of the Banksy.

4 The Banksy as a Hazardous Substance

5 The Plan Agent argues that the Banksy was graffiti which appeared on the Drywall Pilaster
6 on April 10, 2010, which caused the Drywall Pilaster to become a “Hazardous Substance” for
7 purposes of invoking the lessee’s obligation of remediation under paragraph 6.2(c) of the Lease, and
8 on April 14, 2010, Ace Museum as lessee properly removed the Banksy from the Drywall Pilaster
9 pursuant to the requirements of paragraph 6(c) for remediation of hazardous substances. *See* Plan
10 Agent’s Response to Brief Filed by 400 S. La Brea Addressing Issues Raised in January 21, 2022
11 Scheduling Order, Docket No. 1248, at 5-6 (internal page citation 2-3).

12 400 SLB argues that the Banksy’s removal cannot be justified as removal of a hazardous
13 substance since the drywall material used to construct the Drywall Pilaster cannot be considered a
14 hazardous substance.

15 Paragraph 6.2(a) of the Lease defines “[t]he term ‘Hazardous Substance’ as used in this
16 Lease shall mean any product, substance, or waste whose presence, use, manufacture, disposal,
17 transportation, or release, either by itself or in combination with other materials expected to be on
18 the Premises, is either: (i) potentially injurious to the public health, safety or welfare, the
19 environment or the Premises, (ii) regulated or monitored by any governmental authority, or (iii) a
20 basis for potential liability of Lessor to any governmental agency or third party under any applicable
21 statute or common law theory....” Paragraph 7.4(c) requires the lessee to remove all hazardous
22 substances from the Premises.

23 The Bankruptcy Court agrees with 400 SLB that the Plan Agent has not shown that either
24 the Banksy or the Drywall Pilaster meets of the definition of a hazardous substance under the Lease
25 because the Plan Agent did not offer evidence showing that the Drywall Pilaster or the Banksy
26 contained substances that was “potentially injurious to the public health, safety or welfare, the
27 environment or the Premises,” or “regulated or monitored by any governmental authority,” or “a
28 basis of potential liability of Lessor to any governmental agency or third party under any applicable

1 statute or common law theory.” Specifically, the Bankruptcy Court observes that the Plan Agent in
2 his proposed findings of fact and conclusions of law did not propose any findings of fact that either
3 the Banksy or the Drywall Pilaster met the definition of “hazardous substance” under paragraph
4 6.3(a) of the Lease.

5 The Plan Agent’s theory of why Ace Museum’s removal of the Banksy as a hazardous
6 substance within the meaning of paragraph 6.2(a) of the Lease pursuant to paragraph 7.4(c) of the
7 Lease is explained as follows:

8 . . . Section 7.4(c) [of the Lease] which requires the tenant to remov[e] all hazardous
9 substances. Section 6.2(a) defines a hazardous substance as any product whose presence is
10 either potentially injurious to the public health, safety, or welfare of the premises, or a basis
11 for potential liability to the Lessor. Mr. Christmas testified at the Hearing that the Banksy,
12 when it appeared, attracted criminal attention almost immediately. Mr. Christmas stated that
13 a guard was accosted while remaining at the Premises overnight to guard the Banksy, by
14 people who wanted to tie him up and offered him money. Thankfully that did not happen,
15 but if the guard was hurt, or the public hurt, in connection with someone seeking to cut out
the Banksy, that would have created legal exposure for 400 SLB. The increased hazard to
the Premises, or least to any security guard posted to keep the Banksy safe, is plain. While
it may be unusual for graffiti to be considered a hazardous substance, it is also unusual for
graffiti to be worth potentially hundreds of thousands of dollars. Banksy may be the only
artist in the world who, when he makes art, simultaneously creates a public health hazard.

16 See Plan Agent’s Response to Brief Filed by 400 S. La Brea Addressing Issues Raised in January
17 21, 2022 Scheduling Order, Docket No. 1248, at 5-6 (internal page citation 2-3). The Plan Agent’s
18 argument that the Banksy was properly removed by Ace Museum as a hazardous substance pursuant
19 to the Lease is creative but unconvincing because the Banksy itself did not present a public health,
20 safety or welfare hazard and is thus would not be generally understood as a hazardous substance.

21 Based on the foregoing, the Bankruptcy Court finds that the Plan Agent has not shown that
22 Ace Museum properly removed the Drywall Pilaster or the Banksy pursuant to the lessee
23 remediation authority of paragraph 6.2(c) of the Lease as a Hazardous Substance.

24 The Banksy as Graffiti

25 The Plan Agent argues that the Banksy was graffiti which appeared on the Drywall Pilaster
26 on April 10, 2010 was "graffiti" as that term is used in Paragraph 7.1(a) of the Lease, and paragraph
27 7.1(a) of the Lease permitted Ace Museum to remove the Banksy from the Drywall Pilaster on April
28 14, 2010. Plan Agent’s Proposed Conclusions of Law No. 249 and 250

1 400 SLB argues that the Banksy's removal cannot be justified under paragraph 7.1 of the
2 Lease because the Banksy was not "defacing" graffiti. 400 SLB's Proposed Conclusion of Law 31.
3 400 SLB argues:

4 The maintenance and repair obligations under Paragraph 7.1(a) of the Lease were not
5 implicated when the Banksy appeared on the La Brea Property based on the following
6 findings and conclusions: (1) the Banksy has, and at all times relevant, had substantial value,
7 both economic and aesthetic; (2) the affixation of the Banksy did not "deface" the La Brea
8 Property and did not adversely affect the repair or condition of the improvements thereon,
9 but rather enhanced the value of such improvements; (3) Mr. Christmas never considered the
10 Banksy defacing graffiti, but considered it a "wonderful artwork"; (4) the actions of Mr.
11 Christmas and/or Ace Museum reflect that the Banksy was never treated as defacing graffiti,
12 which would be traditionally painted over or cleansed from the La Brea Property; and (5)
13 the Banksy was at all times relevant treated as a work of art by Mr. Christmas, Ace Museum
14 and/or the Plan Agent, the latter of which has secured the Banksy in storage and treated the
15 Banksy as any other artwork in his possession.

16 400 SLB's Proposed Conclusion of Law No. 31. In support of its argument that not all graffiti is
17 removable "defacing" graffiti, 400 SLB relies upon California Penal Code § 594, which defines
18 graffiti as a form of vandalism, which is punishable as a crime under that statute, that is, one is guilty
19 of vandalism if, with respect to personal or real property, he or she "defaces [that property] with
20 graffiti or other inscribed material." 400 SLB's Proposed Conclusion of Law No. 29. 400 SLB
21 argues that under California common law, to "deface" is "[t]o mar the face, features, or appearance
22 of; to spoil or ruin the figure, form, or beauty of; to disfigure." 400 SLB's Proposed Conclusion of
23 Law No. 30, *citing, In re Nicholas Y.*, 85 Cal. App. 4th 941, 944 (2000).

24 400 SLB asserts an alternative argument in opposition to the Plan Agent's assertion that Ace
25 Museum properly removed the Banksy as a graffiti pursuant to paragraph 7.1(a) of the Lease that
26 the means of removal itself to extract the Banksy from the Premises was not reasonable. 400 SLB
27 argues:

28 Alternatively, even if the appearance of the Banksy implicated the repair obligations under
Paragraph 7.1(a) of the Lease, the actions of Mr. Christmas and/or Ace Museum fell outside
of the scope of such repair obligations, as the destruction and removal of an underlying wall
(i.e. the Pilaster) was not a reasonable means by which to clean up graffiti, based on the
following findings and conclusions: (1) graffiti was a regular occurrence at the La Brea
Property; (2) in each case, graffiti was cleaned from the surface on which it was painted, or
painted over; (3) improvements constructed on the La Brea Property were never removed in
order to clean up graffiti; (4) the Banksy itself was affixed to the La Brea Property using
spray paint and could have reasonably been removed via use of paint to cover up the artwork;

(5) there is no evidence in the record that, in order to “repair” the Pilaster after affixation of the Banksy, it was necessary for the Pilaster to be destroyed by way of cutting out the Banksy therefrom; (6) there is no evidence in the record that Mr. Christmas and/or Ace Museum considered the act of removing the Banksy as a necessary “repair” of the La Brea Property; and (7) following extraction of the Banksy from the Pilaster, the Banksy was not discarded, but moved to a secure storage, in order to “protect” the Banksy.

The applicable provision of the Lease regarding the lessee’s obligation and authority to remove graffiti from the Premises is paragraph 7.1(a) of the Lease, which states in part:

"[...] Lessee shall, at Lessee's sole expense, keep the Premises, Utility Installations (intended for Lessee's exclusive use, no matter where located), and Alterations in good order, condition and repair ... including, but not limited to, all equipment or facilities, such as plumbing, HVAC equipment, electrical, lighting facilities, boilers, pressure vessels, fire protection system, fixtures, walls (interior and exterior), foundations, ceilings, roofs, roof drainage systems, floors, windows, doors, plate glass, skylights, landscaping, driveways, parking lots, fences, retaining walls, signs, sidewalks and parkways located in, on, or adjacent to the Premises.... Lessee's obligations shall include restorations, replacements or renewals when necessary to keep the Premises and all improvements thereon or a part thereof in good order, condition and state of repair. Lessee shall, during the term of this Lease, keep the exterior appearance of the Building in a first-class condition (including, e.g., graffiti removal) consistent with the exterior appearance of other similar facilities of comparable age and size in the vicinity, including, when necessary, the exterior repainting of the Building."

This lease provision sets forth the general obligation of the lessee to keep the Premises and improvements in “good order, condition and state of repair.” Moreover, this provision stated that the lessee had the specific obligation to “keep the exterior of the Building in a first-class condition (including, e.g., graffiti removal) consistent with the exterior appearance of other similar facilities of comparable age and size in the vicinity, including, when necessary, the exterior repainting of the Building.” This provision specifically mentions that the lessee had the obligation of graffiti removal in keeping the building in a first-class condition, and the means to keep the building in a first class condition included exterior repainting. The use of the word “including” is not exhaustive, that is, exterior painting is not the only way of keeping the exterior of the building in a first-class condition. This lease provision places the obligation to remove graffiti on the lessee, and giving it the authority to remove it.

Graffiti is not defined in the Lease. The court has considered various definitions of graffiti in the statutory and case law, scholarly legal articles and general reference works.

