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

IN RE:	§	CASE NO. 20-35121
	§	
CBL & ASSOCIATES PROPERTIES, INC., *et al.*,	§	(CHAPTER 11)
	§	
Debtors.	§	(Jointly Administered)

SUPPLEMENTAL LIMITED OBJECTION TO CONFIRMATION OF THE DEBTORS' THIRD AMENDED CHAPTER 11 PLAN; LIMITED JOINDER IN KROEMER'S OBJECTION TO CONFIRMATION; AND RESPONSE TO THE DEBTORS' CONFIRMATION BRIEF

TO THE HONORABLE DAVID R. JONES,
CHIEF UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, Justin Weisenbacher ("Weisenbacher"), a preferred shareholder and party-in-interest, and files this files this *Supplemental Limited Objection To Confirmation Of The Debtors' Third Amended Chapter 11 Plan; And Limited Joinder In Kroemer's Objection To Confirmation* [Dkt. No. 372]; and in support would respectfully show the Court the following:

I.
SUMMARY OF ARGUMENT

1. Weisenbacher, a CBL REIT preferred shareholder, does not object to confirmation of the Debtors' Third Amended Plan *per se*. Rather, his objection is limited to the proposed allocation of the 11.00% "gift" to equity between existing preferred and common shareholders. Weisenbacher further joins in the Objection to Confirmation filed by John A. Kroemer in this regard. [Dkt. # 1321].

2. The Debtors' Third Amended Joint Chapter 11 Plan (the "Plan") proposes to allocate the "gift" to equity on a 50-50 basis—5.5% to preferreds and 5.5% to commons. To date, the Debtors have failed to provide any explanation as to how they came up with a 50-50

split. This allocation was decided with no input from the preferreds. And the proposed 50-50 split does not reflect the actual capital stack vis-à-vis the preferreds and commons. Nor does it take into account the senior "ranking" and other rights to which the preferreds are entitled under the Series D and Series E Preferred Prospectuses.[1] In other words, the proposed allocation is arbitrary and disproportionate.

3. The plan should be confirmed with one modification providing for the distribution of the 11.00% equity "gift" into an equity trust until the preferreds and commons either agree to an appropriate allocation amongst themselves, or the matter is decided by the Court.[2] This can be accomplished post-confirmation *via* further plan modification to incorporate the outcome of settlement or litigation. And it has been successfully done in other cases involving similar disputes between different classes of equity holders. *See, e.g.*, *In re The Dolan Co.*, No. 14-10614 (BLS) (Bankr. D. Del. Jun. 3, 2014).

II.
FACTUAL AND PROCEDURAL BACKGROUND

A. The Debtors' Business and Capital Structure

4. CBL is a self-administered and self-managed real estate investment trust.[3]

5. The REIT Common Stock (as defined below) was publicly traded on the New York Stock Exchange under the symbol "CBL." The REIT is the 100% owner of two qualified real estate investment trust subsidiaries, CBL Holdings I, Inc. ("Holdings I") and CBL Holdings II, Inc. ("Holdings II").

6. As of the Petition Date, the REIT had (i) approximately 1,185,000 shares of

[1] *See, generally*, Ex. A
[2] If necessary, the Court may certify two classes of shareholders, pursuant to Fed. R. Civ. P. 23, and designate class representatives with authority to prosecute and settle claims for declaratory judgment on behalf of each class. *See In re TWL Corp.*, 712 F.3d 886, 892 (5th Cir. 2013) ("In an appropriate situation, class adversary proceedings may be commenced in a bankruptcy case provided that the requirements of the various subdivisions of Rule 23 are satisfied."); *see also* 10 Collier on Bankruptcy § 7023.01.
[3] See Dkt. # 3, Mark Renzi Decl. at ¶ 37.

