

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re HAWKEYE
ENTERTAINMENT, LLC,
Debtor.

Case Nos. 2:20-cv-10656-FLA;
1:19-bk-12102-MT

**ORDER AFFIRMING
BANKRUPTCY COURT ORDER
GRANTING DEBTOR’S MOTION
TO ASSUME LEASE AND
SUBLEASE**

SMART CAPITAL INVESTMENTS I,
LLC, *et al.*,

Appellants,

v.

HAWKEYE ENTERTAINMENT, LLC,

Appellee.

1 **RULING**

2 Before the court is Smart Capital Investments I, LLC, Smart Capital
3 Investments II, LLC, Smart Capital Investments III, LLC, Smart Capital Investments
4 IV, LLC, and Smart Capital Investments V, LLC’s (collectively, “Smart Capital” or
5 “Appellant”) appeal of the order of the United States Bankruptcy Court, Central
6 District of California entered October 27, 2020 (“Order”) finding Debtor Hawkeye
7 Entertainment LLC (“Hawkeye” or “Appellee”) did not default under its lease
8 agreement with Smart Capital, dated July 17, 2009 (“Lease”), for purposes of 11
9 U.S.C. § 365(b)(1) (“§ 365”). For the reasons set forth below, the Bankruptcy Court’s
10 Order is AFFIRMED.

11 **BACKGROUND**

12 Smart Capital leases to Hawkeye the first four floors and a portion of the
13 basement of a building located in Los Angeles, California (the “Property”). Dkt. 15 at
14 9.¹ Hawkeye uses the leased space (the “Premises”) primarily to operate a dance club
15 and event venue. *Id.* In August 2019, Smart Capital served Hawkeye a notice of
16 default, identifying numerous breaches of the Lease, and later served Hawkeye a
17 three-day notice to quit. *Id.* Hawkeye commenced the underlying bankruptcy case on
18 August 21, 2019, before the Lease terminated. *Id.*

19 On October 10, 2019, Hawkeye filed a motion before the Bankruptcy Court to
20 assume the Lease (“Lease Assumption Motion”). *Id.* at 10. Smart Capital opposed
21 the Lease Assumption Motion, asserting Hawkeye had breached the Lease, that
22 Hawkeye had caused damages that had not been cured, and that Hawkeye had not
23 shown adequate assurance of future performance. *Id.*

24 The Bankruptcy Court held an evidentiary hearing on the Lease Assumption
25 Motion over four days from October 13 to October 16, 2020 (the “Hearing”). *Id.* At
26

27 ¹ Citations to page numbers of docket entries are to the page numbers assigned by the
28 court’s CM/ECF header.

1 the conclusion of the Hearing, the Bankruptcy Court granted the Lease Assumption
2 Motion and entered the Order on the Lease Assumption Motion (“Order”). *Id.*; Dkt.
3 16 at 5. In the Order, the Bankruptcy Court stated that Hawkeye was not required to
4 make a showing of cure or adequate assurance of future performance because Smart
5 Capital “did not satisfy its burden under 11 U.S.C. § 365 of demonstrating a material
6 default under the Lease....” Dkt. 16 at 16. Smart Capital timely filed a notice of
7 appeal of the Order on November 10, 2020.

8 STANDARD OF REVIEW

9 When acting in its appellate capacity under 28 U.S.C. § 158(c)(1), the District
10 Court reviews legal conclusions de novo and factual conclusions for clear error. *In re*
11 *Olshan*, 356 F.3d 1078, 1083 (9th Cir. 2004). De novo review requires this court to
12 “consider a matter anew, as if it has not been heard before, and as if no decision had
13 been rendered previously.” *In re Smith*, 435 B.R. 637, 643 (B.A.P. 9th Cir. 2010).
14 Clear error review, however, is “highly deferential” and reversal is only proper if the
15 court has “a definite and firm conviction that a mistake has been committed....” *In re*
16 *Sussex*, 781 F.3d 1065, 1071 (9th Cir. 2015).

