

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov

In re:

CINEMEX USA REAL ESTATE
HOLDINGS, INC., CINEMEX
HOLDINGS USA, INC., and CB
THEATER EXPERIENCE LLC,¹

Chapter 11

Case No. 20-14695-LMI

(Jointly Administered)

Debtors.

DEBTORS' EMERGENCY MOTION FOR ENTRY OF AN ORDER (I) EXTENDING TIME FOR PERFORMANCE OF OBLIGATIONS ARISING UNDER UNEXPIRED REAL PROPERTY LEASES; (II) ESTABLISHING TEMPORARY CASE ADMINISTRATION PROCEDURES; AND (III) GRANTING RELATED RELIEF

(Emergency Hearing Requested for May 18, 2020)

The Debtors are party to over 30 unexpired real property leases² for locations where they operate upscale dine-in movie theaters. The revenues generated from the operation of these theaters are the lifeblood of the Debtors' business. Since the middle of March 2020, the Debtors have been unable to operate their theaters due to the "stay-at-home" orders issued by the states in which they operate. As a result, the Debtors do not have sufficient income from operations to meet their operating expenses, including to pay the landlords sums owed under their leases. The Debtors are, however, in the process of obtaining post-petition financing and anticipate being able to pay all administrative claims in these cases in full in connection with a plan of reorganization once the stay-at-home restrictions are lifted.

In several recent Chapter 11 cases, debtors have obtained relief from the Bankruptcy Court to defer certain payments owed under unexpired leases of non-residential real property. In order to facilitate their own reorganization, the Debtors here respectfully request entry of an order (i) extending the time for performance of obligations arising under unexpired real property leases; (ii) establishing temporary case administration procedures; and (iii) granting

¹ The Debtors in these cases and the last four digits of each Debtor's federal tax identification number are as follows: (1) Cinemex USA Real Estate Holdings, Inc. (2194); (2) Cinemex Holdings USA, Inc. (5502); and (3) CB Theater Experience LLC (0563). The address for the Debtors is 175 South West 7th Street, Suite 1108, Miami, Florida 33130.

² This number of leases excludes the nine (9) leases that the Debtors rejected as of April 30, 2020. See ECF No. 29.

related relief.

Accordingly, the Debtors respectfully request that the Court conduct a hearing on this Motion within 5 business days of the date hereof, consistent with Local Rule 9013-1(F), as the Debtors believe that a hearing on this Motion no later than May 18, 2020, is needed in order for them to continue to operate.

Cinemex USA Real Estate Holdings, Inc. (“Cinemex Real Estate”), Cinemex Holdings USA, Inc. (“Cinemex Holdings”), and CB Theater Experience LLC (“CB Theater” and, with Cinemex Real Estate and Cinemex Holdings, the “Debtors”) by and through their proposed undersigned counsel, file the *Debtors’ Emergency Motion for Entry of an Order (i) Extending the Time for Performance of Obligations Arising Under Unexpired Real Property Leases; (ii) Establishing Case Administration Temporary Procedures; and (iii) Granting Related Relief* (“Motion”). In support of the Motion, the Debtors rely upon the *Declaration of Jose Leonardo Marti in Support of Chapter 11 Petition and First Day Motions* (ECF No. 47), and respectfully represent the following:

I. JURISDICTION

1. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Venue is proper in this District pursuant to 28 U.S.C. § 1408. The statutory predicates for the relief requested herein are sections 105(a) and 363 of title 11 of the United States Code (“Bankruptcy Code”).

II. BACKGROUND

2. On April 25, 2020, and April 26, 2020 (“Petition Dates”), the Debtors filed Voluntary Chapter 11 Petitions in the United States Bankruptcy Court for the Southern District of Florida (the “Chapter 11 Cases”).³

³ Cinemex Real Estate and Cinemex Holdings filed on April 25, 2020, and CB Theater filed on April 26, 2020.

3. The Debtors are operating their business and managing their affairs as debtors-in-possession. *See* 11 U.S.C. §§ 1107(a) and 1108.

4. Cinemex Holdings, which was incorporated in Delaware in February 2014, is the holding company for a total of five U.S. entities: (1) Cinemex Real Estate; (2) CB Theater; (3) Cinemex USA Enterprises, LLC (“Cinemex Enterprises”); (4) Cinemex MD, LLC (“Cinemex MD”); and (5) Cinemex AD, LLC (“Cinemex AD”). Cinemex Enterprises, Cinemex MD and Cinemex AD have not yet filed Chapter 11 petitions (together, “Non-Debtors” and, together with the Debtors, “Cinemex USA”). Cinemex USA is based in Miami.

5. Cinemex Holdings is jointly owned by Grupo Cinemex, S.A. de C.V. (“Grupo Cinemex”) and Operadora de Cinemas, S.A. de C.V. (“Operadora de Cinemas”), both Mexican corporations. Grupo Cinemex has a 66% ownership stake in Cinemex Holdings while Operadora de Cinemas has a 33% ownership stake. Grupo Cinemex owns 99.99% of Operadora de Cinemas.

6. Cinemex USA is in the movie theater business. It operates 41 movie theaters in 12 states, including Florida (with multiple theaters in and around Miami, Tampa and Tallahassee), Alabama, Colorado, Georgia, Illinois, Maryland, Minnesota, New Jersey, New York, North Carolina, Ohio and Virginia. The theaters operate under the brand name “CMX Cinemas.”

