

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION**

In re:

J.C. PENNEY COMPANY, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 20-20182 (DRJ)

(Jointly Administered)

**LIMITED OBJECTION OF SIMON PROPERTY GROUP, INC. TO DEBTORS' EMERGENCY
MOTION FOR ENTRY OF ORDER (I) EXTENDING TIME FOR PERFORMANCE OF
OBLIGATIONS ARISING UNDER UNEXPIRED NONRESIDENTIAL REAL PROPERTY
LEASES, AND (II) GRANTING RELATED RELIEF**

[Relates to Dkt. No. 338]

Simon Property Group, Inc. and its affiliates (“SPG”), by and through its undersigned counsel and pursuant to 11 U.S.C. § 365(d)(3), files this Limited Objection (the “Limited Objection”) to the *Debtors’ Emergency Motion for Entry of Order (I) Extending Time for Performance of Obligations Arising Under Unexpired Nonresidential Real Property Leases, and (II) Granting Related Relief* (the “Motion”), and in support thereof, respectfully states:

Preliminary Statement

1. SPG is the landlord and/or managing agent under 75 leases, ground leases and reciprocal operating agreements of non-residential real property of Debtors located in multiple states. The leases are leases of “real property in a shopping center” within the meaning of Section 365 (b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990). As of the date of filing of this Limited Objection, the leases are unexpired and remain in full force and effect.

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ claims and noticing agent at <http://cases.primeclerk.com/JCPenney>. The location of Debtor J. C. Penney Company, Inc.’s principal place of business and the Debtors’ service address in these chapter 11 cases is 6501 Legacy Drive, Plano, Texas 75024.

2. Due to the COVID-19 national emergency that has resulted in government-ordered closings of businesses across America, which included Debtors' stores located in the United States, Debtors are requesting a suspension of their obligation to timely perform payment of their lease obligations for the first 60 days of these Chapter 11 cases through and including July 14, 2020 (the "Extension Period"). As a general rule, a debtor is required to timely perform all obligations under an unexpired lease of nonresidential real property. *See* U.S.C. §365(d)(3).

3. While SPG recognizes the general exigent circumstances affecting Debtors and other retailers, landlords have likewise been adversely affected. The Extension Period through July 14, 2020 fails to recognize that in SPG's circumstance alone, under government-sanctioned reopening guidelines, approximately 161 of SPG's shopping centers already commenced reopening in May and June in the following states: Florida, Georgia, Indiana, Mississippi, Missouri, South Carolina, North Carolina, New Mexico, Maryland, Michigan, Massachusetts, Illinois, Ohio, Connecticut, Colorado, California, Virginia, New Jersey, Pennsylvania, Maine, Nevada, Tennessee, Oklahoma, Arizona, Wisconsin, New York, Washington, Minnesota, Puerto Rico and Texas. It is anticipated that other states will continue to roll-out reopening plans, consistent with safety guidelines, throughout the Extension Period. The Motion fails to address or recognize that there should be a distinction made between suspending lease obligations for open and operating stores as opposed to those stores that remain closed during the Extension Period.

4. The Debtors have reopened 42 out of 75 of their stores at SPG shopping centers. Of SPG's shopping centers that have reopened, Debtors have 56 stores in these shopping centers, *See Exhibit "A"*. For those stores still closed, landlords are providing not only safe and secure storage of the Debtors' property (and the ABL Secured Parties' Collateral), but the landlords are also coming out of pocket for the Debtors' and ABL Secured Parties' benefit in the amount of all

rent charges, such as taxes, common area maintenance, utilities, and insurance that the Debtors are not paying during this period.

5. Admittedly, the situation is very fluid. SPG, therefore, believes that the rent relief requested in the Motion at the very least should only be applicable to stores that remain closed during the Extension Period and that rent should become due and payable consistent with §365(d)(3)'s timely performance mandate, as stores reopen.

6. Section 365(d)(3) of the Bankruptcy Code requires the Debtors' timely performance of all obligations arising under the leases until the leases are assumed, assumed and assigned, or rejected, including, without limitation, the full payment of rent on the first day of each month. While the Court may extend, "for cause" the time for performance of obligations arising within the first 60 days of the case, SPG believes that cause to extend the time performance does not exist in this instance and is distinguishable from recent case decisions² because Debtors have liquidity available to pay these obligations under the leases as such obligations become due. Simply being in bankruptcy cannot constitute "cause". See *In re Pac-West Telecomm, Inc.*, 377 B.R. 119 (Bankr. D. Del. 2007). SPG agrees with Crossroads Greenville Properties, Ltd. that Debtors' reliance on several pending cases that there is cause to grant an extension is unsupported [ECF No. 477]. The Court has granted Debtors' DIP Motion [ECF No. 38], which provides Debtors with immediate access to funds in the amount of \$225,000,000 in financing under the DIP with an additional \$225,000,000 in funds available on or after July 15, 2020. Under no circumstances should the time for performance be extended beyond such statutory 60 day period.

² See, e.g., *In re Chinos Holdings, Inc.*, Case No. 20-32181 (KLP) [ECF No. 323]; *In Re Art Van Furniture, LLC*, Case No. 20-10553 (CSS) [ECF No. 373]; *In re Pier 1 Imports, Inc.*, Case No. 20-30805 (KRH) [ECF No. 493]; *In re Modell's Sporting Goods, Inc.*, Case No. 20-14179 (VFP) [ECF No. 166].

7. It is not fair or equitable for the Debtors to seek to fund their restructuring on the backs of landlords like SPG. The Debtors have already made use of the mechanism through which all debtors obtain funding for a restructuring. Through the Debtor's DIP Motion, Debtors were able to secure more than enough money to pay rent to its landlords for June and July. In exchange for advancing funds for the payment of the rent, the First Lien Group gets the benefit of first liens, superpriority claims and other 11 U.S.C. §364 protections. Why should the landlords, operating as involuntary lenders under Debtors' Motion, only be protected by administrative claims? Should the Court decide to grant, in whole or in part, Debtors' Motion, it should similarly grant to the landlords, as involuntary lenders, the same protections it granted to the First Lien Group.

8. Alternatively, SPG believes that the landlords should be provided adequate protection for deferred rent pursuant to 11 U.S.C. §363(e). Pursuant to 11 U.S.C. § 363(e):

Notwithstanding any other provision of this section, at any time, on request of any entity that has an interest in property used, sold, or lease, or proposed to be used, sold, or lease, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

9. SPG, therefore, requests that the proposed Order be modified to ensure the payment of all rent due after the Petition Date by a date certain by Debtors consistent with this Limited Objection. SPG joins in the objections of landlords similarly situated with open and opening shopping centers where Debtors are located to the extent they are not inconsistent with this Limited Objection.

WHEREFORE, SPG respectfully requests entry of an Order consistent with this Limited Objection, denying Debtors' Motion as cause to extend performance does not exist, and granting such other relief as the Court shall deem just.

Dated: June 10, 2020

Respectfully submitted,

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By: **/s/Michael M. Parker**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused the foregoing Limited Objection of Simon Property Group, Inc. to *Debtors' Emergency Motion for Entry of Order (A) Extending Time for Performance of Obligations Arising Under Unexpired Non-Residential Real Property Leases, and (II) Granting Related Relief* to be served using the Court's CM/ECF system to those parties registered to receive electronic notices of filing, this 10th day of June, 2020.

By: /s/**Michael M. Parker**
Attorney for Simon Property Group, Inc. and its affiliates