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Hearing Date: June 24, 2009 10:00am

*Attorney for J. C. Penney Corporation, Inc.
and J. C. Penney Properties, Inc.*

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

In re:

Chapter 11

General Growth Properties, Inc., *et al.*,

Case No. 09-11977-ALG

Debtors.

Jointly Administered

THE HONORABLE ALLAN L. GROPPER
UNITED STATES BANKRUPTCY COURT

**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF
J. C. PENNEY CORPORATION, INC. AND J.C. PENNEY PROPERTIES, INC. TO
DEBTORS' MOTION FOR ENTRY OF AN ORDER PURSUANT TO SECTIONS 105
AND 363 OF THE BANKRUPTCY CODE AUTHORIZING CERTAIN ORDINARY
COURSE SALES AND CONVEYANCES OF ASSETS FREE AND
CLEAR OF ALL LIENS, CLAIMS, AND ENCUMBRANCES
WITHOUT FURTHER NOTICE OR ORDER FROM THE COURT**

J. C. Penney Corporation, Inc. ("J. C. Penney Corp.") and J. C. Penney Properties, Inc. ("J. C. Penney Properties", together with J. C. Penney Corp., "J. C. Penney"), by and through their undersigned counsel, hereby assert their Limited Objection and Reservation of Rights to General Growth Properties, Inc., *et al.*'s (the "Debtors") Motion for Entry of an Order (the "Motion") Pursuant to Sections 105 and 363 of the Bankruptcy Code authorizing certain Ordinary Course Sales and Conveyances of Assets Free and Clear of all Liens, Claims, and



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Encumbrances without further Notice or Order from this Court [Docket No. 656], and respectfully states as follows:

Preliminary Statement

J. C. Penney is an occupant at various shopping centers and other properties that are owned and managed by the Debtors. The Debtors, by the Motion, seek broad authority to sell property that they have deemed to be in the ordinary course of business or de minimis, free and clear of all Liens¹, under their proposed Asset Conveyance procedures (the "Procedures"). The Procedures either permit the Debtors to sell property without further notice or order from this Court, or require the Debtors only to give notice to the Committee and the affected Debtor's secured lenders before the Debtors are permitted to convey the property free and clear of the Liens² of any other party. These Procedures blatantly ignore the due process rights of the numerous Lien holders—including J. C. Penney—who have Liens in or on property owned by the Debtors, even though these Asset Conveyances appear to contemplate extinguishing the Liens of these Lien holders. At a minimum, due process requires the Debtors to give notice and opportunity to object to all parties who hold an interest in or on the property which the Debtors wish to sell.

Even if the Debtors were to give notice and opportunity to object to these numerous Lien holders, various of these Liens are not of the type which the Debtors are able to sell free and clear from because the Debtors are unlikely to meet one of the five criteria set forth in Section 363(f) of the Bankruptcy Code. Further, the Motion ignores the special protections afforded by Section 365(h) of the Bankruptcy Code to tenants in a shopping center and may

¹ Capitalized terms used but not defined herein shall have the meanings ascribed them in the Motion.

² The defined term Liens, as defined in the Motion, includes all liens, claims and encumbrances.

seek to sell property without regard to the rights a tenant will receive if its lease is rejected prior to such sale.

J. C. Penney hereby objects to the Procedures. Likewise, J. C. Penney does not consent to any sale of the Debtors' property free and clear of any Lien granted to and/or for the benefit of J. C. Penney under the Real Estate Agreements (defined herein). To the extent the Debtors are not currently seeking authority to sell property free and clear of any such Liens, J. C. Penney hereby reserves its rights to object to such future sale.

Background

1. J. C. Penney is a nationally recognized department store with over 1,000 locations.
2. J. C. Penney is a tenant who leases retail space at approximately 55 locations which are owned and managed by the Debtors (the "Leased Locations"). J. C. Penney also owns retail space at approximately 39 locations which are owned and managed by the Debtors (the "Owned Locations", together with the Leased Locations, the "Locations"). At two of the Owned Locations, J. C. Penney also leases separate property from the Debtors.
3. Most, if not all, of the Locations are located in shopping centers.³
4. Prior to the Debtors seeking bankruptcy protection, J. C. Penney and the Debtors entered into numerous agreements, including, but not limited to: a) leases, licenses and other occupancy agreements; b) construction, operation and reciprocal easement agreements and associated supplemental or separate agreements; and c) other similar documents or contractual arrangements entered into with occupants of shopping centers

³ The Bankruptcy Code does not define "shopping center." Rather, the definition of this term is left to case-by-case interpretation generally following the multifactor test set forth in *In re Joshua Slocum*, 922 F.2d 1081, 1086 (3d Cir. 1991). See, e.g. *Hannaford Bros. Co. v. Ames (In re Ames Dep't Stores)*, 316 B.R. 772, 787-788 (Bankr. S.D.N.Y. 2004). It appears that the majority of the Locations are in retail locations which would be considered Shopping Centers under the test set forth in *Joshua Slocum*.

(collectively, the “Real Estate Agreements”). Such Real Estate Agreements grant a wide variety rights to and/or for the benefit of J. C. Penney, including, but not limited to, leasehold and other real property possessory interests, easements (for ingress, egress, parking, utilities, drainage, lighting, etc.), site plan orientation restrictions (including permissible building areas and common area locations), use restrictions, tenant mix or balance requirements, shopping center operations, common area maintenance (including monetary contributions thereto), operating covenants, architectural standards, construction standards (including monetary contributions to initial development), developer/landlord representations and warranties, buy-back/purchase rights, outparcel restrictions, parking ratios, lighting, signage, destruction (rebuild obligations), insurance requirements and condemnation rules. Each of these rights is critical to J. C. Penney’s investment and operation in each center, and each constitutes a Lien on the Debtors' property at the Locations.

