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

In re:	§	**Chapter 11**
	§	
CBL & ASSOCIATES	§	
PROPERTIES, INC., ***et al.*****,**	§	**Case No. 20-35226 (DRJ)**
	§	
Debtors.[1]	§	**(Jointly Administered)**

MOTION OF DEBTORS FOR AN
ORDER (I) APPROVING SETTLEMENT AGREEMENT WITH
NEW YORK LIFE INSURANCE COMPANY 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 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. 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[2]

1. As the Court is aware, the Debtors are engaged in a negotiation process with holders of Property-Level Guarantee Claims to, among other things, obtain necessary waivers from lenders of defaults triggered by the Debtors' chapter 11 filing. In connection with this process,

[1] A complete list of the Debtors in these chapter 11 cases may be obtained on the website of the Debtor's 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.

[2] Capitalized terms used but not otherwise defined in the Preliminary Statement shall have the meanings ascribed to such terms in the body of the Motion.

and realizing that a more fulsome restructuring of the Volusia Loan was needed, the Debtors negotiated a comprehensive loan modification with New York Life Insurance Company ("**NYL**") as lender to Volusia Mall, LLC ("**Volusia**" or the "**Borrower**"), one of the Debtors' non-Debtor subsidiaries.

2. The loan modification contemplates, among other things: (i) an initial reduction of the Operating Agreement Guaranty Amount, as defined in the Volusia Operating Agreement Guaranty, and additional go-forward reductions in conjunction with amortization payments of the Volusia Loan; (ii) elimination of any recourse trigger that would be enforced under the Recourse Matters Guaranty in the event of a future bankruptcy filing by CBL & Associates Limited Partnership (the "**CBL Guarantor**"); (iii) a waiver of any defaults triggered by the filing of the chapter 11 cases or the Restructuring Transactions (as defined in the Plan), as more particularly addressed in the Settlement Agreement; (iv) the elimination of any deficiency claim by NYL in the CBL Guarantor's chapter 11 case in connection with the allowance and treatment of NYL's Proof of Claim against the CBL Guarantor as a Property-Level Guarantee Settlement Claim in Class 6 of the Plan; (v) a waiver of certain prior monthly deposits required by Volusia to fund tenant allowances and capital expenditures; (vi) [REDACTED] (vii) termination of an anchor tenant reserve and transfer of the funds contained therein to the tenant improvements and leasing commissions reserve; (viii) [REDACTED] and (ix) execution of the loan modification documents and entry of a final and non-appealable order approving the Motion (the "**9019 Order**"), and expiration of applicable appeal periods concerning such order by no later than November 15, 2021.

3. As discussed herein, the Debtors believe that the Settlement Agreement represents a valid exercise of the Debtors' business judgment and is in the best interest of the Debtors, their estates, and their creditors. Importantly, the Settlement Agreement is supported by the ad hoc group of holders of the Debtors' senior unsecured notes (the "**Ad Hoc Noteholder Group**") and the Creditors' Committee.

4. Accordingly, for the reasons set forth herein, the Debtors request that the Court approve the Settlement Agreement and authorize their performance thereunder.

Background

5. 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.

6. 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 (Docket No. 3) (the "**First Day Declaration**").

A. The Volusia Loan

7. Volusia Mall (the "**Mall**") is a regional shopping mall located in Daytona Beach, Florida. The Mall is owned by Volusia, a non-Debtor subsidiary of the CBL Guarantor. All of the equity interests in Volusia are owned directly or indirectly by the CBL Guarantor.

8. On June 19, 2009, NYL and Volusia entered into: (i) that certain Amended, Restated, and Increased Mortgage, Assignment of Leases and Rents and Security Agreement; and (ii) that certain Amended and Restated Assignment of Leases, Rents, Income, and Cash Collateral, whereby NYL agreed to extend credit in the principal amount of $57,800,000 (collectively, the "**Original Mortgage**"). In connection with the Original Mortgage, Volusia provided that certain Amended, Restated, and Increased Promissory Note, dated June 19, 2009, in the principal amount of $57,800,000 in favor of NYL (the "**Original Note**").

9. On April 26, 2019, NYL and Volusia entered into that certain Second Amended and Restated Mortgage, Assignment of Leases and Rents, Security Agreement, and Fixture Filing (the "**Mortgage**"), whereby NYL agreed to advance an additional $9,507,612.40,[3] bringing the total outstanding indebtedness from $40,492,387.60 to $50,000,000. In connection with the Mortgage, Volusia provided that certain Second Amended and Restated Promissory Note, dated April 26, 2019, in the principal amount of $50,000,000 in favor of NYL (the "**Note**"). The Note was subsequently modified by that certain Loan Modification Agreement, dated May 8, 2020 (the "**First Loan Modification**").