California Penal Code 594(a) states that the crime of vandalism occurs when a person

1 “maliciously commits any of the following acts with respect to any real or personal property not his
2 or her own . . . (1) Defaces with graffiti or other inscribed material. (2) Damages. (3) Destroys. . .
3 .” California Penal Code 594(e) further defines graffiti as follows: “As used in this section, the term
4 “graffiti or other inscribed material” includes any unauthorized inscription, word, figure, mark, or
5 design, that is written, marked, etched, scratched, drawn, or painted on real or personal property.”

6 In *National Paint & Coatings Association v. City of Chicago*, 835 F.Supp 421, 425 (N.D.
7 Ill. 1993), *reversed on other grounds*, 45 F.3d 1124 (7th Cir. 1994), the district court adopted a
8 definition of graffiti as “an inscription, drawing or design scratched, painted, sprayed or placed
9 without the consent of the owner on a surface so as to be seen by the public.” In this case, the
10 plaintiffs, manufacturers and retailers of spray paint and large writing markers sought declaratory
11 and injunctive relief that an ordinance of the City of Chicago banning retail sales of spray paint and
12 large writing markers within the city in order to combat graffiti vandalism violated their
13 constitutional rights to sell such products in the city based on substantive due process and the
14 Dormant Commerce Clause. 835 F. Supp. at 423-424. The district court conducted an evidentiary
15 hearing on the plaintiffs’ claims and received evidence on the expected efficacy of the challenged
16 ordinances enacted to address the problem of graffiti vandalism in the city by taggers, gang members
17 and miscellaneous groups. *Id.* at 425-429. The district court held that the ordinances were an
18 illegitimate exercise of the city’s police power under the Illinois Constitution in violation of the
19 plaintiffs’ rights to substantive due process and under the Commerce Clause, finding that the
20 ordinances would not advance the city’s goal of eradicating graffiti and was thus “irrational.” *Id.* at
21 433-435. The Seventh Circuit reversed, applying the rational basis standard of review to the city
22 ordinance, holding that it met that standard and was constitutional, not holding that the ordinances
23 either violated substantive due process or the Commerce Clause. 45 F.3d at 1127-1132.

24 In adopting its definition of graffiti, the district court in *National Paint & Coatings*
25 *Association*, in a portion of its decision not affected by the Seventh Circuit’s reversal,⁷ made the

26
27
28 ⁷ The Seventh Circuit in its opinion did not independently define graffiti in reversing the district
court in *National Pain & Coatings Association*.

1 following observations on the challenge of defining graffiti:

2 No single formulation of the term can adequately encompass the common notion held by the
3 court and the respective parties of what constitutes “graffiti.” Nonetheless, we believe that
4 an accurate description must provide that “graffiti” is in fact intended as an expression of
5 ideas, information and culture, as opposed to a product of carelessness or neglect. As
6 important, who creates “graffiti” and how it is applied sheds considerable light on our efforts
7 to initially identify “graffiti.” In light of these considerations, which are discussed in detail
8 below, and to aid in our present inquiry, we offer the following definition: “graffiti” refers
9 to “an inscription, drawing or design scratched, painted, sprayed or placed without the
10 consent of the owner on a surface so as to be seen by the public.”

8 835 F. Supp. at 425.

9 The district court In *Sherwin-Williams Co. v. City and County of San Francisco*, 857 F.Supp
10 1355, 1359 (N.D. Cal. 1994), adopted the same definition of graffiti as stated in *National Paint &*
11 *Coatings Association*, based on stipulation of undisputed facts submitted by the parties involved,
12 defining graffiti as “an inscription, drawing or design, scratched, painted or placed on a surface
13 without the consent of the owner, so as to be seen by the public.” The district court in *Sherwin-*
14 *Williams Co.* denied the motion of manufacturers and retailers of markers and spray paint for
15 permanent injunction of an ordinance of the City and County of San Francisco that prohibited retail
16 sales of those products unless they were maintained in places accessible only with employee
17 assistance. In so ruling, the district court rejected the claims of the manufacturers and retailers based
18 on substantive due process and the Commerce Clause, holding that the ordinance was a proper
19 exercise of the city’s police powers under the California Constitution. 857 F. Supp. at 1365-1372.

20 The legal scholarship has similarly defined graffiti in terms of marking on a surface without
21 authorization of the owner. For example, one legal scholar has observed that graffiti “means any
22 unsanctioned marking of a surface.” Margaret L. Mettler, *Graffiti Museum: A First Amendment*
23 *Argument for Protecting Uncommissioned Art on Private Property*, 111 Mich. L. Rev. 249, 254
24 (2012).

25 Another example by a legal scholar states, “The term ‘graffiti’ is conventionally defined as
26 ‘unauthorized writing or drawing on a public surface’ and ‘describes everything from random
27 scrawls to mural work.’ Although graffiti is often associated with gangs, a significant amount of
28 graffiti is created by graffiti writers who are not affiliated with a criminal street gang.” Kelly P.

1 Welch, Graffiti and the Constitution: A First Amendment Analysis of the Los Angeles Tagging
2 Crew Injunction, 85 S.Cal.L.Rev. 205, 209 (2011) (internal citations omitted).

3 A third legal scholar has observed:

4 Similar to the examination of the term, “art,” the term, “graffiti,” can be defined both broadly
5 and narrowly. Graffiti is an artistic movement that encompasses many subsets and styles. It
6 can be created through spray-paint, stencils, painting with brushes and rollers, stickers,
7 posters, mosaics, lighting installations, and many other materials. Street art is a subset of
8 graffiti that includes “stickers, wheat-paste posters, stenciled paintings, downloaded images
9 from the Web, as well as free-hand graffiti.” Street art is “often purely artistic,” meaning that
10 it is “an aesthetic work that [the] general public is able to interpret.”

11 Britney Karim, The Right to Create Art in A World Owned by Others - Protecting Street Art and
12 Graffiti Under Intellectual Property Law, 23 U.S.F. Intell. Prop. & Tech. L.J. 53, 57-58 (2019)
13 (citations and footnotes omitted).

14 In a recent scholarly article which the court finds provocative and enlightening, Assaf-
15 Zakharov and Schnetgoke, Reading the Illegible: Can Law Understand Graffiti?, 53 Conn. L. Rev.
16 117 (2021), the authors, Assaf-Zakharov and Schnetgoke, comment that graffiti is also a social and
17 cultural phenomenon, though one that is “deeply puzzling,” and they attempt to define it, though
18 they have found its definition is “intensely disputed”:

19 Graffiti is a deeply puzzling social and cultural phenomenon, surrounded by intensive
20 scholarly debates. The very definition of graffiti is intensely disputed, resulting in a plethora
21 of scholarly answers to the questions of what graffiti is and whether it is different from street
22 art. Although introducing an additional definition of graffiti is not a central purpose of this
23 Essay, given the scholarly disagreement on this point, we must clarify what we conceive
24 under this term. To put it simply, we understand graffiti as an uncommissioned--although
25 not necessarily illegal--form of street art. For us, the term “graffiti” refers to paintings and
26 writings made on city surfaces without anyone's request or order, without following anyone's
27 instructions or guidelines, and without obtaining prior approval.

28 Assaf-Zakharov and Schnetgoke, 53 Conn. L. Rev. at 125 (footnote omitted).

29 Assaf-Zakharov and Schnetgoke further comment about the ambivalent reception of graffiti
30 in political and legal sphere as a social and cultural phenomenon:

31 Social and legal reception of graffiti is highly ambivalent. On the one hand, graffiti painters
32 are often pictured as “vandals” and “hooligans.” Using the “broken windows” theory, several
33 scholars claimed that graffiti invites violent crimes and social decay. Mass media adopted
34 this view, presenting graffiti as a most serious epidemic and declaring “wars on graffiti.”
35 Echoing these sentiments, legislators in many countries and cities toughen the “war on
36 graffiti” by increasing existing penalties and introducing new ones (i.e., suspension of a

1 driving license), extending police search powers, and restricting various graffiti-related
2 activities (such as the selling of paint). Similarly, judges frequently express their dismay
3 with “graffiti vandalism,” sometimes issuing especially high penalties in a specific case to
deter others from painting graffiti.

4 On the other hand, graffiti, especially in its more accessible forms, is increasingly labelled
5 as “street art,” which marks a conceptual move from the context of vandalism into the world
6 of “high” culture. Indeed, it is not uncommon to see graffiti that has been reconceptualized
7 as “street art” exhibited in mainstream museums and galleries. Many cities have launched
8 street art projects, dedicating large public spaces to commissioned or uncommissioned
murals and creating “legal walls” for graffiti. Melbourne even protects graffiti as cultural
heritage. Ironically, the world of commerce--the main target of graffiti criticism--has also
embraced graffiti, commissioning famous artists to design shops and advertising campaigns.

9 This unusual phenomenon of illegal and rebellious activity gaining social acceptance and
10 commercial value creates much ambivalence and contradiction, in terms of both the meaning
11 of graffiti and its social reception. Consider several examples: a successful career of a street
12 artist working legally requires experience as an “authentic,” that is, illegal graffiti writer.
13 Indeed, real estate firms hire graffiti painters to decorate building facades. This practice
14 increases the attractiveness of neighborhoods and raises real-estate value, which in turn often
15 leads to the pieces being called “artwashing,” a term that suggests that art is used to
16 accelerate gentrification. Yet, starting a legal project may be regarded as “selling out” by the
17 graffiti community and may thus undermine the status of the artist as a graffiti writer.
18 Commercial firms, such as Sony and Nike, commission graffiti artists to decorate their stores
19 with works that question the culture of consumerism. Similarly, banks acquire graffiti works
20 with prominent anti-capitalist messages. In 2011, a well-known graffiti artist, Revok, was
21 sentenced to 180 days imprisonment for vandalism. While he was serving his time, his works
22 were exhibited at the Museum of Contemporary Art in Los Angeles. The well-known British
23 artist, Banksy, paints on whatever surfaces he deems appropriate, including private houses
and medical clinics, without asking for anyone's permission. His works are highly
appreciated, sometimes safeguarded by protective casing and restored by local authorities
when needed. “Vandals” painting over his works are severely condemned in mass media and
punished as criminals, while politicians express deep regret for not having done more to
preserve the masterpieces on time. Similarly, painting graffiti over the famous (but mostly
illegally created) murals in Melbourne's Hosier Lane was severely condemned in media and
described as “vandalism of artwork” by Victoria police. Finally, a retrospective of the work
of Keith Haring and Jean-Michel Basquiat, both famous and now deceased graffiti writers,
at the National Gallery of Victoria starts with a video showing the artists at work, thus
redefining a historic documentation of vandalism as a creation of art.

