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]	)	
	)	

ASSOCIATED BANK, NATIONAL ASSOCIATION'S FURTHER OBJECTION TO EMERGENCY MOTION OF DEBTORS REQUESTING (I) JOINT ADMINISTRATION OF ADDITIONAL CHAPTER 11 CASE AND (II) THAT CERTAIN ORDERS IN THE CHAPTER 11 CASES OF CBL & ASSOCIATES PROPERTIES, INC. ET AL. BE MADE APPLICABLE TO NEW DEBTOR

Associated Bank, National Association ("Associated Bank") hereby files this further objection (the "Objection") to the *Emergency Motion of Debtors Requesting (I) Joint Administration of Additional Chapter 11 Case and (II) That Certain Orders in the Chapter 11 Cases of CBL & Associates Properties, Inc. et al. be Made Applicable to New Debtor* (the "Motion").[2] In support of its Objection, Associated Bank states as follows:

I. PRELIMINARY STATEMENT

1. This bankruptcy case is a two-party dispute filed by a single-asset real estate debtor ("SARE") to force an involuntary refinancing on a secured lender one day after a maturity default. The Motion asks this Court to jointly administer this SARE debtor with and have it be bound by fifteen Preexisting Orders entered in the Initial Debtors' cases, cases where the Plan has already

[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.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion and *Associated Bank, National Association's Objection Emergency Motion of Debtors Requesting (I) Joint Administration of Additional Chapter 11 Case and (II) That Certain Orders in the Chapter 11 Cases of CBL & Associates Properties, Inc. et al. be Made Applicable to New Debtor* (ECF No. 9), as applicable.

been confirmed and is going effective today, with little effort to show the appropriateness, relevance or necessity of those orders. While Associated Bank does not object to joint administration for procedural efficiency and convenience, it does object to the Additional Debtor using this procedural tool as a means to get substantive relief vis-à-vis Associated Bank. Moreover, even at this early stage of this case, the circumstances surrounding its filing suggest that the Additional Debtor is a SARE debtor or even that this case be dismissed in its entirety.

II. BACKGROUND

A. The Loan Agreement

2. Prior to the Petition Date, the Prepetition Secured Parties (as defined below) made loans and other financial accommodations (the "Loans") available to the Additional Debtor pursuant to, without limitation, (i) the Syndicated Construction Loan Agreement dated as of October 23, 2018, as amended by that certain Modification Agreement dated as of May 1, 2020 (as amended, restated, supplemented, or otherwise modified from time to time, the "Loan Agreement") between the Additional Debtor, Associated Bank, as agent, and the other financial institutions party thereto as lenders (the "Lenders," and together with Associated Bank, the "Prepetition Secured Parties"), and (ii) certain promissory notes executed and delivered by the Additional Debtor to the Prepetition Secured Parties in the aggregate principal face amount of $29,400,000.00 (as amended, restated or modified from time to time, the "Notes").

3. The Loan Agreement and Notes are secured by substantially all of the Additional Debtor's real and personal property, including, without limitation, the Brookfield Property, as defined below (the "Prepetition Collateral" and such perfected liens thereon shall be referred to as, the "Prepetition Liens"), through, without limitation, (i) that certain Construction Mortgage, Security Agreement, Fixture Filing, and Assignment of Leases and Rents dated as of October 23,

2018, made and executed by the Additional Debtor in favor of Associated Bank recorded on October 25, 2018 as Instrument No. 4367746 in the Register of Deeds of Waukesha County, Wisconsin (the "Mortgage") and (ii) certain guaranties and indemnifications made and executed by CBL & Associates Limited Partnership, a Delaware limited partnership ("Guarantor") (the "Guaranties," collectively with the Loan Agreement, the Notes, the Mortgage, and other documents executed in connection the Loans, the "Prepetition Loan Documents").

