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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)**
Debtors.	:	**(Jointly Administered)**

RESPONSE OF THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS TO BOTH THE MOTION OF THE REPRESENTATIVES UNDER THAT CERTAIN CONTINGENT STOCK AGREEMENT, EFFECTIVE AS OF JANUARY 1, 1996, FOR RELIEF FROM STAY TO LIQUIDATE AND DETERMINE THE CLAIMS OF THE CSA BENEFICIARIES (ALSO KNOWN AS "THE HUGHES HEIRS") AND TO COMPEL ARBITRATION, AND TO THE DEBTORS' MOTION TO ESTIMATE THE HUGHES HEIRS' OBLIGATIONS

The Official Committee of Equity Security Holders (the "Equity Committee") of General Growth Properties, Inc. ("GGP" or the "Company"), by and through its undersigned counsel, hereby opposes the Motion of the Representatives Under the Contingent Stock Agreement ("CSA"), Effective as of January 1, 1996, for Relief from Stay to Liquidate and Determine the Claims of the CSA Beneficiaries (Also Known as "The Hughes Heirs") and to Compel

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Arbitration (the "Lift Stay Motion"), and supports the Debtors' Motion to Estimate the Hughes Heirs' Obligations (the "Estimation Motion"), and states:

EQUITY COMMITTEE'S POSITION

1. Under the CSA, the Hughes Heirs and GGP agreed that the Hughes Heirs would receive, in GGP common stock, 49.6 % of the fair market value of the Summerlin Master Planned Community ("Summerlin MPC"), valued as of December 31, 2009. At issue here is whether the Hughes Heirs should be permitted to impose a flawed and lengthy valuation process, which will threaten to prolong or even derail the reorganization process.

2. The purpose and motivation behind the Lift Stay Motion are clear. The investors who are funding the Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, as it may be subsequently amended from time to time (the "Plan"), require that the Debtors' obligations to the Hughes Heirs (the "Hughes Heirs Obligations") under the CSA be resolved as a condition to closing. This obligation to close terminates in less than five months. The Hughes Heirs waited for almost eight months to file the Lift Stay Motion – until the eve of the filing of the Plan, in order to gain untoward leverage in an attempt to settle their disputes with the Debtors. The Hughes Heirs' history of litigation is well known to the Court and their attempt at further tactical litigation should not be permitted to interfere with the now unfolding confirmation process and their request for relief should therefore be denied.

3. If the dispute with the Hughes Heirs cannot be settled, this Court should take control of the process by denying the Lift Stay Motion, and granting the Estimation Motion, thereby resolving in the single forum of the Bankruptcy Court issues that can delay the reorganization. This is the only course of action that will ensure the integrity of the reorganization process, guarantee timely confirmation of the Plan, and the participation of the

real party in interest – the Equity Committee – thereby obviating the possibility that the equity holders would suffer inappropriate dilution of their recovery in this case without having been afforded a meaningful opportunity to participate.

4. The Estimation Motion sets forth a reasonable valuation proposal that can be accomplished in a timely manner, within the proposed plan confirmation timeline, and with the participation of all interested parties with the right to be heard – the Debtors, the Representatives and the Equity Committee, on behalf of current common equity holders.

5. The Hughes Heirs' assertion that enforcement of all of the provisions of the CSA contract would provide "speedy, cost-effective, convenient, and agreed-upon valuation procedures to liquidate the claims of the Hughes Heirs without judicial intervention" (Lift Stay Motion at ¶1) is inaccurate and overstated. Under the Hughes Heirs' proposal, the CSA appraisal panel would not provide its report regarding the valuation until the end of September at the earliest. At that point, any factual disputes regarding implementation of the CSA could be subject to, first, mediation and then possibly arbitration and/or litigation, which could last an indeterminate time.[1]

[1] The legal disputes arising in the Hughes Heirs' proposed arbitration, moreover, would still be subject to a review in a subsequent proceeding by a court of competent jurisdiction. The CSA provides:

> "In the event there is any disputed question of law involved in any arbitration proceeding hereunder, such as the proper legal interpretation of any provision of this Agreement, the arbitrators shall make separate and distinct findings of all facts material to the disputed question of law to be decided and, on the basis of the facts so found, express their conclusion of the question of law. The facts so found shall be conclusive and binding on the Disputants, ***but any legal conclusion reached by the arbitrators from such facts may be submitted by either Disputant to a court of law for final determination by initiation of a civil action in the manner provided by law***."