24 Legal systems largely mirror the ambivalence surrounding graffiti. In the most common
25 scenario involving a graffiti artist and a court, the artist will play the role of an accused
26 criminal. In such cases, courts label graffiti painters as “vandals” and find them guilty of
27 damage to property, contamination, and other criminal offenses. Yet, in several cases, British
28 judges refused to sentence graffiti painters to jail, acknowledging their artistic talent. In one
decision, the judge expressed the opinion that the graffiti writer could be “the next Banksy.”
In rare scenarios, a graffiti painter will play the role of a plaintiff in a civil suit, claiming that
her rights have been violated either by a certain use of her work or its destruction. Since

1 graffiti artists typically do not own the surfaces they are painting on, their only feasible legal
2 avenue is a copyright infringement suit. Indeed, courts in different countries occasionally
3 applied copyright law to compensate graffiti writers for destruction or unauthorized
4 commercialization of their works. Courts that accept the artists' claims and grant copyright
protection to graffiti commonly refer to the plaintiffs as "painters," "visual artists," "graffiti
artists," or simply "artists."

5 The very same activity--creating numerous murals and signing them with the artist's
6 pseudonym, known as a "tag"--can be described very differently, depending on whether the
7 court is about to convict the graffiti artist for vandalism or grant her a copyright protection.
8 Consider a typical description of graffiti as a criminal act: "The State alleges that each vandal
9 had adopted a distinctive tag (pseudonym) and vandalized property with that unique tag
10 again and again for years until it had become their vandalism identity." And now compare it
11 to a typical description of graffiti as art: "Plaintiffs are well-known and respected graffiti
12 artists. In 2012, Plaintiffs created a mural in San Francisco The mural depicted the
13 stylized signatures of 'Revok' and 'Steel,' pseudonyms commonly associated with
14 plaintiffs[.]"

15 Assaf-Zakharov and Schnetgoke, 53 Conn. L. Rev. at 125-129 (footnotes omitted).

16 The Oxford English Dictionary defines graffiti as follows: "A drawing or writing scratched
17 on a wall or other surface; a scribbling on an ancient wall, as those at Pompeii and Rome. Also, a
18 method of decoration in which designs are produced by scratches through a superficial layer of
19 plaster, glazing, etc., revealing a ground of different colour; chiefly attributive, as in graffiti-
20 decoration, -pottery, -ware." Oxford English Dictionary (online edition accessed on November 16,
21 2022 at <https://www.oed.com/view/Entry/80475#eid2641113>). The Oxford English Dictionary
22 states that the plural form of graffiti is graffiti. *Id.*

23 The Merriam-Webster Dictionary defines graffiti as "usually unauthorized writing or
24 drawing on a public surface." Merriam-Webster Dictionary (online edition accessed at
25 <https://www.merriam-webster.com/dictionary/graffiti> on November 16, 2022)

26 The Collins English Dictionary defines graffiti as follows: "Graffiti is words or pictures that
27 are written or drawn in public places, for example on walls or posters." Collins English Dictionary
28 (online edition accessed on November 16, 2022 at
<https://www.collinsdictionary.com/us/dictionary/english/graffiti>).

The Cambridge English Dictionary states that graffiti is defined as "words or drawings,
especially humorous, rude, or political, on walls, doors, etc. in public places" – Cambridge
Dictionary

1 Encyclopedia Britannica defines graffiti as “form of visual communication, usually illegal,
2 involving the unauthorized marking of public space by an individual or group. Although the
3 common image of graffiti is a stylistic symbol or phrase spray-painted on a wall by a member of a
4 street gang, some graffiti is not gang-related. Graffiti can be understood as antisocial behaviour
5 performed in order to gain attention or as a form of thrill seeking, but it also can be understood as
6 an expressive art form.” Encyclopedia Britannica (online edition accessed on December 1, 2022 at
7 <https://www.britannica.com/art/graffiti-art>). Encyclopedia Britannica also recognizes Banksy under
8 the category of “key people” for “graffiti,” observing that he is an “anonymous British graffiti artist
9 known for his antiauthoritarian art, often done in public places.” Encyclopedia Britannica (online
10 edition accessed on December 1, 2022 at <https://www.britannica.com/biography/Banksy>).

11 Having considered the above legal and reference authorities, the court determines that there
12 does not appear to be a legally controlling definition of graffiti in the statutory or case law applicable
13 to the Lease at issue in this case.

14 The statutory definition of graffiti in California Penal Code § 594(e) was specific to the
15 crime of vandalism involving a malicious attempt to deface property with graffiti and is of limited
16 application here because no one has accused Banksy of committing the crime of vandalism, having
17 a malicious intent to deface with graffiti the Premises at 400 South La Brea Avenue. Defacement
18 is required to prove the crime of vandalism through graffiti under California Penal Code § 594, but
19 defacement is not essential to define graffiti in that provision. That is, contrary to 400 SLB’s
20 assertion, no one has to prove defacement to demonstrate that the Banksy is graffiti.

21 The various definitions of graffiti cited above are generally consistent in having three
22 elements: (1) some sort of marking, painting or inscription scratched, painted or otherwise placed
23 on a surface on property; (2) which is unauthorized; and (3) in a public place to be seen. The
24 bankruptcy court finds that the definition of graffiti given by the courts in the *National Paint &*
25 *Coatings Association* and *Sherwin-Williams* cases as “an inscription, drawing or design scratched,
26 painted, sprayed or placed without the consent of the owner on a surface so as to be seen by the
27 public” to be instructive, and applies that definition here.

28 The evidence indicates that the Banksy painting meets the definition of graffiti as it was a

1 drawing, painted and sprayed without the consent of the owner of the Drywall Pilaster, Ace
2 Museum, or of the Premises, 400 SLB, on a surface, the Drywall Pilaster, on the then exterior of the
3 Premises facing La Brea Avenue so as to be seen by the public. There is no evidence that the Banksy
4 was spraypainted on the Premises with the consent or authorization of either Ace Museum, the
5 lessee, who owned the Drywall Pilaster during the pendency of the Lease, or 400 SLB, the lessor,
6 who owned the Premises. However, the matter of authorization is not free from doubt because as
7 the principal of Ace Museum, Christmas, testified that he authorized Banksy's visitation of the
8 Premises by providing a key to the Premises to his agency, Pest Control, but he did not know in
9 advance, or give consent to Banksy creating an artwork on the Premises as he did, and when
10 Christmas learned of the Banksy artwork or graffiti, he welcomed it as a "wonderful artwork" as he
11 testified after the fact at trial. However, the fact that Christmas welcomed the graffiti after the fact
12 does not mean that it became authorized. Therefore, the bankruptcy court finds that the Banksy
13 painting is graffiti for purposes of paragraph 7.1(a) of the Lease.

14 Paragraph 7.1(a) of the Lease conferred on the lessee, Ace Museum, the duty and authority
15 for graffiti removal in order to keep exterior of the building in a first-class condition. The
16 bankruptcy court finds that Ace Museum acted within its authority under paragraph 7.1(a) of the
17 Lease to remove the Banksy as graffiti on the Drywall Pilaster from the exterior of the building.
18 Mr. Christmas in his testimony in this case never stated that Ace Museum removed the Banksy
19 without authority under the Lease as he testified at trial that Ace Museum as the tenant did not have
20 to ask for permission under the Lease to remove graffiti from the premises. That Ace Museum did
21 not need to ask for permission to remove graffiti under the Lease is shown by the actions of its
22 principal, Mr. Christmas, in directing the removal of the Banksy from the premises without notifying
23 400 SLB or asking for its permission.

24 400 SLB's interpretation of paragraph 7.1(a) of the Lease that graffiti removal is permitted
25 only if the graffiti defaces the exterior surface of the building is unpersuasive as it reads too much
26 into the plain language of the Lease. There is nothing in the language of the Lease that says that
27 only defacing graffiti may be removed from the Premises. The Lease only refers to an obligation
28 imposed on the tenant of graffiti removal and does not qualify in any way graffiti to be removed as

1 defacing, or bad, graffiti.

2 Regarding 400 SLB's alternative argument that the removal of the graffiti in this instance
3 by extraction, or physical removal by cutting out the drywall backing of the Banksy painting from
4 the Drywall Pilaster, the court notes that paragraph 7.1(a) of the Lease does not impose any
5 restrictions on the lessee in performing its obligation of graffiti removal. 400 SLB argues that usual
6 means of graffiti removal was cleaning it or painting it over and that was not done in this instance,
7 making it unreasonable. The court finds that the physical removal of the graffiti was not
8 unreasonable and not inconsistent with the terms of the Lease because the Lease did not impose any
9 restrictions on graffiti removal. The Lease only listed exterior painting as one method of graffiti
10 removal, using the word "including" which implies that the options were not limited to the one
11 specified means.

12 400 SLB other arguments that there is no evidence in the record that, in order to "repair" the
13 Drywall Pilaster after affixation of the Banksy, it was necessary for the Pilaster to be destroyed by
14 way of cutting out the Banksy therefrom; there is no evidence in the record that Mr. Christmas and/or
15 Ace Museum considered the act of removing the Banksy as a necessary "repair" of the La Brea
16 Property; and following extraction of the Banksy from the Pilaster, the Banksy was not discarded,
17 but moved to a secure storage, in order to "protect" the Banksy lack merit. The evidence establishes
18 that after the Banksy was removed from the Drywall Pilaster, which was damaged in the removal,
19 Ace Museum, the lessee, replaced the Drywall Pilaster with a new pilaster of similar construction,
20 and thus, there was no resulting damage to the Premises, that is, a fully functional pilaster was in
21 place when the Lease was terminated, and 400 SLB recovered possession of the Premises. The
22 function of the Drywall Pilaster and its replacement pilaster was to support the Robert Irwin light
23 sculpture of Ace Museum, which was never installed, and thus, the Drywall Pilaster and its
24 replacement never served its original function. 400 SLB has not articulated that it had any purpose
25 or use of the Drywall Pilaster or its replacement.

26 Ace Museum replaced the damaged Drywall Pilaster with a new one of similar construction,
27 and therefore, as far as the pilaster is concerned, 400 SLB suffered no damage from the replacement
28 of the original Drywall Pilaster. The evidence largely based on the testimony of Mr. Hernandez is

1 that the removal of the Drywall Pilaster and construction of its replacement resulted in no material
2 damage to the surrounding surfaces upon which the pilasters rested or were attached, that is, the
3 floor, the ceiling or the cinderblock wall. It is correct to state that the Banksy was not discarded as
4 graffiti, but stored to protect it as an artwork, and thus, its removal and subsequent protection should
5 not be sanctioned by paragraph 7.1(a) of the Lease. Paragraph 7.1(a) or any other provision of the
6 Lease do not address the disposition of removed graffiti, which apparently indicates that the Lease
7 did not address the prospect of the removal of graffiti art on the Premises.