4. As of the Petition Date, the Additional Debtor was indebted to the Prepetition Secured Parties under the Prepetition Loan Documents in the aggregate principal amount of at least $27,461,203.78 (including principal, interest, and certain fees, costs, and expenses, but excluding prepetition professional) (the "Prepetition Secured Obligations").

5. The Loans matured on October 15, 2021, resulting in an event of default under the Loan Agreement due to the failure to repay the Loans (the "Maturity Default").[3]

B. The Initial Debtors' Cases and Discussions Surrounding the Restructuring of the Loan Agreement

6. Beginning on November 1, 2020, the Initial Debtors filed cases under chapter 11 of the Bankruptcy Code. The Initial Debtors and their advisors then initiated discussions with Associated Bank to obtain waivers of defaults under the Loan Agreement arising from the Initial Debtors' cases. Based on certain assurances made by the Additional Debtor, Associated Bank was willing to negotiate mutually acceptable waivers and a forbearance agreement.

[3] As of the Petition Date, at least four events of default had occurred and were continuing under the Loan Agreement, including, (i) a default resulting from the filing of the Initial Debtors' cases, (ii) a default pursuant to Section 8.21 of the Loan Agreement resulting from the Additional Debtor's opening of a new account outside of Associated Bank, (iii) the Maturity Default, and (iv) pursuant to Section 8.41 of the Loan Agreement as a result of the Additional Debtor's failure to maintain the Debt Service Coverage Ratio (as defined in the Loan Agreement) for each testing period beginning with the period ending December 31, 2020.

7. Since the commencement of those discussions until approximately October 2021, Associated Bank understood it was a holder of a Property-Level Guarantee Settlement Claim (Class 6) under the Initial Debtors' Plan, which was first filed on December 29, 2020. As a result, Associated Bank had no reason to participate in the Initial Debtors' cases. On August 11, 2021, the Court entered an order confirming the Initial Debtors' Plan. The effective date of the Plan is anticipated to occur on November 1, 2021.

8. On or about October 8, 2021, the Debtors informed Associated Bank, absent a prompt restructuring of the Loan Agreement on terms demanded by the Additional Debtor, the Additional Debtor would commence a chapter 11 case and compel mediation in order to obtain its preferred terms. After failing to reach terms (and exactly one business day after the occurrence of the Maturity Default), the Additional Debtor filed this Case.

III. OBJECTION

A. This Case is a Two-Party Dispute between a SARE Debtor and Secured Lender.

9. The Motion does not show why the Additional Debtor should be joined with the larger CBL cases or be bound by the Preexisting Orders. Indeed, these requests are improper given that the CBL cases are coming to an end, the Additional Debtor appears to be a SARE debtor and this Case appears to warrant dismissal.

10. Despite the Additional Debtor's failure to designate itself as a SARE debtor, the Additional Debtor appears to be a SARE debtor within the meaning of 11 U.S.C. § 101(51B). As such, it should be treated differently and separately from the Initial Debtors' cases. Courts in the Fifth Circuit apply a three-part test to determine whether a debtor is a SARE debtor. *In re Scotia Pacific Co., LLC*, 508 F.3d 214, 220 (5th Cir. 2007). First, the debtor must have real property constituting a single property or project. Second, the property must generate substantially all of

the gross income of the debtor. Third, no substantial business must be conducted on the property other than the business of operating the real property and activities incidental thereto. *Id.*

