WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
Marcia L. Goldstein
Gary T. Holtzer
Adam P. Strochak
Stephen A. Youngman (admitted *pro hac vice*)
Melanie Gray (admitted *pro hac vice*)
Sylvia A. Mayer (admitted *pro hac vice*)

KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, IL 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
James H.M. Sprayregen, P.C.
Anup Sathy, P.C. (admitted *pro hac vice*)
Richard C. Godfrey, P.C. (admitted *pro hac vice*)
Sallie G. Smylie, P.C. (admitted *pro hac vice*)
Gabor Balassa (admitted *pro hac vice*)

Co-Counsel to the Jointly Represented Debtors

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
	)	

DEBTORS' POST-HEARING MEMORANDUM IN SUPPORT OF OPPOSITION TO THE MOTIONS OF ING CLARION CAPITAL LOAN SERVICES LLC AND WELLS FARGO BANK, N.A., AS TRUSTEE, *ET AL.*, TO DISMISS THE CASES OF CERTAIN DEBTORS AND DEBTORS IN POSSESSION

0911977090702000000000004

INTRODUCTION

Dismissal for cause is an extraordinary remedy to be used sparingly "only if, upon considering the totality of the circumstances, there is substantial evidence to indicate that the debtor made a bad faith filing." *Matter of Cohoes Indus. Terminal, Inc.*, 931 F.2d 222, 227 (2d. Cir. 1991). Here, there is no evidence the Project Debtors filed their petitions in bad faith. To the contrary, the undisputed evidence establishes that the Project Debtors' bankruptcy filings were in good faith. Following six weeks of careful and informed deliberations and with the unanimous recommendations of four sets of financial, restructuring, and legal advisors, the boards of the Project Debtors made the reasonable and prudent business decision to file for Chapter 11 protection in order to safeguard and maximize each debtor's enterprise value for the benefit of all stakeholders. ING and Helios ("Movants") ask this Court not only to second guess these business judgments, but also to conclude that the boards should have ignored the financial realities facing the Project Debtors (including the unprecedented collapse in real estate financing markets that already had prevented GGP from refinancing billions of dollars of maturing debt), and simply wait to experience yet further defaults and foreclosures before seeking bankruptcy court protection on a seriatim, debtor-by-debtor basis. Tellingly, Movants failed to offer any testimony, expert or otherwise, that the amorphous "wait-and-see, march-toward-default" approach Movants urge would constitute a reasonable or prudent exercise of business judgment or would not jeopardize the value of these debtors' enterprises. Movants presented no such evidence, because the decisions at issue were made in good faith and the "wait and see" standard they espouse does not exist. The motions should be denied.

I. ING And Helios Have Not Met Their Burden Of Establishing That The Project Debtors' Filings Were In Bad Faith.

A bankruptcy petition should not be dismissed unless "it is clear that on the filing date there was no reasonable likelihood that the debtor intended to reorganize and no reasonable probability that it would eventually emerge from bankruptcy proceedings." *Cohoes*, 931 F.2d at

227. ING has conceded that: (a) there is no factual dispute over the debtors' ability to reorganize (6/17/09 Hr'g Tr. at 18:2-18:3); and (b) there are no facts establishing that the debtors lacked subjective good faith in filing. (*Id*. at 18:14-19:22.) Helios agreed. (*Id.* at 44:1-44:2.) Accordingly, neither Movant even attempted to introduce evidence to satisfy its burden of proving the dual requirements of "objective futility of the reorganization process **and** subjective bad faith in filing the petition." *In re Kingston Square Assocs.*, 214 B.R. 713, 725 (Bankr. S.D.N.Y. 1997) (emphasis in original).

As to the objective futility prong, the undisputed record evidence demonstrates that the Project Debtors have the ability to reorganize, in that (1) the lenders are oversecured on the Project Entities' loans (6/05/09 Deposition of Allen Hanson ("Hanson Dep.") at 48:21-48:24; 52:5-52:12; 06/05/09 Deposition of Steven Altman ("Altman Dep.") at 72:24-73:2; 80:5-80:7; 92:4-92:8; 94:2-94:6; 99:15-99:17; 102:2-102:5; 107:7-107:11; 109:8-109:12); (2) the Project Debtors have strong operating cash flows; and (3) the Project Debtors are servicing their debt. The undisputed record evidence also demonstrates that the Project Debtors did not lack subjective good faith in filing their Chapter 11 petitions. Among other reasons:

- the petitions were filed after weeks of deliberation and careful consideration of the dire implications the credit markets' shutdown had on the Project Debtors' financing model, which depended on a functioning credit market and their continued ability to refinance debt when due;

- the petitions were filed as part of a coordinated, jointly administered proceeding to (a) avoid the uncertainties surrounding the Project Debtors as they march toward inevitable loan defaults, (b) avoid serial restructurings or bankruptcies that would impose significant costs, both financial and in terms of management time and attention, and (c) maximize the likelihood that the Project Debtors will emerge successfully from the unprecedented credit crisis; and

- the petitions of three Project Debtors -- Lancaster Trust, RS Properties, Inc., and Faneuil Hall Marketplace -- were filed for the additional reasons that their loans went into default when other GGP Group entities filed for bankruptcy.[1]

[1]ING debates whether a cross-default occurred on the RS Properties, Inc. loan, but that dispute does not indicate that the RS Properties, Inc. board made a filing decision in bad faith, particularly since the dispute post-dates the board's filing decision by some two months. Moreover, a cross-default was not the only basis on which RS Properties filed

(Continued…)

(6/16/09 Declaration of Thomas H. Nolan, Jr. ("Nolan Decl."), ¶¶ 6, 7, 22, 24, 38-48, 58-63; 6/17/09 Hr'g Tr. at 197:12-21.) Based on the evidence and the governing legal standard, the Court should deny ING and Helios' motions.

II. Movants' "Prematurity" Argument Fails As A Matter Of Law And On The Facts.

Because they cannot satisfy the proper standard, Movants urge a different one. Citing *In re Schur Mgmt. Co., Ltd.*, 323 B.R. 123 (Bankr. S.D.N.Y. 2005) and *In re SGL Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999), Movants argue that the Project Debtors' filings should be dismissed as prematurely filed. As this Court already has observed, *In re Schur* is distinguishable. (6/17/09 Hr'g Tr. at 58:2-8) And *SGL Carbon* -- which, like *In re Schur*, involved a Chapter 11 filing based on pending litigation -- is equally inapplicable. In both of these cases, whether a debt would ever exist in the future (let alone the amount of such debt) was wholly speculative and entirely dependent on the outcome of the litigation.

A more analogous case, which Movants do *not* cite, is *In re Sletteland*, 260 B.R. 657 (S.D.N.Y. 2001), where the debt was a certainty, and the Court held that the bankruptcy filing was proper. *Id.* at 660, 669.[2] Here, it is undisputed that the Project Debtors face definite CMBS mortgage debt totaling over $1 billion, with most individual loans exceeding $100,000,000. (Nolan Decl. at ¶ 48.) Tellingly, Movants have offered no evidence -- and do not even suggest -- that the Project Debtors generate sufficient cash to pay off their loans upon maturity. Merely because they currently have an acceptable debt service coverage ratio does not translate into an ability to refinance or pay off their mortgage debt when due. Nor does it preclude the Debtors' ability to file for Chapter 11 now rather than waiting until their financial situation cannot be

its petition. Rather, the filing decision was based on additional financial considerations, including that its loan matured in 3-4 years and had a loan-to-value ratio above 70%. (Nolan Decl. at ¶ 48).

[2] Further, as the court in *Sletteland* noted, the "critical issue" in assessing whether good faith existed in both *C-TC 9th Avenue Partnership* and *Cohoes* was "whether there was, on the date of the filing, a good faith intent to reorganize and a lack of any intent to use the bankruptcy process solely as a means to delay, frustrate and relitigate State court issues. *Id.* at 662.

remedied. The Bankruptcy Code encourages early filing, to avoid liquidation and to maximize assets and value for all stakeholders. *E.g., In re Muralo Co. Inc.*, 301 B.R. 690, 698-99 (Bankr. D.N.J. 2003); *In re Wynco Distribs., Inc.*, 126 B.R. 131, 134 (Bankr. D. Mass. 1991). And here, the certainty and size of the Project Debtors' debts give rise to a present, recognized need to reorganize, notwithstanding an ability to meet current expenses. *See, e.g., In re Century/ML Cable Venture*, 294 B.R. at 34 (denial of motion to dismiss notwithstanding court findings that the debtor generated substantial cash flow and could meet its current expenses); *In re Johns-Manville Corp.*, 36 B.R. 727, 736-37 (Bankr. S.D.N.Y. 1984) (denying motion to dismiss notwithstanding that debtor was viable and fully able to meet its current obligations); *In re Chris-Marine U.S.A., Inc.*, 262 B.R. 118, 125 (Bankr. M.D. Fla. 2001) (denying motion to dismiss where debtor was "a viable business with sufficient income to meet expenses, with numerous employees, and with good prospects for reorganization").[3]

