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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

POST-TRIAL SUBMISSION OF LENDERS SERVICED BY HELIOS AMC, LLC IN FURTHER SUPPORT OF MOTION TO DISMISS CASES OF FANEUIL HALL MARKETPLACE, LLC AND SAINT LOUIS GALLERIA L.L.C.

The lenders specially serviced by Helios AMC, LLC ("Helios") (collectively, the "Mall Lenders")[1] make this post-trial submission in further support of their motion to

[1] Wells Fargo Bank, N.A., as Trustee for the Registered Holders of Banc of America Commercial Mortgage, Inc., Commercial Mortgage Pass-Through Certificates, Series 2006 2; Wells Fargo Bank, N.A., as Trustee for the Registered Holders of Credit Suisse First Boston Mortgage Securities Corp., Commercial Mortgage Pass-Through Certificates, Series 2006 C1 and certain noteholders, all acting by and through Helios, in its capacity as Special Servicer.

dismiss the cases of Faneuil Hall Marketplace, LLC ("FHM") and Saint Louis Galleria L.L.C. ("SLG") (together, the "Healthy Mall SPEs").[2]

PRELIMINARY STATEMENT

GGP urges this Court to adopt the rule of "business judgment *über alles.*" GGP's case rests on the false premise that none of their mall subsidiaries' petitions can be dismissed because the decision to file them resulted from the exercise of business judgment evidenced by minutes of numerous meetings guided by several sets of experts. GGP argues, in essence, that the Court's role in deciding motions to dismiss is limited to determining whether the Debtors' managers acted negligently or engaged in self-dealing.

GGP is wrong. Management's lack of bad intentions or negligence does not end the Court's inquiry into whether a filing was appropriate.

Last week, Judge Gonzalez of this Court reiterated this principle when he stated that:

> "Section 1112(b) and its associated 'good faith' doctrine are primarily concerned with the underlying question whether reorganization is the proper course of action in a particular debtor's case. On that score, dismissal of a chapter 11 petition—like dismissal of any lawsuit—is not imposed principally as a sanction for bad intentions or obstreperous behavior. Instead, dismissal flows from the legal determination the debtor is not entitled to the remedy it seeks." *Gucci*, 174 B.R. at 410 (citing *In re Foundry of Barrington P'ship*, 129 B.R. 550, 554 (Bankr. N.D. Ill. 1991)).

In re Loco Realty Corp. (Bankr. S.D.N.Y., June 25, 2009.)

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[2] The Mall Lenders incorporate by reference the arguments set forth in their Reply Memorandum of Law dated June 12, 2009.

The Debtors thus ignore the Court's independent obligation[3] to determine "whether reorganization is the proper course of action" for FHM and SLG. That determination requires the Court to consider whether (1) the filings were premature or otherwise lacked a permissible reorganization purpose; (2) the managers' power to file was exercised for the benefit of the Healthy Mall SPEs themselves, rather than other entities in the GGP "family;" and (3) their managers' business judgment was correct.

While the movant has the initial burden of production with respect to "cause for dismissal", the burden then shifts to the Debtor to prove that the petition was filed in good faith. In re Lizeric Realty Corp., 188 B.R. 499, 503 (Bankr. S.D.N.Y. 1995). The Debtors cannot satisfy their burden of proving good faith merely by pointing to a series of meeting with experts and then relying on the business judgment rule. Rather, they must present evidence that the filings were intended to benefit FHM and SLG in a permissible reorganizational purpose.

There can be little doubt that the Chapter 11 petitions filed on behalf of the Healthy Mall SPEs were intended to benefit GGP and its financially troubled subsidiaries. But the question before the Court is whether the filings were also timely, necessary, or appropriate to benefit the Healthy Mall SPEs themselves. This was also the question that the Independent Managers were charged to answer. However, because the Healthy Mall SPEs'

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[3] The state law "business judgment rule" protection afforded to management is intended to protect managers from claims by shareholders, but does not apply to the question of whether a bankruptcy petition was filed in good faith sufficient to withstand dismissal. "The question before the bankruptcy judge was a question the business judgment rule envisions - whether the Board acted in bad faith when it filed the instant petition. . . . Section 1112(b) authorized the court to dismiss the petition on a finding that it had been filed in bad faith, for the purpose of abusing the judicial process and the reorganization afforded by Chapter 11. In sum, the bankruptcy court did not misapply the law in reaching its decision." In re The Bal Harbour Club, Inc., 316 F.3d 1192 (11th Cir. 2003).

independent managers were duty-bound to consider only those entities' interests, not the interests of GGP,[4] GGP was concerned that the independent managers would not vote in favor of a bankruptcy filing. In order to achieve its goals, GGP had no option but to replace the Healthy Mall SPEs' Independent Managers.