6. Even after valuation of the Summerlin MPC, the Hughes Heirs have some claims for money owed in connection with prepetition payments that allegedly were due under the CSA in connection with the cash flow derived from certain properties. *See*, *e.g.* Exhibit A to Estimation Motion at 3-4. Those claims must be resolved here. The Hughes Heirs simply cannot escape this Court's involvement in the claims allowance process. Consequently, as a matter of judicial economy and fairness to important stakeholders, all claims should be resolved in one forum.

7. Contrary to the Hughes Heirs' self-serving characterizations, the CSA process is not actually arbitration, but a sequential exercise that may involve mediation, arbitration, and litigation, without a defined timeline, which will dangerously prolong the bankruptcy process. This process neither assures the timeliness, fairness, efficiency and full participation that the Debtors ask this Court to respect under a court-supervised claims estimation process, nor eliminates the prospect of this Court's ultimate participation.

8. Moreover, the CSA appraisal process is itself flawed and prejudices Equity. It purports to allow both the Hughes Heirs and Debtor to appoint a third appraiser to value the property and provides that the appraisal furthest from the second highest valuation will be thrown out and the remaining two averaged to determine the fair market value as of a given date. This process encourages the parties to aggregate around a number which has the least likelihood of being discarded, rather than to achieve the purpose of the valuation – to ascertain the fair market value of the Summerlin MPC as of December 31, 2009. It does not permit participation by Equity and would be extremely prejudicial to its interests which, in the equitable context of these bankruptcy proceedings, should be protected by the Court.

CSA at 7.02(c) (emphasis added).

9. The CSA also suffers from critical and material drafting defects such as whether and to what extent information can be shared with the "independent" third appraiser, thereby promoting a process potentially rife with *post hoc* second-guessing and interpretative problems, leading back to this Court for final determination.

10. Because the CSA does not promote fairness and, as outlined below, may prejudice equity holder rights through a flawed and somewhat arbitrary decision-making process, as well as potentially delay the confirmation process to the detriment of all constituents, the Hughes Heirs' Lift Stay Motion should be denied, and an estimation procedure approved that allows participation by all interested parties, on a timeline controlled by this Court, consistent with the Plan process. Since the Bankruptcy Court is charged with the duty of claims allowance and the duty to make valuation determinations, it alone has both the power and expertise to ensure a timely resolution in one forum in which all interested parties can fairly participate.

11. The most efficient solution, generally consistent with the proposal in the Debtors' Estimation Motion, would be for the Debtor, the Hughes Heirs and the Equity Committee to present their appraisals to the Court. Both the Representatives and the Debtors have already made considerable efforts in furtherance of the estimation process by hiring appraisers who have completed substantial work. *See* Lift Stay Motion at para. 26; *see also* Estimation Motion at para. 23. The Equity Committee has also engaged an appraiser who can value the property in a timely manner. This Court would benefit from these efforts to date by adopting the estimation process proposed by the Debtors. The Court would then be able to make the ultimate valuation determination as part of the claims allowance process, consistent with the current Plan timeline.

LEGAL ARGUMENT

I. THE CSA CONTRACT SHOULD NOT BE ENFORCED BECAUSE ITS ENFORCEMENT WOULD BE INEQUITABLE.

12. In seeking to enforce the contractual provisions of the CSA, the Hughes Heirs rely on a line of cases suggesting that secured creditors are entitled to the enforcement of pre-petition contract rights from a solvent debtor. These cases are inapposite here. Among the authorities cited by the Hughes Heirs is *Official Comm. Of Unsecured Creditors v. Dow Corning Corp. (In re Dow Corning Corp.)*, 456 F.3d 668, 671 (6th Cir. 2006), in which the Sixth Circuit recognized that even in solvent debtor cases the right to enforce pre-petition contracts is not absolute: "Solvent debtor cases present a situation where all parties ought to be granted the benefit of their bargains, *unless the equities compel a contrary result.*" (emphasis added).

