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

In re:	§	Chapter 11
CBL & ASSOCIATES PROPERTIES, INC., *et al.*,[1]	§	Case No. 20-35226 (DRJ)
	§	(Jointly Administered)
Debtors.	§	
	§	Related Docket Nos.: 1369, 1373

JOINDER AND STATEMENT OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN SUPPORT OF CONFIRMATION OF THE THIRD AMENDED JOINT CHAPTER 11 PLAN OF CBL & ASSOCIATES PROPERTIES, INC. AND ITS AFFILIATED DEBTORS

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors-in-possession (collectively, the "Debtors"), by and through its undersigned counsel, hereby submits this statement in support (the "Statement") of the *Third Amended Joint Chapter 11 Plan of CBL & Associates Properties, Inc. and its Affiliated Debtors (With Technical Modifications)* [ECF No. 1369] (the "Plan"),[2] and joins in and adopts the arguments submitted by the Debtors in the *Debtors' Memorandum of Law in Support of Confirmation of Third Amended Joint Chapter 11 Plan of CBL & Associates Properties, Inc. and its Affiliated Debtors* [ECF No. 1373] (the "Debtors' Confirmation Brief"). In support of this Statement, the Committee respectfully states as follows:

[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] Unless otherwise noted, capitalized terms used but not otherwise defined in this Statement shall have the meanings ascribed to them in the Plan.

PRELIMINARY STATEMENT

1. The Committee fully supports confirmation of the Plan. The Plan represents the culmination of the spirit of compromise among the Debtors and their key economic constituents that has characterized these chapter 11 cases since the parties' negotiation of the restructuring support agreement that formed the basis for the Plan.

2. As a result of the parties' efforts, the Debtors' unsecured creditors and other stakeholders will recover far more than they would in a hypothetical liquidation. The reported voting outcome evidences voting stakeholders' recognition of the favorable results for all parties borne through the RSA[3] and Plan – indeed, the Committee's support of the Plan is shared by the overwhelming majority of the Debtors' stakeholders.[4]

3. The Committee has reviewed carefully and analyzed each objection to the Plan. In connection with the objection resolution process described in the Debtors' Confirmation Brief, the Committee also has reviewed the proposed language comprising the agreed-upon provisions for inclusion in the Proposed Confirmation Order[5] intended to resolve the Resolved Objections.[6] As described in the Debtors' Confirmation Brief, the remaining unresolved objections (the "Preferred Shareholder Objections")[7] are those lodged by a small number of individual holders

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[3] Defined below.

[4] *See Declaration of Jane Sullivan of Epiq Corporate Restructuring, LLC, Regarding Voting and Tabulation of Ballots Cast on the Third Amended Joint Chapter 11 Plan of CBL & Associates Properties, Inc. and Its Affiliated Debtors* [ECF No. 1354] (as corrected by the *Notice of Updated Exhibit to Declaration of Jane Sullivan of Epiq Corporate Restructuring, LLC, Regarding Voting and Tabulation of Ballots Cast on the Third Amended Joint Chapter 11 Plan of CBL & Associates Properties, Inc. and Its Affiliated Debtors* [ECF No. 1362], the "Sullivan Declaration").

[5] As defined in the Debtors' Confirmation Brief.

[6] As defined in the Debtors' Confirmation Brief.

[7] The Preferred Shareholder Objections include *Objection of Patrick Clark* [ECF No. 988]; *Objection to the RSA and Plan Proposed on March 22nd & Third Request to Create of Official Committee of Preferred Holders* [ECF No. 999]; *Objection to the Amended and Restated Restructuring Support Agreement RSA Plan on March 21nd, 2021* [ECF No. 1001]; *Objection to RSA and Plan Proposed on March 22dn & a Request to Create of Official Committee of Preferred Holders* [ECF No. 1003]; *Objection to RSA and Plan Proposed on March 22dn & a Request to Create of Official Committee of Preferred Holders* [ECF No. 1004]; *Objection of Gebre-Michael Manna* [ECF No. 1024]; *Objection of*

of Existing REIT Preferred Stock. The Preferred Shareholder Objections assert, among other things, that the Plan fails to satisfy the requirements of the absolute priority rule – a construct of the Bankruptcy Code[8] that does not apply where, as here, an impaired class has voted to accept a plan – in respect of its proposed distribution to holders of Existing REIT Common Stock.