11. All of the foregoing factors are present here. First, the real estate is a single commercial project known as the Brookfield Entertainment Complex (the "Brookfield Property") and constitutes a single project even though it houses multiple tenants. *In re Pioneer Austin East Dev. I, Ltd.*, No. 10-30177, 2010 WL 2671732, at *2 (Bankr. N.D. Tex. July 1, 2010) ("real estate development can be completed in separate projects, comprised of several tracts or parcels of land, and still constitute a single property for the purpose of single asset real estate cases"); *See also In re Philmont Dev. Co.*, 181 B.R. 220, 225 (Bankr. E.D. Penn. 1995); *In re Webb MTN, LLC*, No. 07-32016, 2008 WL 656271, at *1, 4 (Bankr. E.D. Tenn. Mar. 6, 2008). Courts in this Circuit and beyond have held that commercial property leased to tenants meets the first definition under 11 U.S.C. § 101(51B). *See, e,g. In re M & C P'ship, LLC*, No. 19-11529, 2021 WL 1679058, at *3-4 (Bankr. E.D. La. Apr. 28, 2021); *In re MTM Realty Trust*, No. 08-13428, 2009 WL 612147, at *2 (Bankr. D.N.H. Mar. 9, 2009). Moreover, the construction of the Brookfield Property was financed by Associated Bank with a single construction loan and is encumbered by Associated Bank's liens. *In re Philmont*, 181 B.R. at 224.

12. Second, the Brookfield Property generates substantially all of the Additional Debtor's gross income in the form of rental income, which satisfies the second prong of the SARE test.[4] Motion (ECF No. 3), Schedule 2 (Initial Budget). *See In re MTM Realty Trust*, No. 08-13428, 2009 WL 612147, at *2; *In re Vargas Realty Enterprises Inc.*, No. 09-10402, 2009 WL 2929258, at *5 (Bankr. S.D.N.Y. July 23, 2009).

[4] Associated Bank is not aware of, and the Additional Debtor has not disclosed, any other income-generating assets.

13. Third, Associated Bank is unaware of any other substantial business activities that are being carried out by the Additional Debtor at the Brookfield Property. The collection of rent is passive in nature and falls squarely within the third element of the SARE definition. *In re MTM Realty Trust*, No. 08-13428, 2009 WL 612147, at *3.

14. Moreover, this Case appears to warrant dismissal. It is a two-party dispute being used as a litigation tactic to restructure the fully matured Loans, implicating several of the dismissal factors for a SARE case under *Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (In re Little Creek)*, 779 F.2d 1068 (5th Cir. 1986). Under 11 U.S.C. § 1112(b)(1), a court may dismiss a chapter 11 bankruptcy case "for cause," based on a finding that the petition was not filed in good faith.[5] In this Circuit, courts have held that two-party disputes may constitute bad faith and "simply have no place in bankruptcy." *See, e.g., In re Anderson Oaks (Phase I) Ltd. P'ship*, 77 B.R. 108, 112 (Bankr. W.D. Tex. 1987).

15. Here, based on what is known at this time, several of the *Little Creek* factors appear to be present. First, there do not appear to be any assets owned by the Additional Debtor other than the Brookfield Property, which generates substantially all of the Additional Debtor's income. Second, Associated Bank's liens encumber the Brookfield Property. Third, it does not appear that the Additional Debtor employs any employees.[6] Fourth, the Additional Debtor has only seven unsecured creditors whose claims total $10,332.68. In comparison, Associated Bank's secured

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[5]The Fifth Circuit explained that the following conditions, several, but not all, of which typically exist and predicate a finding of lack of good faith: (i) one asset, such as a tract of undeveloped or developed real property encumbered by a secured creditor's liens; (ii) no employees except for the principals; (iii) little or no cash flow, and no available sources of income to sustain a plan of reorganization or to make adequate protection payments pursuant to 11 U.S.C. §§ 361, 362(d)(1), 363(e), or 364(d)(1); (iv) few, if any, unsecured creditors whose claims are relatively small; and (v) the property has usually been posted for foreclosure. *Little Creek*, 779 F.2d at 1072.

[6] According to the First Day Declaration, CBL & Associates Management, Inc. pays the wages of the employees at the Brookfield Property, which Brookfield reimburses pursuant to the Management Agreement.

claim is no less than $27,461,203.78. *In re Landmark Capital Co.*, 27 B.R. at 280 (finding that the case was filed in bad faith where, among other factors, the debtor named only four prepetition unsecured creditors that had not been paid). Fifth, while Associated Bank had not posted the Brookfield Property for foreclosure, the Additional Debtor filed this case one business day after the Maturity Default, precluding Associated Bank from exercising such rights under the Prepetition Loan Documents.