13. Here, the equities compel a different result because enforcement of the CSA would exclude Equity Committee participation from an appraisal process that could significantly impact equity recovery. This is all the more significant when the Equity Committee would otherwise have a clear statutory right to participate under Section 1109 of the Bankruptcy Code in an estimation process, and the CSA valuation process may delay the confirmation process.

II. GOOD CAUSE DOES NOT EXIST TO LIFT THE AUTOMATIC STAY

14. The Hughes Heirs selectively cite seven of the twelve factors adopted by the Second Circuit in *In re Sonnax Industries, Inc.*, 907 F.2d 1280 (2d Cir. 1980) (the "*Sonnax* test"), to demonstrate that "cause" exists under section 362(d)(1) to lift the automatic stay. However, the Hughes Heirs have failed to apply the *Sonnax* factors correctly. Properly applied, *Sonnax* supports an estimation proceeding before this Court because, in essence, lifting the stay would be severely detrimental to this bankruptcy.

15. The *Sonnax* factors are as follows:

> (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; and
> (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;
> (12) impact of the stay on the parties and the balance of harms.

907 F.2d at 1286.

A. ***The first* Sonnax *factor does not favor the Hughes Heirs since further involvement of the Court will be necessary***

16. The improvidence of granting relief from a stay is most acutely illustrated by Hughes Heirs' failure to meet the first *Sonnax* factor. The test is whether "relief would result in a partial or complete resolution of the issues." Under the CSA, any factual dispute arising out of the appraisal process is referred to arbitration. Moreover, the peculiar arbitration clause the Hughes Heirs seek to enforce refers all questions of law from the arbitration back to a court of competent jurisdiction at the conclusion of the arbitration. *See* CSA at 7.02(c). The CSA also requires parties to the arbitration to "consent and commit themselves to the jurisdiction of the courts of the State of Delaware and the United States District Court for New Castle County, Delaware for purposes of the enforcement of any arbitration award." CSA at 7.02(d). Thus, the Hughes Heirs' claims, if arbitrated, may well become the subject of litigation in multiple jurisdictions.

17. In short, that which the Hughes Heirs say they seek to avoid by specific enforcement of the CSA – specifically, a lack of judicial involvement – cannot, in fact, be avoided. The valuation of the Summerlin MPC is, therefore, best handled in a proceeding before this Court that can assure fundamental fairness to all concerned constituencies and timely resolution of the issue consistent with the Plan process..

B. *Relief from stay would certainly interfere with the bankruptcy case, and could prevent timely Plan process.*

18. Interference with the Debtors' bankruptcy – the second *Sonnax* factor – is conclusively established by the condition precedent (valuation of the Hughes Heirs Obligations) to the investments that will provide the capital to fund confirmation of the Plan in the Investment Agreements. *See* Notice of Revised Investment Agreements, Exhibits 1-3 at §7.015 (DI 5172). The Investment Agreements expire on December 31, 2010. *See generally id.* at §11.1; *see also* §12.1(qqq). The Hughes Heirs' proposed appraisal, and the resulting arbitration and litigation, could not be completed in that amount of time. The second *Sonnax* factor, therefore, resolves in favor of estimation before this Court.

C. The Debtors' fiduciary duties to the Equity Committee, as well as the Hughes Heirs, militates an equitable appraisal process, one that will not disenfranchise the Equity Committee.