17 Mixed questions of law and fact are those which require the court to apply an
18 established set of facts to an undisputed rule of law. *U.S. Bank Ass’n ex rel.*
19 *CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966
20 (2018). “[T]he standard of review for a mixed question all depends—on whether
21 answering it entails primarily legal or factual work.” *Id.* at 967. When the question
22 involves primarily legal principles, the court should review the lower decision de
23 novo. *See id.* When the question involves primarily factual issues “compelling [the
24 court] to marshal and weigh evidence,” the court must review for clear error. *See id.*

25 DISCUSSION

26 With exceptions not relevant here, a debtor in possession enjoys the rights,
27 power, and duties of a trustee. 11 U.S.C. § 1107. Accordingly, a debtor in possession
28 may, subject to the court’s approval, “assume or reject any executory contract or

1 unexpired lease of the debtor.” *Id.* § 365(a). Under 11 U.S.C. § 365(b)(1), if a
2 “default” has occurred on the executory contract or unexpired lease, then the debtor in
3 possession must provide certain cures and assurances before it may assume the
4 contract or lease:

5 (b)(1) If there has been a default in an executory contract or unexpired
6 lease of the debtor, the trustee may not assume such contract or lease
7 unless, at the time of assumption of such contract or lease, the
trustee—

8 (A) cures, or provides adequate assurance that the trustee will
9 promptly cure, such default other than a default that is a breach of
10 a provision relating to the satisfaction of any provision (other
11 than a penalty rate or penalty provision) relating to a default
12 arising from any failure to perform nonmonetary obligations
13 under an unexpired lease of real property, if it is impossible for
14 the trustee to cure such default by performing nonmonetary acts
15 at and after the time of assumption, except that if such default
16 arises from a failure to operate in accordance with a
17 nonresidential real property lease, then such default shall be
cured by performance at and after the time of assumption in
accordance with such lease, and pecuniary losses resulting from
such default shall be compensated in accordance with the
provisions of this paragraph;

18 (B) compensates, or provides adequate assurance that the trustee
19 will promptly compensate, a party other than the debtor to such
20 contract or lease, for any actual pecuniary loss to such party
resulting from such default; and

21 (C) provides adequate assurance of future performance under
22 such contract or lease.

23 11 U.S.C. § 365(b)(1)(A)-(C).

24 “In a proceeding under § 365, the party moving to assume a lease has the
25 ultimate burden of persuasion that the lease is one subject to assumption and that all
26 requirements for assumption have been met.” *In re Rachels Indus., Inc.*, 109 B.R.
27 797, 802 (Bankr. W.D. Tenn. 1990) (citations omitted). The opposing party, however,
28 “has the initial burden of showing defaults and that those defaults have been properly
noticed to the lessee.” *Id.* “If defaults are established by the proof, then the burden

1 shifts back to the debtor to provide satisfactory proof that the defaults have either been
2 cured or will be promptly cured and that there would be adequate assurance of future
3 performance.” *Id.* If, however, “the proof does not establish any default in an
4 executory contract or unexpired lease, the elements of § 365(b)(1) are not required to
5 be proven by the debtor.” *Id.*

6 The Ninth Circuit has explained the purpose of § 365 as follows:

7 [T]he purpose behind § 365 is to balance the state law contract right of
8 the creditor to receive the benefit of his bargain with the federal law
9 equitable right of the debtor to have an opportunity to reorganize. [*In*
10 *re Circle K Corp.*, 190 B.R. 370, 376 (B.A.P. 9th Cir. 1995)]; *see also*
11 *City of San Francisco Market Corp. v. Walsh*, (*In re Moreggia & Sons,*
12 *Inc.*), 852 F.2d 1179, 1185 (9th Cir. 1988). Section 365, in conjunction
13 with the automatic stay provision of section 362, accordingly suspends,
14 once the bankruptcy petition is filed, the termination of a lease that is in
15 default; it extends a debtor lessee’s opportunity to cure any defaults
16 until the debtor has the chance to decide whether to assume the lease.
17 *See* 11 U.S.C. §§ 362, 365 (1994); *Post v. Sigel & Co.*, (*In re Sigel &*
18 *Co.*), 923 F.2d 142, 144–45 (9th Cir. 1991). The lessor will then get the
19 benefit of its bargain upon assumption, when the debtor lessee must
20 cure the defaults. *See* 11 U.S.C. § 365(b)(1).

