

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In re:	:	Chapter 11
	:	
EAST BROADWAY MALL, INC.,	:	Case No. 19-12280-scc
	:	
Debtor.	:	

**STIPULATED ORDER RE: (I) USE OF CASH COLLATERAL, (II) POST-PETITION
REPLACEMENT LIENS, AND (III) RELATED RELIEF**

This matter came before the Court pursuant to the “Motion to Approve Stipulated Order Re: (I) Use of Cash Collateral, (II) Postpetition Replacement Liens, (III) Assumption of Executory Contracts, and (IV) Related Relief” (the “**Motion**”) filed by East Broadway Mall, Inc. (the “**Debtor**”), the debtor-in-possession in the above-captioned Chapter 11 bankruptcy case (the “**Bankruptcy Case**”). Pursuant to the Motion, the Debtor seeks, among other things, to use cash collateral and other security subject to the liens of Bank of Hope f/k/a BBCN Bank (“**BOH**”), a secured creditor and party-in-interest in the Bankruptcy Case. The Motion presents “core” proceedings pursuant to 28 U.S.C. §§157(b)(2)(A), (G) and (M) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334. The Motion was properly noticed to all parties-in-interest in the Bankruptcy Case.

Pursuant to this Stipulated Order, the Debtor and BOH request that the Court enter this Stipulated Order regarding (i) the Debtor’s use of cash collateral; (ii) the granting of postpetition replacement liens; and (iii) related relief. After due and sufficient notice of the Motion, notice of this Motion having been provided to those parties with an interest in the Debtor’s property, the Debtor’s 20 largest unsecured creditors, and the United States Trustee for the Southern District, a hearing having been held to consider the relief requested in the Motion and considering the consent of the parties as indicated by signature of counsel below, all

evidence proffered regarding the Motion, the entire record before this Court, and good and sufficient cause appearing therefore, the Court FINDS AND CONCLUDES as follows:

I. RECITALS

1.1 On July 12, 2019 (the “**Petition Date**”), the Debtor filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code initiating the above-captioned Chapter 11 case.

1.2 Since the Petition Date, the Debtor has remained in possession of its assets as a debtor-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

1.3 The Debtor owns and operates a mall (the “**Business**”) and the Debtor continues to operate the Business post-petition as a debtor-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

Stipulations

1.4 BOH is the senior secured creditor of the Debtor pursuant to the following documents (collectively, with all other documents relating thereto, the “**Loan Documents**”):¹

(a) Promissory Note dated December 29, 2011, in the principal amount of \$7,000,000 made by the Debtor to the order of BOH (the “**Note**”);

(b) Business Loan Agreement dated December 29, 2011 (the “**Loan Agreement**”);

(c) Leasehold Mortgage Consolidation, Modification, Spreader and Extension Agreement dated December 29, 2011 (the “**Mortgage**”), pursuant to which the Debtor granted to BOH a first priority mortgage on a certain leasehold estate held by the Debtor arising from a ground lease entered into between the City of New York (the “**City**”), as landlord, and the Debtor, as tenant, dated March 1, 1985 (as amended, the “**Ground Lease**”) of real property located at 88 East Broadway, New York, New York (the “**Premises**”), including the buildings, structures, fixtures, additions, enlargements, extensions,

¹ True copies of the Loan Documents are attached hereto as **Exhibit A**.

modifications, repairs, replacements, and improvements located on the Premises (the “**Improvements**” and together with the Premises, the “**Mortgaged Property**”), all leases, subleases and other agreements affecting the use, enjoyment or occupancy of the Mortgaged Property (the “**Leases**”) and all rents, issues, and profits from the Mortgaged Property (the “**Rents**”), and all other rights, interests, and estates granted to BOH under the Mortgage and the proceeds of all of the foregoing;

(d) Assignment of Rents dated December 29, 2011 (the “**Assignment of Rents**”), which grants a continuing security interest in, and conveys to BOH all of the Debtor’s right, title, and interest in and to the Rents;