7. Commencing on March 21, 2020, the governors in the states in which the Debtors operate began to issue “stay-at-home” orders that required the Debtors to shutter their theaters indefinitely. As of the date of this motion, most of these restrictions remain in effect. In March 2020, the Debtors laid off approximately 2,470, or 98% of their 2,500 employees, to reduce costs as they endeavored to weather the COVID-19 storm. However, the stay-at-home orders remain

in effect, and it is unclear when the Debtors will be able to fully reopen their theaters. Faced with a precipitous decline in revenue, but continuing accrual of operating costs, the Debtors filed petitions under Chapter 11 on the Petition Dates.

III. RELIEF REQUESTED

8. By this Motion, and pursuant to sections 102(1), 105(a), 105(d) and 365(d)(3) of the Bankruptcy Code and Rules 1015(c), 2002(m), 9007, 9014 and 9036 of the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”), the Debtors seek entry of an Order substantially in the form attached hereto as **Exhibit A**:

- (a) Suspending the Debtors’ obligations to landlords on account of obligations that accrue under unexpired real property leases (“Leases”),⁴ within 60 days of the Petition Dates, through and including June 24, 2020, pursuant to section 365(d)(3) of the Bankruptcy Code; and
- (b) Establishing the temporary case administration procedures set forth herein governing (i) stay relief and other applications and motions filing procedures; (ii) the Debtors’ entry into Stipulations (defined herein); and (iii) hearings to be held in these Chapter 11 Cases for the next 45 days subject to further extension (collectively, and as further described below, the “Temporary Procedures”).

The Debtors request that, to the extent any of the Temporary Procedures conflict with the provisions of the Bankruptcy Code, the Bankruptcy Rules or the Local Rules of the United States Bankruptcy Court for the Southern District of Florida (“Local Rules”), the Temporary Procedures shall govern and supersede such provisions and rules.

IV. DISCUSSION

A. Impact of COVID-19 on These Chapter 11 Cases

9. The COVID-19 pandemic and the related stay-at-home orders have devastated the non-essential retail industry. Every state in which the Debtors operate a theater has issued “stay-

⁴ The Leases as defined herein exclude the nine (9) leases that the Debtors rejected as of April 30, 2020. *See* ECF No. 29.

at-home” or “shelter in place” orders, resulting in the closure of all non-essential brick-and-mortar businesses, including the Debtors’ theaters.⁵ The Debtors shut down all of their 41 locations to comply with these various closure orders as well as to protect the health of their employees and customers. Given the ongoing nature of the COVID-19 pandemic, the Debtors expect the mandated closures to continue for the near future.

10. Pursuant to the motion to obtain post-petition financing filed on May 5, 2020 (ECF No. 58), the Debtors are seeking approval to obtain post-petition financing in the aggregate amount of up to \$1.92 million. The Debtors recognize that the proposed financing will not provide the Debtors with sufficient liquidity to pay all operating costs during the next 60 days. Accordingly, the Debtors are engaged in ongoing negotiations for supplemental financing to cover all post-petition expenses. The Debtors believe that this supplemental financing, combined with revenues from their theaters upon reopening, will be sufficient to pay all their post-petition obligations. In light of these facts, pending the expiration of the 60-day period commencing on the Petition Date, the Debtors are seeking relief under Bankruptcy Code section 365(d)(3), as described in greater detail below.

B. Preservation of Liquidity

11. The Debtors recognized fairly early during the COVID-19 pandemic the need to preserve liquidity in the absence of theater-generated revenues. The potential for the Debtors to emerge from Chapter 11 as a going-concern thus depends, in large part, on short-term liquidity preservation. The Debtors, originally on their own, but later in consultation with Grupo Cinemex, the debtor-in-possession lender (“DIP Lender”), have made the same difficult decisions as have many other retailers in the face of the COVID-19 pandemic.

⁵ See Sarah Mervosh, Denise Lu and Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

12. As noted above, in March 2020, the Debtors made the difficult decision to lay off approximately 2,470 full and part-time employees, representing approximately 98% of the Debtors' workforce. After additional rounds of layoffs in April and May, as of the date of this Motion, the Debtors have retained less than 20 employees to maintain their business.

13. Like many other businesses,⁶ the Debtors do not presently have sufficient revenue from their theater operations to pay the approximately \$3.2 million per month that will come due under the Leases during the first 60 days of these cases.⁷ And although the Debtors' post-petition financing provides the Debtors with enhanced liquidity, requiring the Debtors to make payments under the Leases *now*, when their theaters are restricted from operating, would place an undue burden on the Debtors.

14. In similar circumstances outside of Chapter 11, many companies are notifying landlords of their intent to abate rent until they can reopen their businesses. The Debtors are in the process of retaining Province, Inc. ("Province") to assist them in their restructuring efforts, including negotiating with landlords to obtain rent concessions.⁸ While the Debtors are optimistic that most landlords will agree to modifications of May and June rent under these

⁶ See Lauren Coleman-Lochner, Natalie Wong and Edward Ludlow, *U.S. Retailers Plan to Stop Paying Rent to Offset Virus*, BLOOMBERG, Mar. 24, 2020, <https://www.bloomberg.com/news/articles/2020-03-24/u-s-retailers-plan-to-stop-paying-rent-to-offset-virus-closures>.