16. Overall, the nature and scale of this case does not match the Initial Debtors' cases. Joint administration of a brand new SARE debtor with a year-old complex chapter 11 case covering 178 debtors, who are already subject to a confirmed, effective plan of reorganization, should not be allowed as a tactic to obtain substantive relief. Especially when the Additional Debtor has not shown the relevance or applicability of previously-granted substantive relief to the new debtor, its creditors, and the facts of its case. And particularly when the totality of the circumstances so far provide strong evidence that this case was not filed in good faith, but instead as a litigation tactic to force an involuntary refinancing on a secured lender.

B. Many of the Preexisting Orders Are Inappropriate, Irrelevant or Unnecessary.

17. The Debtors are attempting to use joint administration to bind Associated Bank to 15 Preexisting Orders entered in the Initial Debtors' cases. There is no effort to tailor these orders to the Additional Debtor, its creditors or the facts of this case. The sole support for this request is a barely eight-page First Day Declaration, which itself fails to provide evidentiary support for much of the relief requested or show how it is applicable to this debtor, its creditors, and this case. Associated Bank objects to the applicability of the Preexisting Orders to this case, as more specifically described in the following paragraphs.

18. First, Associated Bank objects to the application of the Order granting complex chapter 11 bankruptcy case treatment (ECF No. 35). There is nothing complex about this case. Instead, as previously discussed, the Additional Debtor appears to be a SARE debtor.

19. Second, Associated Bank objects to the utilities Order (ECF No. 61) on the basis that the Additional Debtor has made no attempt to identify what utility companies provide utility services to the Additional Debtor and the associated costs of such services.

20. Third, Associated Bank objects to the critical service providers Order (ECF No. 63) on the basis that the Additional Debtor fails to identify what services specifically are being provided to the Additional Debtor and the associated costs of such services.

21. Fourth, Associated Bank objects to the cash management Order (ECF No. 263) because it is not sufficiently tailored to the Additional Debtor's cash management system and to the extent the Additional Debtor fails to execute the negotiated deposit account control agreement with Citizens Bank, with which the Additional Debtor opened a new account in violation of Section 8.21 of the Loan Agreement. This violation constituted an Event of Default pursuant to the Loan Agreement. *See supra* note 2. In addition, the Additional Debtor's cash is Associated Bank's collateral and/or proceeds from such collateral.

22. Fifth, Associated Bank objects to the Cash Collateral Order (ECF No. 1018). The Cash Collateral Order was applied to the Additional Debtor on an interim basis while Associated Bank and the Additional Debtor negotiate protections for Associated Bank. Moreover, Associated Bank's liens encumber all of the Additional Debtor's assets, including the Cash Collateral. As such, Associated Bank is entitled to basic adequate protections, including the following:

a. Monthly interest payments in accordance with the terms of the Prepetition Loan Documents. This relief would be consistent with the relief granted to Wells Fargo Bank, National Association in the Initial Debtors' cases. *See* Cash Collateral Order, ECF No. 1018, ¶

11(b)(i).