8 On January 21, 2022, the Bankruptcy Court issued an order requesting the parties to address
9 in post-trial briefing the possible relevance of an English case involving a dispute of ownership
10 between a tenant and a landlord over a Banksy artwork painted on the premises owned by the
11 landlord and leased by the tenant in *The Creative Foundation v. Dreamland Leisure Ltd.*, [2015]
12 EWHC 2556 (Ch), 2015 WL 5202303 (High Court of Justice, Chancery Division, Sept. 11, 2015).⁸
13 Both parties filed briefs in response to this order; the Plan Agent in briefs filed on February 3, 2022
14 and February 17, 2022 (Docket Nos. 1235 and 1248) and 400 SLB on February 3, 2022 (Docket
15 No. 1236).

16 In the *Dreamland Leisure* case, Banksy had painted an artwork on the wall of the leased
17 premises, and the tenant removed a portion of the wall with the Banksy on it and shipped the Banksy
18 to the United States for sale by an art dealer. An arts charitable organization as the assignee of the
19 landlord to its rights in the artwork sued the tenant in the High Court of Justice asserting a claim for
20 delivery of the portion of the wall on which the Banksy was painted. The High Court granted
21 summary judgment for the charitable organization, rejecting the tenant's defense that it properly
22 removed the Banksy artwork pursuant to the clause in its lease to keep the premises "in good and
23

24 ⁸ The website of the Judiciary of the United Kingdom states: "The High Court of Justice in
25 London, together with the Court of Appeal and the Crown Court, are the Senior Courts of England
26 and Wales. Its name is abbreviated as EWHC for legal citation purposes. It deals at first instance
27 with all high value and high importance civil law (non-criminal) cases, and also has a supervisory
28 jurisdiction over all subordinate courts and tribunals, with a few statutory exceptions. The High
Court consists of 3 divisions: the King's Bench Division, the Family Division, and the Chancery
Division." Website of the Judiciary of the United Kingdom (accessed online on December 2,
2022 at <https://www.judiciary.uk/courts-and-tribunals/high-court/>).

1 substantial repair and condition” by removing the Banksy as graffiti. The High Court concluded
2 that the landlord was the owner of every part of the premises and the tenant had the burden of
3 showing that there was a term in the lease that lead to a different result and held there was nothing
4 in the lease by implication that supported the tenant’s claim that it could acquire ownership of the
5 removed wall with the Banksy on it in discharging its lease obligation to keep the premises in good
6 repair. The High Court also determined that there were three objectively reasonable methods of
7 removing graffiti from the wall, (1) painting it over, (2) removing it by chemical or abrasive
8 cleaning, or (3) removing a section of the wall and replacing it. The court also held summary
9 judgment for the charitable organization was appropriate because the tenant could not meet its
10 burden of proving that the method of removal, which was much more invasive than the other two
11 methods, was at least equally objectively reasonable to the other methods. Accordingly, the High
12 Court held that the charitable foundation as the landlord’s assignee was entitled to summary
13 judgment because that the lease did not permit the tenant to sever the wall which was property of
14 the landlord.

15 400 SLB argues that the Bankruptcy Court should reach the same conclusion in its favor in
16 this case because *Dreamland Leisure* is persuasive authority with substantially similar facts, and
17 similarities of the law, the lease and the actions taken by the lessor and the lessee. 400 S. La Brea,
18 LLC’s Supplemental Post-Trial Brief Regarding the “Banksy” Contested Matter, Docket No. 1236
19 at 15-21 (internal page citation 11-17). However, the Bankruptcy Court agrees with the Plan Agent
20 that *Dreamland Leisure* is distinguishable from this case because the terms of the lease are different.
21 In *Dreamland Leisure*, the Banksy was painted on the wall of the premises, and it was undisputed
22 that the wall belonged to the landlord and the tenant in severing the wall was severing property of
23 the landlord. In this case, the Banksy was painted on the Drywall Pilaster, which was property of
24 the tenant, Ace Museum, under the Lease as a Trade Fixture, a Utility Installation or a Lessee Owned
25 Alteration, at the time that the portion of the Drywall Pilaster with the Banksy was removed. Thus,
26 at the time, Ace Museum as the tenant was removing its property, the Drywall Pilaster, while in
27 *Dreamland Leisure*, the tenant had removed a portion of the wall, which was the landlord’s property.
28 Moreover, while both the leases in *Dreamland Leisure* and this case required the tenants to keep the

1 leased premises in good order, condition and repair, the Lease in this case placed the specific
2 obligation on the tenant of graffiti removal. In *Dreamland Leisure*, the tenant did not have the
3 specific express obligation and authority of graffiti removal while in this case, the tenant, Ace
4 Museum, did. In light of these dissimilarities, the Bankruptcy Court determines that the same result
5 as in *Dreamland Leisure* does not necessarily obtain.

6 The Law of Real Property Accession and Personal Property Accession

7 On January 21, 2022, the Bankruptcy Court issued an order requesting the parties to address
8 in post-trial briefing the impact of the California accession statutes on the ability to remove fixtures
9 from property, that is, whether Ace Museum could have acquired ownership of the Banksy through
10 accession as California Civil Code § 1000 provides that property may be acquired through several
11 means, including accession. Both parties filed briefs in response to this order; the Plan Agent in
12 briefs filed on February 3, 2022 and February 17, 2022 (Docket Nos. 1235 and 1248) and 400 SLB
13 on February 3, 2022 (Docket No. 1236). In their proposed findings of fact and conclusions of law,
14 the parties request that the bankruptcy court issue findings of fact and conclusions of law regarding
15 the application of the California accession statutes.

16 The Plan Agent argues that Ace Museum was entitled to ownership of the Banksy through
17 the California law of accession, specifically, he argues that pursuant to California Civil Code § 1025,
18 when graffiti appeared on the Drywall Pilaster on April 10, 2010, that graffiti became owned by the
19 owner of the Drywall Pilaster, that is, Ace Museum. California Civil Code § 1025 states: "When
20 things belonging to different owners have been united so as to form a single thing, and cannot be
21 separated without injury, the whole belongs to the owner of the thing which forms the principal part;
22 who must, however, reimburse the value of the residue to the other owner, or surrender the whole
23 to him."

24 The Plan Agent asserts that immediately prior to the graffiti appearing on the Drywall on or
25 about April 10, 2010, the Drywall Pilaster was property of Ace Museum, and graffiti appearing on
26 the Drywall on or about April 10, 2010, did not change the ownership of the Drywall Pilaster. Plan
27 Agent's Proposed Findings of Fact No. 238 and 239. The Plan Agent further asserts that the person
28 or persons who spray painted the graffiti on the Drywall on April 10, 2010, are unknown. Plan

1 Agent's Proposed Finding of Fact No. 241.

2 The Plan Agent in support of his claim that Ace Museum owns the Banksy also relies upon
3 California Civil Code § 1013, which states: "When a person affixes his property to the land of
4 another, without an agreement permitting him to remove it, the thing affixed, except as otherwise
5 provided in this chapter, belongs to the owner of the land, unless he chooses to require the former
6 to remove it or the former elects to exercise the right of removal provided for in Section 1013.5 of
7 this chapter." Plan Agent's Proposed Findings of Fact No. 240 and 243; *see also*, Plan Agent's
8 Response to Brief Filed by 400 S. La Brea Addressing Issues Raised in January 21, 2022 Scheduling
9 Order, Docket No. 1248 at 3-6. The Plan Agent reasons that based on California Civil Code § 1013,
10 under California law, a thing is deemed to be affixed to land when it is attached to it by roots, as in
11 the case of trees, vines or shrubs; or imbedded in it, as in the case of walls; or permanently resting
12 upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means
13 of cement, plaster, nails, bolts, or screws [...]. Plan Agent's Proposed Finding of Fact No. 242.
14 With respect to the Banksy, the Plan Agent argues that to the extent the Drywall Pilaster is
15 considered to have been "land" as that term is used in California Civil Code § 1013, pursuant to
16 California Civil Code § 1013, when graffiti appeared on the Drywall Pilaster, that graffiti became
17 owned by the owner of the Drywall Pilaster, or Ace Museum. Plan Agent's Proposed Finding of
18 Fact No. 243.

19 In opposition to the Plan Agent's argument based on the law of accession, 400 SLB argues
20 that the law of accession does not support the Plan Agent's claim of ownership because California
21 Civil Code § 1013 does not apply to the Pilaster as the Lease sufficiently addresses ownership rights
22 relating to improvements made by the lessee.

23 The Bankruptcy Court agrees with 400 SLB that the law of accession based on California
24 Civil Code § 1013 does not support or explain the Plan Agent's argument that Ace Museum owned
25 the Banksy as owner of the "land," being the Drywall Pilaster. First, the court agrees with 400 SLB
26 that the Lease sufficiently addresses the ownership rights relating to the improvements made by Ace
27 Museum as the lessee and there is no need to resort to statutory law of accession under California
28 Civil Code § 1013. Second, Ace Museum as the lessee of the Premises cannot be considered the

owner of the "land" under California Civil Code § 1013 as "land" is given a narrow definition under the California Civil Code § 659, which states: "Land is the material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance, and includes free or occupied space for an indefinite distance upwards as well as downwards, subject to limitations upon the use of airspace imposed, and rights in the use of airspace granted, by law." *See also*, 3 Miller and Starr, *California Real Estate*, § 9.3 (Real and personal property distinguished). 400 SLB is the owner of the "land," i.e., the Premises or the La Brea Property, and Ace Museum as the lessee had an ownership interest in a leasehold interest and improvements under the Lease as personal property. As lessee under the Lease, Ace Museum had an estate for years, which is not considered ownership of land. As stated by the California Supreme Court in *Auerbach v. Assessment Appeals Board No. 1*, 39 Cal.4th 153 (2006),

Indeed, under California law an estate for years is not real property at all but rather a chattel real—a form of personalty—even though the substance of the estate, being land, is real property. (*Id.*, [California Civil Code] §§ 761, 765....) [¶] Notwithstanding the fact that a lease is a present possessory interest in land, there is no question that as a nonfreehold estate it is a different species of interest from a freehold estate in fee simple.... A leasehold is not an *ownership* interest, unlike the possession of land in fee simple.... It is for that reason that common parlance refers to the 'owner' of a freehold estate, encumbered or unencumbered, but to the 'holder' of a lease; the freeholder is sei[z]ed of land, whereas the leaseholder is not.