(e) Commercial Security Agreement dated December 29, 2011 (the “**Security Agreement**”), which grants BOH a first priority lien in and security interest upon substantially all personal property of the Debtor and the proceeds thereof (as further described in the Security Agreement) (the “**Personal Property Collateral**” and together with all the collateral described in the Mortgage and the Assignment of Rents, the “**Collateral**”; the Collateral that constitutes cash collateral will be referred to herein as the “**Cash Collateral**”);

(f) Escrow Agreement dated December 29, 2011 (“**Escrow Agreement**”), which grants BOH certain rights in \$60,000 deposited into escrow with Friedman Harfenist Kraut & Pearlstein LLP (the “**Escrowed Deposit**”);

(g) Environmental Indemnity Agreement dated December 29, 2011 (the “**Environmental Indemnity**”), which provides certain indemnities by the Debtor and certain guarantors relating to Environmental Laws, Hazardous Materials, and Hazardous Activity (as such terms are defined in the Environmental Indemnity);

(h) ADA Compliance Agreement dated December 29, 2011 (“**ADA Agreement**”), which provides certain covenants, representations, and warranties by the Debtor and certain guarantors relating to compliance with the Americans with Disabilities Act of 1990, as amended and supplemented;

(i) UCC-1 Financing Statement (filing number 201201030003811) filed on January 3, 2012 and UCC-3 Financing Statement Amendment (filing number 201607195867580) filed on July 19, 2016 (the “**UCC Financing Statements**”); and

(j) Recognition Agreement dated December 22, 2011 (the “**Recognition Agreement**”), which grants certain rights to BOH by the Debtor and the City with respect to the Ground Lease.²

1.5 As of the Petition Date, pursuant to the Loan Documents, the Debtor’s indebtedness to BOH under the Note was no less than \$5,851,940.00, including, without limitation, \$5,490.691.13 of principal, \$129,847.56 of interest, and \$231,401.31 of attorneys’ fees (together with continuing interests, costs, and expenses due under the Loan Documents, the “**Indebtedness**”). The Indebtedness is secured by substantially all of the Debtor’s assets, including but not limited to the Collateral.

1.6 The Debtor has requested that BOH consent to the Debtor’s use of the Cash Collateral, and the Debtor has undertaken arm’s-length negotiations with BOH, regarding its use of Cash Collateral. BOH is willing to allow the Debtor the use of Cash Collateral pursuant to the terms and conditions set forth in this Stipulated Order.

1.7 The terms and conditions of this Stipulated Order are fair and reasonable, were negotiated by the parties in good faith at arm’s-length, and the parties otherwise acted in good faith.

² In addition, the Debtor’s principals, Grace Chan and Kwok Ming Chan (the “**Guarantors**”) each executed a Commercial Guaranty dated December 29, 2011, (the “**Guaranties**”), pursuant to which the Guarantors unconditionally guaranteed all obligations owing from the Debtor to BOH. BOH reserves all of the rights and remedies that it is entitled to under the Guaranties.

II. OPERATIVE PROVISIONS

2.1 The foregoing Recitals are incorporated into these Operative Provisions without any distinction between the two segments of this Stipulated Order regarding their efficacy or enforceability.

2.2 **As Authority to Use Cash Collateral.** Effective *nunc pro tunc* from the Petition Date, the Debtor may use Cash Collateral only as provided in this Stipulated Order. If the Debtor fails to comply with the terms and conditions of this Stipulated Order, the Debtor's authorization to use the Cash Collateral for any purpose shall be automatically terminated.

2.3 **Use of Cash Collateral.** The Debtor's use of Cash Collateral is limited to payment of the authorized expenses contained in a budget that has been approved by BOH (the "**Budget**"). An initial Budget is attached hereto as **Exhibit B**. The Debtor is authorized to use the Cash Collateral only to pay the ordinary and necessary operating expenses of the Debtor listed in the Budget. Except for payments to insiders or the Carey Group, the Debtor may use Cash Collateral in amounts up to five percent (5%) in excess of any line item in the Budget without the prior written consent of BOH, or further order of Court (the "**Approved Expenses**"). The Debtor's use of Cash Collateral is conditioned upon the Debtor's payment of Approved Expenses in compliance with a waterfall that has been approved by BOH (the "**Waterfall**"). An initial Waterfall is annexed to the Budget attached hereto as Exhibit B. Any further or additional agreements for the use of the Cash Collateral, at the sole discretion of BOH, shall be memorialized in one or more separate cash collateral agreements, without the need for further approval of this Court.