⁷ This monthly amount (which is a current estimate) excludes the rent for the nine (9) leases that the Debtors rejected as of April 30, 2020. See ECF No. 29. Taking into account property-related expenses such as tax and insurance, the aggregate monthly amount that will come due under the Leases is, based on current estimates, approximately \$3.9 million.

⁸ See "Debtors' Application for an Order Authorizing Employment of Province, Inc. as Financial Advisors to the Debtors Effective as of May 5, 2020 Pursuant to Section 327(A) and 382(A) of the Bankruptcy Code" (ECF No. 81).

circumstances, it is possible that some will not. Either way, the Debtors' position is that they are not required to make such payments under contract and/or applicable law.⁹

C. Temporary Procedures

15. The Debtors believe that establishing alternative procedures for the filing of pleadings for an interim period of at least 45 days, subject to further extensions, will (1) assist the Debtors and their estates by limiting professional expenses; and (2) reduce litigation that places added stress on a court system currently facing the challenges of trying to continue to serve its vital functions while maintaining the safety of the public and court personnel. The Temporary Procedures proposed herein will be less burdensome and costly than those typically followed under normal circumstances, which, in turn, will maximize the efficiency and orderly administration of these Chapter 11 Cases, while at the same time ensuring that appropriate notice and due process are provided.

16. The Debtors submit that the following Temporary Procedures should govern the filing of pleadings and the scheduling of hearings in these Chapter 11 Cases for an initial period of 45 days from the date on which the Proposed Order is entered ("Initial Period"), subject to (1) an extension of an additional 30 days beyond the Initial Period with the consent of the U.S. Trustee and counsel for any official committee by filing a statement on the docket; and (2) further extensions upon the filing of a motion by the Debtors.¹⁰

⁹ As previously noted, the Debtors were prohibited from operating their theaters as of the Petition Dates due to various stay-at-home orders issued by governmental authorities and, to date, their theaters remain closed. Accordingly, while this Motion seeks only to suspend the Debtors' obligations in accordance with section 365(d)(3) of the Bankruptcy Code, nothing herein should be construed to waive or abridge any rights or defenses of the Debtors concerning (1) the non-payment of rent obligations or any objection to claims of landlords for such payments, including, without limitation, on grounds of lease terms, the takings doctrine, the doctrine of intervening impossibility and the frustration of purpose doctrine; or (2) any additional deferrals sought by the Debtors in these Chapter 11 Cases.

¹⁰ The Debtors propose that the Temporary Procedures not apply to the U.S. Trustee.

(a) Stay Relief and Other Application and Motion Filing Procedures (“Stay Relief and Other Procedures”). With respect to any motion filed seeking relief under section 362 of the Bankruptcy Code (“Stay Relief Motion”) or any motion or application filed seeking payment of an administrative claim, compelling rejection, assumption or assumption and assignment of contracts or leases, or enforcing or pursuing any other rights pursuant to section 365(d)(3) or (d)(5) of the Bankruptcy Code (“Other Motions and Applications”):

(i) Any party wishing to obtain relief from the automatic stay or seeking the payment of an administrative expense claim or to have the Debtors reject, assume, or assume and assign contracts or leases or enforcing or pursuing any other rights pursuant to section 365(d)(3) or (d)(5) of the Bankruptcy Code is encouraged, but not required, to contact the Debtors in an effort to reach an agreement so that relief can be achieved by entering into a Stipulation in accordance with subpart (b) below.

(ii) Absent a finding by the Court that a matter is time sensitive, no Stay Relief Motion or Other Motions and Applications will be set for a hearing prior to June 25, 2020, or such later date as determined by the Court in light of prevailing circumstances. Notwithstanding the foregoing, any party who files a Stay Relief Motion or Other Motion or Application can seek to resolve such motion using the procedures set forth in subparagraph (b)(ii) below. Furthermore, any party wishing to have a status conference on any such Stay Relief Motion or Other Motion or Application may contact Chambers to set up a telephonic status conference, at which conference the Court may decide to continue the Stay Relief and Other Procedures as to the Stay Relief Motion or Other Motion or Application, as the case may be, or to modify such procedures, as is appropriate under the circumstances.

(b) Stipulations. With respect to the Debtors’ entry into Stipulations (as defined below):

(i) Parties are encouraged to contact counsel for the Debtors in order to resolve any objections that they may have or relief they may seek and to try to reach a consensual resolution, which resolution may be submitted to the Court with the consent of the Consultation Parties (as defined below) in accordance with sub-paragraph (iii) below.