39 Cal.4th at 162-163 (emphasis in original; citation omitted).

However, Ace Museum's leasehold interest in the Premises under the Lease and the improvements defined as property of the lessee under the Lease may be considered as personal property, and the Plan Agent points out, there are different statutes for accession applicable to real property and personal property. Plan Agent's Brief Addressing Issues Raised in January 21, 2022 Scheduling Order, Docket No. 1235 at 2-3 (internal page citation 1-2). The California statutes regarding accession to real property are found in California Civil Code §§ 1013-1019 and accession to personal property are found in California Civil Code §§ 1025-1033. *Id.*

As previously noted, California Civil Code § 1025, which is part of the California statutes regarding accession to personal property, states: "When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole belongs

1 to the owner of the thing which forms the principal part; who must, however, reimburse the value
2 of the residue to the other owner, or surrender the whole to him." As also previously noted, the Plan
3 Agent asserts that immediately prior to the graffiti appearing on the Drywall on or about April 10,
4 2010, the Drywall Pilaster was property of Ace Museum, and graffiti appearing on the Drywall on
5 or about April 10, 2010, did not change the ownership of the Drywall Pilaster. Plan Agent's
6 Proposed Findings of Fact No. 238 and 239. The Plan Agent further asserts that the person or
7 persons who spray painted the graffiti on the Drywall on April 10, 2010, are unknown. Plan Agent's
8 Proposed Finding of Fact No. 241. When the Banksy was spraypainted onto the Drywall Pilaster,
9 it became united with the Drywall Pilaster to form a single thing, and cannot be separated without
10 injury, and thus, pursuant to California Civil Code § 1025, the Banksy became owned by the owner
11 of the Drywall Pilaster, Ace Museum, as one of the following: (1) Trade Fixture; (2) Utility
12 Installation; or (3) Lessee Owned Alteration. This conclusion is consistent with California Civil
13 Code § 732, which states: "The owner of a thing owns also all its products and accessions." 400
14 SLB argues that the Banksy was an "Alteration" under the Lease that was not made by Ace Museum
15 as lessee, and therefore, the Banksy cannot be a Lessee Owned Alteration as it was not made by Ace
16 Museum as lessee. However, the court determines that the Banksy was made by a nonlessee,
17 presumably the artist Banksy, on the Drywall Pilaster, which was property owned at the time by
18 Ace Museum, and therefore, under the law of accession to personal property is also property of the
19 lessee, Ace Museum.

20 This conclusion of Ace Museum's ownership of the Banksy by accession to personal
21 property is justified by the factual circumstances in this case indicating a gift of the artwork by artist
22 Banksy to Ace Museum. In California, a gift is "a transfer of personal property, made voluntarily,
23 and without consideration." *United States v. Alcaraz-Garcia*, 79 F.3d 769, 775 (9th Cir. 1996), *citing*
24 *and quoting*. California Civil Code § 1146. The elements of a gift are: (1) competency of the donor
25 to contract; (2) a voluntary intent on the part of the donor to make a gift; (3) delivery, either actual
26 or symbolic; (4) acceptance, actual or imputed; (5) complete divestment of control by the donor;
27 and (6) lack of consideration for the gift. *Id.* at 775, *citing inter alia*, *Jaffe v. Carroll*, 35 Cal.App.3d
28 53, 59 (1973). As Mr. Christmas testified, he invited Banksy to inspect the Ace Museum premises

1 to induce Banksy to give a show at the museum and gave a key to the premises to Banksy's agents
2 with his organization, Pest Control. Banksy visited the premises and bestowed the artwork on Ace
3 Museum's premises, painting it on the Drywall Pilaster, which under the Lease is property of Ace
4 Museum as the lessee. The circumstances indicate a gift of the artwork by Banksy to Ace Museum
5 as it appears that Banksy was a competent donor to contract, his painting of the artwork on Ace
6 Museum's premises without its knowledge indicates a voluntary intent to make a gift, the gift of the
7 artwork was delivered by painting it on Ace Museum's property, acceptance of the gift by Ace
8 Museum as indicated by Mr. Christmas's statements that it would be part of Ace Museum's
9 collection and its removal to a storage facility and the lack of consideration for the gift as Ace
10 Museum paid nothing for the artwork painting on its property. There is no indication that Banksy
11 intended his gift to the landlord, 400 SLB, as there is only evidence of contacts and a relationship
12 between him and Ace Museum, and not with 400 SLB.

13 In the *Dreamland Leisure* case, the English High Court of Justice by the Hon. Mr. Justice
14 Arnold commented on which party, the landlord or the tenant, should benefit from the windfall from
15 the Banksy on the leased premises, that is, from the "spontaneous actions of a third party":

16 . . . I do not consider that it makes a difference that the value is attributable to the spontaneous
17 actions of a third party. It is fair to say that, whatever solution is adopted, one party gets a
18 windfall. But who has the better right to that windfall? In my view, it is the Lessor. . . .

19 In that case, the wall on which the Banksy was painted belonged to the landlord as the tenant
20 did not have ownership of the wall as property. However, in this case, the Drywall Pilaster on which
21 the Banksy was painted, which under the Lease was property of the tenant, Ace Museum. Because
22 the Banksy was painted on Ace Museum's property, the court concludes that it has the better right
23 to the windfall based on accession and/or transfer or gift. The Banksy was painted on the property
24 of Ace Museum, and it had the right to remove its property as a Trade Fixture at least and did not
25 violate the Lease in engaging in graffiti removal.

26 The Drywall Pilaster as Integral Part of the Premises

27 The Plan Agent argues that to the extent that the Lease did not address whether Ace Museum
28 as lessee could remove the Banksy, Ace Museum was authorized to remove it pursuant to California
Civil Code § 1019, because the Drywall Pilaster never became an integral part of the Premises. Plan

1 Agent's Proposed Conclusion of Law No. 227. The Plan Agent argues that normal business practice
2 allows lessees to make changes to their own work at leased premises (such as changing the location
3 of an office wall), without needing to obtain permission to do so, the Drywall Pilaster was built at
4 the Premises for the purposes of trade, manufacture, ornament, or domestic use, the Banksy was
5 removed on April 14, 2010, without material injury to the Premises, the Drywall Pilaster was
6 removed in early 2011, without material injury to the Premises, and therefore, the Drywall Pilaster
7 never became an integral part of the Premises, as that term is used in California Civil Code § 1019.
8 Plan Agent's Proposed Conclusion of Law No. 256; Plan Agent's Brief Addressing Issues Raised
9 in January 21, 2022 Scheduling Order, Docket No. 1235 at 5 (internal page citation 4). Accordingly,
10 the Plan Agent argues that to the extent the Lease does not address the question of whether Ace
11 Museum could remove the Banksy, California Civil Code § 1019 provides that Ace Museum could
12 lawfully remove the Banksy. Plan Agent's Proposed Conclusion of Law No. 257.

13 California Civil Code § 1019 provides: "A tenant may remove from the demised premises,
14 any time during the continuance of his term, anything affixed thereto for purposes of trade,
15 manufacture, ornament, or domestic use, if the removal can be effected without injury to the
16 premises, unless the thing has, by the manner in which it is affixed, become an integral part of the
17 premises." As a factual matter, the court would find that the Drywall Pilaster did not become an
18 integral part of the premises because it was installed to support the Robert Irwin light sculpture,
19 which was never installed, and had no function until the Robert Irwin light sculpture was installed
20 and could be easily removed without damage to the surrounding premises. However, as recognized
21 by the California Supreme Court in *Peiser v. Mettler*, since the lease provides for rights and
22 obligations of the parties as to fixtures installed by the tenant, the express lease provisions govern.
23 50 Cal.2d at 609-610 ("The parties' intention, as expressed by their written agreement [as stated in
24 the terms of the lease that all such improvements shall remain on the land and become the absolute
25 property of the lessor] is controlling."). As discussed herein, the express terms of the Lease govern
26 the treatment of Lessee-Owned Alterations, Utility Improvements or Trade Fixtures.

27 Accordingly, the Bankruptcy Court does not adopt the Plan Agent's argument based on
28 California Civil Code § 1019 to find that Ace Museum properly removed the Banksy or the Drywall

1 Pilaster as not becoming an integral part of the premises pursuant to California Civil Code § 1019.

2 Whether Ace Museum Properly Removed the Banksy as a Good Faith Improver

3 The Plan Agent argues that to the extent that the Lease did not address whether Ace Museum
4 as lessee could remove the Banksy, Ace Museum was authorized to remove it pursuant to California
5 Civil Code § 1013.5, because its predecessor, Christmas, acted in good faith believing that he had a
6 right to install the Drywall Pilaster on the Premises and remove it without damage to the Premises.
7 Plan Agent's Proposed Conclusion of Law No. 227; Plan Agent's Brief Addressing Issues Raised
8 in January 21, 2022 Scheduling Order, Docket No. 1235 at 4-5 (internal page citation 3-4).

9 California Civil Code § 1013.5 provides: "When any person, acting in good faith and
10 erroneously believing because of a mistake either of law or fact that he has a right to do so, affixes
11 improvements to the land of another, such person, or his successor in interest, shall have the right
12 to remove such improvements upon payment, as their interests shall appear, to the owner of the land,
13 and any other person having any interest therein who acquired such interest for value after the
14 commencement of the work of improvement and in reliance thereon, of all their damages
15 proximately resulting from the affixing and removal of such improvements."

16 However, as recognized by the California Supreme Court in *Peiser v. Mettler*, since the lease
17 provides for rights and obligations of the parties as to improvements of the premises made by a
18 tenant, the express lease provisions govern. 50 Cal.2d at 609-610 ("The parties' intention, as
19 expressed by their written agreement [as stated in the terms of the lease that all such improvements
20 shall remain on the land and become the absolute property of the lessor] is controlling."). As
21 discussed herein, the express terms of the Lease govern the treatment of Lessee-Owned Alterations,
22 Utility Improvements or Trade Fixtures.

23 Regarding the application of the good faith improver statutes, such as California Civil Code
24 § 1013.5, to a landlord-tenant relationship, Miller and Starr in *California Real Estate* comment:

25 The good-faith improver statutes probably are of no assistance to a tenant. He or she may be
26 mistaken regarding the right to remove an improvement that he or she has affixed to the
27 property, but the statute allowing for removal only provides relief when there is a mistake in
the right to affix the improvement.

28 3 Miller and Starr, *California Real Estate*, § 9.55, citing *inter alia*, California Civil Code § 1013.5

1 (footnotes omitted).

2 Moreover, Miller and Starr on California Real Estate has also commented on the application
3 of the good faith improver statutes to optionees, such as Ace Museum and Christmas, who are treated
4 similar to vendees of real property:

5 When a vendee attaches items of personal property to the real property, on a breach of the
6 contract, either the defaulting vendee or a creditor of the vendee may claim that the items
7 are personalty and removable. The creditor of the vendee or a person who has leased or sold
8 the items to the vendee has no greater rights in the property than the vendee.

