Hearing Date and Time: July 22, 2009 at 11:00a.m. (Prevailing Eastern Time)
Objection Deadline: July 17, 2009 at 4:00p.m. (Prevailing Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

DEBTORS' OPPOSITION TO THE MOTION OF MOTT INC. d/b/a HUGO BOSS FOR RELIEF FROM THE AUTOMATIC STAY TO TERMINATE THE LEASE

TO THE HONORABLE ALLAN L. GROPPER
UNITED STATES BANKRUPTCY JUDGE:

South Street Seaport Limited Partnership, its ultimate parent, General Growth Properties, Inc. ("**GGP**"), and their debtor affiliates, including Tysons Galleria L.L.C. ("**Tysons Galleria**"), as debtors and debtors in possession (collectively, "**General Growth**" or the "**Debtors**"),[1] submit this opposition (the "**Opposition**") to the *Motion of*

[1] A list of the Debtors, along with the last four digits of each Debtor's federal tax identification number, is filed with the Court at Docket No. 593 and is also available for free online at www.kccllc.net/GeneralGrowth.

Mott Inc. for Relief From the Automatic Stay to Terminate the Lease [Docket No. 885] (the "**Motion**") and respectfully represent as follows:

I.

PRELIMINARY STATEMENT

1. Mott Inc. d/b/a Hugo Boss ("**Hugo Boss**") requests this Court lift the automatic stay to permit it to terminate a lease dated July 18, 2007, for a store at the Debtors' Tysons Galleria shopping mall (the "**Lease**"). The Motion should be denied as futile because Tysons Galleria has not breached the terms of the Lease and Hugo Boss has no basis to terminate the lease. Rather, the plain and unambiguous language of the Lease makes it clear that if Hugo Boss is prevented from beginning construction by the Beginning Work Date, the Beginning Work Date and the Opening Day shall be extended one day for each day that Hugo Boss is prevented from beginning work. Thus, although Tysons Galleria was unable to complete work on the leased space by the date set forth in the construction schedule in the Lease due to the actions of another tenant, the terms of the Lease anticipated this possibility and provided a solution of extending the schedule under the Lease. Considering the scope of the Lease, which extends through 2019, the minimal delay explicitly anticipated in the terms of the Lease does not constitute a material breach and should not give rise to a right of termination. Stay relief would be futile because Hugo Boss simply has no right to terminate the Lease; the Motion should be denied.

2. This type of groundless Motion is exactly the type of matter the automatic stay is designed to protect against. The automatic stay provides debtors with a breathing spell after the commencement of a chapter 11 case, shielding them from

creditor harassment at a time when the debtors' personnel should be focusing on restructuring. Here, the Debtors are continuing efforts to stabilize their business and are utilizing the breathing spell provided by the stay to, among other things, restructure finances and comply with the terms of tenant lease obligations in a cost-efficient, orderly manner. Hugo Boss has not demonstrated and cannot demonstrate the requisite cause to lift the automatic stay at this time. As such, the Motion should be denied.

II.

BACKGROUND

3. Hugo Boss is a current tenant at the Debtors' Tysons Galleria Shopping Center, located in Tysons Corner, Virginia, a suburb of Washington, DC. Effective July 18, 2007, Hugo Boss and Tysons Galleria entered into a long-term Lease for a new store at Tysons Galleria to which Hugo Boss would relocate. The Lease extends through August 31, 2019, and is attached hereto as "**Exhibit A**" and filed under seal pursuant to an Order of this Court (Docket No. 1030). The terms of the Lease provide Hugo Boss with a relocated space and extend the term of the original lease between Hugo Boss and Tysons Galleria from August 31, 2008 until such time as Hugo Boss opens and begins paying rent on the new, relocated space. The Lease contains a construction schedule whereby Tysons Galleria agrees to perform the construction necessary to prepare the space for occupancy by Hugo Boss prior to the beginning work date, defined in the Lease as June 1, 2009 (the "**Beginning Work Date**"), and Hugo Boss agrees to perform all required tenant construction prior to the opening date, defined in the Lease as September 1, 2009 (the "**Opening Date**"). Importantly, Article 2(c) of the Lease provides that where a tenant is prevented from beginning construction on the

relocated space because of the landlord's failure to complete its work, the Beginning Work Date and the Opening Date shall be extended by one day for each day the tenant is prevented from commencing work. The Lease thus expressly contemplated that the new space might not be ready for Hugo Boss to begin its own construction work on June 1, 2009, and provided a remedy – automatic delay of the Opening Date for the new store, deferral of rent obligations for the new space, and extension of the lease for the existing space.

4. Beginning on April 16, 2009 (the "**Commencement Date**") and continuing thereafter, the Debtors, including Tysons Galleria, each commenced a voluntary case under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"). The Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"). The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. On June 24, 2009, Hugo Boss filed its Motion to lift the automatic stay to terminate the Lease.