- (ii) Subject to the notice and consent of the Consultation Parties, requests of the Debtors for approval of stipulations regarding (1) turnover of estate property in accordance with sections 542 and 543 of the Bankruptcy Code; (2) rejection of contracts or leases outside of rejection procedures; (3) settlement and compromise of prepetition and post-petition claims, cross-claims, litigation and causes of action, including pre-petition claims threatened or actions brought by various parties against one or more of the Debtors or their estates in judicial, administrative or other actions or proceedings; or (4) any such other and further agreements as may be reached between the parties may be granted by stipulation filed under certification of counsel of the Debtors (each a “Stipulation”) in lieu of proceeding by motion.
- (iii) The Debtors may enter into Stipulations with any parties provided that (1) the Debtors determine, in the exercise of their reasonable business judgment, that such Stipulation and the actions to be taken and/or resolutions set forth therein are in the best interests of the Debtors’ estates; (2) the Debtors (a) obtain the consent of counsel for any official committee appointed, counsel for the DIP Lender; and (b) provide notice to the U.S. Trustee and the U.S. Trustee has not raised an objection (the parties in this clause (2), the “Consultation Parties”); *provided* that such Stipulations shall not provide for any cash payments by the Debtors in excess of \$25,000 (“Threshold Amount”); *provided, further* that the Threshold Amount shall not apply if the Debtors are seeking to resolve any claim that would require payment on the effective date of a plan in accordance with section 1129 of the Bankruptcy Code. Each Stipulation shall provide a statement of the action proposed to be taken, including any claim settlement with respect thereto and a concise statement of the terms and conditions of, and the reasons for, the proposed action.
- (iv) To obtain Court approval of a Stipulation, the Debtors shall (1) file a certification of counsel (each a “Certification of Counsel”) that (a) explains that the Consultation Parties have each received a copy of the Stipulation in advance of the filing of the Certification of Counsel and they each consent or have not objected, as applicable, to the Debtors’ entry into the Stipulation; and (b) attaches a proposed form of order approving the Stipulation and the proposed actions set forth therein (each a “Proposed Stipulation Approval Order”); and (2) serve the Certification of Counsel by e-mail upon (a) any party(ies) directly affected by the Stipulation (if any); and (b) all parties that have requested notice pursuant to Bankruptcy Rule 2002. If after the Debtors submit the Certification of Counsel, no objections are received within three (3) business days thereof, the Court may enter the Proposed Stipulation Approval Order without the need for a hearing. To the extent that an objection is filed on the docket or any of the Consultation Parties do not consent, the Court may, among

other things, schedule a hearing on the objection and the Debtors' and any other parties' deadline to submit a response or reply thereto.

- (c) All Hearings to be Held Telephonically. With respect to all hearings, status conferences, trials and any other matters scheduled to be held in open Court ("Hearings") in these Chapter 11 Cases:
- (i) The Updated Public Notice Regarding Status of Bankruptcy Court Operations During COVID-19 Outbreak ("COVID-19 Notice"),¹¹ pursuant to which the Court is currently requiring that all hearings be held telephonically and/or by video conference unless otherwise ordered by the presiding judge, is incorporated herein by reference.
 - (ii) There shall be no periodic omnibus hearings scheduled in these Chapter 11 Cases until further order of the Court.
 - (iii) All hearings held in these Chapter 11 Cases shall be by telephonic appearance only, unless the Court instructs otherwise. Parties are instructed to arrange for their participation in such telephonic hearings through CourtCall by phone at (888) 882-6878 or by email at info@courtcall.com. Any party may use a live- or listen-only line through CourtCall without seeking permission from the Debtors or the Court.
 - (iv) Any party that files a motion or pleading shall obtain from the Court a hearing date in advance of such filing, and file substantially contemporaneously with such filing a notice of hearing ("Hearing Notice"). Each Hearing Notice shall include instructions for how parties may arrange for their telephonic or video participation and the procedures for doing so.

V. BASIS FOR RELIEF REQUESTED

A. Cause Exists to Suspend the Debtors' Obligations Under the Leases for 60 Days Pursuant to Section 365(d)(3) of the Bankruptcy Code

17. Section 365(d)(3) of the Bankruptcy Code authorizes the Court to extend the Debtors' obligations under the Leases during the first 60 days of these Chapter 11 Cases for cause. *See* 11 U.S.C. § 365(d)(3). The Bankruptcy Code does not define "cause," and

¹¹ *See* United States Bankruptcy Court Southern District of Florida, *Updated Public Notice Regarding Status of Bankruptcy Court Operations During COVID-19 Outbreak* (Mar. 16, 2020), available at <https://www.flsb.uscourts.gov/news/updated-public-notice-regarding-status-bankruptcy-court-operations-during-covid-19-outbreak>.

determining whether to extend these obligations is within the Court's discretion. *See In re Beltway Medical, Inc.*, 358 B.R. 448 (Bankr. S.D. Fla. 2006) (noting that "while the language of section 365(d)(3) directs 'timely performance,' what is 'timely performance' is dictated by the Bankruptcy Code, the underlying lease, and this Court's discretion based on the facts and circumstances of a particular case" (citing *Collier on Bankruptcy* ¶ 503.03 (15th ed. rev. 2006)); *In re Graphic Trade Bindery, Inc.*, No. 12-13189-TJC, 2012 WL 1232089, at *6 n.8 (Bankr. D. Md. Apr. 12, 2012) (stating that "immediate payment of administrative expenses ... is left to the discretion of the bankruptcy court" (quoting *In re Midway Airlines Corp.*, 406 F.3d 229, 242 (4th Cir. 2005)); *see also In re Pac-West Telecomm, Inc.*, 377 B.R. 119, 126 (Bankr. D. Del. 2007) (noting that "simply being in bankruptcy cannot constitute 'cause'" on grounds that an extension would be automatic rather than discretionary). A court may look to a "specific cause" articulated by a debtor or "applicable legal precedent." *Pac-West Telecomm*, 377 B.R. at 126.¹²

18. The Debtors submit that the multiple state-mandated closures of their theaters as a result of the COVID-19 pandemic satisfies the "cause" requirement of section 365(d)(3). It is impossible for the Debtors to operate their theaters and, more generally, perform under the Leases as a result of the guidelines prohibiting operations of non-essential businesses. Suspension of the Debtors' rent obligations for "cause" under Bankruptcy Code section 365(d)(3) is not only appropriate under these circumstances but is also critical to the Debtors' prospects of successfully reorganizing in these cases.