Rather than offer any evidence to satisfy their burden of proof, Movants simply speculate that the Project Debtors' loans could be refinanced. It is undisputed that the Project Debtors' advisors counseled their boards that, given conditions in the overall commercial real estate finance market (and the moribund CMBS market in particular) and the billions of dollars of loan maturities coming due over the next few years, it was extremely doubtful that the Project Debtors could refinance those loans or secure alternative financing. (Nolan Decl. at ¶ 41.) Significantly,

[3] Attempting to avoid their burden of proof, Movants cite *Integrated Telecom*, 384 F.3d 108, 118 (3d Cir. 2004), to argue that the Project Debtors' statement that they are operationally sound shifts the burden to them to establish good faith. (ING Reply at 7). *Integrated Telecom* does not help Movants as it, like *In re Schur* and *SGL Carbon*, involved a debtor's attempt to use Chapter 11 to gain a litigation advantage. Additionally, the debtor had sufficient cash to pay all of its debts, and intended to dissolve and liquidate, rather than reorganize. No such facts, or purpose, are present here. Moreover, courts in the Second Circuit repeatedly hold that the burden is on the Movant to prove that a case should be dismissed for cause, including lack of good faith. *In re Century/ML Cable Venture*, 294 B.R. at 34; *In re D & F Meat Corp.*, 68 B.R. 39, 40) (Bankr. S.D.N.Y. 1986) ("[i]t is well settled law that the burden of establishing cause for dismissal or conversion to Chapter 7 rests squarely on the party seeking such relief."). Further, Movants have failed even to satisfy an initial burden of production. They have offered no evidence that the Project Debtors lack "a valid 'intent to reorganize' or 'reorganizational purpose' to the filing," *In re Schur*, 323 B.R. at 128, and they simply claim the objective futility test can never be satisfied in so-called "prematurity" cases.

Movants came forward with no evidence or expert opinion that the credit markets will sufficiently rebound and have the capacity for refinancing the billions of CMBS and other debt maturing within the next three to four years. To the contrary, both Movants testified that there is *no* certainty when there will be a functioning credit market. (Hanson Dep. at 155:8-155:11; Altman Dep. at 30:22-30:25) And ING's Rule 30(b)(6) witness, Mr. Altman, admitted that he could not disagree with the conclusion that the CMBS markets would be closed for the next 3-5 years. (Altman Dep. at 38:8-38:17.)

Lacking any evidence to refute these showings, Movants simply argue that the filings were premature. Movants offer no standard for determining prematurity; instead, they supply only self-serving opinions. ING testified that *any* bankruptcy filing before a conversation with the loan servicer is premature -- even when a loan maturity is 90 days away. (6/17/09 Hr'g Tr. at 115:13-116:3.) In ING's words: "Our view is that come talk to us when you have come closer to your maturity date and we'll see what we can work out." (*Id*. at 116:17-116:18) And according to Helios, any bankruptcy petition earlier than a filed and unresolvable foreclosure action is premature. Thus, according to Helios, *even if unable to refinance its loans when they mature, and even after the commencement of a foreclosure action,* a Project Debtor "would still not have an immediate need to file for bankruptcy unless and until it was unable to achieve a resolution prior to the foreclosure sale of its property." (Helios Reply Br. at 7-8.) These subjective, extreme opinions provide no basis to find that the Debtors' filings were "premature."[4]

[4] Attesting to the lack of any coherent standard presented by Movants, they take inconsistent positions with regard to the business judgments made by the Project Debtors' boards. ING argues that the boards' prudent business judgments are simply irrelevant where the filings are purportedly premature. (Dkt. Entry # 751, Omnibus Reply ("ING Reply Br.") at 3) Helios, in contrast, argues that the replacement of the independent managers on the St. Louis Galleria LLC and Faneuil Hall Marketplace LLC boards constitutes "evidence of bad faith." (Dkt. Entry # 750, Reply Memorandum of Law ("Helios Reply Br.") at 10.) The evidence Helios submitted -- declarations from the former independent managers -- does not support Helios' argument. To the contrary, the independent managers testified that Corporation Service Company (CSC's) counsel concluded they were properly removed and replaced. (Helios Exs. H19 at ¶ 7 and H20 at ¶ 7.) Moreover, the CSC independent managers remained on numerous project entity boards and voted unanimously to file those entities for Chapter 11 protection, considering the same filing factors, and with the same advisors, as the Project Debtors. (Nolan Decl. at ¶ 52.) The Project Debtors have fully

(Continued…)

Nor do they provide a basis for the Court to disregard the business judgments of the Project Debtors' boards.[5] Indeed, were the Project Debtors to do what Movants urge -- wait to file for Chapter 11 until each Project Debtor is on the brink of default or beyond -- Movants no doubt would seek dismissal of those filings as improper attempts to avoid foreclosure.