4. The Committee submits that the Plan was proposed in good faith, appropriately classifies claims and interests, is fair and equitable, and otherwise complies with the requirements for confirmation of a Plan pursuant to section 1129 of title 11 of the United States Code (the "Bankruptcy Code"). The Plan also provides the greatest potential for recoveries to unsecured creditors and, indeed, all of the Debtors' stakeholders. If the Plan is confirmed, the Debtors will emerge from chapter 11 with a significantly deleveraged balance sheet. This, in turn, will provide the opportunity for all stakeholders to share in benefits provided by the future growth of an economically sound enterprise. Based on the foregoing, and for the reasons set forth herein and in the Debtors' Confirmation Brief, the Court should overrule the Preferred Shareholder Objections and confirm the Plan.

Gebre-Michael Manna [ECF No. 1029]; *Objection to the "Debtors' Motion for an Order Authorizing Debtors to Perform Under the Amended Restructuring Support Agreement and Granting Related Relief" on April 2nd and Fourth Request to Create of Official Committee of Preferred Holders* [ECF No. 1034]; *Objection to the latest "Amended Chapter 11 Plan" along with the Associated "Amended Disclosure Statement" & Fifth Request to Create of Official Committee of Preferred Holders* [ECF No. 1070]; *Objection to the Amended and Restated Restructuring Support Agreement RSA Plan on March 21nd, 2021* [ECF No. 1077]; *Preferred Shareholder's Objection to Revised Plan and Disclosure Statement and Joinder in Motion for Appointment of Official Committee of Preferred Shareholders* [ECF No. 1107]; *Objection to the Debtor's Chapter 11 Plan and Associated "Amended Disclosure Statement"* [ECF No. 1110]; *Objection to the Motion of Debtors for Entry of an Order Approving Disclosure Statement and Related Solicitation Procedures; and Joinder in Motion for Appointment of Official Committee of Preferred Equity Holders* [ECF No. 1115]; *Summary of Objection to the Debtor's Chapter 11 Plan and Associated "Amended Disclosure Statement" and Second Plan and Statement* [ECF No. 1140]; and *Preferred Shareholder's Objection to Confirmation of Debtor's Revised Plan of Reorganization* [ECF No. 1321] (the "Kroemer Objection").

[8] Defined below.

RELEVANT BACKGROUND

5. Beginning on November 1, 2020 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. On November 13, 2020, the Office of the United States Trustee (the "U.S. Trustee") appointed the Committee pursuant to the *Notice of Appointment of Committee of Unsecured Creditors* [ECF No. 204].[9] Since its appointment, the Committee has actively participated in the Debtors' chapter 11 cases, focusing not only on maximizing unsecured recoveries but also on ensuring the sustainability, viability and value of the Reorganized Debtors following their emergence from chapter 11.

6. From and after the Petition Date, the Debtors have engaged with their key economic stakeholders in the pursuit of the stated objective to achieve a consensual restructuring.[10] To that end, the Debtors participated in a lengthy, judicially-supervised mediation with certain bank lenders, an ad hoc group holding a majority of the Debtors' unsecured notes, and the Committee.[11]

7. The mediation ultimately resulted in an amended restructuring support agreement (the "RSA") between the Debtors and a majority of each of the Debtors' prepetition secured lenders and unsecured noteholders[12] that established the framework for the Plan. On April 29, 2021, the Court granted the Debtors' motion requesting authority to perform under the RSA.[13]

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[9] On March 19, 2021, the U.S. Trustee filed a *Notice of Amended Appointment of Committee of Unsecured Creditors* [ECF No. 975].

[10] *See* Declaration *of Mark Renzi in Support of Debtors' Chapter 11 Petitions and First Day Motions* [ECF No. 3], ¶ 80.

[11] *See Notice of Filing of Agreed Mediation Order Appointing Judge Marvin Isgur as Mediator as to Chapter 11 Plan and Wells Fargo Adversary Proceeding* [ECF No. 747].

[12] *See Notice of Filing of Amended Restructuring Support Agreement Among the Debtors, the Consenting Bank Lenders and Consenting Noteholders* [ECF No. 980].

[13] *See Order Authorizing Debtors to Perform Under the Amended Restructuring Support Agreement and Granting Related Relief* [ECF No. 1090].

