UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
www.flsb.uscourts.gov

IN RE:

DAYMARK REALTY ADVISORS, INC.,	**CASE NO.: 18-23750-RBR**
DAYMARK RESIDENTIAL MANAGEMENT, INC.	**CASE NO.: 18-23751-RBR**
DAYMARK PROPERTIES REALTY, INC.	**CASE NO.: 18-23752-RBR**
	(Jointly Administered)
	CHAPTER 7

Debtors.
_____/

OPPOSITION TO EXPEDITED MOTION TO (1) ESTABLISH NOTICE PROCEDURES RELATING TO MOTION TO APPROVE SETTLEMENT AGREEMENTS AND FOR ENTRY OF BAR ORDERS AND (2) SET A HEARING ON MOTION TO APPROVE SETTLEMENT

I. INTRODUCTION

Objecting Creditors Richard Carlson as Beneficiary of GREIT Liquidating Trust and terminated trust on behalf of himself and all others similarly situated, Tyrone Wynfield derivatively on behalf of and as liquidating trustee for NNN Capital Fund I, LLC, Milton O. Brown as liquidating trustee for NNN Congress Center, LLC, Dennis Dierenfield, individually and in his capacity as trustee of the Dennis Dierenfield Living Trust; 350 Seventh Avenue Associates, L.P. and co-plaintiffs, Willowbrook Apartments, LLC and co-plaintiffs, Plantations at Haywood 1, LLC and co-plaintiffs, 1600 Barberry Lane 8, LLC and co-plaintiff, Dennis Dierenfield and co-plaintiffs (collectively "Objecting Creditors") object to Expedited Motion to (1) Establish Notice Procedures Relating To Motion to Approve Settlement Agreements and for Entry of Bar Orders and (2) Set a Hearing on Motion to Approve Settlement ("Procedures Motion") filed by Chad S. Paiva, as Chapter 7 Trustee (the "Trustee") for the substantively consolidated bankruptcy estates of the Debtors, Daymark Realty Advisors, Inc., Daymark Properties Realty, Inc. and Daymark Residential Management, Inc. (the "Debtors").

II. ARGUMENT AND AUTHORITY

A. Bankruptcy Rule 7023 and Federal Rule of Civil Procedure 23 Applies to the Instant Proposed Settlement.

While section 105 provides the bankruptcy court with broad equitable power, it cannot be used to override other mandates of the Bankruptcy Code. The plain language of section 105(a) provides that a bankruptcy court's exercise of equitable power should be "necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (emphasis added). In using the term "provisions" rather than "purposes" or "principles," the statutory language requires that the exercise of section 105 equitable power be related to another section in the Bankruptcy Code and not merely to an abstract bankruptcy concept, such as fairness and justice.

In re Dairy Mart Convenience Stores, Inc., 351 F.3d 86, 92 (2d Cir. 2003).

The equitable power of a bankruptcy court under section 105(a) is not unrestrained. "Bankruptcy Rule 765 generally incorporates Rule 65 of the Federal Rules of Civil Procedure so that it is necessary to comply with Federal Rule 65 when seeking injunctive relief.... While the power may be broad under Section 105, the courts should be careful not abuse it. Section 105 is not without limits. It does not permit the court to ignore, supersede, suspend or even misconstrue the statute itself or the rules. The bankruptcy courts should exercise great care in this regard. 2 *Collier on Bankruptcy* ¶ 105.02 (15th ed. 1982)." *Matter of Johns-Manville Corp.*, 26 B.R. 405, 415 (Bankr. S.D.N.Y. 1983), aff'd sub nom. *In re Johns-Manville Corp.*, 40 B.R. 219 (S.D.N.Y. 1984).

In *Law v. Siegel*, 571 U.S. 415, 427, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014), the Supreme Court reaffirmed that the principal restraint on the exercise of equitable power under section 105 is that it cannot contravene another section of the Bankruptcy Code or the applicable rules. In that case, despite the debtor's misconduct, section 105 did not authorize the bankruptcy court to

surcharge the debtor's exempt asset to pay for administrative expenses because the surcharge violates express sections in the Bankruptcy Code. Id. at 422, 134 S.Ct. 1188. The Court emphasized that "[i]t is hornbook law that section 105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." *Id*. at 427, 134 S.Ct. 1188.