21 *In re Circle K Corp.*, 127 F.3d 904, 909 (9th Cir. 1997).

22 Smart Capital advanced several theories of default at the Hearing, including the
23 following it continues to pursue on appeal: (1) Hawkeye’s failure to pay timely rent in
24 April 2020; (2) Hawkeye’s failure to sign an estoppel certificate; (3) Hawkeye’s entry
25 into a contract with Fearless LA, a religious group, for use of the premises; (4)
26 Hawkeye’s failure to hold insurance policies of certain minimums provided in the
27 Lease; and (5) Hawkeye’s sale of alcohol on the ground floor of the space in violation
28 of the Lease. Dkt. 15 at 17-28.

According to Smart Capital, these constitute “defaults” for the purposes of
§ 365(b)(1). Noting that “default” is not defined under the Bankruptcy Code, Smart
Capital argues the plain meaning of the term implies any breach of a lease
agreement—whether material or not—is sufficient to trigger Hawkeye’s burden under

1 § 365(b)(1)(A)-(C) to show the lease is subject to assumption and that all
2 requirements for assumption have been met. Dkt. 15 at 21 (citing *In re Metromedia*
3 *Fiber Network, Inc.*, 335 B.R. 41 (Bankr. S.D.N.Y. 2005)). Hawkeye disagrees and
4 argues the existence and nature of a default under an unexpired lease is determined
5 pursuant to state law of material breach. Dkt. 17 at 26. Under that standard, Hawkeye
6 contends, the late payment and other alleged breaches were not material and, thus, not
7 defaults under § 365. *Id.* at 26-27. For the reasons stated below, the court agrees with
8 Hawkeye and affirms the Bankruptcy Court’s legal conclusion that, to constitute a
9 default under § 365, a breach of an unexpired lease agreement must be sufficiently
10 material to warrant the lease’s termination under state law.

11 Courts have recognized that state law is to be applied in the interpretation of
12 undefined terms in § 365. The Ninth Circuit, for example, has held the term
13 “executory contract” under § 365 must be construed with respect to state contract law.
14 *In re Cochise Coll. Park, Inc.*, 703 F.2d 1339, 1348 n.4 (9th Cir. 1983) (“Although
15 whether a given contract is ‘executory’ under the Bankruptcy Act is an issue of federal
16 law ... the question of the legal consequences of one party’s failure to perform its
17 remaining obligations under a contract is an issue of state contract law.”). The Second
18 Circuit, moreover, has construed another undefined term under § 365, “unexpired,”
19 with respect to whether a tenant had the power to revive the lease under applicable
20 state law. *Super Nova 300 LLC v. Gazes*, 693 F.3d 138, 142 (2d Cir. 2012);
21 *Brattleboro Hous. Auth. v. Stoltz (In re Stoltz)*, 197 F.3d 625, 629 (2d Cir. 1999)
22 (“[B]ecause property interests are created and defined by state law, federal courts have
23 looked to state law to determine a debtor’s interests, including leasehold interests, in
24 the bankruptcy estate.”). Thus, in the absence of any authority by Smart Capital that
25 the court is precluded from looking to state law here, the court will look to California
26 law to construe the term “default.”