10. In connection with the execution of the Mortgage and Note, NYL and the CBL Guarantor entered into: (i) that certain Guaranty (Volusia Operating Agreement), dated April 26, 2019 (the "**Volusia Operating Agreement Guaranty**"), whereby the CBL Guarantor

[3] As of the date thereof, the principal balance remaining on the Original Note was $40,492,387.60.

guaranteed payment under the Note, capped in the amount of (a) $5,000,000 of the principal amount of the loan, plus (b) accrued and unpaid interest and late charges on such amount, plus (c) the reasonable costs and expenses incurred by NYL in collecting such amounts; and (ii) that certain Guaranty (Recourse Matters), dated April 26, 2019 (the "**Recourse Matters Guaranty**" and, together with the Mortgage, the Note, and the Volusia Operating Agreement Guaranty, the "**Volusia Loan**"), whereby the CBL Guarantor guaranteed all of Volusia's present and future obligations under the Note and Mortgage arising from, under, or out of certain non-recourse exceptions, including the filing of the CBL Guarantor's chapter 11 case.

11. In connection with the foregoing, NYL filed a proof of claim against the CBL Guarantor (Proof of Claim No. 94) (the "**Proof of Claim**").

B. Events Leading to Settlement Agreement[4]

12. On November 19, 2021, NYL sent a letter to Volusia and the CBL Guarantor, asserting that the filing of the CBL Guarantor's chapter 11 petition on the Petition Date constituted an event of default under the Mortgage, thereby triggering the CBL Guarantor's obligation to pay, pursuant to the Recourse Matters Guaranty, all outstanding principal, interest, and other obligations under the loan if the CBL Guarantor's chapter 11 case was not dismissed within sixty (60) days.

13. On April 29, 2021, NYL sent a notice of event of default and reservation of rights letter to Volusia (the "**April Letter**") and the CBL Guarantor, asserting an event of default under the Mortgage for the failure of Volusia to deposit in the month of April: (i) $83,334 pursuant to that certain Reserve Account Deposit Agreement (Volusia Anchor Vacancy Reserve) dated as

[4] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Plan (as defined herein).

of April 26, 2019 between Volusia and NYL, as amended by the First Loan Modification (the "**Anchor Reserve Agreement**"); (ii) $31,660 pursuant to that certain Reserve Account Deposit Agreement (Volusia Capital Improvement Reserve) dated as of April 26, 2019 between Volusia and NYL, as amended by the First Loan Modification (the "**Capital Reserve Agreement**"); and (iii) $52,767 pursuant to that certain Reserve Account Deposit Agreement (Volusia TI/LC Reserve) dated as of April 26, 2019 between Volusia and NYL, as amended by the First Loan Modification (the "**TI/LC Reserve Agreement**" and, together with the Anchor Reserve Agreement and the Capital Reserve Agreement, the "**Reserve Agreements**").

14. On June 11, 2021 and July 12, 2021, NYL sent notice of events of default and reservation of rights letters (together with the April Letter, the "**Default Letters**") to Volusia and the CBL Guarantor, asserting additional events of default under the Mortgage arising from the failure of Volusia to make similar deposits for the months of June and July pursuant to the Reserve Agreements.

15. 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**"), which was confirmed by order dated August 11, 2021 (Docket No. 1397). As contemplated by the Plan, the Debtors have been attempting to negotiate settlements with holders of Property-Level Guarantee Claims, pursuant to which such holders will agree to waive defaults arising from the chapter 11 cases in exchange for the reinstatement of such holder's Property-Level Guaranty Claim.[5] In connection with this process,

[5] Property-Level Guarantee Claims are defined in the Plan as "any Claim against a Debtor arising from or based upon a prepetition guarantee by the LP or REIT (or a subsidiary thereof) of a Property-Level Loan." Property-Level Loans are defined as "any mortgage loan, construction loan, CMBS loan, or any other loan made to a Property-Level Borrower, provided, that, Property-Level Loans shall not include the First Lien Credit Facility or Senior Unsecured Notes." Property-Level Borrowers are defined as "the Non-Debtor Affiliates listed on Exhibit E" of the Plan.

Volusia and the Debtors reached an agreement with NYL on a comprehensive restructuring of the Volusia Loan.