b. Replacement liens in the Prepetition Collateral and in the post-petition property of the Additional Debtor ("Adequate Protection Liens"), whether now existing or hereafter acquired or arising, and wherever located (the "Postpetition Collateral," and the collateral subject to such Adequate Protection Liens, the "Replacement Collateral"), which Adequate Protection Liens shall (i) be supplemental to and in addition to the Prepetition Liens, (ii) attach with the same priority as enjoyed by the Prepetition Liens immediately prior to the Petition Date, (iii) be deemed to be legal, valid, binding, enforceable, perfected liens, not subject to subordination or avoidance, for all purposes in this case, (iv) not be subordinated or be made *pari passu* with any other lien under 11 U.S.C. §§ 363 and 364 or otherwise, and (v) be deemed to be perfected automatically upon the entry of the final Cash Collateral Order, without the necessity of filing of any UCC-1 financing statement, state or federal notice, mortgage or other similar instrument or document in any state or public record or office and without the necessity of taking possession or control of any collateral. Similar relief was granted in the following cases involving a SARE debtor: *In re Raza Services LLC*, No. 16-30113 (Bankr. S.D. Tex. Feb. 2, 2016); *In re Cameron-811 Rusk, L.P.*, No. 10-31856-H3-11 (Bankr. S.D. Tex. July 1, 2010); *In re Northbelt, LLC*, No. 19-30388 (Bankr. S.D. Tex. Feb. 28, 2019); *In re Southbelt Properties Mgmt, Inc.*, No. 10-80254 (Bankr. S.D. Tex. Aug. 30, 2010).

c. Superpriority adequate protection claim under 11 U.S.C. § 507(b) to the extent the Adequate Protection Liens are shown to be inadequate to protect the Prepetition Secured Parties against the diminution in value of the Prepetition Collateral, including the Cash Collateral, resulting from the Additional Debtor's use of Cash Collateral pursuant to the final Cash Collateral Order (the "Superpriority Claims," and collectively with the Adequate Protection Payments and Adequate Protection Liens, the "Adequate Protection Obligations"). Similar relief was approved in *In re Cameron-811 Rusk, L.P.*, No. 10-31856-H3-11; *In re Southbelt Properties Mgmt, Inc.*, No. 10-80254.

d. The waiver of any right or claim to costs or expenses of the administration of this case, or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings, being imposed upon Associated Bank or the Prepetition Secured Parties pursuant to 11 U.S.C. §§ 506(c) and/or 105(a), or any similar principal of law, or otherwise. Similar relief was approved in *In re Cameron-811 Rusk, L.P.*, No. 10-31856-H3-11. Also, the waiver of any right or claim against Associated Bank or the Prepetition Secured Parties regarding the "equities of the case" exception of 11 U.S.C. § 552(b) or the equitable doctrine of "marshalling" or any similar doctrine with respect to the Prepetition Collateral or the Replacement Collateral.

23. Sixth, Associated Bank objects to the application of the Orders approving the employment of Moelis & Company LLC (ECF No. 744) and Deloitte & Touche (ECF Nos. 937, 938). The Debtors have not shown why it is in the best interests of the estate to employ an investment banker where no sale of assets is contemplated. Likewise, the Debtors have not articulated what tax advisory and audit services are needed in this case.

24. While Associated Bank does not have a problem, *per se*, with the remaining orders, the Debtors should nonetheless be required to, at a minimum, provide evidentiary support for their relevance and application to this case.

IV. RESERVATION OF RIGHTS

25. Nothing in this Objection should be construed to adversely affect any of Associated Bank's rights, claims, or causes of action against the Debtors under any of the Prepetition Loan Documents, the Bankruptcy Code, or any other applicable law.

WHEREFORE, Associated Bank respectfully requests that the Court deny the Motion as set forth herein and grant Associated Bank such other and further relief to which Associated Bank may be justly entitled.

Dated: November 1, 2021

Respectfully submitted,

KATTEN MUCHIN ROSENMAN LLP

/s/ Yelena Archiyan

Yelena Archiyan
Texas State Bar No. 24119035
2121 N. Pearl St., Suite 1100
Dallas, TX 75201
Telephone: (214) 765-3657
Email: yelena.archiyan@katten.com

-and-

Peter Siddiqui (admitted *pro hac vice*)
Paul Musser (admitted *pro hac vice*)
525 W. Monroe St.
Chicago, IL 60661-3693
Telephone: (312) 902-5455
Email: peter.siddiqui@katten.com
paul.musser@katten.com

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2021, a true and correct copy of the foregoing was served by the Court's Electronic Case Filing System to all parties registered or otherwise entitled to receive electronic notices.

/s/ Yelena Archiyan
Yelena Archiyan