6. As of July 17, 2009, Tysons Galleria has not commenced or completed work on the relocated space because the current tenant has not yet vacated the space as previously contemplated.[2] The Debtors anticipate that all necessary construction

[2] At the time the Lease was negotiated with Hugo Boss, the current tenant of the relocated space indicated to the Debtors that they were willing to vacate the premises on or before the Beginning Work Date. However, due to the current economic downturn and the strain on the retail industry, the current tenant has withdrawn its commitment to the Debtors to move out of the space prior to

required by the Lease will be completed by Tysons Galleria in early 2010 after the current tenant vacates in December 2009, allowing Hugo Boss to commence its work and open the relocated space to the public shortly thereafter. In the interim, in accordance with the terms of the Lease, the terms of Hugo Boss's original lease with Tysons Galleria, including the rental amount, are extended and Hugo Boss continues to operate its business without interruption in the original space.

III.

ARGUMENT

A. The Automatic Stay is Fundamental to the Reorganization Process

7. Hugo Boss requests that this Court terminate, modify or otherwise provide relief from the automatic stay to permit Hugo Boss to terminate its Lease with Tysons Galleria. Hugo Boss is not entitled to such relief. As discussed in greater detail below, Hugo Boss does not have a right to terminate for construction delays under the terms of the Lease and is not entitled to unilaterally terminate the Lease under relevant contract law.

8. The automatic stay is one of the fundamental protections afforded to a debtor's estate under the Bankruptcy Code. *See, e.g., Midatlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection,* 474 U.S. 494, 503 (1986) ("The automatic stay

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the expiration of its lease on December 31, 2009. This change in circumstances has resulted in Tysons Galleria's inability to complete its construction work prior to the Beginning Work Date, and triggered the day-to-day extension for such delay contemplated in Article 2(c) of the Lease. Providing such extensions in construction schedules is common practice in the Debtors' industry, particularly when multiple tenants are involved in a relocation. Tenants have the ability to bargain for fixed construction schedules rather than floating schedules that provide for extensions where it is necessary to their business interests. Here, Hugo Boss was fully aware of the floating construction schedule at the time it entered the Lease and did not bargain for the protection they are now seeking.

provision of the Bankruptcy Code has been described as one of the fundamental debtor protections provided by the bankruptcy laws.") (citations and internal quotations omitted); *In re Drexel Burnham Lambert Group, Inc.*, 113 B.R. 830, 836 (Bankr. S.D.N.Y. 1990) ("The automatic stay imposed by section 362(a) of the Bankruptcy Code is one of the most fundamental debtor protections provided by the bankruptcy laws.") (citations and internal quotations omitted). The broad protection of the automatic stay extends to all matters that may have an effect on a debtor's estate and is designed to relieve "the financial pressures that drove [the debtors] into bankruptcy." H.R. Rep. No. 95-595, at 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97; *Official Committee of Unsecured Creditors v. PSS Steamship Co*. 114 B.R. 27, 29 (Bankr. S.D.N.Y. 1989). It does this by providing the debtor with a "breathing spell" after the commencement of a chapter 11 case, shielding it from creditor harassment at a time when the debtor's personnel should be focusing on restructuring. *See Teachers Ins. & Annuity Ass'n of Am. v. Butler*, 803 F.2d 61, 64 (2d Cir. 1986) (holding that the automatic stay applied to an appeal that otherwise would "distract…debtor's attention from its primary goal of reorganizing") (citation and internal quotation marks omitted); *AP Indus. Inc. v. SN Phelps & Co. (In re AP Indus., Inc.)*, 117 B.R. 789, 798 (Bankr. S.D.N.Y. 1990) ("The purpose of the protection provided by chapter 11 is to give the debtor a breathing spell, an opportunity to rehabilitate its business and to enable the debtor to generate revenue.").

9. Under Section 362 (d) of the Bankruptcy Code, relief from the stay will be granted only where the party seeking relief demonstrates "cause:"

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . .
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

11 U.S.C. § 362(d)(1). The statute does not define what constitutes "cause;" however, courts in this district have determined that, in examining whether cause exists, they "must consider the particular circumstances of the case and ascertain what is just to the claimants, the debtor, and the estate." *In re Mego Int'l, Inc.*, 28 B.R. 324, 326 (Bankr. S.D.N.Y. 1983).