27 Although any breach of an agreement gives a right to damages, *see Borgonovo*
28 *v. Henderson*, 182 Cal. App. 2d 220, 231 (1960), only a breach that is material gives a

1 right to termination. *See Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal.
2 App. 3d 1032, 1052 (1987). This holds true in the landlord-tenant context. *See NIVO*
3 *I LLC v. Antunez*, 217 Cal. App. 4th Supp. 1, 5 (2013) (“Whether a particular breach
4 will give a plaintiff landlord the right to declare a forfeiture is based on whether the
5 breach is material.”). Accordingly, whether a particular breach would afford Smart
6 Capital the right to declare a forfeiture—and, hence, establish a default under § 365—
7 is based on whether Hawkeye’s alleged breach is material. “Whether a breach is so
8 material as to constitute cause for the injured party to terminate a contract is ordinarily
9 a question for the trier of fact.” *NIVO I LLC*, 217 Cal. App. 4th Supp. at 4. Thus, this
10 court reviews for clear error the Bankruptcy Court’s factual findings as to whether
11 alleged breaches occurred and, if so, whether they were material. *See In re Olshan*,
12 356 F.3d at 1083.

13 **I. April 2020 Rent Payment**

14 Smart Capital’s chief argument on appeal concerns Hawkeye’s failure to pay
15 timely rent in April 2020. Dkt. 15 at 17-19. According to Smart Capital, Hawkeye
16 defaulted under the Lease when it failed to pay the required minimum rent by April 1,
17 2020. Dkt. 15 at 17-25. It is undisputed Hawkeye made the rent payment on April 29
18 or 30, 2020. *Id.* at 14; Dkt. 17 at 38 & n.5. The Bankruptcy Court concluded the late
19 payment was not a default. Dkt. 16 at 170-72.

20 The Bankruptcy Court did not clearly err in finding, as a factual matter, that the
21 late April 2020 rent payment was not a material breach of the Lease agreement. The
22 Bankruptcy Court found persuasive that there was uncertainty regarding Hawkeye’s
23 liability for the April 2020 rent payment, in light of a then-recently issued local
24 moratorium on certain rent payments in the early stages of the COVID-19 pandemic.
25 *Id.* The Bankruptcy Court noted that Hawkeye filed a motion to determine its liability
26 for the rent payment and that, although that motion was denied, Hawkeye made the
27 rent payment less than one month after the due date, including a late fee pursuant to
28 the Lease. *Id.* Based on the evidence before the Bankruptcy Court, this court does not

1 have “a definite and firm conviction that a mistake has been committed” and will not
2 reverse the Order on this basis. *See In re Sussex*, 781 F.3d at 1071; *see also EDC*
3 *Associates, Ltd. v. Gutierrez*, 153 Cal. App. 3d 167, 170 (1984) (“It is a general rule
4 that the right of a lessor to declare a forfeiture of the lease arising from some breach
5 by the lessee is waived when the lessor, with knowledge of the breach, accepts the
6 rent specified in the lease.”).

7 **II. Subletting for Religious Services**

8 Smart Capital next argues the Bankruptcy Court erred in finding Hawkeye’s
9 subletting of the premises to Fearless LA, a religious group, was not a breach of the
10 Lease. Dkt. 15 at 27-31. The Lease provided a “Use of Premises” provision as
11 follows:

12 1.17 Use of Premises: The Premises shall be used solely for the
13 operation of a nightclub, restaurant, entertainment venue and related
14 lawful businesses along with the storage use (collectively, the
15 “Permitted Use”). The Premises may not be used for any other purpose
without the Landlord’s prior written consent. (Article 9).

16 Dkt. 16 at 22. According to Smart Capital, Hawkeye breached the Use of Premises
17 provision by subletting the space to Fearless LA for religious worship. Dkt. 15 at 27-
18 31.