On May 25, 2021, the Debtors filed their *Third Amended Joint Chapter 11 Plan of CBL & Associates Properties, Inc. and its Affiliated Debtors* [ECF No. 1163] and accompanying *Disclosure Statement for Third Amended Joint Chapter 11 Plan of CBL & Associates Properties, Inc. and its Affiliated Debtors* [ECF No. 1164] (the "Disclosure Statement"). The Debtors filed the Plan on August 9, 2021.

8. While the Committee participated in the mediation, it is not a party to the RSA. The Committee ultimately determined to support the Plan as being in the best interests of unsecured creditors.

9. The Debtors' liquidation analysis, annexed to the Disclosure Statement at Exhibit D, demonstrates that in a hypothetical chapter 7 liquidation, unsecured creditors would recover a fraction of what they are owed.[14] Under the negotiated settlement that resulted in the RSA, however, the Plan provides that the Debtors' existing shareholders (both common and preferred) will share in an allocated portion – up to eleven percent of the New Common Stock that will be issued pursuant to the Plan[15] – of the Consenting Noteholders' recovery.

10. On May 26, 2021, the Court entered its order approving the Disclosure Statement, which, among other things (i) established July 26, 2021 at 4:00 p.m. (Prevailing Central Time) as the Plan Voting Deadline; and (ii) established July 26, 2021 at 4:00 p.m. (Prevailing Central Time) as the Plan Objection Deadline. In accordance with the Court's order approving the Disclosure Statement,[16] holders of Interests in Class 11 (Existing REIT Preferred Stock) and Class 12 (Existing REIT Common Stock) were entitled to vote on the Plan.

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[14] On a consolidated basis, the unsecured recovery would be less than thirty percent. *See*, Disclosure Statement at Ex. D (Liquidation Analysis).

[15] *See Plan* §§ 4.11 (Class 11: Existing REIT Preferred Stock), 4.12 (Class 12: Existing REIT Common Stock).

[16] *See Amended Order (I) Approving Disclosure Statement and Form and Manner of Disclosure Statement Hearing, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling Confirmation Hearing, (IV) Establishing Notice and Objection Procedures for Confirmation of the Proposed Plan, (V) Approving Notice Procedures for the*

11. After the Voting Deadline, the Debtors' voting and tabulation agent finalized the tabulation of the Ballots, as described in the Sullivan Declaration. Each Class of Claims or Interests, as applicable, entitled to vote on the Plan – including Class 11 and Class 12 – voted to accept the Plan.[17] Over ninety-five percent of holders of Existing REIT Preferred Stock who voted on the Plan voted to accept the Plan.[18]

STATEMENT

12. The Committee submits that the Preferred Shareholder Objections should be overruled and joins in and adopts the legal arguments in the Debtors' Confirmation Brief. The Committee separately provides this Statement to address the argument set forth in the Preferred Shareholder Objections premised on the assertion that the Plan fails to adhere to the requirements of the absolute priority rule – a provision of the Bankruptcy Code that is not applicable where, as here, a class has voted to accept a plan.

13. "The proponent of the confirmation of a plan must prove by a preponderance of the evidence that it satisfies the relevant requirements of 11 U.S.C. § 1129(a), and if the plan is not fully consensual, 11 U.S.C. § 1129(b)." *In re Breitburn Energy Partners LP*, 582 B.R. 321, 349 (Bankr. S.D.N.Y. 2018) (emphasis added) (citing *In re Quigley Co.*, 437 B.R. 102, 125 (Bankr. S.D.N.Y. 2010)); 7 Collier on Bankruptcy ¶ 1129.05[1][d] (16th ed. 2020) ("At [the confirmation] hearing, the proponent bears the burdens of both introduction of evidence and persuasion that each subsection of section 1129(a) has been satisfied . . . . If nonconsensual confirmation is sought, the proponent of such a plan will have to satisfy the court that the

Assumption and Assignment of Executory Contracts and Unexpired Leases, and (VI) Granting Related Relief [ECF No. 1168], ¶ 6.

[17] *See Sullivan Declaration*, Ex. A.

[18] *See id.*

requirements of section 1129(b) are also met. In either situation, the plan proponent bears the burden of proof by a preponderance of the evidence.").

14. In order to confirm a plan of reorganization that is not consensual, a plan proponent must show that the "plan does not discriminate unfairly … with respect to each class of claims or interest that is impaired under, ***and has not accepted***, the plan." 11 U.S.C. § 1129(b)(1) (emphasis added). When the Bankruptcy Code's language is plain, "the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks and citations omitted). The Court's analysis, then, should end at the Sullivan Declaration – Class 11 has accepted the Plan, and, as such, the requirements set forth in § 1129(b) do not apply.

