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by ING Clarion Capital Loan Services LLC
as Special Servicer*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)
)
) **Chapter 11**
GENERAL GROWTH PROPERTIES,)
INC., et al.) **Case No. 09-11977 (ALG)**
)
Debtors.) **(Jointly Administered)**

**POST-TRIAL MEMORANDUM IN SUPPORT OF ING CLARION
CAPITAL LOAN SERVICES LLC’S MOTION TO DISMISS
THE CLARION DEBTORS’ BANKRUPTCY CASES**

ING Clarion Capital Loan Services LLC, as Special Servicer for the lenders set forth on Exhibit A hereto (“ING Clarion”), hereby files this post-trial memorandum in support of its motion (the “Motion to Dismiss”) to dismiss the bankruptcy cases of the debtors set forth on Exhibit A hereto (collectively, the “Clarion Debtors”).

I. The Proper Legal Standard is Whether a Debtors Has a Present Need for Chapter 11 Relief.

The Motion to Dismiss raises the following question: Can a financially sound special purpose subsidiary that has no present need for bankruptcy relief (and may never have such a need) and its financially challenged parent leverage the parent’s financial difficulties so that the subsidiary, by filing its own chapter 11 case, may circumvent its contractual commitments in order to shift value from its creditors to its parent? If the answer is “yes,” it well may signal the



demise of a form of non-recourse, commercial real estate financing that has been efficacious, less expensive and in other ways beneficial to borrowers and their equity holders. ING Clarion submits that precedent counsels that the answer to this question must be a resounding “no”: a person or entity with no present need for bankruptcy relief may not exploit the bankruptcy process to disadvantage another party for the benefit of its equity owner.¹ Because the evidence presented at the hearing demonstrates that the Clarion Debtors have no present need for bankruptcy relief, their chapter 11 cases should be dismissed.

II. The Evidence Shows That the Clarion Debtors Have No Present Need to Reorganize.

Though the Clarion Debtors have emphasized their purported dependence on their parent debtors, even suggesting that the Clarion Debtors would fail absent the provision of services by their parent debtors (a suggestion for which no proof was offered at trial and for which ample evidence to the contrary was offered through ING Clarion’s expert witness (Tr. 6/17/2009 at 145:12-147:22 (Casey))), the Clarion Debtors and parent debtors have admitted that such services would continue to be provided by the parent debtors whether or not the Clarion Debtors were in bankruptcy, just as these services are still being provided for property level subsidiaries that did not file chapter 11 cases. Tr. 6/17/2009 at 195:14 -196:22 (Nolan). Thus, the alleged dependence of the Clarion Debtors on the parent debtors is irrelevant as a basis for these bankruptcy filings.

The Clarion Debtors’ remaining argument in support of a present need for reorganization is their alleged inability to refinance their respective loans as and when the loans become due.²

¹ Though such evidence would not justify the filings of the Clarion Debtors even if it had been presented, no evidence was proffered that it was critical to the reorganization of the ultimate parent or any other GGP affiliate that may have a present need for bankruptcy protection that it receive more funds from any of the Clarion Debtors than it could receive legally from these entities if they were not in bankruptcy.

² Though RS Properties, Inc. and Lancaster Trust also allege that the bankruptcy filing by certain affiliates triggered a cross-default justifying their bankruptcy petitions, each failed to prove that such a cross-default existed. Pursuant to the respective loan agreements Joint Exhibits 15 and 16 at Section 8.1(a)(viii), the filing by certain affiliates

Yet, the earliest maturity of any of the 8 loans at issue was 14 months from the petition date (two others had maturity dates 18 months out; another did not mature for two and one-half years; still another, for five years; and three others, for 19 years or longer). ING Clarion Ex. 1 (reflecting maturity dates). The only evidence offered to show that these loans cannot be refinanced when they come due is the testimony of Mr. Nolan that an investment banker retained jointly by all of the debtors does not believe that the state of the credit markets in the future will make it possible for any of the Clarion Debtors to refinance their loans before maturity. Tr. 6/17/2009 at 198:4-200:7 (Nolan). Yet, past predictions about the health of the credit markets have proven to be inaccurate, and there is no reason to conclude that this prediction will be any more accurate than the prior prognostications.

