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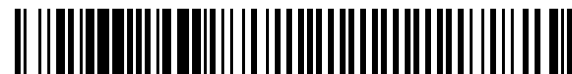
**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:	)	Chapter 11
	)	
General Growth Properties, Inc., et al.	)	Case No. 09-11977 (ALG)
	)	
Debtors.	)	Jointly Administered
	)	

DEBTORS' POST-HEARING MEMORANDUM IN OPPOSITION TO THE MOTIONS OF METROPOLITAN LIFE INSURANCE COMPANY TO DISMISS THE CASES OF CERTAIN DEBTORS AND DEBTORS IN POSSESSION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MetLife has failed to meet its burden of proof. After discovery and a full day of trial testimony, MetLife did not (because it cannot) satisfy its burden of establishing bad faith in the Subsidiary Debtors' decisions to file for bankruptcy protection.[1] To the contrary, the evidence establishes that the decisionmakers made prudent business judgments. Supported by GGP Group's advisors, the decisionmakers determined that, given the crash of the commercial real estate financing market, the Subsidiary Debtors' mortgage loans — each with a maturity date in the next two years — had little or no chance of being successfully refinanced. (6/16/09 Decl. of Thomas Nolan ("Nolan Decl.") ¶¶ 6–7; 6/23/09 Supp. Decl. of Thomas Nolan ("Nolan Supp. Decl.") ¶¶ 10–13; DX-MTD Ex. 1) The decisionmakers also considered that the loan-to-value ratios ("LTV") on the mortgage loans at Providence Place and White Marsh exceeded 70%[2] — a threshold above which, GGP Group's advisors explained, the loans likely could not be refinanced without a restructuring. (Nolan Decl. ¶ 44; Nolan Supp. Decl. ¶ 13, DX-MTD Ex. 1)[3] The decisionmakers concluded in good faith that addressing the Subsidiary Debtors' anticipated restructuring needs now, as part of a coordinated restructuring process, would maximize each entity's enterprise value. (Nolan Decl. ¶¶ 6–7, 59–62; Nolan Supp. Decl. ¶ 12)

After participating in numerous meetings and discussions concerning these and other

[1] The applicable legal standards are addressed in Debtors' post-hearing memorandum in opposition to the ING Clarion and Wells Fargo/Helios motions to dismiss, filed simultaneously with this memorandum. Also, capitalized terms in this memorandum have the same meaning as in Debtors' Memorandum of Law in Opposition to the Motions to Dismiss of Metropolitan Life Insurance Co. and FRM Funding Co., Inc., dated June 15, 2009.

[2] The loan-to-value figure that GGP calculated for the total indebtedness (*i.e.*, mezzanine, mortgage, and TIF loans) on the Providence Place property was 94.2%. (DX-MTD Ex. 3 at Tab 1A, GGP-MetLife-00003) And, according to MetLife's calculations in April 2009, the LTV on the White Marsh loan was 79.57%. (Hr'g Tr. 200:21-24; DX-MTD Ex. 60 at Met/GGP 01668)

[3] Moreover, once Rouse Providence Place LLC (the CMBS mortgage borrower at Providence Place) and the borrowers on the other MetLife loans (Howard Hughes Properties, L.P., 10000 West Charleston Boulevard, LLC, and White Marsh Mall, LLC) were going to file for bankruptcy protection, it followed that the other Subsidiary Debtors should file as well: Providence Place LLC cross-defaulted upon Rouse Providence LLC's bankruptcy filing; 1120/1140 Town Center Drive, LLC's and 9901-9921 Covington Cross, LLC's sole assets were pledged as collateral on MetLife's loan to Howard Hughes Properties, L.P.; and White Marsh Mall Associates, White Marsh Phase II Associates, and White Marsh General Partnership's sole assets were pledged as collateral on guarantees on MetLife's loan to White Marsh Mall LLC. (Nolan Supp. Decl. ¶¶ 14-16; DX-MTD Ex. 1)

filing factors, Thomas Nolan, Robert Michaels, and Adam Metz signed consents to file the Subsidiary Debtors for bankruptcy, consistent with the entities' organizational documents. (Nolan Decl. ¶¶ 28–33, 37; Nolan Supp. Decl. ¶¶ 2–7; DX-MTD Exs. 1, 3 (at B tabs))[4] Those decisionmakers were also familiar with GGP Group's unsuccessful attempts after September 2008 to raise equity and debt, and to refinance or secure alternative financing for maturing loans, including reaching out to dozens of banks, insurance companies, pension funds, master and special servicers, and brokers. (Nolan Decl. ¶¶ 12–21; Nolan Supp. Decl. ¶¶ 8–9)