Moreover, as a factual matter, the record evidence is that GGP actively engaged in extensive pre-petition efforts to refinance and secure new financing for maturing CMBS debt -- but was unsuccessful because of constraints imposed on master and special servicers in the timing and scope of their ability to renegotiate. (Nolan Decl. at ¶¶ 14-16.) For example, master servicer Wachovia (who is the master servicer for several ING-serviced loans to Project Debtors) refused to turn the files for two loans over to the special servicer until *after* the loans already had matured and the project entities were in default. (*Id.* at ¶ 17.) Movants offer no evidence to call into question the business judgment of the Project Debtors' boards that future efforts to engage the servicers would not be equally futile.[6]

Adding to their lack of proof, neither ING nor Helios offered a single witness with decision-making authority who could testify as to the availability of refinancings or loan

---

explained the basis for their decisions to replace the independent managers who had been assigned to the boards by CSC. (6/17/09 Hr'g Tr. at 226:2-228:7; Nolan Decl. at ¶¶ 26-27.)

[5] The Project Debtors were organized under the laws of Delaware (Parcity Trust, PC Lancaster Trust, RS Properties, Inc., Bakersfield Mall, Fashion Place, LLC, GGP-Tucson Mall LLC, Visalia Mall LLC, St. Louis Galleria LLC, and Stonestown Shopping Center); Illinois (Lancaster Trust and HO Retail Properties II Limited Partnership); Massachusetts (Faneuil Hall Marketplace); and New York (RASCAP Realty, Ltd.). These states each recognize the general rule that when, as here, the decisions of a governing board are made in good faith on an informed basis, they are subject to the protections of the business judgment rule. *See Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 984-86 (Del. Ch. 2000); *Davis v. Dyson*, 9900 N.E.2d 698, 714 (Ill. App. 1st Dist. 2008); *Blake v. Friendly Ice Cream Corp.*, 2006 WL 1579596, *11-12 (Mass. Super. Ct. May 24, 2006); *Pugliese v. Mondello*, 871 N.Y.S.2d 174, 177 (N.Y. App. Div. 2008).

[6] ING does not dispute that a transfer of servicing rights to ING did not occur until the entities filed for bankruptcy. (6/17/09 Hr'g Tr. at 71:25-72:6.) And Helios admitted that if a borrower directly contacts Helios concerning loan terms for which a service transfer event has not occurred, Helios' policy is to respond that there is no role Helios can play. (Hanson Dep. at 83:16-84:3, 95:2-95:3.) The unrefuted evidence here shows that given the Project Debtors' inability to negotiate any meaningful loan modifications until the loan is transferred to the special servicer, filing for bankruptcy was the only realistic option that would preserve and maximize the value of the Project Debtors' assets in accordance with the purposes of Chapter 11.

modifications for the Project Debtors' loans. ING's sole witness, Mr. Altman, is not on the ING committee that has authority to recommend loan modifications for any project level debtors associated with GGP. (6/17/09 Hr'g Tr. at 108:16-108:22.) Even that committee lacks authority to actually extend or modify any loans; rather, the committee must obtain approval of the controlling class representative for the particular CMBS trust at issue. (*Id.* at 92:14-92:19.) Although ING "would be able to easily identify" the controlling class representative (6/17/09 Hr'g Tr. at 93:17-93:19), it also chose not to bring any controlling class representative to be examined in Court. Helios similarly acknowledged that, with respect to loan extensions or modifications, "Helios can't agree to anything." (Hanson Dep. at 61:9-61:13.) Like ING, "Helios recommends to the decision makers in accordance with the process that's laid out under each pooling and servicing agreement." (*Id.* at 61:14-61:16.) Also like ING, Helios did not bring any decision makers into Court, warranting an adverse inference as to what those decision-makers would have said. *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 81-82 (2d Cir. 2000).

