NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Hassen Imports Partnership, Debtor.	Case No. 2:11-bk-42068-ER Chapter 7 **MEMORANDUM OF DECISION** Date: October 21, 2013 Time: 11:00 A.M. Place: Ctrm. 1568, 15th Fl. 255 E. Temple Street Los Angeles, CA 90012

On October 21, 2013, the Court held a hearing on the City of West Covina's ("City") Emergency Motion for Stay Pending Appeal of "Order Authorizing and Confirming Sale of Auto Mall Property Free and Clear of Liens, Claims and Interests" (the "Motion for Stay Pending Appeal")(Dkt. 929). Appearances were as stated on the record. Having considered the Motion for Stay Pending Appeal, the Objection of the chapter 7 trustee ("Trustee"), joined by Corepointe Capital Finance, LLC ("Corepointe"), Dighton America ("Dighton"), and the Los Angeles Country Treasurer and Tax Collector (collectively, the "Oppositions"), the City's Reply, as well as the arguments made on the record at the hearing, the Court makes the following findings.

I. Facts and Procedural Background

The City seeks an Order Staying the Court's Order Authorizing and Confirming Sale of Auto Mall Property Free and Clear of Liens, Claims and Interests (the "Sale Order"). The Motion for Stay Pending Appeal is opposed by the Trustee, Corepointe, Dighton, and the Los Angeles County Treasurer and Tax Collector.

The facts of this case are well known to the parties and have previously been set forth in the Court's Tentative Ruling Denying the City's Motion to Enforce Covenants and Contractual Interests in Property. (Dkt. 867). The facts need not be fully repeated here.

Hassen Imports Partnership ("Debtor") filed a voluntary petition under chapter 11 on July 27, 2011. At the time of filing, the Debtor owned several real properties located in the City of West Covina. On January 2, 2013, the Court entered an Order Granting the City's Motion to Convert the Case to One Under Chapter 7. (Dkt. 595). The Debtor appealed the decision to the Ninth Circuit Bankruptcy Appellate Panel (the "BAP"), but on August 19, 2013, the BAP issued a Memorandum of Decision Affirming this Court's Order. (Dkt. 806).

On July 26, 2013, the Trustee filed a Motion for Order Authorizing and Approving Bidding Procedures in Connection with Proposed Sale of Dealership Properties and Non-Dealership Properties. (Dkt.791). On August 5, 2013, the City filed an opposition asserting that the bidding procedures failed to adequately protect its interests, including its asserted ability to approve or disapprove of any subsequent owner of real properties located at (1) 1900 East Garvey Avenue South, West Covina, CA ("Hummer"); (2) 1932 East Garvey South, West Covina, CA ("Chevrolet") and; (3) 2000 East Garvey Avenue South, West Covina, CA ("Ford") (collectively, the "Auto Mall Property"). (Dkt. 795). On August 13, 2013 the Court entered an Order Approving the Bidding Procedures. (Dkt. 804).

On August 21, 2013, the Trustee filed Motion to (1) sell the Auto Mall Properties free and clear of liens claims and interests, (2) confirm the sale to the highest bidder, (3) determine that the buyer is a good faith purchaser pursuant to § 363(m), and (4) waive the fourteen day stay prescribed by Rule 6004(h)(the "Sale Motion"). (Dkt. 828). On the same day, the City filed its

own Motion to Enforce Covenants and Contractual Interests in Property (the "City's Motion"). (Dkt. 831). Both motions were vigorously opposed.

On September 10, 2013, the Court issued its Tentative Ruling denying the City's Motion which sets out at length the Court's findings and conclusions as to the City's asserted interests in the Auto Mall Property. (Dkt. 867). On September 11, 2013, at 9:30 a.m., the Court heard oral arguments and, unconvinced by the City's arguments, denied the City's Motion. The Court entered an Order Denying the City's Motion the following day, which incorporated the Court's Tentative Ruling by reference. (Dkt. 866). Following the conclusion of oral arguments on the City's Motion, the Court held an open auction for the sale of the Auto Mall Properties and confirmed the sale to the highest and best bidder, Dighton America ("Dighton") for $16,750,000. The Court also made a finding that Dighton was a good faith purchaser pursuant to § 363(m) on the record, taking testimony of Ziad Alhassen ("Alhassen"), an officer of Dighton.

On September 26, 2013, the City filed a Motion for Leave to Appeal, Notice of Appeal to District Court and a Notice of Referral of Appeal with respect to the Court's Order Denying the City's Motion. (Dkts. 878-83). On October 8, 2013, the Court entered an Order Granting, in part, the Sale Motion in accordance with the Court's oral ruling on September 11, 2013 (the "Sale Order"). (Dkt. 911). The following day, the City filed a Motion for Leave to Appeal, Notice of Appeal to District Court and a Notice of Referral to Appeal with respect to the Sale Order. (Dkts. 912-916).