In addition, the decisionmakers knew that, in late 2008 and early 2009, GGP Group's capital markets group had communicated with MetLife about GGP Group's loan portfolio, including, in particular, a December 2008 meeting between David Charles and Andrew Kadolph, heads of GGP Group's capital markets group, and representatives of MetLife — attended, for a portion, by Adam Metz. (6/24/09 Hearing Tr. ("Hr'g Tr.") 74:8–76:18) Nolan testified that, at the time of the filing decisions, he was aware that MetLife representatives had stated MetLife was (i) concerned about being associated with GGP Group's "headline risk"; (ii) not interested in financing certain non-MetLife loans that were maturing in 2009; and (iii) very focused only on refinancing existing loans with 2009 maturities within their portfolio. (*Id.*) Emails produced by MetLife from January 2009 confirm that one such meeting occurred in December 2008, and that GGP requested additional discussions in early 2009. (DX-MTD Ex. 64 at Met/GGP 02017)

MetLife has presented no evidence to challenge the decisionmakers' judgments that loans maturing in 2010 and 2011 were unlikely to be refinanced or to secure new financing, and thus

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[4] All the Subsidiary Debtors are LLCs and partnerships. (DX-MTD Ex. 3 (at B tabs)) The business judgment rule applies to the decisions of an LLC's members and managers and of a partnership's general partner. *See. e.g., Bakerman v. Sidney Frank Importing Co., Inc.*, 2006 WL 3927242, at *9 (Del. Ch. Oct. 10, 2006); *LGB Group, LLC v. Booty*, 2004 WL 1058958, at *11-*12 (Md. Cir. Ct. Jan. 28, 2004); *In re Boston Celtics Ltd. P'ship S'holders Litig.*, 1999 WL 641902, at *4 (Del. Ch. Aug. 6, 1999).

required restructuring.[5] Nor can MetLife dispute the decisonmakers' judgment that loan-to-value ratios above 70% would be difficult to refinance without restructuring the loans, given that MetLife independently concluded that a 20% increase in LTV to 79.6% in 2009 on the White Marsh loan presented a "refinance risk" and that, to be refinanced, the loan would have to be *paid down by $46 million*, to reduce the LTV *back to 60%.* (Hr'g Tr. 208:5–209:10; DX-MTD Ex. 60 at Met/GGP 1679 (emphasis added)) Likewise, after Debtors' bankruptcy filings, MetLife notified GGP that, to refinance the Providence Place loan with a high LTV, MetLife wanted a *$30 million pay-down*. (Hr'g Tr. 155:13–156:5)

Because it has no evidence to challenge the good faith of GGP's decisionmaking, MetLife attempts to argue — contrary to the applicable legal standard — that the decisionmakers erred because MetLife purportedly might have refinanced the loans if GGP had just asked. MetLife's counterfactual speculation about what its representatives might have agreed to is not a basis for challenging the decisionmakers' good faith. Moreover, none of MetLife's three witnesses had decisionmaking authority for refinancing loans. (*Id.* at 130:5–132:14, 169:23–171:13, 213:5–214:24) Thus, none can say whether MetLife would have refinanced the loans. (*Id.* at 129:2–9, 165:6–9, 173:4–9) Indeed, MetLife's decision not to present testimony from any member of its investment committee or board who had decision-making authority on refinancing these loans warrants an adverse inference against MetLife as to what those decisionmakers would have said. *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 81 (2d Cir. 2000).