2.4 **Replacement Liens.** Notwithstanding anything in Bankruptcy Code § 552 to the contrary, and in addition to its liens and security interests under the Loan Documents, BOH shall have and is hereby granted (effective and continuing without the necessity of the execution, filing and/or recordation of mortgages, deeds of trust, security agreements, control agreements, pledge agreements, financing statements or otherwise), a valid and perfected first priority security interest and lien (the "**Replacement Liens**") in all of the

Debtor's now owned or after acquired property (whether owned or existing as of the Petition Date or thereafter acquired) and proceeds of the foregoing (collectively, the "**Replacement Collateral**"). The Replacement Liens will be evidenced by the Loan Documents and this Stipulated Order. The Replacement Liens shall have the same validity, enforceability, and priority of BOH's prepetition liens and security interests in the Collateral pursuant to the Loan Documents, and shall be enforceable if and to the extent of any diminution in the value of BOH's interest in the Collateral, as the Collateral existed as of the Petition Date. In addition, BOH will retain all of its existing liens and security interests in all of the Collateral, including, without limitation, the liens and security interests described above and any rights of setoff and/or recoupment. The Replacement Liens shall be senior to all other postpetition security interests, liens, and rights of setoff in the Replacement Collateral. The Replacement Liens shall not attach to any of the Debtor's claims or causes of action arising under Sections 502(d), 544, 545, 547, 548, 549, 550 and 553 of the Bankruptcy Code and any other avoidance or similar action under the Bankruptcy Code.

2.5 Adequate Protection Payments: As adequate protection to protect against a diminution in the value of any interest BOH may have in Collateral, the Debtor shall make monthly payments on the 29th day of each month to BOH payable to "Bank of Hope" in the amount of \$50,698.55.³ The first adequate protection payment of \$50,698.55 that is due October 29, 2019, shall be due on the earlier of October 29, 2019 and within two business days of entry of this Stipulated Order. All future monthly adequate protection payments shall be made on or before 29th day of each month beginning November 29, 2019. A 6% late fee shall be payable for any adequate protection payment made after its due date.

³ Since the Petition Date, the Debtor has been making monthly payments to BOH in the amount of \$50,698.55. This amount is less than the monthly installment of principal and interest that is due under the Loan Documents. BOH reserves the right to seek additional amounts, including payment of default interest and reimbursement of attorneys fees, *nunc pro tunc* from the Petition Date in any future cash collateral stipulation or in connection with any modification, amendment, or extension of this Stipulated Order.

2.6 **Termination Events:** Unless extended further with the written consent of BOH (confirmed by the execution of another cash collateral agreement and entry of a further order of the Court approving such further cash collateral agreement), the authorization granted to the Debtor to use Cash Collateral under this Stipulated Order will terminate without further notice, except as provided in paragraph 2.7, upon the earliest of:

(a) the date upon which the Debtor lodges an order or otherwise consents to the conversion of its Bankruptcy Case to Chapter 7, or otherwise is no longer Debtor-In-Possession in the Bankruptcy Case or is otherwise limited or excluded from the management and operation of its business (through the appointment of a trustee or an examiner under the Bankruptcy Code, or through the appointment of some other type of fiduciary or custodian under federal or state law);

(b) the entry of any stipulation, agreed order, or order of the court granting stay relief to any party that claims an interest in the Collateral or the Replacement Collateral;

(c) the filing by the Debtor of a motion which seeks to grant, or entry of an order granting, a party other than BOH a lien or security interest equal or senior to the liens and security interests held by BOH in the Collateral and the Replacement Collateral without the consent of BOH;

(d) the Debtor ceases to operate its business without the prior written consent of BOH;

(e) the filing or entry of any consensual motion, stipulation, or any order of the court providing for the rejection of the Ground Lease or any of the Leases without BOH's prior written consent;

(f) an order is entered by the Court or a stipulation is entered into by the Debtor providing for modification of the automatic stay for any party with an interest in the non-residential real property lease (including the lessor, the sub-lessor, or any fee ownership interest) without BOH's prior written consent;