B. Summary of Settlement Agreement

16. The settlement agreement will be implemented through a Second Loan Modification Agreement (the "**LMA**"),[6] the form of which is annexed hereto as **Exhibit B** (the "**Settlement Agreement**"). The Settlement Agreement will be executed and become effective contingent upon and as promptly as practicable after the 9019 Order becomes final and non-appealable, subject to an outside date of November 15, 2021. The key terms of the Settlement Agreement are as follows:[7]

Term	Description
Waiver of Defaults	NYL will waive the following defaults: (i) the shortfalls in the required reserve deposits for April 2021 and June 2021 and thereafter until the consummation of the loan modification, and (ii) the CBL Guarantor's default caused by the filing of the chapter 11 cases, including waiving any default or recourse event that was triggered due to such bankruptcy filing, or from the confirmation of the Plan (as drafted as of the date of this Motion, including any technical amendments, adjustments, and modifications made thereto in accordance with Section 12.4(b) thereof), or on account of any of the Restructuring Transactions (as that term is defined in the Plan).
Monthly Reserve Deposit	In lieu of current required deposits into the TI/LC Reserve Account and the Cap Ex Deposit Account (as defined in the Capital Reserve Agreement), a monthly reserve deposit of (the "**Monthly Reserve Deposit**") shall be required, which shall be allocated on an 80%/20% split between the TI/LC Reserve Account and the Cap Ex Deposit Account respectively (together, the "**Reserves**"). NYL will consider funding requests for TI/LC or Capital Expenditures in the event reserve funds are unavailable in one of the specified Reserves, but otherwise available in the other Reserve. To the

[6] The settlement agreement will also be implemented through an Amended and Restated Cash Management Agreement (the "**CMA**"). However, because the CMA will be entered into between Volusia and NYL, and no Debtors are a party thereto, the Debtors are not seeking authority from the Court to enter into the CMA.

[7] The summary of salient provisions of the Settlement Agreement are provided for informational purposes and is qualified in its entirety and subject to the express terms and provisions of the documentation comprising the Settlement Agreement that is appended hereto.

Term	Description
	extent cash flow is insufficient to make such reserve deposit, such deficiencies shall accrue and be payable to the extent that future cash flow is sufficient to pay the same (such deficiency, the "**Reserve Deficiency**").
Operating Agreement Guaranty	The Operating Agreement Guaranty Amount, as defined in the Volusia Operating Agreement Guaranty, shall be reduced from $5,000,000 to $2,750,000. So long as no event of default occurs, the Operating Agreement Guaranty Amount shall be further reduced at a rate of $0.50 for every $1.00 of scheduled amortization occurring after the proposed loan modification, which is expected to reduce to $0 by the end of 2023.
Recourse Matters Guaranty	The Recourse Matters Guaranty will be Reinstated, on the Effective Date in accordance with the Plan, the Volusia Operating Agreement Guaranty shall be re-affirmed on the Effective Date as modified on the terms set forth in the LMA, and NYL's Proof of Claim will be Allowed as a Class 6 Claim under the Plan, which will be treated in accordance with the Settlement Agreement, provided, however, at the time the proposed loan modification is consummated, the Loan Documents shall be modified to provide that any future bankruptcy filing of the CBL Guarantor will not trigger recourse to the CBL Guarantor.
Costs and Expenses	Volusia shall have paid all documented costs and expenses, including legal fees, incurred by NYL in connection with the proposed loan modification, the Settlement Agreement, this Motion, and the CBL Guarantor bankruptcy, which costs, expenses and fees NYL has been authorized by Volusia to fund from existing Reserves.
Anchor Reserve	The Anchor Reserve Agreement shall be terminated and the funds contained therein shall be transferred to the TI/LC Reserve Account.
Deficiency Claim	NYL shall have no unsecured deficiency claim against the CBL Guarantor in the CBL Guarantor's chapter 11 cases.

Jurisdiction

17. 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

18. By this Motion, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code and Rules 2002, 6004, and 9019 the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), the Debtors request entry of an order (a) authorizing the Debtors to enter into the Settlement Agreement, and (b) granting related relief.

19. A proposed form of order granting the relief requested herein is annexed hereto as **Exhibit A** (the "**Proposed Order**").

Relief Requested Should Be Granted

20. Section 363(b)(1) of the Bankruptcy Code authorizes a debtor in possession to "use, sell, or lease, other than in the ordinary course of business, property of the estate," after notice and a hearing. The Fifth Circuit recognizes that a debtor may use property of the estate outside the ordinary course of business under this provision if there is a good business reason for doing so. *See, e.g.*, *ASARCO, Inc. v. Elliott Mgmt. (In re ASARCO, L.L.C.)*, 650 F.3d 593, 601 (5th Cir. 2011) ("[F]or the 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.") (quoting *In re Cont'l Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986)); *In re ASARCO, L.L.C.,* 441 B.R. 813, 830 (Bankr. S.D. Tex. 2010); *GBL Holding Co., Inc. v. Blackburn/Travis/Cole, Ltd. (In re State Park Bldg. Grp., Ltd.)*, 331 B.R. 251, 254 (Bankr. N.D. Tex. 2005). For the reasons stated below, the Settlement Agreement represents a valid exercise of the Debtors' business judgment.