Even if the Court were to credit, as more than speculation, the Clarion Debtors' allegations that sources of refinancing will not be available for loans coming due in less than four years, five of the Clarion Debtors still would not have shown a present need to file. First, the loan to Clarion Debtor HO Retail Properties II Limited Partnership (for the Washington Park Mall) was five (5) years from maturity when its bankruptcy petition was filed.

Second, no evidence was offered that the three "Anticipated Repayment Date" or "ARD" loans, for Bakersfield Mall LLC and RASCAP Realty, Ltd. (Valley Plaza Shopping Center; maturity date in 24 years), GGP-Tucson Mall L.L.C. (Tucson Mall; maturity date in 24 years) and Visalia Mall, L.P. (Visalia Mall; maturity date in 19 years), could not be refinanced when these loans become due a generation from now. Instead, these Clarion Debtors argue that the

constituted a default only if, at the time such affiliates filed bankruptcy, they had remaining indemnification obligations in connection with the loans to RS Properties, Inc. and Lancaster Trust, respectively. No evidence or argument was offered that any such indemnification obligations remained in effect when the affiliates filed for bankruptcy. Even if an affiliate's bankruptcy filing did trigger such a cross-default, no evidence was offered that a waiver of the default had been requested and refused. In fact, ING Clarion, as special servicer for the lenders on the loans to these two Clarion Debtors, represented that it would waive such a cross-default in any event. Thus, the alleged cross-defaults provide no basis for a claim of present need for relief under chapter 11. Tr. 6/17/2009 at 29:10-21.

ARD (the ARD for Tucson Mall occurred prepetition; the other two, for Visalia Mall and Valley Plaza Shopping Center, will not occur until 9 months and 3 years after the bankruptcy filings, respectively) is the equivalent of a maturity date, because they and the parent debtors are unhappy with the bargained for terms of the respective loan agreements that become effective on the ARD. That argument is wrong as a matter of the unambiguous provisions of the loan documents and the law. The relevant loan agreements make clear that the passage of the ARD is not a default and that these Clarion Debtors have no obligation to pay off their respective loans on the ARD. See Joint Exhibits 14, 19 and 20 at 2.2.4 – 2.2.6. Moreover, the ARD provisions are not *in terrorem* provisions but rather protect the borrower against default if refinancing is not feasible in the short term or interest rates are unattractive at the time of the ARD. In consideration of this protection, the economics of the loan are adjusted as of the ARD: (a) the interest rate increases but the increased amount accrues and is capitalized, and (b) any surplus cash – i.e., cash remaining after paying debt service and operating and other expenses for the benefit of the property – is used to pay down the principal amount of the loans rather than distributed to the parent entities, which benefit from the increased value of the parent’s interest in the debtor as the principal balance of the loan is reduced. See Joint Exhibits 14, 19 and 20 at 2.2.5 The lender may not withhold its consent unreasonably to the borrower’s budget for operating expenses and capital expenditures See Joint Exhibits 14, 19 and 20 at 5.1.11(d) – (e); Tr. 6/17/2009 at 191:7-193:9 (Nolan), as illustrated by the actual events at Tucson Mall, where the ARD occurred in October 2008, but the property level debtor, pre-bankruptcy, was using all of its cash to pay (i) monthly debt service at the same level as before the ARD, (ii) operating expenses and (iii) capital expenditures for a development project, leaving no surplus cash to apply against the principal balance of the loan. Tr. 6/17/2009 at 189:8-189:22; 191:7-193:9

(Nolan). In short, the ARD feature allows the Clarion Debtors whose loans include that feature to obtain long-term financing with the flexibility to refinance at, or at any time after, the ARD when the market is favorable with no prepayment premium or penalty. Id. The inclusion of this feature in the loan agreements of the four ARD Clarion Debtors provides no basis for a claim that they have a present need for chapter 11 relief.

For the reasons stated at the June 17, 2009 hearing, in ING Clarion's previous submissions and in this Memorandum, and based on the evidence presented at the hearing³, the cases of the Clarion Debtors should be dismissed.