(g) the Debtor fails to provide BOH with access to Debtor's subtenants and prospective subtenants at the Mortgaged Property or otherwise fails to facilitate and cooperate with BOH's ability to communicate with such subtenants and prospective subtenants regarding their leases or prospective leases at the Mortgaged Property;

(h) the Debtor fails to provide BOH with access to the Carey Group or otherwise fails to facilitate and cooperate with BOH's ability to communicate with the Carey Group regarding the Debtor;

(i) BOH does not receive copies of all invoices, reports, and work product of the Carey Group at the same time as it is received by the Debtor;

(j) the Guarantors fail to timely pay 50% of the fees incurred by the Carey Group;⁴

(k) the Debtor makes any payment to an insider (including to Terry Chan or either of the Guarantors or any member of their family), including any salary, wages, commissions, or management fees without BOH's prior written consent;

⁴ The Guarantors shall pay ½ of the monthly fees of the Carey Group, which fee shall be capped at \$10,000 per month, and the balance shall be paid by the Debtor as a budgeted line item in the Budget.

(l) any of the Rents are paid to any person or entity without BOH's prior written consent;⁵

(m) the Debtor or its representatives fail to comply with the provisions of this Stipulated Order or the Loan Documents; or

(n) November 30, 2019 or such later date as may be agreed to in writing BOH.

(Any of the forgoing (a)-(n) shall be referred to as a "**Termination Event**"). Notwithstanding any such termination, the rights, claims, security interests liens and priorities of BOH with respect to all transactions that occur prior to the occurrence of such termination, including, without limitation, all liens and priority claims provided for in this Stipulated Order, will remain unimpaired and unaffected by any such termination, will survive any such termination, and will be binding upon any and all successors-in-interest to the Debtor, including any trustee that may be appointed in the Bankruptcy Case.

2.7 Notice of Termination Event. Upon occurrence of a Termination Event, BOH shall provide the Debtor, the United States Trustee for the Southern District of New York, and the creditors' committee, or if a committee is not appointed, the Debtor's 20 largest unsecured creditors as listed on the Debtor's schedules, with five (5) days' notice of such Termination Event before terminating authorization for the use of Cash Collateral.

2.8 Reports. The Debtor will respond promptly to any request for accountings, leases, rent rolls, financial statements, tax returns, or other business or financial information from BOH, shall permit inspection of its books and records, or the Business or other Collateral by BOH (or its representatives) upon two (2) business days' notice, and shall permit BOH to interview its subtenants at the Premises without notice to the Debtor. The Debtor shall provide BOH with bi-weekly accountings of rent payments

⁵ All Rents shall be deposited into the Debtor's DIP account. It shall be a violation of this Order if any of the Rents are improperly diverted.

received by each tenant, which accountings shall be due on first and third Monday of each month for the prior two week period. The Debtor shall provide BOH with copies of all bank statements within two (2) business days of receiving same from the bank. The Debtor shall provide BOH with a copy of a three (3) year account history for each tenant within seven days of the date of this Order. The Debtor shall provide BOH with copies of all invoices, reports, and work product of the Carey Group, as well as copies of all documents and information provided to the Carey Group, at the same time as it is received by the Debtor or the Carey Group, respectively. BOH shall have the right to communicate with the Carey Group regarding the Debtor and shall be timely apprised by the Carey Group of the status of the Carey Group's efforts on behalf of the Debtor.

2.9 Survival of Reporting Obligations. Notwithstanding the occurrence of a Termination Event, the requirement of the Debtor to provide BOH all information in Paragraph 2.8 above, and any other financial information reasonably requested by BOH or its attorneys or other representatives, including all such information which was required to be provided by Debtor to BOH under the Loan Documents, will continue so long as the Debtor remains as debtor-in-possession in this case.

2.10 Perfection of Replacement Liens. The Replacement Liens in the Replacement Collateral granted hereby shall be valid, perfected, enforceable and effective against the Debtor and their successors and assigns, including any trustee or receiver in these or any superseding Chapter 7 cases, without any further action by the Debtor or BOH and without the execution, delivery, filing or recordation of any control agreements, promissory notes, financing statements, mortgages, security agreements or other documents. The Debtor acknowledges that BOH may, but is not required to, file any financing statement to perfect the Replacement Liens granted by this Stipulated Order.