Further, the objective pre-bankruptcy facts show that MetLife was not inclined to

[5] To the contrary, MetLife's Rule 30(b)(6) witness on the topic admitted that "reasonable minds" can differ as to when the commercial real estate financing market is likely to reemerge. (Politano Dep. 163:17–21) Further, MetLife concluded, before the bankruptcy filings, that refinancing the debt at Providence Place within one year "may be a challenge" (Hr'g Tr. 141:10–142:5; DX-MTD Ex. 70 at Met/GGP 00031, 00035), and that "the short amount of time remaining" — *17 months* — until the White Marsh loan matured was a reason to drop its credit rating by two levels. (Hr'g Tr. 205:17–23; DX-MTD Ex. 60 at Met/GGP 01675)

refinance the three loans. MetLife's assessment of the loans turned, in large part, on the financial condition of the loans' sponsor, GGP.[6] Thus, in April 2008, before the credit markets crashed, MetLife observed that several billion dollars of GGP debt would mature each year from 2008 to 2013, concluding that "it will be good to keep an eye on the *beneficial borrower* [of the White Marsh loan]**,** *General Growth Properties*, because it faces certain financial challenges in the next five years, mainly in refinancing its heavy debt burden." (DX-MTD Ex. 60 at Met/GGP 01680 (emphasis added)) And, in December 2008, Robert Merck, MetLife's "boss of bosses" identified GGP, given its debt exposure, as a "lessons learned opportunity." (DX-MTD Ex. 71; Hr'g Tr. 174:16–20, 176:10–177:12) Jim Hills from Merck's group responded by noting that "[w]e wouldn't do a loan with GGP now, given their problems." (Hr'g Tr. 180:10–15; DX-MTD Ex. 71 at Met/GGP 02660) Then, in March 2009, MetLife identified GGP's "deteriorating financial capacity" as a reason to downgrade the Providence Place loan to several levels below investment grade, and determined that MetLife should "take a pass" on the loan at maturity, rather than refinance or extend it.[7] (Hr'g Tr. 140:1–14; 142:18–143:2, 144:24–145:24, 146:10–148:16; DX-MTD Ex. 70 at Met/GGP 00031, 00035; DX-MTD Ex. 72)

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[6] MetLife initially regarded the Subsidiary Debtors' affiliation with GGP as a "positive factor" in originating the loans (Hr'g Tr. 198:23–199:1), and subsequently reviewed GGP's creditworthiness and debt burden in evaluating whether to refinance the loans. (*Id*. at 142:22–143:19 (Politano); 208:10–209:10 (Casey))

[7] In particular, MetLife noted that GGP, the Providence Place loan sponsor and property operator, "is facing some significant financial stress due to a large amount of debt coming due in 2009 and 2010." (DX-MTD Ex. 70 at Met/GGP 00031, 00035) With respect to the Summerlin properties, MetLife identified the possibility of a GGP bankruptcy filing as risk factor, going so far as to put that loan on the "top ten watch list" of the region's riskiest loans — weeks before GGP filed for bankruptcy protection. (Hr'g Tr. 182:4–18; DX-MTD Ex. 66 at 03824) Likewise, for White Marsh, MetLife noted in April 2009 that if "GGP['s] financial problems continue, the borrower may have difficulty refinancing and coming up with the money needed to pay down the loan amount." (Hr'g Tr. 207:23–209:10, Ex. 60 at Met/GGP 01679) In evaluating whether to refinance a loan, MetLife also considers whether a sponsor has defaulted on its debt obligations. (Hr'g Tr. 143:3–19 (Politano), 212:24–213:4 (Casey)) By the time the Subsidiary Debtors filed for bankruptcy, GGP Group had defaulted on billions of dollars in corporate-level and project-level debt (Nolan Supp. Decl. ¶¶ 9, 11), further diminishing any possibility of refinancing the Subsidiary Debtors' loans. Notably, MetLife's Rule 30(b)(6) witness on the topic could not identify a single loan that MetLife has refinanced where a sponsor had defaulted on millions of dollars of other loans or was in bankruptcy. (Politano Dep. 194:13–19, 195:4–18)