15. In enacting the Bankruptcy Code, Congress chose to vest each creditor ***class*** with negotiating leverage intended to encourage debtors to formulate consensual plans of reorganization. *See* Bruce A. Markell, *A New Perspective on Unfair Discrimination in Chapter 11*, 72 AM. BANKR. L.J. 227, 247 (1998) ("Rather than allowing each creditor to assert unfair discrimination, the drafters of the Code made unfair discrimination a class right."). It is for Congress, then, and not for the courts, to provide individual creditors with the ability to raise an unfair discrimination argument regardless of whether a class has accepted a plan. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207 (1988) (finding deviation from strictures of the Bankruptcy Code was unacceptable, even where court "may well have believed that . . . creditors would be better off"). Thus, under the Bankruptcy Code, "it is possible . . . to have a plan that unfairly discriminates but nevertheless is confirmable notwithstanding the objection of a dissident (and outvoted) class member." Markell, 72 AM. BANKR. L.J. at 247. For the reasons

stated in the Debtors' Confirmation Brief, the Committee submits that the Plan does not discriminate unfairly as to Class 11. Even if it did, however, the Preferred Shareholder Objections still would not carry the day, inasmuch as their proponents have been decidedly outvoted.

16. Bankruptcy courts uniformly recognize that they are without authority to amend a proposed plan or to confirm a plan in a piecemeal fashion. *See, e.g.*, *In re Haukos Farms, Inc.*, 68 B.R. 428, 437 (Bankr. D. Minn. 1986) ("It is not the proper business of the Bankruptcy Court to fashion a reorganization plan for a debtor, either at or before confirmation. Furthermore, a Bankruptcy Court cannot confirm parts of a plan and reject others. A plan proposed by a party must either be confirmed or rejected in its entirety."); *In re Spanish Lake Assocs.*, 92 B.R. 875, 877 (Bankr. E.D. Mo. 1988) ("The Court is not permitted to alter the terms of a plan. It must merely decide whether the plan complies with the requirements of § 1129(b)") (citation omitted); *In re Waterville Valley Town Square Assocs.*, 208 B.R. 90, 99 (Bankr. D.N.H. 1997) (finding that "it is the Court's duty to confirm or deny confirmation of the plan that is before the Court and to not modify the plan by court fiat"); *In re Trenton Ridge Inv'rs, LLC*, 461 B.R. 440, 508 (Bankr. S.D. Ohio 2011) ("The Court … certainly does not have the authority to modify the Plans … .") (citation omitted). Thus, the suggestion in the Preferred Shareholder Objections that the Court can somehow "fix" the Plan to provide for the proponents' desired redistribution of the allocated recovery among Classes 11 and 12[19] is unavailing.

17. Were the Court to sustain the Preferred Shareholder Objections and decline to confirm the Plan (It should not.), it would not result in a distribution of eleven percent of New Common Stock to holders of Existing REIT Preferred Stock. Rather, the Debtors would need to

[19] *See, e.g., Kroemer Objection* at 13 (asserting that "confirmation should be denied until [the Plan] is revised to provide a fair and equitable allocation of 11% of new equity that satisfies the absolute priority rule").

go "back to the drawing board" and formulate a different plan. As it has noted previously,[20] it is the Committee's position that absent the RSA, the recovery that is being provided to holders of Interests in Classes 11 and 12 should instead be distributed to unsecured creditors. Accordingly, were the proponents of the Preferred Shareholder Objections to succeed in their arguments, unsecured creditors comprise the only constituency that should benefit from a redistribution of the New Common Equity currently allocated for distribution to Classes 11 and 12.

RESERVATION OF RIGHTS

The Committee reserves the right to supplement this Statement at or prior to the Confirmation Hearing.

CONCLUSION

For the reasons stated herein, and for the reasons stated in the Debtors' Confirmation Brief, the Committee respectfully requests that the Court overrule the Preferred Shareholder Objections and confirm the Plan.

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[20] *See Objection of the Official Committee of Unsecured Creditors to Motion to Appoint an Official Committee of Preferred Equity Holders* [ECF No. 1180], ¶ 8.

Dated: August 10, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 10, 2021, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ *Charles R. Gibbs*
Charles R. Gibbs