Ultimately, knowing that they would need to demonstrate a permissible benefit to the Healthy Mall SPEs, GGP and its professionals created justifications labeled "Filing Factors." (Joint Trial Exhibit 4). In summary, the Debtors argue that the FHM and SLG bankruptcy filings were warranted because:

1) their filings will improve the health of their parent entities, who are best able to manage them;

2) SLG will not be able to refinance its loan at maturity in July 2010, in part because its current LTV is more than 70%; and

3) the Rouse Company's filing constituted a cash management event under FHM's loan documents, which might have resulted in a lock-box.

Each of the foregoing reasons is pretextual and contradicted by the evidence.

There is No Evidence of Need or Unique Benefit of GGP/GMMI Management.

GGP implicitly concedes that placing the Healthy Mall SPEs into bankruptcy solely to benefit parent entities at the expense of the Healthy Mall SPEs is insufficient justification. Thus, GGP argues, the bankruptcy filings were appropriate because the Healthy

[4] Article XIII (o) of each of the Operating Agreements contains the requirement for Independent Directors and states: "To the fullest extent permitted by law, including Section 18-110(c) of the Act, the Independent Managers shall consider **only** the interests of the Company, including its respective creditors, in acting or otherwise voting on the matters referred to in Article III (p)." (Joint Trial Exhibits 34 and 35.)

Mall SPEs will suffer if the parent entities are financially unsound and/or unable to manage them. GGP's strained position is belied by its admission that it was aware that other property managers could manage FHM and SLG, but did not perform any calculation as to the cost or benefit of obtaining such replacement property management services. (Nolan dep., pp. 180 – 181).

Moreover, GGP has presented no evidence that non-debtor subsidiaries are not receiving the benefits of GMMI management. Those non-debtor subsidiaries include entities that are not joint ventures, and all of them continue to receive the same benefits as FHM and SLG.

GGP is disingenuous to claim that consideration of "all constituencies" justified filing the Healthy Mall SPEs' petitions. Those filings, and the upstreaming of cash that would otherwise be amortizing the FHM and SLG loans, does nothing to preserve or enhance the value of FHM or SLG;[5] rather, the Healthy Mall SPEs' funds are simply being used to benefit a separate entity.

SLG's Filing Based on an Anticipated July 2010 Maturity Date was Premature.

SLG's filing was, and remains, unnecessary and detrimental to the interests of SLG's creditors and estate. Rather than using some of its huge Net Operating Income to amortize its loan as it had been doing pre-petition, GGP is causing SLG to upstream those funds to SLG's detriment. Moreover, SLG has failed to show any advantage it gained by

[5] In re Walden Ridge Development, LLC, 292 B.R. 58, 64 (Bankr. D.N.J. 2003) ("the filing was an appropriate exercise of business judgment and protected the equity of the Debtor in the Purchase Contract for the benefit of other creditors, as well as the Debtor.")

filing fifteen months prior to its July 2010 maturity date that cannot be gained by a filing in mid 2010 (if necessary at that time), because nothing in this proceeding can change the facts (if accurate) that SLG may have difficulty refinancing in July 2010 and its LTV exceeds 70%. Finally, GGP concedes that special servicers may extend loan maturities, but claims it needed to put the Healthy Mall SPEs in bankruptcy because it is untenable for GGP to work on individual loan maturity extensions seriatim rather than simultaneously and globally, and that there may be fees associated with consensual loan extensions. These contentions are meritless. GGP entities did not obtain their loans globally with all lenders in one proceeding, and any fees that may be associated with extending SLG's July 2010 loan maturity will pale in comparison to the fees and costs attributable to its premature and improper Chapter 11 filing.

FHM's Filing was Unnecessary and Detrimental to the Interests of FHM's Creditors and Estate.

According to the Debtors, the sole Filing Factor applicable to FHM is the cross-default occasioned by the bankruptcy filing of its sole member, The Rouse Company Operating Partnership LP. The Debtors have not, nor can they, adduce evidence that the avoidance of the potential imposition of a lock box works any benefit to FHM; many borrowers operate successfully under a lock box arrangement. Instead, the bankruptcy is detrimental to FHM because it is upstreaming cash that would otherwise be used to amortize its loan, and because it will incur large and wholly unnecessary fees and costs in the Chapter 11 proceedings.

CONCLUSION

For the foregoing reasons, the Mall Lenders respectfully request that the Court dismiss the Chapter 11 petitions of Fanueil Hall Marketplace LLC and Saint Louis Galleria L.L.C. and grant such other and further relief as the Court deems proper.

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