¹² In addition, section 105 authorizes the Court to "toll" certain time periods if such tolling is "consistent with the underlying philosophy of the Bankruptcy Code." *In re Richards*, 994 F.2d 763, 765 (10th Cir. 1993). While the Debtors are not presently seeking to extend the Debtors' obligations under their unexpired real property leases beyond the 60 days provided for in section 365(d)(3) of the Bankruptcy Code such extension may become necessary in furtherance of their efforts to preserve and maximize value for stakeholders. The Debtors reserve all rights to seek such further extensions to the extent necessary.

19. For these reasons, the Debtors submit that the obligations to perform under the Leases should be suspended for 60 days from the Petition Dates to and through June 24, 2020. Recent cases support this result. See *In re Modell's Sporting Goods, Inc.*, Case No. 20-14179 (Bankr. D. N.J. Mar. 27, 2020), *Order Temporarily Suspending the Debtors' Chapter 11 Cases Pursuant to 11 U.S.C. §§ 105 and 305* (ECF No. 166) (granting “[o]perational [s]uspension” and permitting debtors to accrue obligations under leases); *In re Pier 1 Imports, Inc.*, Case No. 20-30805 (Bankr. E.D. Va. May 10, 2020), *Memorandum Opinion* at 6-7 (ECF No. 637) (granting debtors’ request to “delay the payment of certain accrued but unpaid rent obligations during the Limited Operations Period”).

B. The Temporary Procedures Are Reasonable and Appropriate Under the Circumstances

20. The Bankruptcy Code, the Bankruptcy Rules and the Local Rules provide the Court with authority to approve notice, case management and administrative procedures. In particular, Bankruptcy Rule 2002(m) provides that “[t]he court may from time to time enter orders designating the matters in respect to which, the entity to whom, and the form and manner in which notices shall be sent except as otherwise provided by these rules.” Fed R. Bankr. P. 2002(m); see also Fed. R. Bankr. P. 9007 (“When notice is to be given under these rules, the court shall designate, if not otherwise specified herein, the time within which, the entities to whom, and the form and manner in which the notice shall be given.”). In addition, Bankruptcy Rule 9036 authorizes a “person as the court or these rules may direct, [to] send [a] notice to—or serve [a] paper on—a registered user by filing it with the court’s electronic-filing system.” Fed. R. Bankr. P. 9036.

21. Section 102(1) of the Bankruptcy Code provides that, where the Bankruptcy Code provides for an action to occur “after notice and a hearing,” such action may occur “after such

notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances.” 11 U.S.C. § 102(1)(A). Therefore, the Debtors submit that telephonic appearances at hearings and electronic notice of proposed motions or pleadings prior to filing should be required to alleviate the burden on the Debtors, the Court, the Clerk of the Court and other parties-in-interest. The relief requested is supported by Bankruptcy Rule 1015(c), which provides that when two or more cases are being jointly administered, as these Chapter 11 Cases are, the Court may enter orders “as may tend to avoid unnecessary costs and delay.” Fed. R. Bankr. P. 1015(c).

22. Furthermore, pursuant to the COVID-19 Notice, the Court is currently requiring that all hearings be held telephonically and/or by video conference unless otherwise ordered by the presiding judge. The Temporary Procedures are consistent with the COVID-19 Notice as they continue the requirement for having telephonic hearings rather than holding them in person.

23. Section 105(a) of the Bankruptcy Code provides in relevant part that, “[t]he 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). The Debtors submit that implementation of the Temporary Procedures is appropriate and necessary to carry out the provisions of the Bankruptcy Code and well within the equitable powers of the Court under section 105(a), given the extraordinary nature of the current circumstances brought about by the COVID-19 outbreak.

24. The Debtors submit that approval of the Temporary Procedures is in the best interests of the Debtors and their estates and creditors. The closure of the Debtors’ theater locations necessitated by the COVID-19 outbreak has placed a significant strain on the Debtors’ financial condition. In order to preserve their chances of reopening their theaters in the future, the Debtors will have to further cut costs and expenses until such time as the theaters are able to

reopen. Such cost-cutting measures necessarily include, among other things, limiting the commencement of new litigation that, in turn, will limit the amount of professional fees and expenses in the Chapter 11 Cases.

25. The Temporary Procedures, by requiring that prior to the filing of a motion or pleading, the parties must, first, confer in good faith and, second, participate in a telephonic conference with the Court, should eliminate unnecessary motion practice and thereby reduce the cost of administration of the Chapter 11 Cases. Similar procedures have been successfully followed by numerous courts and judges to manage discovery disputes and curtail the filing of unproductive disposition motions in civil litigations.¹³ Given the enormous strain on the Debtors' business and the Court system occasioned by the COVID-19 crisis, the Debtors submit the circumstances warrant such procedures here for a limited interim period of at least 45 days.

26. The Debtors submit that establishing the foregoing Temporary Procedures will significantly aid the efficient administration of these Chapter 11 Cases and lower the costs of case administration during this period of extraordinary crisis. Accordingly, the relief requested is in the best interests of the Debtors' estates and creditors and parties in interest.

