

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:	§	Chapter 11
	§	
CBL & ASSOCIATES	§	
PROPERTIES, INC., <i>et al.</i> ,	§	Case No. 20-35226 (DRJ)
	§	
Debtors. ¹	§	(Jointly Administered)

**MOTION OF DEBTORS FOR ENTRY OF AN
ORDER (I) AUTHORIZING AND APPROVING SALE OF PROPERTY, FREE AND
CLEAR OF ALL LIENS, CLAIMS AND INTERESTS, AND ENCUMBRANCES, AND
(II) GRANTING RELATED RELIEF**

IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING, SPECIFICALLY ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY-ONE (21) DAYS FROM THE DATE YOU WERE SERVED WITH THIS PLEADING. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

CBL & Associates Properties, Inc. (“CBL”) and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “**Debtors**”), respectfully represent as follows in support of this motion (the “**Motion**”):

Preliminary Statement

1. The Debtors have entered into that certain Purchase and Sale Agreement dated July 26, 2021 between CAF Capital Partners, LLC (“**Purchaser**”) and CBL & Associates Management, Inc. (“**Seller**”) (the “**Purchase and Sale Agreement**” or the “**PSA**”) for the sale of

¹ A complete list of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <https://dm.epiq11.com/CBLProperties>. The Debtors’ service address for the purposes of these chapter 11 cases is 2030 Hamilton Place Blvd., Suite 500, Chattanooga, Tennessee 37421.

certain real estate and residential units in Pearland, Texas (the “**Property**”) for the purchase price of \$8.75 million.

2. The sale of the Property will bring substantial benefits to the Debtors and their estates because the sales price exceeds market estimates and is expected to yield an attractive cap rate. Accordingly, the Debtors submit that, in the exercise of their business judgment, the sale of the Property is in the best interest of their estates and this Motion should be granted.

Background

3. Beginning on November 1, 2020 (the “**Petition Date**”), the Debtors each commenced with this Court a voluntary case under chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”). The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. The Debtors’ chapter 11 cases are being jointly administered for procedural purposes only pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) and Rule 1015-1 of the Bankruptcy Local Rules for the United States Bankruptcy Court for the Southern District of Texas (the “**Local Rules**”). On November 13, 2020, the United States Trustee for Region 7 (the “**U.S. Trustee**”) appointed an official committee of unsecured creditors (the “**Creditors’ Committee**”) in these chapter 11 cases pursuant to section 1102 of the Bankruptcy Code. No trustee or examiner has been appointed in these chapter 11 cases.

4. Additional information regarding the Debtors’ business, capital structure, and the circumstances leading to the commencement of these chapter 11 cases is set forth in the *Declaration of Mark Renzi in Support of Debtors’ Chapter 11 Petitions and First Day Motions*,

sworn to on November 2, 2020 (the “**First Day Declaration**”) (Docket No. 3) (the “**First Day Declaration**”).²

5. On August 9, 2021, the Debtors filed the *Third Amended Joint Chapter 11 Plan of CBL & Associates Properties, Inc. and Its Affiliated Debtors (with Technical Modifications)* (Docket No. 1369) (the “**Plan**”). By order dated August 11, 2021, the Court confirmed the Plan (Docket No. 1397).

Jurisdiction

6. The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Relief Requested

7. By this Motion, pursuant to sections 105(a), 363, and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006, and 9014, the Debtors seek entry of an order substantially in the form of **Exhibit A** attached hereto (the “**Proposed Order**”) (i) authorizing and approving the Purchase and Sale Agreement for the sale by the Debtors of the Property, free and clear of all liens, claims and interests, and encumbrances, and (ii) granting related relief. A copy of the Purchase and Sale Agreement is annexed hereto as **Exhibit B**.