19 The evidence before the Bankruptcy Court showed Fearless LA performed
20 religious worship with rock-and-roll music, large stereo equipment, and dancing. Dkt.
21 16 at 173. The Bankruptcy Court concluded the evidence showed Fearless LA was
22 “not your typical church” and did not host “quiet, private church ceremony[ies].” *Id.*
23 Rather, Fearless LA “had piles of really large stereo boxes” “for blaring music.” *Id.*
24 The Bankruptcy Court noted the premises were “a large downtown dance venue” and,
25 thus, the premises were “appropriate for a church that uses large stereo equipment ...”
26 *Id.* Furthermore, the Bankruptcy Court noted that “the premises ha[d] included the
27 Fearless L.A. Church for many years” and that there was no evidence of any
28 complaint by the landlord or that the use by Fearless was ever discussed before the

1 notice of default as a violation of the Lease. *Id.* at 174. Based on the use of the
2 parties over the years and the terms of the Lease, the Bankruptcy Court held that “the
3 Fearless L.A. Church comes within the, quote, ‘entertainment venue and related
4 business use’ contemplated by the lease, and was not a default.” *Id.*

5 On these facts, the Bankruptcy Court did not clearly err in finding Hawkeye did
6 not breach the Lease agreement, which required the Premises to be used as an
7 “entertainment venue.” *Id.* The court, therefore, will not reverse the Order on this
8 basis.

9 **III. Failure to Sign an Estoppel Certificate**

10 Smart Capital also argues the Bankruptcy Court erred in finding Hawkeye’s
11 failure to sign an estoppel certificate did not constitute a breach of the Lease. Dkt. 15
12 at 25-27. “An ‘estoppel certificate’ ... is a signed certification of various matters with
13 respect to a lease. [It] binds the signatory to the statements made and estops that party
14 from claiming to the contrary at a later time.” *Plaza Freeway v. First Mountain Bank*,
15 81 Cal. App. 4th 616, 626 (2000) (citations omitted).

16 The Lease provided as follows with respect to estoppel certificates:

17 18.3. Estoppel Certificates. From time to time (but not more than twice
18 in any calendar year), each party shall execute and deliver to the other
19 (or to any third party specified by the requesting party), a written
20 statement certifying the following information: (i) this Lease is in full
21 force and effect and has not been amended, except for any amendments
22 specifically stated, (ii) the expiration date of the Term of this Lease,
23 subject to Tenant’s right to extend the Term under Section 3.2, (iii) a
24 statement that there are not, to such party’s actual knowledge, uncured
25 defaults on the part of the requesting party, or specifying such defaults
26 if any are claimed, (iv) a statement that, to such party’s actual
27 knowledge, such party has no claims or offsets against the requesting
28 party, or specifying such claims or offsets if any are claimed, and (v)
the then current monthly Minimum Rent payable under this Lease and
the date through which such monthly Minimum rent has been paid.
Each party shall deliver such estoppel statement within thirty (30) days
of a written request from the other party. Any such estoppel statement

1 may be relied on by any prospective purchaser, lender, assignee or
2 subtenant of the Premises.

3 Dkt. 16 at 44.

4 The Bankruptcy Court found the following facts. Smart Capital requested
5 Hawkeye sign an estoppel certificate on May 7, 2019. *Id.* at 222. Believing the
6 estoppel certificate would misrepresent information,² Hawkeye did not sign the
7 estoppel certificate and, within the 30-day time period required under the Lease, sent
8 an edited copy to Smart Capital with language Hawkeye believed to represent
9 accurately its compliance with the Lease. *Id.* at 223, 225. In the meantime, Michael
10 Chang, on behalf of Smart Capital, executed an estoppel certificate on June 6, 2019,
11 attesting that “Lessor has no knowledge of any uncured default by lessor or lessee
12 under the lease.” Dkt. 16 at 170; *see also id.* at 207. In early August 2019, Smart
13 Capital sent Hawkeye a Notice of Default, stating Hawkeye “failed to provide a
14 signed estoppel certificate that complies with the requirements of the lease.” *Id.* at
15 223.

16 The Bankruptcy Court held the Lease did not require Hawkeye to sign an
17 estoppel certificate if Hawkeye believed the certificate misrepresented information.
18 *Id.* at 225. As the Bankruptcy Court explained:

19 The paragraph just does not contemplate blindly signing any
20 document any bank would provide, regardless of accuracy. The
21 Debtor was not willing to certify certain information on the two
22 certificates that were provided, but it was willing to provide an edited
23 version. ...