5. J. C. Penney also may have certain similar and/or other rights in property of the Debtors pursuant to section 365(h) of the Bankruptcy Code—should the Debtors reject a Real Estate Agreement — which would also constitute Liens on the Debtors' property.

6. On April 16, 2009, the Debtors each sought protection under chapter 11 of the Bankruptcy Code.

7. On June 1, 2009, the Debtors filed the Motion.

Objection

8. By the Motion, the Debtors seek the ability to sell almost any asset which they own, or at least a portion of any asset they own, free and clear of all Liens without notice to various parties who have Liens on the subject property, including J. C. Penney. (Motion ¶¶ 9, 12 and 13). However, the Procedures for the Asset Conveyances neither meet the

requirements of section 363(f) of the Bankruptcy Code nor the minimum requirements of due process. As such, J. C. Penney hereby objects to the Motion.

9. The Debtors assert that the Asset Conveyances free and clear of all Liens are permissible because the Debtors will meet section 363(f) of the Bankruptcy Code. The Debtors contend that they meet the requirements of 363(f) because a) the Lien will attach to the proceeds of such sale under section 363(f)(3), b) the Lien holder could be compelled to accept monetary payment under section 363(f)(5), or c) the Lien holder has consented to sale because they have been given the opportunity to object to the Procedures under section 363(f)(2). (Motion ¶¶ 19 and 20). The Debtors' assertions are without base in fact or law with respect to J. C. Penney's Liens.

10. Numerous of the Liens which the Debtors may seek to sell free and clear from, including Liens that have been granted to and/or benefit J. C. Penney under the Real Estate Agreements, are not of a type that can be satisfied by monetary payments (e.g., easements, site plan orientation restrictions (including permissible building areas and common area locations), use restrictions, tenant mix or balance requirements, shopping center operations, common area maintenance, operating covenants, architectural standards, construction standards, developer/landlord representations and warranties, buy-back/purchase rights, outparcel restrictions, parking ratios, lighting, signage, destruction (rebuild obligations), insurance requirements, condemnation rules, other restrictive covenants, etc.). See Gouveia v. Tazbir, 37 F.3d 295, 300 (7th Cir. 1994); Silverman v. Ankari, 196 B.R. 251, 255-56 (Bankr. E.D.N.Y. 1996). Neither the attachment to proceeds of section 363(f)(3) of the Bankruptcy Code nor the Debtors' compelling acceptance of money satisfaction under section 363(f)(5) of the Bankruptcy Code would be applicable to such a Lien. See Id. Therefore, the Debtors

cannot sell property free and clear of such Liens, including the Liens that have been granted to and/or benefit J. C. Penney under the Real Estate Agreements, unless the Lien holder consents to such sale.

11. The Debtors contend that a Lien holder shall have been deemed to consent to the sale of property free and clear of such Lien under section 363(f)(2) of the Bankruptcy Code by receiving notice of the Motion and failing to object. (Motion ¶ 20). However, Constitutional due process requires a notice to be reasonably calculated to notify an interested party of the pendency of an action, the relief requested by the action, and to afford a party an opportunity to object. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In the current case, it is unclear what property the Debtors may convey under the Procedures—and thus which Liens may be implicated—because the Debtors do not enumerate any of the property which they wish to sell with specificity or state what Liens they wish to sell free and clear from. Such notice is facially insufficient to notify a Lien holder, including J. C. Penney, of the pending sale of the property in which they have a Lien, fails to adequately disclose the relief requested because it does not identify what property the Debtors are seeking to sell or what Liens the Debtors seek to sell free and clear from, and provides no opportunity to object to a particular sale of property. Rather, the relief requested by the Debtors will grant them the unfettered ability to sell property without regard to the rights of Lien holders.

12. J. C. Penney hereby objects and does not consent to any sale of the Debtors' property free and clear of any Lien granted to and/or for the benefit of Penney under the Real Estate Agreements, including, but not limited to, leasehold and other real property possessory rights, easements (for ingress, egress, parking, utilities, drainage, lighting, etc.), site plan

orientation restrictions (including permissible building areas and common area locations), use restrictions, tenant mix or balance requirements, shopping center operations, common area maintenance (including monetary contributions thereto), operating covenants, architectural standards, construction standards (including monetary contributions to initial development), developer/landlord representations and warranties, buy-back/purchase rights, outparcel restrictions, parking ratios, lighting, signage, destruction (rebuild obligations), insurance requirements and condemnation rules, which the Debtors may be seeking authority to sell free and clear from such Liens pursuant to the Procedures.

13. J. C. Penney hereby further objects and does not consent to the sale free and clear of any Liens which arise pursuant to section 365(h) of the Bankruptcy Code, which the Debtors may be seeking authority to sell free and clear from such Liens pursuant to the Procedures.

14. J. C. Penney hereby submits that the Procedures be modified to provide Lien holders their due process and/or statutory rights by requiring the Debtors to provide notice and sufficient opportunity to object—or alternatively consent—to any Asset Conveyance which may affect that Lien holder's Lien.

CONCLUSION

WHEREFORE, for the reasons stated herein, J. C. Penney, by counsel, objects to the Motion, and respectfully requests the Court deny the relief requested by the Debtors.

Dated: June 18, 2009
New York, NY

By: S/Shawn R. Fox

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