10. In determining whether cause exists to lift the stay, courts in the Second Circuit follow the seminal decision in *In re Sonnax Indus., Inc*. *See In re Sonnax Indus., Inc.*, 907 F.2d 1280 (2d Cir. 1990); *see also Mazzeo v. Lenhart (In re Mazzeo),* 167 F.3d 139, 143 (2d Cir. 1999) (vacating a district court order granting stay relief where the bankruptcy court had not applied the *Sonnax* factors, made only sparse factual findings and ultimately did not provide the appellate court "with sufficient information to determine what facts and circumstances specific to the present case the court believed made relief from the automatic stay appropriate."). In *Sonnax*, the court outlined twelve factors to be considered when deciding whether to lift the automatic stay:

> 1) whether relief would result in a partial or complete resolution of the issues;
> 2) lack of any connection with or interference with the bankruptcy case;
> 3) whether the other proceeding involves the debtor as a fiduciary;
> 4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;

5) whether the debtor's insurer has assumed full responsibility for defending it;
6) whether the action primarily involves third parties;
7) whether litigation in another forum would prejudice the interests of other creditors;
8) whether the judgment claim arising from the other action is subject to equitable subordination;
9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor;
10) the interests of judicial economy and the expeditious and economical resolution of litigation;
11) whether the parties are ready for trial in the other proceeding; and
12) impact of the stay on the parties and the balance of harms.

Sonnax, 907 F.2d at 1286.

11. The moving party bears the initial burden to demonstrate, using the relevant *Sonnax* factors, that cause exists for lifting the stay. *See Sonnax*, 907 F.2d at 1285 ("If the movant fails to make an initial showing of cause, however, the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection").

12. Additionally, to demonstrate a right to relief from the stay, the movant "must set forth and demonstrate that if the stay were modified, it would be entitled, under applicable law, to take the action it desires." *In re Drexel*, 113 B.R. at 838. It would be imprudent to lift the automatic stay to permit the movant to terminate an agreement where it cannot demonstrate that it otherwise enjoys that right. *See id*. at 839; *see also In re Nuclear Imaging Sys., Inc.*, 260 B.R. 724, 730 (Bankr. E.D. Pa. 2000) (stating that refuting the claim to the requested relief can serve to negate a prima facie showing of cause to lift the stay).

B. Hugo Boss Has Not Demonstrated Cause to Lift the Stay

13. In the Motion, Hugo Boss makes no reference to the *Sonnax* factors, nor does it sustain its burden of demonstrating cause to lift the stay. Rather, Hugo Boss's only argument in support of showing cause to lift the stay is that it should be allowed to terminate because Tysons Galleria's alleged breach has prevented Hugo Boss from commencing its work on the relocated space by the Beginning Work Date.

14. Hugo Boss simply does not have the right to terminate the Lease for Tysons Galleria's inability to complete its construction work by the Beginning Work Date. Rather, Article 2(c) of the Lease provides:

> If Tenant is prevented from beginning construction in the Leased Premises by the Beginning Work Date because of the failure of Landlord to substantially complete Landlord's Work within the Leased Premises, the Beginning Work Date and the Opening Date shall be extended by 1 working day for each working day that Tenant is prevented.

Article 2(c) of the Lease.

15. Under Virginia law, a lease is "effective and enforceable" according to its own terms. *See* Va. Code Ann. § 8.2A-301. Hugo Boss has not and cannot point to any term in the Lease entitling it to terminate the Lease. To lift the stay and create a right of termination for Hugo Boss where one does not otherwise exist would "defy logic" and contradict the holdings of bankruptcy courts in this and other districts. *See In re Drexel*, 113 B.R. at 838.

16. Furthermore, the Lease provides that the term of the original lease is extended from August 31, 2008 until such time that Hugo Boss opens the relocated space to the public and begins paying rent on the new space. In the interim, Hugo Boss is not harmed by continuing to operate in the original space under the terms of the original

lease, including the original rental rates. Indeed, the impact of lifting the stay to create a right of termination for Hugo Boss would cause far greater harm to the Debtors than allowing the stay to remain in place would have on Hugo Boss. Lifting the stay would enable Hugo Boss to terminate the Lease – a right that it would not otherwise enjoy under the terms of the Lease – and would potentially result in significant loss of income for the Debtors from a long-term lease with a longstanding tenant.

17. Accordingly, Hugo Boss has not met its burden of establishing cause for lifting the Automatic Stay and the Motion should be denied.

IV.

NOTICE

18. No trustee or examiner has been appointed in these chapter 11 cases. The Debtors have served notice of this Opposition on: (i) the Office of the U.S. Trustee, Attn: Greg M. Zipes; (ii) Attorneys for the Committee, Akin Gump Strauss Hauer & Feld LLP, Attn: Michael S. Stamer and James Savin; (iii) Kenneth M. Misken and John T. Farnum as attorneys for Hugo Boss; and (iv) parties entitled to receive notice in these chapter 11 cases pursuant to Bankruptcy Rule 2002. The Debtors submit that no other or further notice need be provided.

WHEREFORE, the Debtors respectfully request that the Court deny the Motion and the relief requested therein.

Dated: July 17, 2009
New York, New York

/s/ Adam P. Strochak

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EXHIBIT A

HUGO BOSS/TYSONS GALLERIA LEASE

CONFIDENTIAL –
FILED UNDER SEAL PURSUANT TO
BANKRUPTCY COURT ORDER