Ultimately, the basis for Movants' filings is not the Project Debtors' failure to satisfy any legal standard -- regardless of whether one chooses the two-pronged standard applied in the Second Circuit, or the Movants' amorphous "prematurity" standard. Rather, their motions are based on the view that Chapter 11 filings by entities like the Project Debtors are "wrong" because "there was an independent board member who was meant to, at least from the lender's point of view, meant to prevent a bankruptcy filing." (Altman Dep. 159:7-159:13, 160:8-160:11.) But as *In re Kingston Square* makes clear, such filings, including the filings by the Project Debtors here, are not wrong. No special rules or prohibitions apply to single purpose entities as far as eligibility to file for bankruptcy, and a filing is not in bad faith unless there is both objective futility **and** subjective bad faith. 214 B.R. at 725. Neither is present here.

In sum, Movants offer no factual or legal basis for their motions.[7] There is no factual basis to conclude that, if the Project Debtors would only wait and "see what we can work out," they would be able to refinance their debts on maturity. Rather, at best, Movants offer the same, inherently uncertain "possibility of refinancing" that plagued -- and, ultimately, rendered unsuccessful -- GGP's pre-petition efforts to restructure its debt. And as a matter of law, the Project Debtors' boards did not act prematurely in opting not to wait until default or foreclosure to see what they could work out, but instead to protect each debtor's enterprise value by filing for Chapter 11.

CONCLUSION

The unequivocal record evidence establishes that the Project Debtors filed their Chapter 11 petitions in good faith, seeking to protect and maximize the value of each Project Debtor enterprise. Given the unprecedented conditions in the credit markets, GGP's inability to refinance billions of debt pre-petition, and the dismal prospects for refinancings their significant debts in the future, the decisions to file for bankruptcy protection were prudent and reasonable. Not only are the Chapter 11 filings justified by the record evidence, but the decisions to seek protection now rather than to wait for inevitable, seriatim defaults are fully supported by the policy goals underlying the Bankruptcy Code. Movants' claims of "bad faith" are not supported by the record evidence and have no support in the law. Their motions should be denied.

---

[7] Although ING also argues that Lancaster Trust is not bankruptcy eligible, as explained more fully in the Project Debtors' Omnibus Opposition at 43 -47 (Dkt. # 711), the totality of the circumstances establish that the Lancaster Trust is an entity eligible to file for bankruptcy as a business trust. Relying on *In re Woodsville Realty Trust*, 120 B.R. 2 (Bankr. D.N.H. 1990), ING ignores the fact-specific, "totality of the circumstances" analysis set forth in *In Re Secured Equip Trust of E. Air Lines, Inc.*, 38 F.3d 86, 90-91 (2d Cir. 1994). Lancaster Trust is duly authorized to conduct business in Pennsylvania. (Debtors-MTD Ex. 20, Certificate of Authority) Its Application for Certificate of Authority expressly states that "[t]he trust is a trust formed for a purpose or purposes involving pecuniary profit, incidental or otherwise." Moreover, it enters into contracts and leases at Park City Center in its own name (Nolan Dec. at ¶ 54) -- and numerous leases explicitly refer to it as an Illinois *business trust*. (Debtors-MTD Exs. 22-26) And although ING argues that the interest of the Trust's sole beneficiary is non-transferable (ING Reply at 23), under the terms of the Merger Agreement, GGP Limited Partnership indirectly acquired the entire beneficial interest in Park City Center upon the merger. (Debtors-MTD Ex. 19).

Date: July 2, 2009

Respectfully submitted,

/s/ Richard C. Godfrey

James H.M. Sprayregen, P.C.
Anup Sathy, P.C. (admitted *pro hac vice*)
Richard C. Godfrey, P.C. (admitted *pro hac vice*)
Sallie G. Smylie, P.C. (admitted *pro hac vice*)
Gabor Balassa (admitted *pro hac vice*)
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, IL 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200

Co-Attorneys for Certain Subsidiary Debtors and Debtors in Possession

and

Marcia L. Goldstein
Gary T. Holtzer
Adam P. Strochak
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

and

Stephen A. Youngman (*admitted pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
200 Crescent Court, Suite 300
Dallas, TX 75201
Telephone: (214) 746-7700
Facsimile: (214) 746-7777

and

Melanie Gray (*admitted pro hac vice*)
Sylvia A. Mayer (*admitted pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
700 Louisiana Street, Suite 1600
Houston, TX 77002
Telephone: (713) 546-5000
Facsimile: (713) 224-9511

Attorneys for Debtors and Debtors in Possession