On October 11, 2013, the City filed the instant Motion for Stay Pending Appeal of Order Authorizing and Confirming Sale of Auto Mall Property Free and Clear of Liens, Claims and Interests. (Dkt. 929). The City concurrently filed an Application for Order Setting Hearing on Shortened Notice. (Dkt. 930). The Court entered an Order Granting the Application and set the hearing for October 21, 2013. (Dkt. 936).

For the reasons set forth below in this Memorandum of Decision, the Court denies the Motion for Stay Pending Appeal in full.

II. Discussion

The City seeks a stay pending appeal under Fed. R. Bankr. P. 8005 to pursue its pending appeal of the Sale Order in District Court. An appellant seeking a discretionary stay pending appeal under Bankruptcy Rule 8005 must prove: (1) appellant is likely to succeed on the merits of the appeal; (2) appellant will suffer irreparable injury; (3) no substantial harm will come to the appellee; and (4) the stay will do no harm to the public interest. *In re Irwin*, 338 B.R. 839, 843 (Bankr. E.D. Cal. 2006); *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), *In re Wymer*, 5 B.R. 802, 806 (BAP 9th Cir. 1980). The party seeking a stay pending appeal has the burden of proof on each of the four elements, and failure to satisfy any one of the four elements justifies denying the stay motion. *See Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.)*, 191 B.R. 433, 445 (Bankr. E.D. Cal. 1995) (denying the motion for a stay pending appeal based on the appellant's failure to satisfy the first two elements, and declining to consider elements three and four).

In the alternative, the City requests that if the Court denies its Motion for Stay Pending Appeal, that the Court issue a very brief stay, of a day and a half, to try to attract the attention of the District Court with an emergency motion for a stay pending appeal of the Sale Order currently pending before the United States District Court (USCD Case No. 2:13-cv-07532-DDP).

A. Likelihood of Success on the Merits of the Appeal

To obtain a stay of a final bankruptcy court order pending appeal, appellants must show that it is more likely than not they will succeed on the merits, whatever the possibility of irreparable injury; " *In re North Plaza, LLC*, 395 B.R. 113, 120 (S.D.Cal.2008); *See also In re Grand Traverse Development Co. Ltd. Partnership*, 151 B.R. 792 (Bankr. W.D. Mich. 1993) (Motion to stay bankruptcy court's order pending appeal places on movant a higher burden to establish likelihood of success than does motion for preliminary injunction, since appellant must establish likelihood that it will win reversal on its appeal).

The City asserts that it is likely to succeed on the merits of its appeal because Court misinterpreted and misapplied Bankruptcy Code § 363(f)(5), as well as applicable California real property law, and made several critical findings of fact that are without support, and actually

contrary to evidence and inferences from facts in the record. *Motion for Stay Pending Appeal* at 9.

The City bases its arguments on the Second ARDDOPA, an agreement that controls the development and use of the Auto Mall Properties, to which the City is a successor, grants the City a number of distinct interests in the Auto Mall Property. *Motion for Stay Pending Appeal* at 4. Specifically, the City argues that it obtained the right to approve or disapprove any transfer of ownership of the Auto Mall Property from the Debtor to any other person or entity (the "Ownership Covenant") and a right to approve or disapprove any proposed dealership seeking to operate on the Auto Mall Property (the "Operating Covenant"). *Id.* at 4-5; *See also* Second ARDDOPA §§ 106 and 602.

The Court does not believe the City has demonstrated a sufficient likelihood of success on appeal. In its Motion for Stay Pending Appeal the City largely reiterates arguments that the City has already presented to the Court in the City's Motion, and which the Court rejected in its Tentative Ruling, incorporated herein by this reference, and at the hearing on the City's Motion.

Additionally, in response to the Court's Tentative Ruling, on the eve of the hearing of the City's Motion, the City filed a request for the Court to take judicial notice of the original ARDDOPA. *See Dkts.* 862; 863, Declaration of Michael Touhey, Exhibit 1. The City asserted that its interests actually arose out of the original ARDDOPA, rather than the Second ARDDOPA, and that an attorney general opinion supported the finding that the City's interests predated Corepointe's interests. The City further argued that the terms of the Second ARDDOPA somehow related support the recordation of the original ARDDOPA. While the Court notes that the original ARDDOPA was fully executed, the Memorandum of Recordation (included with the original ARDDOPPA p. 154- 157) is unexecuted and contains no evidence demonstrating that the original ARDDOPA was actually recorded. Therefore, although the Court considered the City's argument with respect to the original ARDDOPA, without sufficient evidence or any citation to case law to back up the City's contention, the Court found the City's arguments to be unavailing.