24 The bottom line is, under 18.1 and 18.3, I find that the Debtor was not
25 under any obligation to sign the estoppel certificate that it believed
26 misrepresented information. [¶] In other words, the lease does not
27 require the Debtor to rubberstamp anything that is presented to it, and
28 it would be against public policy to compel any party to sign an
estoppel certificate if it misrepresents facts, or to sign a document that

² The record is not clear as to the exact misrepresentations Hawkeye believed it would make if it had signed the unedited estoppel certificate.

1 would effectively waive known claims. That kind of position is just
2 begging for bank fraud to be committed, and I think it's against public
policy.

3 Dkt. 16 at 224, 225. Accordingly, the Bankruptcy Court held Hawkeye's failure to
4 sign the estoppel certificate was not a breach of the Lease and, thus, not a default
5 under § 365. *Id.* at 225-26.

6 Although Smart Capital argues the Bankruptcy Court "erred as a matter of law,"
7 Dkt. 15 at 27, Smart Capital cites no authority in support of this conclusion. Smart
8 Capital relies principally on the contractual language of the estoppel certificate
9 provision, which provides that a party "shall," upon request from the requesting party,
10 respond with a signed estoppel certificate within 30 days. Dkt. 15 at 27. As the
11 Bankruptcy Court explained, however, while the Lease may require a signed estoppel
12 certificate, the Lease would be against public policy if it required a party to attest
13 falsely to factual statements. Dkt. 16 at 224, 225. Smart Capital cites no case or other
14 authority showing the Bankruptcy Court "erred as a matter of law" in so holding. The
15 court, therefore, will not reverse the Bankruptcy Court on this ground.

16 **IV. Failure to Comply with Conditional Use Beverage Permit**

17 Smart Capital next argues Hawkeye failed to comply with the conditional use
18 beverage ("CUB") of the Lease. Dkt. 15 at 32-34. Article 9.5 of the Lease provides
19 that Hawkeye must "comply with any and all present and future governmental laws,
20 ordinances, rules, regulations and orders applicable to the Premises and Tenant's use
21 and occupancy thereof for the Permitted Use" Dkt. 16 at 30. Accordingly,
22 Hawkeye was bound by Condition No. 2 of the CUB, as incorporated through the City
23 of Los Angeles' permit approval dated February 25, 2013, which stated: "[t]he use
24 and development of the property shall be in substantial conformance with the plot plan
25 submitted with the application and marked Exhibit 'A', except as may be revised as a
26 result of this action." Dkt. 16 at 235. According to Smart Capital, Exhibit A included
27 a plot plan that did not identify the first floor as a space where alcohol was permitted
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1 to be served, but, nevertheless, Hawkeye served alcohol on the first floor. Dkt. 15 at
2 33; Dkt. 16 at 257-261.

3 While the Bankruptcy Court found there was “no dispute that alcohol was
4 served on the first floor in 2019,” the Bankruptcy Court ultimately concluded Smart
5 Capital had not met its burden to establish, by a preponderance of the evidence, that
6 such alcohol service constituted a breach of the CUB and, by extension, the Lease.
7 Dkt. 16 at 183-84. The Bankruptcy Court found credible Adi McAbian’s
8 (“McAbian”) testimony on behalf of Hawkeye that, on each occasion when alcohol
9 was served on the first floor, Hawkeye had secured a daily permit for such service. *Id.*
10 at 184.

11 Smart Capital argues the Bankruptcy Court clearly erred because it relied solely
12 on McAbian’s testimony that such permits were secured and “placed the onus on
13 Smart Capital to prove the non-existence of a document (in this case, a temporary
14 permit for the sale of alcohol on the first floor of the Premises)” Dkt. 15 at 33.
15 The court disagrees and finds the Bankruptcy Court did not clearly err. The
16 Bankruptcy Court noted Smart Capital bore the burden to establish that the alcohol
17 service was in violation of the lease and found, in light of counterevidence from
18 McAbian, Smart Capital did not meet its burden. Dkt. 16 at 183-84. The court will
19 not reverse the Bankruptcy Court on this basis.