2.11 Super-Priority Claim. To the extent the Replacement Liens and other relief granted to BOH in this Stipulated Order do not provide BOH with adequate protection of its interest in the BOH Collateral, BOH will have a super-priority administrative expense claim

(the “**Super-Priority Claim**”) under Bankruptcy Code § 507(b) as necessary to compensate BOH fully for the use of the Collateral by the Debtor. The Super-Priority Claim of BOH will have priority over all administrative expenses of any kind incurred in the Bankruptcy Cases, including such administrative expenses of the kinds specified in, or allowable under Sections 105, 326, 330, 331, 503(b), 506(c), 507(a), 507(b) or 726 of the Bankruptcy Code. Except with the consent of BOH, no costs or expenses of administration which have been or may be incurred in these proceedings, any conversion of these proceedings pursuant to Section 1112 of the Bankruptcy Code, or in any other proceeding related hereto, and no priority claims are, or will be, prior to or on a parity with the Super-Priority Claim of BOH against the Debtor.

2.12 **Carve Out.** The security interests in and Replacement Liens upon any of the Collateral or Replacement Collateral securing the Indebtedness, and to the extent a super-priority administrative expense claim is granted to BOH, pursuant to the terms of this Stipulated Order, shall be subordinate only to (i) the fees and expenses of the Clerk of this Court and the Office of the United States Trustee pursuant to 28 U.S.C. §1930(a) plus applicable interest on any such fees; (ii) the amount of outstanding and unpaid allowed professional fees (the “**Professional Fees**”) for professionals retained by the Debtor up to an aggregate amount not to exceed \$15,000.00, which may be increased upon further discussion with BOH and evidenced by an amendment to this Stipulated Order, subject to the terms and conditions set forth below, and reasonable fees and expenses of a hypothetical chapter 7 trustee up to an aggregate amount not to exceed \$5,000 if the case is converted to chapter 7 (the “**Carve-Out**”). For purposes of this paragraph, the “**Professional Fees**” shall mean the outstanding and unpaid commissions, fees and expenses awarded or allowed by final order of the Court pursuant to Sections 326, 330 or 331 of the Bankruptcy Code for professionals retained by the Debtor in accordance with an Order of this Court pursuant to Section 327 of the Bankruptcy Code (the “**Debtor’s Professionals**”), subject to the rights and interests of all parties in interest of this case, including, without limitation, BOH, to object to the allowance and/or

payment of any fees and expenses requested by any Debtor's Professionals. None of the Carve-Out may be used in connection with the assertion or joinder in any claim, counter-claim, action, proceeding, application, motion, objection, defense or other contested matter, the purpose of which is to seek any order, judgment, determination or similar relief: (i) invalidating, setting aside, avoiding, subordinating, in whole or in part, the obligations, liens and security interests in any of the Collateral of BOH or (ii) preventing, hindering or delaying BOH's assertion or enforcement of its liens or realization upon any collateral.

2.13 Intentionally Omitted.

2.14 Rights Reserved. Nothing in this Stipulated Order will be deemed or construed as an admission or waiver by BOH as to adequate protection, or any other issue in the case, and this Stipulated Order will not constitute consent by BOH to the use of Cash Collateral other than for the limited purpose expressly provided herein. Moreover, nothing contained in this Stipulated Order will be deemed to waive or diminish any rights of BOH under the Loan Documents.

2.15 Terms Binding. The provisions of this Stipulated Order will be binding upon and inure to the benefit of BOH and the Debtor and their respective successors and assigns, including but not limited to any trustee in bankruptcy hereinafter appointed as a representative of the Debtor's estate. The Debtor may not object to, challenge, or seek to avoid the amount, validity, or enforceability of the Indebtedness, or BOH's liens in the Collateral.

2.16 Modifications. Any of the provisions of this Stipulated Order may be waived or modified by BOH and the Debtor jointly in writing.