The Property

8. In 2006, CBL acquired approximately 140 acres of land in Pearland, Texas and in 2008, developed its first mixed use project, Pearland Town Center, on the acquired land. Part of that development included a 6-acre parcel that CBL sold in 2008 to Sueba, a multifamily developer and manager. Sueba was instrumental in the development on that parcel of a 62-unit

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the First Day Declaration.

residence complex owned by CBL (“**Phase I**”). In 2009, Sueba built and owned a 172-unit multifamily complex with amenities (“**Phase II**”). Sueba managed both the Phase I and Phase II residences with certain shared expenses for the use of the amenities by Phase I residences. Subsequently, Sueba sold the Phase II units to PTCR Development I, LLC (“**PTCR**”) but continued to manage both Phase I and Phase II for two separate owners (CBL and PTCR, respectively) with Phase I continuing to use the amenities and paying allocated expenses to Phase II.

9. PTCR now intends to sell Phase II and approached CBL to consider a potential sale of Phase I along with Phase II to maximize the price of both sets of units. After research, two qualified brokers were interviewed and Newmark (“**NKF**”) was selected to represent both owners.

10. NKF conducted a thorough, targeted marketing effort to financially credible owners of multifamily portfolios. As part of that marketing process, NKF prepared a valuation analysis for Phase I, which estimated potential selling prices from market-value at \$8 million to a “premium” value of \$8.5 million. The depreciated book value for the unencumbered Phase I residences is approximately \$6.3 million

11. The Debtors received an all-cash offer from Hilltop, a highly respected buyer, for a gross price of \$8.3 million. The Debtors and NKF received a second offer for \$8.75 million from the Purchaser, a Dallas based private equity real estate firm that manages over 26,000 multifamily units in Texas and across the Southwest United States, which exceeded both the Hilltop offer and the NKF “premium” estimate. Based on the depreciated book value, the Debtors will realize approximately \$2.45 million in gain on sale before broker commissions and other costs.

CBL accepted this offer and negotiated the Purchase and Sale Agreement. The executive committee of the board of directors of the REIT approved the transaction.

12. Pursuant to the Plan, the Property was to be collateral for the New Secured Notes (as defined in the Plan). Consequently, the Debtors have agreed that the proceeds of the sale will be used to pay down the New Secured Notes after the Effective Date (each as defined in the Plan). The Ad Hoc Bondholder Group supports the relief requested in the Motion.

Relief Requested Should be Granted

A. Selling the Property is a Reasonable Exercise of Debtors' Sound Business Judgment and in Best Interests of Estates

13. The Court may grant the relief requested herein pursuant to section 363 of the Bankruptcy Code, which provides, in relevant part, that “[t]he [debtor], after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). Courts in the Fifth Circuit have granted a debtor’s request to use property of the estate outside of the ordinary course of business pursuant to section 363(b) of the Bankruptcy Code upon a finding that such use is supported by sound business reasons. *See, e.g., In re BNP Petroleum Corp.*, 642 F. App’x 429, 435 (5th Cir. 2016); *In re Cont’l Air Lines*, 780 F.2d 1223, 1226 (5th Cir. 1986) (“[F]or a debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business.”); *see also In re Crutcher Res. Corp.*, 72 B.R. 628, 631 (Bankr. N.D. Tex. 1987) (“A Bankruptcy Judge has considerable discretion in approving a § 363(b) sale of property of the estate other than in the ordinary course of business, but the movant must articulate some business justification for the sale.”); *In re Borders Grp., Inc.*, 453 B.R. 477, 482 (Bankr. S.D.N.Y. 2011) (“a debtor often satisfies the business judgment standard if ‘the directors of a corporation acted on an informed

basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”) (quoting *In re Integrated Res., Inc.*, 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992)); *In re Terrace Gardens Park P’ship*, 96 B.R. 707, 714 (Bankr. W.D. Tex. 1989).

14. Section 105 of the Bankruptcy Code provides, in relevant part, that “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). *see also In re Tusa-Expo Holdings, Inc.*, Case No. 08-45057-DML-11, 2008 WL 4857954, at *1 (Bankr. N.D. Tex. Nov. 7, 2008); *CEI Roofing*, 315 B.R. at 56; *In re Mirant Corp.*, 296 B.R. 427 (Bankr. N.D. Tex. 2003).