Moreover, although the City had this opportunity to further expand its argument, the City continues to heavily rely on the validity of the Second ARDDOPA with little mention of the original ARDDOPA. Therefore, the Court remains unconvinced that the City is more likely than not to succeed on the merits of its appeal.

The City also argues for the first time that Health & Safety Code § 33437 does, in fact require the redevelopment agency to impose such covenants, conditions, and restrictions as the agency deems necessary. *Motion for Stay Pending Appeal* at 13. This is an argument which the Court need not consider at this late juncture. However, in any event, the Court finds that the mere existence of § 33437 does not establish that the City's asserted Ownership and Operating Covenants were in fact real covenants or equitable servitudes. The Court again notes that those Covenants are distinguishable from the "use" covenant in the Second ARDDOPA requiring the Auto Mall Property to remain an automobile dealership. Moreover, even though the Court determined the Operating Covenant to be an equitable servitude chargeable against the Trustee, the Court nevertheless found that pursuant to § 363(f)(5), the Auto Mall Property could be sold free and clear of the Operating Covenant.

Therefore, the Court again, does not find that the City has demonstrated a likelihood of success on appeal.

B. Irreparable Harm to the City

The Supreme Court has made it clear that an injunction cannot issue merely because there is a possibility that there will be irreparable injury to the plaintiff, but rather that it must be likely that there will be. *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 22-23 (2008), *see also Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). Moreover, "it is well settled that an appeal being rendered moot does not itself constitute irreparable harm." *In re Red Mountain Mach. Co*., 451 B.R. 897, 908-09 (Bankr. D. Ariz. 2001), *citing In re Fullmer*, 323 B.R. 287, 304 (Bankr. D. Nev. 2005). The law is clear in the Ninth Circuit that "irreparably injury cannot be shown solely from the possibility that an appeal may be moot." *In re Red Mountain Mach. Co*., 451 B.R. at 908-09, *citing In re Irwin*, 338 B.R. 839, 853 (E.D. Cal. 2006).

In the City's Motion for Stay Pending Appeal, the City asserts that it will suffer immediate, irreparable injury if a stay of the Sale Order is denied, because a closing of the sale transaction would effectively moot its appeal and thereby deprive the City of its opportunity to have the serious legal issues it has raised adjudicated. *Motion for Stay Pending Appeal* at 17. However, as indicated above, mootness alone is insufficient to demonstrate irreparable harm.

The City further argues that if a stay is not issued, the City will suffer the following immediate and irreparable harm:

> (1) the City *may* lose its ability to ensure that the Auto Mall Properties are used exclusively for new car dealerships and related operations . . . absent a stay of the Sale Order pending appeal, the survival of the [Auto Mall Property] will be put at serious risk if all use restrictions on the Auto Mall Property are removed. Without restrictions limiting the use of the Auto Mall Properties a new owner *could* dramatically change the purpose and nature of the [Auto Mall Property] and destroy one of the largest sales tax bases in the City;
>
> (2) the City will forever lose its contractual rights and interests in the Auto Mall Properties pursuant to Section 106 and 602 of the Second ARDDOPA. Those rights, which are recognized by all parties, were bargained for by the City and the City paid $4.1 million in public funds to the Debtor to obtain them.

Reply at 4-5 (emphasis added). Thus, the City asserts that if a stay is not issued, immediate and irreparable harm will befall the City that extends far beyond the loss of its appellate rights and includes immediate irreparable harm directly to the City's taxpayers. *Id.* at 5.

The Court is unpersuaded. The Court finds that the City's asserted injuries are purely speculative and unsupported by any evidence. The City has not demonstrated that the loss of its Ownership and Operating Covenants will actually result in a change in the nature of the Auto Mall Property. The Court notes that at the hearing on the Motion for Stay Pending Appeal, the Trustee and Dighton made it abundantly clear that the so-called "use" covenant requiring the Auto Mall Property to remain automobile dealerships was not extinguished by the sale.

Moreover, the City has not demonstrated that the Auto Mall Property, in the hands of Dighton, will result in any economic harm to the City. Further, while questioning Alhassen with respect to the Court's determination as to whether it should make a 363(m) finding, Alhassen indicated his intention was to sell the Auto Mall Properties to a third party. *See* Dkt. 927 at 65-66.

As such, the Court finds that the City has failed to establish that it will suffer irreparable harm if a stay is not issued.