8 If the contract of sale expressly provides that all items attached by the vendee are to remain
9 as fixtures and the property of the vendor, the courts will enforce the agreement and prevent
10 removal of the items by the vendee or the vendee's creditor.

10 The parties to an option to purchase real property are akin to the parties to a contract of sale.
11 Therefore, when an optionee attaches personal property to the real estate subject to the
12 option, it is presumed that it was attached with the intent of benefiting the optionee's interest
13 in the property and the fee title received when the option is exercised. If the option is not
14 exercised, the optionee cannot remove the attached items from the real property.

13 3 Miller and Starr, *California Real Estate*, §§ 9:51 and 9.52, *citing inter alia*, California Civil Code
14 § 1013.5; *Teater v. Good Hope Development Corp.*, 14 Cal. 2d 196, 208, 93 P.2d 112 (1939); and
15 *Pomeroy v. Bell*, 118 Cal. 635, 638, 50 P. 683 (1897) (footnotes omitted). Accordingly, the
16 Bankruptcy Court does not adopt the Plan Agent's argument based on California Civil Code §
17 1013.5 to find that Christmas and his entity, Ace Museum, could properly remove the Banksy or the
18 Drywall Pilaster as a good faith but mistaken improvers pursuant to California Civil Code § 1013.5.
19 Ace Museum as lessee and optionee and Christmas as original lessee and optionee knew what rights
20 they had to improve the leased premises, which were set forth expressly in the Lease, and could not
21 have a good faith mistaken belief to permit them to affix and remove the Drywall Pilaster pursuant
22 to the good faith improver statute in California Civil Code §1013.5.

23 Consent by 400 SLB to Removal of the Drywall Pilaster

24 The Plan Agent contends that the Banksy is property of Ace Museum because 400 SLB
25 consented to its removal: (1) by consenting to the Plans which showed the Drywall Pilaster as not
26 existing at the Premises; (2) by stating in the Lease Addendum that it was consenting to removal of
27 interior, nonstructural walls to the extent that removal is consistent with the Plans submitted to 400
28

1 SLB; and (3) by not objecting to removal of the Drywall Pilaster at any time after April 10, 2010.
2 Plan Agent's Proposed Conclusions of Law, Nos. 260-263.

3 The Bankruptcy Court agrees with 400 SLB's objections to the Plan Agent's proposed
4 conclusions of law that its consent to the Plan constituted consent to removal of the Drywall Pilaster
5 or the Banksy, or that the disclosure of Mr. Christmas as lessee regarding certain work that he may
6 perform constituted consent to removal of the Drywall Pilaster or the Banksy or to an agreement
7 that otherwise superseded the terms of the Lease because the Plan Agent has not shown that 400
8 SLB had knowledge of the Banksy or the Drywall Pilaster to consent to their removal before the
9 Plan Agent filed the Application, and therefore, the Bankruptcy Court concludes that the Plan Agent
10 has not shown that 400 SLB consented to Ace Museum's removal of the Drywall Pilaster or the
11 Banksy.

12 Moreover, the Plan Agent's first assertion that 400 SLB consented to removal of the Drywall
13 Pilaster by consenting to the Plans, which had shown the Drywall Pilaster as not existing at the
14 Premises, lacks merit because 400 SLB could not consent to removal of an object by approving
15 Plans that did not show it on the plans. Perhaps the apparent logic of the Plan Agent is that since
16 400 SLB did not know about, or consent to, the Drywall Pilaster, it consented to its removal, but
17 this would be illogical. Consent to the Drywall Pilaster's construction, and consent to its removal
18 are two different matters, and the Plan Agent has failed to show 400 SLB's knowledge of the
19 Drywall Pilaster to infer consent to its removal.

20 The Plan Agent's second assertion that 400 SLB consented to removal of the Drywall
21 Pilaster by stating in the Lease Addendum that it consented to removal of interior, non-structural
22 walls to the extent that removal is consistent with plans submitted to 400 SLB lacks merit because
23 the Lease Addendum merely informed 400 SLB that Ace Museum as lessee intended to construct
24 and remove interior, non-structural walls to accommodate art exhibitions and showings, but did not
25 indicate 400 SLB's consent to such work as it only gave conceptual approval, not actual approval,
26 of such work to have been shown on hand-marked plans and specifications to have been attached as
27 Exhibit B to the Lease, which was never attached or shown to 400 SLB. Therefore, this second
28 consent argument fails because at most, 400 SLB gave conceptual approval of tenant work on plans

1 and specifications which were never made part of the Lease, and there is a failure of proof that 400
2 SLB had approved, or gave consent to, construction or removal of the Drywall Pilaster. The Plan
3 Agent has failed to show 400 SLB consented to removal of the Drywall Pilaster in this manner.

4 Bar of the Four-Year Statute of Limitations for Breach of Contract

5 The Plan Agent contends that the Banksy is property of Ace Museum because 400 SLB
6 barred by the four-year statute of limitations for breach of contract from claiming ownership of the
7 Banksy. Plan Agent's Proposed Conclusion of Law, Nos. 266; see also, California Code of Civil
8 Procedure § 337. The Bankruptcy Court agrees with 400 SLB objection to this proposed conclusion
9 of law that the four year statute of limitations for breach of contract is inapplicable to the dispute
10 between the parties involving declaratory relief or quiet title relief as to ownership of the Banksy
11 and that whether there was a breach of the Lease does not change 400 SLB's rights to claim
12 ownership of the Banksy, including the right to immediate possession of its property under the
13 doctrine of replevin, and therefore, the Bankruptcy Court concludes that the Plan Agent has not
14 shown that 400 SLB is barred by the four year statute of limitations for breach of contract from
15 claiming ownership of the Banksy.

16 Bar of Doctrine of Laches

17 The Plan Agent contends that the Banksy is property of Ace Museum because 400 SLB
18 barred by the doctrine of laches from claiming ownership of the Banksy. Plan Agent's Proposed
19 Conclusions of Law, Nos. 268-273. The Bankruptcy Court agrees with 400 SLB's objection to this
20 contention that the doctrine of laches is inapplicable because the Plan Agent has not shown that 400
21 SLB was aware of the Drywall Pilaster or the Banksy to invoke the doctrine of laches against it.
22 The factual findings indicate that 400 SLB and its manager, Dayan, did not have knowledge of the
23 Drywall Pilaster or its removal, first for the Banksy, and later, for its replacement, as indicated by
24 the factual findings, including those proposed by the Plan Agent. These findings include the Plans,
25 Image Book and the Model provided to 400 SLB for Christmas's Renovation Project of the Premises
26 for Ace Museum did not show the Drywall Pilaster, Mr. Christmas and Ace Museum did not ask 400
27 SLB for consent to construct or remove the Drywall Pilaster, Mr. Christmas and Ace Museum did
28 not ask 400 SLB for consent to remove the Banksy. There is no evidence that Mr. Christmas or Ace

1 Museum informed 400 SLB or its manager, Dayan, of the Drywall Pilaster or the Banksy. Mr.
2 Dayan did not recall ever seeing the Drywall Pilaster at the Premises, and no one at Fortuna, 400
3 SLB's property management company, ever informed Dayan of the construction of the Drywall
4 Pilaster, if it knew. Therefore, the Bankruptcy Court concludes that the Plan Agent has not shown
5 that 400 SLB is barred by the doctrine of laches from claiming ownership of the Banksy based on
6 prior knowledge of the Drywall Pilaster or the Banksy.

7 Lien Priority Dispute as to the Banksy

8 Regarding dispute over ownership of the Banksy, if the Banksy is determined to be property
9 of 400 SLB, the court need not consider the relative priority of the judgment liens of the parties
10 against Ace Museum. However, as recited above, the Banksy is determined to be property of Ace
11 Museum, and the relative priority of the judgment liens held by the parties must be determined as
12 to whether the Plan Agent or 400 SLB has ownership of the Banksy as a judgment creditor.

13 As property of Ace Museum, the judgment debtor, the Plan Agent as the judgment creditor
14 of the judgment entered by the Bankruptcy Court on July 3, 2019 may execute a judgment levy on
15 the property of Ace Museum to collect the judgment, and the execution of which creates a judgment
16 lien. California Code of Civil Procedure § 697.710.

17 On January 27, 2017, the Bankruptcy Court issued a writ of attachment in favor of the Plan
18 Agent against Ace Museum (Docket No. 81). The writ of attachment related to all artworks,
19 inventory and other attachable assets of Ace Museum stored by Ace Museum at the Premises and
20 the Cochran Avenue storage facility. *Id.* According to the Plan Agent, he levied upon the Banksy
21 pursuant to the writ of attachment. Plan Agent's Trial Brief, Docket No. 1179 at 41 (internal page
22 citation 35). Pursuant to California Code of Civil Procedure § 488.500, a levy on property under a
23 writ of attachment creates an attachment lien on the property from the levy. An attachment on
24 equipment or inventory has the same force and effect as a judgment lien on personal property created
25 at the same time would have. California Code of Civil Procedure § 488.500(c). According to the
26 Plan Agent, he has had the Banksy in his possession since 2016 when he took custody of the artwork
27 at the Cochran Avenue storage facility, and the Plan Agent's attachment lien attached to the Banksy
28 in January 2017, which gave him a priority in the Banksy over any interest in it that is asserted by

1 400 SLB or any other party, because his judgment lien relates back to the attachment of the
2 prejudgment attachment lien to the Banksy. Plan Agent's Trial Brief, Docket No. 1179 at 41
3 (internal page citation 35); *see also*, California Code of Civil Procedure § 697.020.

4 400 SLB obtained a money judgment against Ace Museum on September 14, 2017, and
5 recorded its judgment lien on June 5, 2019 by filing a notice of judgment lien for personal property
6 with the California Secretary of State, which attaches to certain personal property of Ace Museum
7 as the judgment debtor. Plan Agent's Trial Brief, Docket No. 1179 at 42 (internal page citation 36),
8 citing, Exhibits A and B to Request for Judicial Notice in Support of 400 SLB Defendants'
9 Opposition to Plan Agent's Motion for Entry of Final Judgment, Docket No. 599, filed on June 11,
10 2019; *see also*, California Code of Civil Procedure § 697.510(a).