15. The Debtors submit that selling the Property represents a reasonable exercise of sound business judgment and is in the best interests of the Debtors’ estates. Given that the Phase II owner intended to sell, the Debtors were presented with the opportunity to maximize the value on the Property as the Debtors believe that selling Phase I with Phase II would generate more favorable pricing. To confirm that, the Debtors used a highly respected and experienced broker to conduct a thorough, targeted marketing effort to financially credible owners of multifamily portfolios. The results supported the Debtors’ view as the Debtors received two offers to buy the Property, with the winning offer exceeding NKF’s “premium” price estimate by a quarter of a million dollars. The purchase price of \$8.75 million represents the maximum value attainable for the Property and the cap rate of 4% is an excellent return for the Debtors.

16. The Debtors believe the Purchaser’s offer for the Property was the highest and best offer received by the Debtors, considering the totality of the marketing process. The Debtors submit that the transaction contemplated by the Purchase and Sale Agreement will provide a greater recovery for the Debtors’ estates than would be provided by any other available alternative. Accordingly, the Debtors’ determination to enter into the Purchase and Sale

Agreement is a valid and sound exercise of the Debtors' business judgment and should be approved.

B. The Sale of the Assets Should Be Approved "Free and Clear" Under Section 363(f) of the Bankruptcy Code

17. Section 363(f) of the Bankruptcy Code permits the Debtors to sell assets free and clear of all liens, claims, interests, charges, and encumbrances (with any such liens, claims, interests, charges, and encumbrances attaching to the net proceeds of the sale with the same rights and priorities therein as in the sold assets). As section 363(f) is stated in the disjunctive, when proceeding pursuant to section 363(f), it is only necessary to meet one of the five conditions of section 363(f). *In re Nature Leisure Times, LLC*, No. 06-41357, 2007 WL 4554276, at *3 (Bankr. E.D. Tex. Dec. 19, 2007) ("The language of § 363(f) is in the disjunctive such that a sale free and clear of an interest can be approved if any one of the aforementioned conditions contained in § 363(f) are satisfied."). The Debtors believe that they demonstrated their satisfaction of one or more of these conditions and, in particular, that absent an objection to the sale of the Property, any party with a claim or interest in the Property may be deemed to have consented to the sale. Moreover, based on the title commitment, the Debtors are not aware of any liens on the Property. To the extent that any liens do exist, the Debtors would expect that the sale price exceed the aggregate value of any such liens and liens would attach to the sale proceeds.

C. The Sale of the Assets Has Been Proposed in Good Faith and Without Collusion, and the Purchaser Will Be a "Good-Faith Purchaser"

18. Pursuant to section 363(m) of the Bankruptcy Code, a good-faith purchaser is one who purchases assets for value, in good faith, and without notice of adverse claims. *O'Dwyer v. O'Dwyer (In re O'Dwyer)*, 611 Fed. App'x 195, 200 (5th Cir. 2015); *In re Mark Bell Furniture Warehouse, Inc.*, 992 F.2d 7, 9 (1st Cir. 1993); *In re Willemain v. Kivitz*, 764 F.2d 1019, 1023 (4th Cir. 1985); *In re Congoleum Corp.*, No. 03-51524, 2007 WL 1428477, *2 (Bankr. D.N.J.

May 11, 2007); *see also In re Abbotts Dairies of Penn., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986) (to constitute lack of good faith, a party's conduct in connection with the sale must usually amount to fraud, collusion between the Purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders).

19. In other words, a party would have to show fraud or collusion between the purchaser and the debtor-in-possession or trustee or other bidders in order to demonstrate a lack of good faith. An appropriate characterization of good faith in a bankruptcy sale is a lack of “fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.” *In re Bleaufontaine, Inc.*, 634 F.2d 1383, 1388 n.7 (5th Cir. 1981) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)).

20. The Debtors submit that Purchaser is a “good-faith” purchaser within the meaning of section 363(m) and the terms of the Purchase and Sale Agreement were negotiated at arms'-length and in good faith without any collusion or fraud.³ Additionally, Purchaser is not an “insider” or “affiliate” of any of the Debtors as those terms are defined in section 101 of the Bankruptcy Code. Accordingly, the Debtors contend that Purchaser is entitled to the protections of section 363(m).