2.17 Reservation of Certain Rights and Bar of Challenges and Claims. Nothing in this Stipulated Order shall prejudice the rights of any unsecured creditor's committee or any party-in-interest (other than the Debtor) to assert, object to or challenge (a) the validity, extent, perfection or priority of the liens and security interests asserted by BOH, (b) the validity, allowability, priority, status, or the amount of the Indebtedness and any claim for interest, fees,

commissions, costs, or expenses thereon, or (c) any and all claims for alleged damages of the estate arising out of the actions or inactions of BOH or otherwise asserting claims of the estates against BOH, including, without limitation, claims arising out of related to the Loan Documents or any related document and claims under Chapter 5 of the Bankruptcy Code or for fraudulent transfers and/or conveyances or under the doctrines of equitable subordination, recharacterization, or deepening insolvency (collectively, the “**Reservation of Rights**”); provided, however, that, unless a contested matter or adversary proceeding raising such claims, objections, or challenges is commenced on or before November 30, 2019 (the “**Reservation of Rights Period**”), all such claims, challenges and objections shall be forever waived, and the Indebtedness shall be allowed as a secured claim within the meaning of Section 506 of the Bankruptcy Code. Upon the expiration of the Reservation of Rights Period, any and all claims, objections or challenges to (a) the validity, extent, perfection, or priority of the liens and security interests asserted by BOH, (b) the validity, allowability, priority, status or size of the obligations under the Loan Documents and any claim for interest, fees, commissions, costs or expenses thereon, or (c) any and all claims for alleged damages of the estates arising out of the actions or inactions of BOH, including, without limitation, claims arising out of related to the Loan Documents or any related document and claims under Chapter 5 of the Bankruptcy Code or for fraudulent transfers and/or conveyances or under the doctrines of equitable subordination, recharacterization, or deepening insolvency, shall be deemed by way of settlement and compromise to be forever barred and the findings, stipulations, and admissions contained in this Stipulated Order shall be binding on the Debtor and all other parties in interest and creditors of the Debtor and its estate. The Reservation of Rights Period may be extended in writing by BOH. The Reservation of Rights period may also be extended by order of the Court upon a motion by any committee filed prior to the expiration of the Reservation of Rights Period.

2.18 **Notice.** Any motion or request by the Debtor or any other party to authorize the use of Cash Collateral, to modify the terms of this Stipulated Order, or to obtain any other relief that would impair, adversely affect or alter the rights of BOH under this

Stipulated Order shall only be heard upon at least three (3) business days actual notice to BOH's counsel of record. No subsequent stay, modification, termination, failure to extend the term of or vacation of this Stipulated Order shall affect, limit or modify the validity, enforceability or perfection of the Replacement Lien granted to BOH.

DATED this ____ day of August, 2019.

HONORABLE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

Approved as to
form and content by:

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East Broadway Mall
Inc / Exp 08/2019

Gross Monthly income	237,634.00	
Monthly Expenses		
Net Payroll	8,546.95	
Prepaid-Tax	5,305.95	
Unemployment Tax		
Worker's Comp	665.00	
Bank of Hope	50,698.00	
DCAS Rent	62,208.00	
Utility(ConED)	15,000.00	
Utility(Water/ Sewer)	19,261.91	
Office Exp/Sup	10,423.99	
Repair Maintenance	6,229.44	
Management		
Insurance	4,080.00	
Security	8,896.00	
	191,315.24	
	Total:	191,315.24
	Net:	46,318.76

EXHIBIT B

BUDGETED EXPENSE WATERFALL

The Debtor shall pay budgeted expenses in the following order. The Debtor may not pay a lower priority item if any higher priority item that is due has not been paid. The Debtor may not deviate from this waterfall without BOH's prior written consent. Nothing contained in this Budgeted Expense Waterfall shall preclude the Guarantors or another insider of the Debtor from paying a budgeted expense out of their own funds; provided, however, that the Debtor shall have no obligation to reimburse such Guarantor or insider for such payment absent BOH's prior written consent.

1. Bank of Hope Monthly Loan Payment
2. Bank of Hope's Professional Fees and Expenses
3. Ground Lease Rent
4. Cary Group Fees and Expenses
5. Insurance
6. Utility
7. Net Payroll
8. Payroll Tax
9. Unemployment Tax
10. Worker's Comp
11. Security
12. Repair Maintenance
13. Office Expenses and Supplies