Dated: July 2, 2009.

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³ As to Lancaster Trust, the evidence found in ING Clarion Ex. 62 shows that this Clarion Debtor does not have the significant attributes of a corporation (e.g., beneficiary's interest in trust is non-transferable; trustees can terminate trust at any time in their sole discretion; trust terminates on fixed date if not sooner terminated; and trust has no directors, officers or employees), accordingly is not a business trust, and therefore is ineligible to be a debtor.

EXHIBIT A

ING Clarion Capital Loan Services LLC is the Special Servicer with respect to the respective mortgage loans held by each of the Lenders set forth below and is authorized under the applicable Pooling and Servicing Agreement and, where applicable, Intercreditor Agreement or Co-Lender Agreement, to act on behalf of such Lenders.

1. Fashion Place Mall (debtor Fashion Place, LLC) - Wells Fargo Bank, N.A., as Trustee for the Certificate holders of Credit Suisse First Boston Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2005-C6

2. Park City Center (Note A1)(debtor Lancaster Trust)
Bank of America, N.A., successor trustee to Wells Fargo Bank, N.A., successor-by-merger to Wells Fargo Bank Minnesota, N.A., as Trustee for the Certificate holders of Wachovia Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2003-C8

Park City Center (Note A2)(debtor Lancaster Trust)
U.S. Bank National Association, successor trustee to Wells Fargo Bank, N.A., successor-by-merger to Wells Fargo Bank Minnesota, N.A., as Trustee for the Certificate holders of Wachovia Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2003-C9

Park City Center (Note B1)(debtor Lancaster Trust)
EHY Sub Asset LLC

Park City Center (Note B2)(debtor Lancaster Trust)
Metlife Bank, N.A.

3. Regency Square Mall (A1 Note)(debtor RS Properties Inc.)
Bank of America, N.A., successor trustee to Wells Fargo Bank, N.A., successor-by-merger to Wells Fargo Bank Minnesota, N.A., as Trustee for the Certificate holders of Wachovia Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2003-C7

Regency Square Mall (A2 Note)(debtor RS Properties Inc.)
Bank of America, N.A., successor trustee to Wells Fargo Bank, N.A., successor-by-merger to Wells Fargo Bank Minnesota, N.A., as Trustee for the Certificate holders of Wachovia Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2003-C8

4. Stonestown Mall (Note A)(debtor Stonestown Shopping Center L.P.) - Wells Fargo Bank, N.A., successor-in-interest to LaSalle Bank National Association, as Trustee for the Certificate holders of ML-CFC Commercial Mortgage Trust 2006-3, Commercial Mortgage Pass-Through Certificates, Series 2006-3

Stonestown Mall (Note B)(debtor Stonestown Shopping Center L.P.)
Teachers Insurance and Annuity Association of America

5. Tucson Mall(debtor GGP-Tucson Mall L.L.C.) - Bank of America, N.A., successor trustee to Wells Fargo Bank, N.A., successor-by-merger to Wells Fargo Bank Minnesota, N.A., as Trustee for the Certificate holders of Wachovia Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2003-C8
6. Valley Plaza Shopping Center(debtors Bakersfield Mall LLC and RASCAP Realty, Ltd.) Bank of America, National Association, as successor-by-merger to LaSalle Bank National Association, as Trustee for the Certificate holders of LB-UBS Commercial Mortgage Trust 2003-C7, Commercial Mortgage Pass-Through Certificates, Series 2003-C7
7. Visalia Mall(debtor Visalia Mall, L.P.) - Bank of America, National Association, as successor-by-merger to LaSalle Bank National Association, as Trustee for the Certificate holders of LB-UBS Commercial Mortgage Trust 2003-C7, Commercial Mortgage Pass-Through Certificates, Series 2003-C7
8. Washington Park Mall (debtor HO Retail Properties II Limited Partnership) - Bank of America, N.A., successor-by-merger to LaSalle Bank National Association, as Trustee for the Certificate holders of Wachovia Bank Commercial Mortgage Trust, Commercial Mortgage Pass-Through Certificates, Series 2004-C12