7.375% Series D Cumulative Redeemable Preferred Stock outstanding (the "Series D Preferred Stock") and (ii) approximately 690,000 shares of 6.625% Series E Cumulative Redeemable Preferred Stock outstanding (the "Series E Preferred Stock" and, together with the Series D Preferred Stock, the "REIT Preferred Stock").[4]

7. As of October 30, 2020, the REIT had approximately 196,572,455 shares of common stock outstanding (the "REIT Common Stock").[5]

8. Partners in the Operating Partnership hold their ownership through LP Preferred Units and common and special common units of limited partnership interests in the Operating Partnership (the "LP Common Units").[6] As of the Petition Date, the Operating Partnership had approximately 201,690,311 LP Common Units outstanding. The LP Common Units and the REIT Common Stock have essentially the same economic characteristics, as they effectively participate equally in the net income and distributions of the Operating Partnership.[7] For each share of REIT Common Stock, the Operating Partnership has issued a corresponding number of LP Common Units to Holdings I and Holdings II in exchange for the proceeds from the REIT Common Stock issuance.[8] Each limited partner in the Operating Partnership has the right to exchange all or a portion of its LP Common Units for REIT Common Stock, or at the Company's election, their cash equivalent.[9] When an exchange for REIT Common Stock occurs, the REIT assumes the LP Common Units.

9. During 2019, subject to further quarterly review, the Board suspended all future dividends with respect to the REIT Preferred Stock and REIT Common Stock, as well as all

[4] See Dkt. # 3, Mark Renzi Decl. at ¶ 53
[5] *Id.* at ¶ 54.
[6] *Id.* at ¶ 55.
[7] *Id.*
[8] *Id.*
[9] *Id.*

distributions with respect to the LP Common Units (except for the special common units of the Operating Partnership) and LP Preferred Units (the "Dividend Suspension"). Other than distributions to holders of special common units of the Operating Partnership, CBL has not paid any dividends since the Dividend Suspension.

B. Events Leading Up To The Debtors' Bankruptcy

10. On October 14, 2020, the board of directors of the REIT approved the formation of a special committee (collectively, the "**Special Committee**"). The Special Committee is authorized to, among other things, consider, evaluate, and approve any transactions for and on behalf of the Company in which the Chief Legal Officer or outside counsel advises that a conflict exists between the Company and its equity holders, its affiliates, or its managers and officers in the context of a chapter 11 restructuring case. The Special Committee consists has two members, namely, Scott D. Vogel ("Vogel") and Carolyn B. Tiffany ("Tiffany"). Notably, Tiffany owned 33,091 shares of REIT common stock as of January 6, 2020. Upon information and belief, Tiffany owns no preferred stock.

11. On August 18, 2020, the Debtors reached an agreement with certain bondholders on the terms of a comprehensive restructuring transaction. The parties executed the Restructuring Support Agreement (the "Restructuring Support Agreement" or "RSA") along with an accompanying term sheet (the "Restructuring Term Sheet") outlining the material terms of a restructuring to be implemented through a plan of reorganization (the "Pre-Negotiated Plan") for the Company.

12. Under the original RSA, holders of REIT Preferred Stock and CBL Common Shares would receive 10% of the New Equity Interests and warrants exercisable for 20% of the New Equity Interests exercisable solely for cash. The Original RSA did not, however, provide for

an allocation of the New Equity Interests between preferreds and commons. Instead, the original RSA stated that the allocation was "TBD":[10]

Preferred Equity Interests	If holders of Preferred Equity Interests vote to accept the Plan as a class, each holder of an allowed Preferred Equity Interest shall receive its *pro rata* share of [TBD][2]% of the New Equity Interests and [TBD]% of the Warrants (as defined below), which New Equity Interests shall be subject to dilution by the Warrants, the Management Incentive Plan and subsequent issuances of common stock (including securities or instruments convertible into common equity) by the Company from time to time after the Plan Effective Date, as set forth herein. If holders of Preferred Equity Interests vote to reject the Plan as a class, holders of Preferred Equity Interests shall receive no recovery under the Plan.

Common Equity Interests and Special Common Units	If holders of Common Equity Interests and limited partnership units of CBL & Associates Limited Partnership designated as special common units (the "**Special Common Units**") vote to accept the Plan as a class, each holder of existing Common Equity Interests and Special Common Units shall receive its *pro rata* share of [TBD] % of the New Equity Interests and [TBD]% of the Warrants (as defined below) on terms and conditions consistent with the term sheet attached hereto as Exhibit 2 (the "**Warrants**"), which New Equity Interests shall be subject to dilution by the Warrants and the Management Incentive Plan and subsequent issuances of common stock (including securities or instruments convertible into common stock) by the Company from time to time after the Plan Effective Date. If holders of Common Equity Interests and Special Common Units vote to reject the Plan as a class, holders of Common Equity Interests and Special Common Units shall receive no recovery under the Plan.