11 Where personal property has been levied upon under a writ of attachment, a third party may
12 claim a lien in that property, but only to the extent that the lien is superior to the executing party's
13 lien under California Code of Civil Procedure § 720.210(a). According to the Plan Agent, 400
14 SLB's judgment lien is junior to the Plan Agent's judgment lien pursuant to California Code of Civil
15 Procedure § 488.500(c) relates back to the perfection of his attachment lien on the Banksy in 2017
16 pursuant to California Code of Civil Procedure § 697.020, and because 400 SLB's judgment lien is
17 junior to the Plan Agent's judgment lien, 400 SLB cannot claim an interest in the Banksy. Plan
18 Agent's Trial Brief, Docket No. 1179 at 41 (internal page citation 35).

19 As stated previously, pursuant to California Code of Civil Procedure § 488.500, a levy on
20 property under a writ of attachment creates an attachment lien on the property from the levy. *See*
21 *also*, Ahart, *Rutter Group California Practice Guide: Enforcing Judgments & Debts*, ¶ 4:493.
22 California Code of Civil Procedure § 488.335 provides that unless another method of levy is
23 provided, the levying officer must take into custody the tangible personal property of a defendant
24 judgment debtor in its possession into custody to constitute a levy on such property and create an
25 attachment lien thereon. *See also*, California Code of Civil Procedure § 488.500; Ahart, *Rutter*
26 *Group California Practice Guide: Enforcing Judgments & Debts*, ¶ 4:457. What constitutes
27 "custody" under this statute is that the levying officer takes custody by removing the property to a
28 place of safekeeping (e.g., warehouse), installing a keeper or otherwise obtaining possession or

1 control of the property. California Code of Civil Procedure § 488.090.

2 This method of levy for an attachment is applicable if the tangible personal property was in
3 the possession of Ace Museum, that is, if the Cochran Avenue storage facility where the Banksy
4 was stored and taken by the Plan Agent was its premises. It appears that as suggested by the Plan
5 Agent's proposed finding of fact no. 209, which is disputed by 400 SLB, the Cochran Avenue
6 storage facility was the leased premises of Douglas Christmas or one of his other entities, Ace New
7 York Gallery Corp., and thus, the Banksy at the Cochran Avenue storage facility would have been
8 in the possession of a third person, either Christmas or one of his other entities. In such instance,
9 California Code of Civil Procedure § 488.345 is the governing statute, which provides that unless
10 another method of levy is provided, tangible personal property in a third person's possession or
11 control is levied upon in the same manner as under a writ of execution under California Code of
12 Civil Procedure § 700.040. *See also*, Ahart, *Rutter Group California Practice Guide: Enforcing*
13 *Judgments & Debts*, ¶ 4:481. California Code of Civil Procedure § 700.040 provides that in order
14 to levy upon the judgment debtor's tangible personal property in the possession or control of a third
15 person, the levying officer must personally serve a copy of the writ of execution or attachment and
16 a notice of levy on the third person. *See also*, Ahart, *Rutter Group California Practice Guide:*
17 *Enforcing Judgments & Debts*, ¶ 6:500

18 Commenting on the application of the California statutory law of attachment, the United
19 States District Court for the Central District of California has observed:

20 . . . "Attachment is a harsh remedy because it causes the defendant to lose control of his
21 property before the plaintiff's claim is adjudicated." *Martin v. Aboyan*, 148 Cal.App.3d 826,
22 831, 196 Cal.Rptr. 266 (1983). In California, the procedures and grounds for obtaining
23 orders permitting prejudgment writs of attachment are governed by California Code of Civil
24 Procedure ("C.C.P.") §§ 481.010, *et seq.* *Pos-A-Traction, Inc. v. Kelly-Springfield Tire Co.*,
25 112 F.Supp.2d 1178, 1181 (C.D.Cal.2000). Since California's attachment law is purely
statutory, it must be strictly construed. *Kemp Bros. Constr., Inc. [v. Titan Elec. Co.]*, 146
Cal.App.4th [1474,] at 1476 [(2007)], 53 Cal.Rptr.3d 673; *Pacific Decision Sciences Corp.*
v. Superior Court, 121 Cal.App.4th 1100, 1106, 18 Cal.Rptr.3d 104 (2004).

26 *VFS Financing, Inc. v. CHF Express, LLC*, 620 F.Supp.2d 1092, 1095-1096 (C.D. Cal. 2009), cited
27 in Ahart, *Rutter Group California Practice Guide: Enforcing Judgments & Debts*, ¶ 4:493; *see also*,
28 *Pacific Decision Sciences Corp. v. Superior Court*, 121 Cal.App.4th 1100, 1105-1108 (2004). Thus,

1 the court must strictly construe the application of California statutory law of attachment in
2 determining whether the Plan Agent's attachment lien complies with the statutory requirements.

3 The court has reviewed the Plan Agent's Proposed Findings of Fact and Conclusions of Law,
4 Docket No. 1257, and cannot ascertain whether there is sufficient evidence to make findings of fact
5 and conclusions of law that the Plan Agent obtained an attachment lien by levy upon the Banksy in
6 2017 either in the possession of defendant Ace Museum or a third party, either Douglas Christmas
7 or one of his other entities, before 400 SLB perfected its judgment lien against the personal property
8 of Ace Museum in 2019. The Plan Agent's Proposed Findings of Fact Nos. 208-210 and
9 Conclusions of Law Nos. 274-277 relate to his claim that he holds an attachment lien on the Banksy.

10 The text of the Plan Agent's Proposed Findings of Fact Nos. 208-210 states as follows:

11 208. On May 19, 2016, the Plan Agent learned of the existence of the Banksy, which at that
12 point was being stored at 12695 S. Cochran Avenue in Los Angeles (the "Cochran
Location").

13 209. The Cochran Location was, at the time, being rented by Mr. Christmas through his
14 entity ACE Gallery New York.

15 210. After filing the Application, Plan Agent obtained control of the artworks stored by Mr.
16 Christmas at the Cochran Location, and the Banksy was one of those artworks.

17 In support of Proposed Finding of Fact No. 210, the Plan Agent cites to Docket No. 80 at
18 page 9 of 16, which was the Notice of Entry of the Ex Parte Right to Attach Order and Order for
19 Issuance of the Writ of Attachment and the Temporary Restraining Order Prohibiting Ace Museum,
20 Douglas Christmas, and Any Party Acting on Their Behalf to Move, Sell or Encumber Property
21 Described therein, etc. 400 SLB objected to these proposed findings of fact as lacking evidentiary
22 support. 400 S. La Brea, LLC's Responses and Objections to Plan Agent's Proposed Findings of
23 Fact and Conclusions of Law Regarding the "Banksy" Contested Matter, Docket No. 1262 at 58.

24 The text of the Plan Agent's Proposed Conclusions of Law Nos. 274-277 states as follows:

25 274. A levy on property on a writ of attachment creates an attachment lien on the property
26 from the time of the levy.

27 275. An attachment on equipment or inventory has the same force and effect as a judgment
28 lien on personal property created at the same time would have.

276. On July 3, 2019, the Court entered a judgment in favor or Plan Agent, against Ace

1 Museum.

2 277. Plan Agent possesses a valid senior lien on the Banksy.

3 400 SLB does not dispute Plan Agent's Proposed Conclusions of Law Nos. 274-276, but
4 disputes Proposed Conclusion of Law No. 277 as "Misleading/Contrary to Evidentiary Record" and
5 "Lack of Authority/Support." 400 S. La Brea, LLC's Responses and Objections to Plan Agent's
6 Proposed Findings of Fact and Conclusions of Law Regarding the "Banksy" Contested Matter,
7 Docket No. 1262 at 97.

8 The Plan Agent's Proposed Findings of Fact and Conclusions of Law cited above do not
9 support factual findings that he obtained an attachment lien on the Banksy as personal property of
10 the judgment debtor, Ace Museum, in 2017. The proposed findings of fact do not describe that an
11 attachment levy was made by the levying officer, who was identified in the writ of attachment,
12 Docket No. 81, as the Sheriff or Any Marshal or Constable of the County of Los Angeles and
13 Registered Process Service pursuant to California Code of Civil Procedure § 488.080.

14 The Bankruptcy Court has considered the Plan Agent's factual contentions in his Trial Brief,
15 Docket No. 1179, to ascertain the evidentiary support for the attachment of the Banksy by levy to
16 perfect his attachment lien, which were as follows:

17 On January 25, 2017, Plan Agent filed an Ex Parte Application for a Right To Attach order,
18 against Ace Museum. Subsequently, Plan Agent obtained control of artworks stored by Mr.
19 Christmas at the Cochran Location. Pursuant to that order, Plan Agent obtained possession
20 of certain artworks owned by Ace Museum. The Banksy was one of those artworks. The
21 Plan Agent thus possesses a court-ordered right to attach order along with a prior in time
22 possessory lien. Pursuant to CCP 488.500(a), a levy on property under a writ of attachment
creates an attachment lien on the property from the date of levy. An attachment on
equipment or inventory has the same force and effect as a judgment lien on personal property
created at the same time would have. CCP § 488.500(c).

23 On July 3, 2019, the Court entered a judgment in favor of Plan Agent, against Ace Museum.

24
25 Docket No. 1179 at 16 (internal page citation 10) (footnotes omitted). The evidence cited in support
26 of these assertions were the Ex Parte Application for a Right to Attach order, Docket No. 72, Notice
27 of Entry of the Ex Parte Right to Attach Order and Order for Issuance of the Writ of Attachment
28 and the Temporary Restraining Order Prohibiting Ace Museum, Douglas Christmas, and Any Party

1 Acting on Their Behalf to Move, Sell or Encumber Property Described therein, etc., Docket No 80,
2 Final Judgment against Ace Museum and Order Granting Motion Pursuant to FRCP 54(b) for Entry
3 of Final Judgment against Ace Museum, Docket Nos. 620 and 621. This cited evidence does not
4 support a finding that an attachment lien was created on the Banksy through a levy by the levying
5 officer taking into custody the Banksy as personal property of Ace Museum under California Code
6 of Civil Procedure § 488.335 if the Banksy was in or under Ace Museum's possession by personally
7 serving the writ of attachment and the notice of levy on either Douglas Christmas or his entity under
8 California Code of Civil Procedure § 488.345 in either of them had possession of the Banksy at the
9 Cochran Avenue storage facility.

10 The Bankruptcy Court has taken into consideration the declarations of the Plan Agent in
11 support of the Application regarding his contention that he has an attachment lien on the Banksy.
12 In the Plan Agent's original declaration in support of the Application, Docket No. 713, he stated:

13 3. After issuance of the Writ of Attachment, I went to the Museum premises and removed
14 for safe keeping the artworks listed on Exhibit B. I confirmed from the Museum records
15 available to me in the Art and Architecture premises that these works were donated to the
16 Museum by the R. Michael and Susan Rich, collectors with whom Douglas Christmas had a
relationship. Proof of that donation is attached as Exhibit F. Therefore, these are artworks
owed solely by Museum and no one else had a claim of ownership to them.