20 **V. Failure to Comply with Insurance Provisions**

21 Smart Capital lastly argues Hawkeye failed to comply with the Insurance
22 requirements of the Lease. Dkt. 15 at 31-32. Pursuant to Article 17 of the Lease, as
23 amended, Hawkeye was required to carry “[n]ot less than Seven Million Dollars
24 (\$7,000,000.00) in single limit coverage per occurrence with an annual aggregate of
25 not less than Eight Million Dollars (\$8,000,000.00) for bodily injury, personal injury,
26 death and property damage liability with liquor liability and assault and battery
27 coverage endorsements.” Dkt. 16 at 62. Before the Bankruptcy Court, Smart Capital
28 attempted to show Hawkeye was in breach of the Lease by carrying insurance

1 minimums less than the \$7 million coverage required. *Id.* at 185-87. According to
2 Smart Capital, the Bankruptcy Court improperly shifted the burden to Smart Capital
3 “to prove that such insurance did *not* exist.” Dkt. 15 at 31.

4 The court disagrees the Bankruptcy Court improperly shifted a burden to Smart
5 Capital. As explained above, and as the Bankruptcy Court explained in its ruling,
6 Smart Capital bore the initial burden to establish Hawkeye defaulted under the Lease.
7 *In re Rachels*, 109 B.R. at 802; Dkt. 16 at 16. As relevant here, therefore, Smart
8 Capital bore the burden to establish Hawkeye did not carry the insurance minimums
9 required under the Lease.

10 The Bankruptcy Court did not clearly err in finding Smart Capital did not meet
11 its burden to show, by a preponderance of the evidence, that Hawkeye was in violation
12 of the insurance requirements of the Lease. The Bankruptcy Court found credible
13 McAbian’s testimony that Hawkeye possessed the required insurance and explained
14 Smart Capital had not submitted evidence tending to show otherwise. *Id.* at 186. On
15 appeal, Smart Capital fails to show “a mistake ha[d] been committed” in the
16 Bankruptcy Court’s assessment of the evidence. *In re Sussex*, 781 F.3d at 1071.
17 Although it argues Hawkeye only produced evidence of an umbrella policy with
18 coverage up to \$6 million on the date of the hearing, Smart Capital overlooks that the
19 Bankruptcy Court explicitly relied on McAbian’s testimony that Hawkeye possessed
20 all insurance required under the Lease to find Smart Capital had not met its initial
21 burden. Dkt. 16 at 186.

22 Smart Capital further argues it should not have been required to demonstrate
23 Hawkeye lacked coverage because it is impossible to prove a negative. *Id.* As the
24 Bankruptcy Court noted, however, there was no proof Smart Capital requested proof
25 of insurance from Hawkeye nor was this issue included in the three-day notice to quit.
26 *Id.* It appears from the trial record that this issue was first raised in Smart Capital’s
27 trial brief and that Smart Capital did not take discovery on this issue. *See id.* at 272-
28 73. The court, thus, finds the Bankruptcy Court properly held that Smart Capital


1 failed to meet its initial burden of showing, by a preponderance of the evidence, that
2 Hawkeye was in violation of the insurance requirements of the Lease, and that the
3 Bankruptcy Court did not commit clear error in finding Smart Capital failed to meet
4 that burden. Accordingly, the court will not reverse the Bankruptcy Court on this
5 basis.

6 **CONCLUSION**

7 For the foregoing reasons, the court AFFIRMS the Bankruptcy Court's October
8 27, 2020 Order finding Hawkeye did not default under its lease agreement with Smart
9 Capital for purposes of § 365(b)(1).

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11 IT IS SO ORDERED.

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13 Dated: October 26, 2021

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16 FERNANDO L. AENLLE-ROCHA
17 United States District Judge
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