C. Balancing the Harms

The City asserts that, while the harm to it is great, a stay pending appeal will only cause a relatively brief delay in the sale of one of the numerous properties the Trustee is selling to Dighton. *Motion for Stay Pending Appeal* at 17. To ensure this, the City states that if it is granted a stay, it will seek an expedited briefing schedule. *Id.* Moreover, the City asserts that a short delay will not harm the estate because there appears to be no urgency because the Trustee waited over a month before filing the proposed order on the sale of the Auto Mall Property. *Id.* at 18.

The City also contends that it is the largest under-secured creditor, representing approximately 90% of the unsecured creditor pool and therefore any additional interest and expenses that may be incurred by the estate pending the appeal will be borne by the City. *Id.* Further, the City is prepared to post a bond in a reasonable amount to cover any loss that might be incurred by the estate as a direct result of the issuance of a stay pending appeal. *Id.* In its Reply, the City suggests an appropriate bond amount would be $390,801.54, which represents the amount of interest and taxes that would accrue during the three months it will take to prosecute its appeal on an expedited basis. *Reply* at 7.

In the Trustee's Opposition, joined by Corepointe , Dighton, and the Los Angeles County Treasurer and Tax Collector, the Trustee states that a stay pending appeal would have a devastating effect on the estate and creditors. *Opposition* at 16; *See also Dkts.* 942, 945-47. The Trustee avers that despite months of aggressive marketing by the Trustee and his employed broker, Dighton was the only bidder for the Auto Mall Property. *Opposition* at 16. Moreover,

the Trustee asserts that if a stay is issued, the estate will be forced to incur default interest of approximately $85,000 per month, plus fees and charges, property taxes and penalties at a rate of 18%, administrative expenses, and costs to maintain and insure the Auto Mall Property. *Id* . The Trustee also contends the City's suggestion that an appeal will only take three months is hollow and that if the City is unsuccessful at the District Court, the City will almost certainly appeal to the Ninth Circuit. *Id.* at 16, FN 6. Finally, at the hearing on the Motion for Stay Pending Appeal, Dighton indicated that, pursuant to the sale agreement, Dighton is permitted, and would, refuse to go forward with the sale if the a stay is granted or if any court were to determine that the Auto Mall Property could not be sold free and clear of the Ownership and Operating Covenants.

Therefore, the Court finds that the estate will in fact incur a direct and tangible harm if a stay is granted, given that the sale may be lost and that every day that passes without the sale being consummated the estate must incur the expense of default interest, taxes, penalties, and administrative expenses. Moreover, granting a stay pending appeal also works as a delay in distribution to the estates' creditors. *See In re F.G. Metals, Inc.,* 390 B.R. 467, 478 (Bankr. M.D. Fla. 2008) (significant delay in the administration or distribution of an estate generally satisfies the criterion of harm to other parties).

The Court also finds that without the ability to predict the length of time for appeal, it cannot adequately determine the proper amount of a bond the City should be required to post to ensure that the estate's interests are protected if the City were unsuccessful on appeal.

Thus, the Court finds that the City has not sufficiently demonstrated that the balance of harm tips in its favor to grant the City's Motion for Stay Pending Appeal.

D. The Public Interest

The City maintains that the public interest will not be harmed by a brief stay of the Sale Order and that the City and its residents will suffer irreparably injury if their appeal is mooted prior to its resolution. *Motion for Stay Pending Appeal* at 19. On the other hand, the Trustee asserts that by allowing the sale of the Auto Mall Property to close, the City [and its residents] will benefit from new tax revenue generated from the operation of new dealerships. *Opposition* at 15.

The Court finds that the public interest is implicated here due to the potential benefit generated by the operation of auto-dealerships. The Court again reiterates that, at the hearing on the Motion for Stay Pending Appeal, all parties acknowledge that the sale of the Property did not and does not extinguish the "use" covenant requiring the Auto Mall Property to remain automobile dealerships. If the Court were to grant the City's Motion for Stay Pending Appeal, it is indisputable that the Auto Mall Property would remain vacant. Conversely, if the sale proceeds, there is a greater likelihood that the Auto Mall Property will become operable and therefore create a benefit to the public.

Therefore, the Court finds that the City has not carried its burden on this factor.

III. Conclusion

For the reasons stated above, the City's Motion for Stay Pending Appeal is DENIED in full. The Court will enter an appropriate order.

Date: October 21, 2013

Ernest M. Robles
United States Bankruptcy Judge

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled **MEMORANDUM OF DECISION DENYING THE CITY OF WEST COVINA'S MOTION FOR STAY PENDING APPEAL** was entered on the date indicated as ▮Entered▮ on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (▮NEF▮) ▮ Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of 10/21/2013, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

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II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail to the following person(s) and/or entity(ies) at the address(es) indicated below:

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III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an ▮Entered▮ stamp, the party lodging the judgment or order will serve a complete copy bearing an ▮Entered▮ stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below:

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