C. Cause Exists to Suspend Lease Payments Pursuant to the Terms of the Leases, the Takings Doctrine, the Doctrine of Intervening Impossibility, and the Frustration of Purpose Doctrine

27. The governmental response to the COVID-19 outbreak constitutes an execution of police powers for the improvement of the public condition by limiting the spread of a pandemic.

The general rule as to whether an exercise of such police powers constitutes a taking is that

¹³ See *Modell's Sporting Goods, Inc.*, No. 20-14179 (Bankr. D. N.J., Mar. 23, 2020), *Debtors' Verified Application in Support of Emergency Motion for Entry of an Order Temporarily Suspending Their Chapter 11 Cases Pursuant to 11 U.S.C. §§ 105 and 305* (ECF No. 115); *CraftWorks Parent, LLC*, No. 20-10475 (Bankr. D. Del. Mar. 20, 2020), *Motion of Debtors for Entry of an Order (I) Establishing Temporary Procedures and (II) Granting Related Relief* (ECF No. 174); *Pier 1 Imports, Inc.*, No. 20-30805 (Bankr. E.D. Va. Mar. 31, 2020), *Debtors' Emergency Motion for Entry of an Order (I) Approving Relief Related to the Interim Budget, (II) Temporary Adjourning Certain Motions and Applications for Payments, and (III) Granting Relief* (ECF No. 438).

“while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In *Pennsylvania Coal*, the Supreme Court held that a regulation rendering an activity commercially impracticable has very nearly the same effect for constitutional purposes as appropriating or destroying it. 260 U.S. at 414. As in *Pennsylvania Coal*, the regulatory orders resulting in the closing of the Debtors’ theaters has rendered the Debtors’ activity of operating the theaters commercially impracticable and has in fact deprived the Debtors of the right to operate.

28. In addition, the Court should find that Debtors are entitled to an abatement of rent commensurate with the reduced utility of their leased premises based on the terms of the Leases. The Leases provide, in relevant part, that in the event any part of the leased premises or a substantial portion of the shopping center in which the leased premises is located is taken by any competent authority, Debtors shall have the right to continue the lease in full force and effect with a reduced fixed rent commensurate with the reduced area and/or reduced utility of the leased space – which reduced rental will become effective upon the date of such taking. *See, e.g.*, Lease Agreement by and between Downtown at the Gardens, LLC and Cobb Theaters III, LLC, dated as of December 10, 2003, § 25.3 (providing that in the event of a taking via condemnation, “[t]he Annual Minimum Rent and other charges payable by Tenant shall equitably abate”); Lease Agreement by and between Bellwether Properties of Florida (Limited) and Cobb Theatres III, LLC, dated February 15, 2010, § 25.3 (same); Lease Agreement by and between Libertytown LLC and Cobb Theaters IV, LLC, dated as of July 26, 2013, § 17.2 (upon a taking by eminent domain, “Minimum Rental shall be reduced in proportion to the area taken, effective on the date physical possession is taken by the condemning authority and Percentage Rental shall be adjusted to reflect such change in the Minimum Rental”).

29. Accordingly, because the governmental regulation in question amounts to a taking of the leased premises, the Debtors are entitled under the terms of the Leases to an abatement of rent commensurate with the reduced utility of the leased premises. Such abatement shall continue in effect during the pendency of the applicable stay-at-home orders.

30. In addition to the relief to which the Debtors are entitled under the Leases, the Debtors are entitled to an abatement of rent and to suspend their obligations under the Leases on the equitable grounds of supervening impossibility and frustration of purpose. The doctrine of supervening impossibility excuses performance by a party under a contract when such “performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basis assumption on which the contract was made,” unless the language of the contract indicates the contrary. *See* Restatement (Second) of Contracts § 261 (1981). This defense is available when a party can establish three factors: “(1) the unexpected occurrence of an intervening act, (2) such occurrence was of such a character that its nonoccurrence was a basic assumption of the agreement of the parties, and (3) that occurrence made performance impracticable.” *Opera Co. of Boston, Inc. v. Wolf Trap Foundation of Performing Arts*, 817 F.2d 1094, 1102 (4th Cir. 1987). One such intervening act is a governmental regulation or law. Restatement (Second) of Contracts § 264 (“If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.”); *see also United States v. Johnson*, 420 F. Supp. 3d 462, 473 (E.D. Va. 2019) (Excusing government’s performance where “a subsequent change in the law . . . undermine[d] the basis of the agreement”); *Texas Co. v. Hogarth Shipping Corp.*, 256 U.S. 619, 629-30 (1921) (excusing ship owner’s performance where its ships were

requisitioned for use in the British navy); *Unihealth v. US. Healthcare, Inc.*, 14 F. Supp. 2d 623, 635 (D.N.J. 1998) (excusing performance where the government ended its hospital billing system and where the parties should have assumed that the billing rates under the system would fluctuate but not that the system would end); *Sch. Dist. NO. 16 of Sherman Cty. v. Howard*, 98 NW. 666, 666-67 (Neb. 1904) (where school was shut down by Board of Health due to smallpox outbreak, school district was released from paying teacher's wages).