13. According to Mr. Renzi's "first day" Declaration, "[**t]he allocation of the New Equity Interests and the warrants between the holders of the REIT Preferred Stock and the CBL Common Shares was to be determined by the Company and the Required Consenting Noteholders**."[11]

C. The Debtors' Bankruptcy Proceedings

14. Beginning on November 1, 2020 (the "Petition Date"), the Debtors commenced their chapter 11 cases by filing voluntary petitions in this Court under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their

[10] *Id.* at p. 125.
[11] *Id.* at ¶ 79.

properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

15. On November 13, 2020, the Official Committee of Unsecured Creditors (the "Creditors' Committee") was appointed by the Office of the United States Trustee for Region 7 (the "U.S. Trustee") pursuant to section 1102 of the Bankruptcy Code to represent the interests of unsecured creditors in these chapter 11 cases. [Dkt. # 204].

16. At least three preferred equity holders have filed motions or joined in other motions seeking to appoint an official preferred equity holders committee. [*See* Dkt. Nos. 193, 1107, 1217]. The Court held a hearing on the Matthew Page's motion to appoint preferred equity committee on June 8, 2021, and then entered an order denying the motion following the hearing.

17. According to the Debtor's confirmation hearing brief, there are eight unresolved objections to confirmation. All of them were filed by preferred shareholders.

III.
ARGUMENT AND AUTHORITIES

18. The plan should be confirmed with one modification providing for the distribution of the 11.00% equity "gift" into an equity trust until the preferreds and commons either agree to an appropriate allocation amongst themselves, or the matter is decided by the Court.[12] This can be accomplished pre- or post-confirmation *via* further plan modification to incorporate the outcome of settlement or litigation. It has been successfully done in other cases involving similar disputes between different classes of equity holders. *See, e.g., In re The Dolan Co.*, No. 14-10614 (BLS) (Bankr. D. Del. Jun. 3, 2014).

[12] If necessary, the Court may certify two classes of shareholders, pursuant to Fed. R. Civ. P. 23, and designate class representatives with authority to prosecute and settle claims for declaratory judgment on behalf of each class. *See In re TWL Corp.*, 712 F.3d 886, 892 (5th Cir. 2013) ("In an appropriate situation, class adversary proceedings may be commenced in a bankruptcy case provided that the requirements of the various subdivisions of Rule 23 are satisfied."); *see also* 10 Collier on Bankruptcy § 7023.01.

19. But this issue should ***not*** prevent confirmation. The Debtors and all senior creditors are (or at least should be) indifferent as to how the 11.00% gift to equity is allocated between the preferreds and commons. Indeed, the original RSA filed by the Debtor as Exhibit B to its "first-day" motion—with its pre-packaged Chapter 11 Plan term sheet—shows that the allocation of the equity gift between preferreds and commons was "TBD."[13] Preferreds were kept in the dark while management arbitrarily "determined" the proposed 50-50 split. The preferreds should be allowed a meaningful opportunity to negotiate a fair and proportionate allocation of the equity gift, which will hopefully result in confirmation of a fully consensual modified plan.

WHEREFORE, Justin Weisenbacher respectfully requests that the Court confirm the Plan with one modification, pursuant to 11 U.S.C. § 105, to provide for the distribution of the 11.00% equity "gift" into an equity trust until the preferreds and commons either agree to an appropriate allocation amongst themselves, or the matter is decided by the Court; and grant such other and further relief at law and in equity to which he is entitled.

Respectfully submitted,

WILSON, CRIBBS + GOREN, P.C.

By: */s/ Brian B. Kilpatrick*
Brian B. Kilpatrick, TBN 24074533
Email: bkilpatrick@wcglaw.com
2500 Fannin Street
Houston, Texas 77002
Telephone (713) 222-9000
Facsimile (713) 229-8824

ATTORNEYS FOR JUSTIN F. WEISENBACHER

[13] *Id.* at p. 125.

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2021, a true and correct copy of the foregoing Notice of Appearance and Request for Notices was served on all parties requesting notices electronically *via* the Court's CM/ECF notification system.

/s/ Brian B. Kilpatrick

BRIAN B. KILPATRICK