21. Bankruptcy Rule 9019(a) provides that "[o]n motion by the [debtors in possession] and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). Further, pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may approve a compromise or settlement so long as the proposed settlement is fair, reasonable, and in

the best interests of the estate. *See Off. Comm. of Unsecured Creditors v. Moeller (In re Age Refin., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, approval of a compromise is within the discretion of the bankruptcy court. *See United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980) (citations omitted) (decided under the Bankruptcy Act). Settlements are considered a "normal part of the process of reorganization" and a "desirable and wise method[] of bringing to a close proceedings otherwise lengthy, complicated, and costly." *Rivercity*, 624 F.2d at 602–03.

22. The Fifth Circuit has established a three-factor balancing test under which bankruptcy courts analyze proposed settlements. *Id.* The factors the Court considers are: "(1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all other factors bearing on the wisdom of the compromise." *See Age Refin.*, 801 F.3d at 540 (internal citations omitted).

23. Under the rubric of the third factor, the Fifth Circuit has specified two additional factors that bear on a decision to approve a proposed settlement. First, the Court should consider "the paramount interest of creditors with proper deference to their reasonable views." *Id.*; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). Second, the Court should consider the "extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." *Age Refin.*, 801 F.3d at 540; *Foster Mortg.*, 68 F.3d at 918 (citations omitted).

24. Generally, the role of the Bankruptcy Court is not to decide the issues in dispute when evaluating a settlement. *Watts v. Williams*, 154 B.R. 56, 59 (S.D. Tex. 1993). Rather,

the Court should determine whether the settlement as a whole is fair and equitable. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968).

25. Here, the terms of the Settlement Agreement are fair and reasonable, and in the best interest of the Debtors, their estates, and their creditors, and therefore should be approved based upon the three factors considered by courts in the Fifth Circuit.

26. ***First***, the likelihood of the Debtors' success in litigating the issues pertaining to the Volusia Loan—including issues relating to the property's value and the amount of any resulting deficiency claim in the CBL Guarantor's chapter 11 case—is uncertain. What is not uncertain, however, is that the litigation would likely require the expenditure of significant funds and cause substantial detrimental impact to the Debtors. Such negative impact would be felt even if the Debtors were successful in the litigation. Having the benefit of certainty and prior agreement between NYL, the Debtors, and Volusia is preferable to what could otherwise be costly, time-consuming, and distracting litigation that would harm the Debtors estates.

27. ***Second***, litigating the issues resolved by the Settlement Agreement could be extensive and complex. The Settlement Agreement avoids complicated disputes over alleged events of default and the amount of NYL's deficiency claim against the CBL Guarantor and aids the Debtors in the efficient reorganization of the CBL Guarantor's obligations pursuant to the Recourse Matters Guaranty and the Volusia Operating Agreement Guaranty. The time and cost saved by approval of the Settlement Agreement and relief requested in this Motion is beneficial to all involved in these chapter 11 cases.

28. ***Third***, the Settlement Agreement is the result of arms'-length, good-faith negotiations between the Debtors, NYL, and their advisors. As described above, the Settlement Agreement eliminates the need to spend significant resources litigating complex issues and

efficiently provides a path for the restructuring of the Mortgage, the Recourse Matters Guaranty, and the Volusia Operating Agreement Guaranty to be implemented through the Settlement Agreement and the Plan. The Settlement Agreement also represents a restructuring of the Volusia Loan on terms beneficial to the Debtors, which will strengthen the Volusia property going forward. The Debtors believe that [REDACTED] represents a fair term in the context of the whole Settlement Agreement and will also facilitate the future growth and upkeep of the Mall.

29. Based upon the foregoing, and under these circumstances, entry into and performance under the Settlement Agreement is in the best interests of the Debtors, their estates, and their creditors, is fair and reasonable, and is the result of extensive arms'-length negotiations. Therefore, the Debtors respectfully request that the Court approve the terms of the Settlement Agreement and authorize performance thereunder through entry of the Proposed Order.

Request for Bankruptcy Rule 6004 Waivers

30. The Debtors request a waiver of the notice requirements under Bankruptcy Rule 6004(a) and any stay of the order granting the relief requested herein pursuant to Bankruptcy Rule 6004(h). As explained above, the relief requested herein is necessary to avoid immediate and irreparable harm to the Debtors. Accordingly, ample cause exists to justify the waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent such stay applies.

[*Remainder of page intentionally left blank*]

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 18, 2021
Houston, Texas

Respectfully submitted,

/s/ Alfredo R. Pérez

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Certificate of Service

I hereby certify that on August 18, 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