31. The Debtors' request to suspend its rental payments is also an applicable defense to breach of contract under the doctrine of frustration of purpose. First, the principal purpose of the Debtors in entering into the Leases is the operation of the movie theaters. There could be no other understanding between the parties as to the Debtors' principal purpose. Second, the frustration of purpose associated with government-ordered business closures brought about by an unprecedented pandemic with global reach could neither have been anticipated in contracting nor regarded as an assumed risk by either party to the Leases. Third, the non-occurrence of a government-ordered halt to nonessential business operation was necessarily a basic assumption of the Leases in that the purpose of such contracts is the operation of movie theaters that the government has since deemed nonessential.

32. Accordingly, the Debtors satisfy the factors of both doctrines: the governmental response to the COVID-19 pandemic (1) is a supervening impossibility; and (2) has frustrated the purpose of the Leases in that the Debtors are not able to operate their theaters. The Debtors are entitled to rent abatement during the period the stay-at-home orders rendered performance of their leases impossible and frustrated the purpose of those contracts.

33. For the foregoing reasons, the Debtors respectfully request that the Court enter the Order granting the relief requested herein. The Debtors believe that such relief is vital to the

Debtors' efforts to facilitate their reorganization and gives creditors the best opportunity to have a going-concern partner at the conclusion of these Chapter 11 Cases.

34. To implement the foregoing successfully, the Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay of an order authorizing the use, sale or lease of property under Bankruptcy Rule 6004(h).

35. Notice of this Motion will be provided to: (1) the U.S. Trustee; (2) counsel to the DIP Lender; (3) the parties listed on the Debtors' consolidated list of their 30 largest unsecured creditors; and (4) all parties that have requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that no other or further notice is required under the circumstances.

36. No prior request for the relief sought herein has been made to this or any other Court.

37. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim, or an approval or assumption of any agreement, contract or lease under Bankruptcy Code section 365. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

WHEREFORE, the Debtors respectfully request that the Court enter the proposed order substantially in the form attached hereto as **Exhibit A** granting the relief requested in this Motion and such other and further relief as may be just and proper.

Dated: May 12, 2020

Respectfully submitted,

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COUNSEL FOR CINEMEX USA REAL
ESTATE HOLDINGS, INC., CINEMEX
HOLDINGS USA, INC., and CB THEATER
EXPERIENCE LLC

EXHIBIT A
(Proposed Order)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov

In re:

CINEMEX USA REAL ESTATE
HOLDINGS, INC., CINEMEX
HOLDINGS USA, INC., and CB
THEATER EXPERIENCE LLC,

Chapter 11

Case No. 20-14695-LMI

Debtors.

(Jointly Administered)

**ORDER EXTENDING TIME FOR PERFORMANCE OF OBLIGATIONS
ARISING UNDER UNEXPIRED REAL PROPERTY LEASES AND
ESTABLISHING TEMPORARY CASE ADMINISTRATION PROCEDURES**

This cause came before the Court on May _____, 2020, at ___ a.m. / p.m. in Miami, Florida, upon the motion (“Motion”)¹ of the above-captioned Debtors for entry of an order extending the time for performance of obligations arising under unexpired real property leases

¹ Unless otherwise defined herein, all capitalized terms shall have the meaning ascribed to them in the Motion.

(“Leases”) and establishing temporary case administration procedures, all as more fully set forth in the Motion.

Based on specific facts and circumstances of this case and for the reasons stated on the record, which are incorporated herein, the Court finds that (i) it has jurisdiction over the matters raised in the Motion pursuant to 28 U.S.C. §§ 157 and 1334; (ii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and this Court may enter a final order consistent with Article III of the Constitution; (iii) venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; (iv) the relief requested in the Motion is in the best interests of the Debtors’ estates, their creditors, and other parties-in-interest; (v) notice of the Motion and the hearing were appropriate under the circumstances and no other notice need be provided; and (vi) upon review of the record before the Court, including the legal and factual bases set forth in the Motion and the statements made by counsel at the hearing, good and sufficient cause exists to grant the relief requested. Accordingly, it is

ORDERED as follows:

1. The Motion is **GRANTED** as set forth herein.
2. The performance obligations arising under the Leases are hereby extended to _____, 2020.
3. The Temporary Procedures, as set forth on Schedule I to this Order, are hereby approved.
4. The contents of the Motion satisfy the requirements of Bankruptcy Rule 6003(b).
5. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such Motion and the requirements of Bankruptcy Rule 6004(1) and the Local Rules are satisfied by such notice.

6. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this order are immediately effective and enforceable upon its entry.

7. This Court shall retain exclusive jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

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Submitted By:

Patricia B. Tomasco
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711 Louisiana, Suite 500
Houston, Texas 77002
Telephone: 713-221-7100
Email: pattytomasco@quinnemanuel.com

Copies to:

Attorney Patricia B. Tomasco, who shall serve a copy of this order on all interested parties and file a certificate of service reflecting same.