17 4. In a second seizure after issuance of the Attachment Order, I was able to obtain control
18 of artworks stored by Christmas at the facility on 12695 S. Cochran Avenue, Los Angeles,
19 CA. One of the artworks retrieved from that location was a work that had been painted
20 initially on a portion of the Museum's exterior wall that had been "prepared" for that purpose
21 by Douglas Christmas. A copy of the photograph of the painting is attached hereto as Exhibit
22 C. The painting "appeared" in or around April 2010, according to news reports at the time.
23 A number of factors lead Christmas and others to believe that the painting had been done by
24 the graffiti artist Banksy (for these purposes, the painting will be referred to as the "Banksy,"
25 although that artist, as is his custom, has refused to acknowledge it is work done by him.) I
26 believe the Banksy is an original work that can be marketed, without any authentication by
the artist, whoever that may be. After the painting was on the Museum wall for a few days,
the plywood frame and surface it was painted on were removed from the wall by Christmas
and the exterior wall was subsequently repaired. When I inventoried the artworks in the
Cochran storage facility, I found the Banksy. I am of the opinion this work, having been
painted on the wall of the premises leased by the Museum and then taken into Christmas's
control, is property of the Museum.

27 5. I wish to offer the Exhibit B artworks and the Banksy for sale, with the proceeds used to
28 partially satisfy Art and Architecture's judgment against Museum. I intend to follow the
procedures for collection of a judgment set forth in the California Code.

1 Docket No. 713 at 14-15. The court notes that the Plan Agent’s statements made in this declaration
2 about a “second seizure” in which he obtained physical custody of the Banksy, he did not state
3 whether this “seizure” was accomplished through a levy through the taking of physical custody of
4 the Banksy by the levying officer in accordance with California Code of Civil Procedure § 488.335
5 and the date of “seizure” to establish a lien priority date for an attachment lien.
6

7 The Plan Agent’s statements in his declaration are consistent with the language of the
8 temporary restraining order issued by the court on January 25, 2017 (Docket No. 77), which stated
9 in pertinent part:

10 4. From the date and time of entry of this order through February 1, 2017, the Plan Agent
11 is hereby authorized to take possession of the Storage Location and secure the building and
12 its contents, including but not limited to, changing locks, paying utilities, paying rent,
13 moving contents property of the Post-Confirmation Bankruptcy Estate of Art and
14 Architecture Books of the 21st Century to a more secure location, and other reasonable
15 actions to protect and preserve the building and its contents; . . .

16 This language providing for authorization of the Plan Agent to take possession of the Cochran
17 Avenue Storage Facility was proposed by the Plan Agent in his ex parte application for temporary
18 restraining order and writ of attachment (Docket No. 72),⁹

19 In the Plan Agent’s reply to the opposition of 400 SLB to the Application, he asserted as
20 follows:

21 As to the Banksy, whether or not 400 S. La Brea has a perfected judgment lien on this
22 personal property is irrelevant as its lien is junior in priority to the prior attachment lien held
23 by the Plan Agent. Any question of competing liens in the same property is not a real
24 question or controversy to be resolved in the context of this Application. (It is obvious that
25 the Plan Agent has a superior lien interest in the Banksy to the interest asserted in it by 400
26 S. La Brea. Attached hereto as Exhibit A is a true and correct copy of the Plan Agent’s Writ
27 of Attachment; this was attached as Exhibit A to the original Application with this Court.).

28 ⁹ This language is to effectuate a consensual turnover of the property to be attached. However,
while the court may issue orders in aid of attachment, such as a turnover order, this language is not
compliant with California Code of Civil Procedure § 488.080(a)(1) to effectuate an attachment
levy to perfect an attachment lien. As noted by the Rutter Group California Practice Guide on
Enforcing Judgments & Levies, “Once a W/A [writ of attachment] issues, the court may order
defendant to transfer to the levying officer property the officer must take into custody to perfect
the [attachment] lien (¶ 4:453). [CCP § 482.080(a)(1)].” Ahart, *Rutter Group California Practice
Guide: Enforcing Judgments & Debts*, ¶ 4:430.

1 Docket No. 721 at 3. In the Plan Agent's declaration in his reply to 400 SLB's opposition
2 to the Application, he stated as follows:

3 10. As this Reply states, the Banksy was removed long before 400 S. La Brea obtained its
4 judgment against Ace Museum, long after I obtained a Writ of Attachment against this
5 artwork and long before 400 S. La Brea recorded its Judgment Lien Personal Property under
6 California law.

6 Docket No. 721 at 14.

7 Based on the court's review of the Plan Agent's assertions that he has an attachment lien on
8 the Banksy perfected by levy in 2017 and the evidence offered by the Plan Agent in support thereof,
9 the court determines that the Plan Agent has not shown that he has any attachment lien based on a
10 levy by the levying officer specified in the writ of attachment issued by the court in January 2017.
11 It appears that based on the Plan Agent's statements in his declarations in support of the Application
12 is that after the court issued the writ of attachment, he obtained possession of the Banksy from
13 Christmas who apparently allowed the Plan Agent to retrieve the Banksy from the Cochran Avenue
14 storage facility pursuant to the temporary restraining order. While arguably, this is the functional
15 equivalent of a levy because the judgment creditor obtains possession of personal property of the
16 judgment debtor, it has not been shown to be the legal equivalent of a levy of personal property by
17 the levying officer pursuant to the California statutes governing creation of an attachment lien on
18 personal property of a judgment debtor, such as the Banksy owned by Ace Museum. It is certainly
19 understandable that the Plan Agent sought to obtain immediate possession of the Ace Museum's
20 artwork expeditiously at the time, but the steps prescribed by the statute for executing a levy upon
21 a writ of attachment on Ace Museum's personal property to perfect an attachment lien under
22 California Code of Civil Procedure § 488.335 or § 488.345 were not followed.¹⁰ Expedience does

24 ¹⁰ Alternatively, personal service of the temporary protective order obtained by the Plan Agent on
25 the defendant Ace Museum would have created a lien on all attachable California property
26 described in the temporary protective order and actually owned by defendant at the time of service
27 pursuant to California Code of Civil Procedure § 486.110(a), but there is no evidence of personal
28 service of the temporary protective order on Ace Museum. The proof of service of the notice of
entry of the temporary protective order only shows email service, regular mail service and
electronic mail service of the temporary protective order on counsel for Ace Museum, and there is
no indication of personal service on defendant Ace Museum itself.

1 not equate to compliance with applicable law because the court must strictly construe the California
2 attachment statutes and cannot determine that the Plan Agent had a perfected attachment lien against
3 Ace Museum by levy on the Banksy in January 2017 which would prime the 400 SLB's judgment
4 lien on Ace Museum's personal property in 2019. "The Attachment Law statutes are subject to
5 strict construction, and where a court is required to exercise its jurisdiction in a particular manner
6 or subject to certain limitations, an act beyond those limits is in excess of its jurisdiction and void."
7 *Pacific Decision Sciences Corp. v. Superior Court*, 121 Cal.App.4th at 1106, *citing and quoting*,
8 *Epstein v. Abrams*, 57 Cal.App.4th 1159, 1168 (1997). Absent evidence that the Plan Agent
9 perfected an attachment lien against Ace Museum for his judgment lien to attach to the Banksy
10 before 400 SLB perfected its judgment lien, the court must determine that the judgment lien of SLB
11 attaches to the Banksy ahead of any lien claim of the Plan Agent.¹¹

12 IV. FINAL CONCLUSIONS

13 Based on the foregoing, the bankruptcy court determines that (1) the Banksy is property of
14 Ace Museum and (2) the judgment lien of 400 SLB attached first to the Banksy as property of Ace
15 Museum as the Plan Agent has not shown that his judgment lien was perfected before 400 SLB.
16 Accordingly, the Bankruptcy Court recommends that the United States District Court enter
17 judgment for declaratory relief in favor of 400 SLB that its judgment lien against Ace Museum
18 attaches to the Banksy ahead of any lien claim of the Plan Agent and denying the Plan Agent's
19 Application for levy and sale as to the Banksy and that a final judgment be entered regarding the
20 priority of liens on the Banksy pursuant to Federal Rule of Civil Procedure 54(b) made applicable
21 to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7054 as the contested matter
22 regarding the competing claims to ownership of the Banksy are separate and independent of the

23
24 ¹¹ Because in the view of the undersigned, the outcome of this contested matter may be resolved
25 on lien priority alone, the undersigned is considering submitting the matter to the district judge on
26 that issue alone without having to adjudicate the issue of ownership of the Banksy as between Ace
27 Museum and 400 SLB, which would simplify the further proceedings before the district court
28 because the lien priority issue is clear-cut in the view of the undersigned. That is, the undersigned
would submit the matter to the district judge based on the assumption that the Banksy was owned
by Ace Museum, not 400 SLB. In their objections to these proposed findings of fact and
conclusions of law and responses thereto, the parties should address this possibility.

1 other claims in this adversary proceeding.

2 **V. FURTHER PROCEDURAL CONSIDERATIONS**

3 Pursuant to Federal Rule of Bankruptcy Procedure 9033(b), within 14 days after being
4 served with a copy of the bankruptcy court's proposed findings of fact and conclusions of law, a
5 party may serve and file with the clerk of the court written objections which identify the specific
6 findings or conclusions objected to and state the grounds for each objection. A party may respond
7 to another party's objections within 14 days after being served with a copy thereof. A party
8 objecting to the bankruptcy judge's proposed findings or conclusions shall arrange promptly for the
9 transcription of the record, or such portions of it as all parties may agree upon or the bankruptcy
10 judge deems sufficient, unless the district judge otherwise directs.

11 The bankruptcy judge will review the objections and responses thereto to these proposed
12 findings of fact and conclusions of law, and may amend the proposed findings of fact and
13 conclusions of law and submit them to the United States District Court, or may submit the original
14 proposed findings of fact and conclusions of law to the United States District Court. In this regard,
15 the bankruptcy court will apply the procedures of Local Civil Rule L.R. 72-3 of the United States
16 District Court for the Central District of California applicable to reports and recommendations of
17 the United States Magistrate Judges to its proposed findings of fact and conclusions of law issued
18 pursuant to Federal Rule of Bankruptcy Procedure 9033.

19 IT IS SO ORDERED.

20 ###

21
22
23
24 Date: December 7, 2022



25 Robert Kwan
United States Bankruptcy Judge