The decisionmakers also understood that MetLife had reason to postpone or drag out refinancing discussions until closer to the maturity date, at which point MetLife could have insisted on terms the entities could not satisfy or foreclosed on the properties that, by MetLife's own admission, are oversecured. (Casey Dep. 60:11–20; Politano Dep. 181:24–182:10; Menne Dep. 84:20–86:14) Moreover, MetLife's determination that, to refinance the White Marsh loan, the borrower would need to pay down $46 million (Hr'g Tr. 207:6–22; DX-MTD Ex. 60 at Met/GGP 01679), and MetLife's post-petition request for a $35 million pay-down to refinance Providence Place (Hr'g Tr. 155:13–156:5) — pay-downs that the Subsidiary Debtors could not possibly afford — confirm the reasonableness and good faith of the decisionmakers' judgment that re-engaging MetLife to discuss refinancing would have been unproductive. (*Id.* at 66:2–9)

Finally, in its pre-hearing submissions, MetLife asserted that these bankruptcy cases should be dismissed because there *might* not be any other impaired creditors and MetLife *might* vote against a plan of reorganization. This argument is speculative and premature. Who the Subsidiary Debtors' other creditors are and what the plan's terms might be have not yet been determined. (Hr'g Tr. 90:8–91:9) As in most bankruptcies, "the unsecured creditor pool would grow over time as invoices are submitted." (*Id.* at 91:8-91:9) Moreover, MetLife once again presented no witness with decisionmaking authority to testify that MetLife would reject any and all possible reorganization plans. MetLife's argument is also contrary to law, which affords each Subsidiary Debtor the opportunity to propose a plan for its stakeholders to consider.[8]

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[8] There "is no requirement in the Bankruptcy Code that the [debtor] prove it can confirm a plan in order to file a petition." *In re Century / ML Cable Venture*, 294 B.R. 9, 36 (Bankr. S.D.N.Y. 2003); *see also In re Sletteland*, 260 B.R. 657, 667 (Bankr. S.D.N.Y. 2001) (Gropper, J.) (denying motion to dismiss on grounds that the debtor would be unable to propose a confirmable plan of reorganization, where debtor had not yet proposed a plan); *In re RCM Global Long Term Capital Appreciation Fund, Ltd.*, 200 B.R. 514, 524 (Bankr. S.D.N.Y. 1996) (same); *In re Lizeric Realty Corp.*, 188 B.R. 499, 503-04 (Bankr. S.D.N.Y. 1995) (same). In four of the six cases cited in MetLife's pre-hearing submissions, courts dismissed petitions based on creditor objections to a reorganization plan, but only *after* a plan had been filed. *See In re 266 Washington Assocs.*, 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992); *In re 499 W. Warren St. Assocs. Ltd. P'ship*, 151 B.R. 307, 309 (Bankr. N.D.N.Y. 1992); *In re Lumber Exch. Ltd.*

In sum, the after-the-fact *ipse dixit* of MetLife witnesses who themselves lacked authority to make investment decisions cannot override the business judgments of the Subsidiary Debtors' decisionmakers, supported by their professional advisors. MetLife has failed to present: (i) any expert opinion criticizing the Subsidiary Debtors' decisions or their decision-making process in filing for chapter 11 protection; (ii) any evidence of subjective bad faith by the decisionmakers; (iii) any witness or evidence to establish the objective futility of a reorganization; (iv) any evidence that the commercial real estate credit markets upon which the Subsidiary Debtors' financing model depends function today in any meaningful sense, or that they will revive in the short-term; (v) any evidence that disputes or rebuts the fact GGP Group functioned as an integrated business enterprise for the benefit of all its subsidiaries; (vi) any evidence that MetLife would have refinanced its loans to the Subsidiary Debtors upon their maturity; or (vii) any actual decisionmaker for refinancing any of the loans. MetLife's motions should therefore be denied.

Date: July 2, 2009

Respectfully submitted,

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P'ship, 125 B.R. 1000, 1002 (Bankr. D. Minn. 1991); *In re Fur Creations by Varriale, Ltd.*, 188 B.R. 754, 760 (Bankr. S.D.N.Y. 1995). In the other two cases MetLife cited, courts dismissed the petitions for other reasons. *See In re Metro. Realty Corp.*, 433 F.2d 676, 679 (5th Cir. 1970) (individual sought to file under provision governing corporate filings); *In re C-TC 9th Ave. P'ship*, 113 F.3d 1304 (2d Cir. 1997) (dismissal based on multi-factor test and because petition was filed as a litigation tactic).

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