Schedule I

(Temporary Procedures)

- (a) Stay Relief and Other Application and Motion Filing Procedures (“Stay Relief and Other Procedures”). With respect to any motion filed seeking relief under section 362 of the Bankruptcy Code (a “Stay Relief Motion”) or any motion or application filed seeking payment of an administrative claim, compelling rejection, assumption or assumption and assignment of contracts or leases, or enforcing or pursuing any other rights pursuant to section 365(d)(3) or (d)(5) of the Bankruptcy Code (“Other Motions and Applications”):
- (i) Any party wishing to obtain relief from the automatic stay or seeking the payment of an administrative expense claim or to have the Debtors reject, assume, or assume and assign contracts or leases or enforcing or pursuing any other rights pursuant to section 365(d)(3) or (d)(5) of the Bankruptcy Code is encouraged, but not required, to contact the Debtors in an effort to reach an agreement so that relief can be achieved by entering into a Stipulation in accordance with subpart (b) below.
 - (ii) Absent a finding by the Court that a matter is time sensitive, no Stay Relief Motion or Other Motions and Applications will be set for a hearing prior to June 25, 2020, or such later date as determined by the Court in light of prevailing circumstances. Notwithstanding the foregoing, any party who files a Stay Relief Motion or Other Motion or Application can seek to resolve such motion using the procedures set forth in sub-paragraph (b)(2) below. Furthermore, any party wishing to have a status conference on any such Stay Relief Motion or Other Motion or Application may contact Chambers to set up a telephonic status conference, at which conference the Court may decide to continue the Stay Relief and Other Procedures as to the Stay Relief Motion or Other Motion or Application, as the case may be, or to modify such procedures, as is appropriate under the circumstances.
- (b) Stipulations. With respect to the Debtors’ entry into Stipulations (as defined below):
- (i) Parties are encouraged to contact counsel for the Debtors in order to resolve any objections that they may have or relief they may seek and to try to reach a consensual resolution, which resolution may be submitted to the Court with the consent of the Consultation Parties (as defined below) in accordance with sub-paragraph (iii) below.
 - (ii) Subject to the notice and consent of the Consultation Parties, requests of the Debtors for approval of stipulations regarding (1) turnover of estate property in

accordance with sections 542 and 543 of the Bankruptcy Code, (2) rejection of contracts or leases outside of the rejection procedures, (3) settlement and compromise of prepetition and post-petition claims, cross-claims, litigation, and causes of action, including prepetition claims threatened or actions brought by various parties against one or more of the Debtors or their estates in judicial, administrative or other actions or proceedings, or (4) any such other and further agreements as may be reached between the parties may be granted by stipulation filed under certification of counsel of the Debtors (each a “Stipulation”) in lieu of proceeding by motion.

- (iii) The Debtors may enter into Stipulations with any parties provided that (1) the Debtors determine, in the exercise of their reasonable business judgment, that such Stipulation and the actions to be taken and/or resolutions set forth therein are in the best interests of the Debtors’ estates; (2) the Debtors (a) obtain the consent of counsel for any official committee appointed, counsel for the DIP Lender; and (b) provide notice to the U.S. Trustee and the U.S. Trustee has not raised an objection (the parties in this clause (2), “Consultation Parties”); *provided that* such Stipulations shall not provide for any cash payments by the Debtors in excess of \$25,000 (“Threshold Amount”); *provided, further that* the Threshold Amount shall not apply if the Debtors are seeking to resolve any claim that would require payment on the effective date of a plan in accordance with section 1129 of the Bankruptcy Code. Each Stipulation shall provide a statement of the action proposed to be taken, including any claim settlement with respect thereto and a concise statement of the terms and conditions of, and the reasons for, the proposed action.

- (iv) To obtain Court approval of a Stipulation, the Debtors shall (1) file a certification of counsel (each a “Certification of Counsel”) that (a) explains that the Consultation Parties have each received a copy of the Stipulation in advance of the filing of the Certification of Counsel and they each consent or have not objected, as applicable, to the Debtors’ entry into the Stipulation; and (b) attaches a proposed form of order approving the Stipulation and the proposed actions set forth therein (each, a “Proposed Stipulation Approval Order”); and (2) serve the Certification of Counsel by e-mail upon (a) any party(ies) directly affected by the Stipulation (if any); and (b) all parties that have requested notice pursuant to Bankruptcy Rule 2002. If after the Debtors submit the Certification of Counsel, no objections are received within three (3) business days thereof, the Court may enter the Proposed Stipulation Approval Order without the need for a hearing. To the extent that an objection is filed on the docket or any of the Consultation Parties do not consent, the Court may, among other things, schedule a hearing on the objection and the Debtors’ and any other parties’ deadline to submit a response or reply thereto.

(c) All Hearings to be Held Telephonically. With respect to all hearings, status conferences, trials and any other matters scheduled to be held in open Court (“Hearings”) in these

Chapter 11 Cases:

- (i) The Updated Public Notice Regarding Status of Bankruptcy Court Operations During COVID-19 Outbreak (“COVID-19 Notice”), pursuant to which the Court is currently requiring that all hearings be held telephonically and/or by video conference unless otherwise ordered by the presiding judge, is incorporated herein by reference.
- (ii) There shall be no periodic omnibus hearings scheduled in these Chapter 11 Cases until further order of the Court.
- (iii) All Hearings held in these Chapter 11 Cases shall be by telephonic appearance only, unless the Court instructs otherwise. Parties are instructed to arrange for their participation in such telephonic hearings through CourtCall by phone at (888) 882-6878 or by email at info@courtcall.com. Any party may use a live- or listen-only line through CourtCall without seeking permission from the Debtors or the Court.
- (iv) Any party that files a motion or pleading shall obtain from the Court a hearing date in advance of such filing, and file substantially contemporaneously with such filing a notice of hearing (“Hearing Notice”). Each Hearing Notice shall include instructions for how parties may arrange for their telephonic or video participation and the procedures for doing so.