³ Section 363(m) provides that:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

D. Assumption and Assignment of Related Contracts and Unexpired Leases is an Exercise of Sound Business Judgment and Should Be Approved

21. In connection with the Purchase and Sale Agreement, the Debtors seek to assume and assign certain related unexpired residential leases, service contracts (the “**Service Contracts**”), and other leases (collectively, with the unexpired residential leases and the Service Contracts, the “**Leases**”) to Purchaser pursuant to section 365 of the Bankruptcy Code.⁴

22. Section 365 of the Bankruptcy Code authorizes a debtor to assume and/or assume and assign its executory contracts and unexpired leases, subject to the approval of the court, so long as the defaults under such contracts and leases are cured and adequate assurance of future performance is provided. The Debtors’ decision to assume or reject an executory contract or unexpired lease must only satisfy the “business judgment rule” and will not be subject to review unless such decision is clearly an unreasonable exercise of such judgment. *See, e.g., Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985) (applying a business judgment standard to debtor’s determination to assume an unexpired lease); *In re Penn Traffic Co.*, 524 F.3d 373, 383 (2d Cir. 2008) (business judgment test “rather obviously presupposes that the estate will assume a contract only where doing so will be to its economic advantage.”); *In re Del Grosso*, 115 B.R. 136, 138 (Bankr. N.D. Ill. 1990) (“[T]he standard to be applied for approval of the assumption [of an executory contract] is the business judgment standard.”).

23. Any assumption of the Leases and Service Contracts is an exercise of the Debtors’ sound business judgment because the transfer of such contracts and leases is integral to the sale contemplated by the Purchase and Sale Agreement and is necessary for the Debtors to obtain the best value for the Property.

⁴ The Debtors have already provided assumption notices to contract counterparties in connection with the plan confirmation process. The Debtors will provide notice to contract counterparties whose contracts are being assumed and assigned prior to the Effective Date in connection with this Motion.

24. Some of the Service Contracts that the Debtors are seeking to assign in connection with the PSA contain provisions restricting assignment. To facilitate the assumption and assignment of the Leases, the Debtors request that the Court find that all anti-assignment provisions therein, whether such provisions expressly prohibit or have the effect of restricting or limiting assignment of such contract or lease, to be unenforceable and prohibited pursuant to section 365(f) of the Bankruptcy Code.⁵

Reservation of Rights

25. Nothing contained herein is intended to be or shall be deemed as (i) an admission as to the validity of any claim against the Debtors, (ii) a waiver or limitation of the Debtors' or any party in interest's rights to dispute the amount of, basis for, or validity of any claim, (iii) a waiver of the Debtors' rights under the Bankruptcy Code or any other applicable nonbankruptcy law, (iv) an agreement or obligation to pay any claims, (v) a waiver of any claims or causes of action which may exist against any creditor or interest holder, (vi) an admission as to the validity of any liens satisfied pursuant to this Motion, or (vii) an approval, assumption, adoption, or rejection of any agreement, contract, lease, program, or policy under section 365 of the Bankruptcy Code. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended to be and should not be construed as an admission to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

⁵ Section 365(f)(1) provides in part that, "notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease" 11 U.S.C. § 365(f)(1). Section 365(f)(3) further provides that "Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee." 11 U.S.C. § 365(f)(3).

Notice

26. Notice of this Motion will be served on any party entitled to notice pursuant to Bankruptcy Rule 2002 and any other party entitled to notice pursuant to Local Rule 9013-1(d).

No Previous Request

27. No previous request for the relief sought herein has been made by the Debtors to this or any other court.

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WHEREFORE the Debtors respectfully request entry of the Proposed Order granting the relief requested herein and such other and further relief as the Court may deem just and appropriate.

Dated: August 13, 2021
Houston, Texas

Respectfully submitted,

/s/ Alfredo R. Pérez
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and Debtors in Possession*

Certificate of Service

I hereby certify that on August 13, 2021, a true and correct copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Alfredo R. Pérez

Alfredo R. Pérez