19. The third *Sonnax* factor considers whether the Debtors are acting as fiduciaries. While the Hughes Heirs assert the Debtors' obligation as their fiduciary under the CSA, the Debtors, as debtors-in-possession, are fiduciaries to all creditors and to existing equity under the Bankruptcy Code and are therefore responsible for maximizing value of the corporate enterprise for all of its constituents. *See e.g. Wolf v. Weinstein*, 372 U.S. 633, 649 (1963) (stating that "so long as the Debtor remains in possession, it is clear that the [Debtor] bears essentially the same fiduciary obligation to the creditors as does the trustee for the Debtor out of possession"); *Hirsch*

v. Pa. Textile Corp., Inc. (In re Centennial Textiles, Inc.), 227 B.R. 606, 612 (Bankr. S.D.N.Y. 1998) (explaining that a debtor-in-possession owes the same fiduciary duty as a trustee to the creditors and the estate" and must treat all parties to the case fairly); *see also In re Bellevue Place Associates*, 171 B.R. 615, 624 (Bankr. N.D. Ill. 1994) (citing *Continental Airlines, Inc. (In re Continental Airlines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir. 1987)) (stating that the debtor-in-possession is a fiduciary to all creditors and equity security holders). For this reason, the Debtors have rightly opposed the Lift-Stay Motion. The Debtors have recognized their duty to the whole by proposing an estimation process that respects (i) the Equity Committee's statutory duty to participate, (ii) a fair and timely resolution of the Hughes Heirs' disputes and (iii) the bankruptcy confirmation process, without the detriment of undue delay to the creditor body.

D. Valuation before the Hughes Heirs' "Appraisal Panel" will result in a skewed and inaccurate valuation.

20. The fourth *Sonnax* factor contemplates whether a specialized tribunal with the necessary expertise has been established to hear the cause of action. While the Hughes Heirs attempt to describe the CSA's contemplated "appraisal panel" as conforming to the concept of a "specialized tribunal," the appraisal process is deeply flawed. As noted above, the three appraisal approach would result in the appraisal furthest from the second highest valuation being thrown out and the remaining two averaged. This process encourages the parties to aggregate around a number which has the least likelihood of being discarded, rather than to achieve a fair and accurate valuation. The so-called "specialized tribunal," therefore, is far less likely to result in a true valuation than would an estimation procedure before this Court. Moreover, as discussed above, the process would exclude Equity which, in the context of these equitable bankruptcy proceedings, would be unfair and prejudicial.

E. The fifth factor considers whether the Debtor's insurer has assumed full responsibility for defending it.

21. There is no insurance company to pay for the costly and time consuming appraisal, mediation, arbitration and litigation advocated by the Hughes Heirs. All expenses incurred by the Debtor are ultimately borne by the equity holders. The Hughes Heirs are certainly aware of this, which only exposes their Lift Stay Motion for what it is, an attempt to gain leverage in a settlement negotiation. This Court should reject that attempt, and ensure the rapid and cost effective resolution of this dispute.

F. The sixth factor evaluates the involvement of third parties.

22. The sixth *Sonnax* factor considers whether the "action" involves third parties. Indeed, in this case it is the third party – the Equity Committee – that has the greatest stake in the outcome of the resolution of the valuation of the Hughes Heirs Obligations, and it is the Equity Committee which would be excluded from that appraisal proceeding if the Lift Stay Motion is granted. The Equity Committee's interest in the valuation of the Hughes Heirs Obligations compels denial of the Lift Stay Motion under the sixth *Sonnax* factor.

G. Granting the Lift Stay Motion would substantially delay confirmation of the plan, resulting in prejudice to other creditors and interest holders, and thus impede the efficient administration of judicial resources.

23. Analysis of the seventh factor (whether litigation in another forum would prejudice the interests of other creditors), the tenth factor (whether the interests of judicial economy are served by a relief from stay), and the twelfth factor (impact of the stay on the parties and balance of potential harm), all demonstrate that substantial prejudice would result by the delay of confirmation of the Plan that would inevitably result from granting the Lift Stay Motion.

24. Here, lifting the stay at this stage places this bankruptcy case at unnecessary risk of indeterminate delay, and thus would adversely impact creditors and other interest holders. As noted above, the Plan cannot be confirmed until the appraisal process is complete and the "value" of the Hughes Heirs' interests determined. Determination of the Hughes Heirs Obligations is a condition precedent to closing on the Investment Agreements, which is the foundation for the recapitalization of the Debtors under their proposed Plan. The Lift Stay Motion which leaves a determination critical to plan confirmation and consummation in the hands of third parties for an unknown period could severely impede the reorganization process.

25. Although the Lift Stay Motion suggests a timeline under which the preliminary determination of valuation could be made by the end of September, disputes that arise could be very protracted and undermine the plan timeline, to the detriment of the larger constituency.

26. The Hughes Heirs are effectively trying to opt out of the claims allowance process at the twelfth hour and to establish their entitlement to a piece of the GGP pie without the input of the Equity Committee or this Court. The balance of harms clearly weighs in favor of an estimation procedure that can be completed within the control of this Court so that the valuation central to determination of GGP's obligation to the Hughes Heirs under the CSA will not disrupt the plan process and unduly prejudice the Company or its stakeholders.

III. ARBITRATION, IN ANY EVENT, IS PREMATURE AND NOT REQUIRED BY LAW

27. The unusual arbitration clause that the Hughes Heirs' seek to enforce provides for arbitration and mediation of any factual dispute covered by the CSA but requires the parties to address any legal disputes to a court. CSA at §7.02 (b) and (c). The request for arbitration assumes that the appraisal process, even if it were to go forward, would end in failure. There is no doubt that the CSA appraisal process would prolong and threaten Plan confirmation, which is

ample reason to deny the Lift Stay Motion. But requesting arbitration before that process has even commenced is obviously premature and ought not be countenanced as a legal matter under the CSA.

28. Consequently, arbitration with respect to the Hughes Heirs claims is not compulsory – notwithstanding the Federal Arbitration Act – but discretionary. This is true because claims allowance and estimation, and adjustments of debtor, creditor and equity interest holder relationships are core proceedings under the Bankruptcy Code (*see* 28 U.S.C. 157(b)(2)(B) and (O)) and because arbitration of the claim would "seriously jeopardize" the bankruptcy proceeding and impede an efficient reorganization. *United States Lines v. American S.S. Owners Mut. Protection & Indem. Ass'n (In re United States Lines)*, 197 F.3d 631, 641 (2d Cir. 1999). The peculiar arbitration provisions in the CSA are not structured to achieve the speedy resolution deemed critical by the Second Circuit in *United States Lines*. "Arbitration" under the CSA would substantially jeopardize the bankruptcy proceedings by extracting from the process a determination that is critical to plan consummation and to equity recovery at a time when equity is being solicited to make an informed decision on what it is getting out of this case. The CSA's unique form of arbitration is not only unwarranted, and potentially inappropriate, because there is no dispute at this time, but also potentially detrimental to the larger constituency because it puts at risk the Plan process. *See id.* at 641 (affirming bankruptcy court's denial of motion to compel arbitration where claim was a core proceeding integral to the bankruptcy court's ability to preserve and equitably distribute the trust's assets); *see also Phillips v. Concrelton, L.L.C. (In re White Mountain Mining Co., L.L.C.)*, 403 F.3d 164, 170 (4th Cir. 2005) (concluding that arbitration of claim in bankruptcy proceeding seeking a determination of debtor's assets was "inconsistent with the purpose of the bankruptcy laws to centralize disputes

about a chapter 11 debtor's legal obligations so that reorganization can proceed efficiently . . ."); *see also Sanchar Nigam Ltd. v. Startec Global Communications Corp. (In re: Strategic Global Communications Corp.)*, 300 B.R. 244-55 (D. Md. 2003) (holding that enforcing arbitration of claims premised on provisions of the Bankruptcy Code would conflict with a central purpose of bankruptcy – to allow the bankruptcy court to centralize all disputes concerning property of the debtor so that reorganization can proceed efficiently and unimpeded by proceedings in other arenas.)

CONCLUSION

29. Cause does not exist to lift the stay and risk disruption of a plan process at the expense of all other constituents, especially because it would impair the statutory right of the Equity Committee to be heard on an issue vital to its constituents' recovery. This is especially so when the Bankruptcy Code provides a timely, efficient and fair estimation process that protects all parties' rights, without prejudicing any. For the foregoing reasons, the Hughes Heirs' Lift Stay Motion should be denied and the Estimation Motion should be granted in accordance with this Response.

Dated: July 16, 2010

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