In this matter, removing the protections of Rule 23 is not "necessary or appropriate" to carry out the provisions of the Code. The Motion to Approve Settlement and Compromise includes a third party bar. "Although the entry of bar orders which preclude third parties from pursuing independent claims is permitted under 11 U.S.C. § 105, such orders constitute an **extraordinary remedy** which are generally justifiable only where the bar order is integral to the settlement." *In re Sentinel Funds, Inc.*, 380 B.R. 902, 905 (Bankr. S.D. Fla. 2008).

Rule 23 certification establishes the procedural rules that must be satisfied before 25,000 putative claimants[1] may be bound; neither section 105 nor Bankruptcy Rule 9019 does so. The Trustee may argue that Bankruptcy Rule 9019 vests the Court with broad discretion to approve settlements between adverse parties. However, under Bankruptcy Rule 9019, the focus of a bankruptcy Court's analysis of whether to approve a settlement is whether the proposed settlement is fair, equitable and *in the best interests of the estate*. "It is a fundamental tenet of bankruptcy jurisprudence that the proponent of a settlement, such as the trustee in this case, bears the burden of demonstrating that the proposal is both reasonable and in the best interests of the bankruptcy estate." *In re Vazquez*, 325 B.R. 30, 35 (Bankr. S.D. Fla. 2005). Rule 23, on the other hand, which authorizes entry of a judgment discharging claims, focuses on whether the proposed settlement is fair and reasonable to the plaintiffs—particularly unnamed class members—who will be bound by

[1] Objecting Creditors estimate the total of the classes number not less than 15,000 however because many of those persons may have been involved in multiple investments the number could be much higher.

the settlement.

Section 105 and Bankruptcy Rule 9019 also do not permit authorizing actions forbidden by the Bankruptcy Code and Rules. Section 502 states that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed ...." 11 U.S.C. § 502(a) (emphasis added). And, an unsecured creditor "must file a proof of claim ... for the claim ... to be allowed." Fed. R. Bankr. P. 3002; see also Fed. R. Bankr. P. 3003(c)(2). In the absence of a certified class, unfiled claims cannot be allowed. Approval of the settlement agreements attached to the Motion to Approve Settlement without class certification would contravene the express provisions of the Bankruptcy Code and Rules, such as section 502(a), section 501, Rule 3002(a), and Rule 3003(c)(2) by barring claims not before this Court nor for which a proof of claim is required while simultaneously denying those same persons without a filed proof of claim any recovery from the estate.

Bankruptcy Rule 7023 applies Federal Rule of Civil Procedure 23 in adversary proceedings. Here, the Court deals not with an adversary proceeding, but rather with contested claims that are part of the claims allowance process. As explained below, the application of Rule 7023 (and, hence, of Rule 23) to the claims allowance process is subject to the discretion of the bankruptcy court. See *In re Charter Co.*, 876 F.2d 866, 873 (11th Cir. 1989).

Federal Rule of Civil Procedure 23 "prescribes the requirements for the maintenance or defense of a civil action as a class action and the procedures to be followed in the conduct of such an action." 10 COLLIER ON BANKRUPTCY ¶ 7023.01 (16th ed. 2018). Rule 23(a) lists four prerequisites to a class action being filed, and states:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a)

Now faced with the admitted "25,000 creditors and parties-in-interest" the Court should find no difficulty concluding Rule 23 (a)(1) is satisfied. Rule 23(a)(2) is satisfied as the Motion to Approve Settlement is settled by the *Justice Oaks* factors, specifically,(i) the probability of success in the litigation between the Trustee and Settling Parties; (ii) the difficulties, if any, to be encountered in collection; (iii) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (iv) the paramount interests of the creditors and a proper deference to their reasonable views. *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990). Similarly Rule 23(a)(3) is satisfied as the analysis of the Trustee's claims is the same for all 25,000 creditors and parties-in-interest and their treatment under the proposed settlement, which includes and unlimited claims bar, treats all the creditors and parties in interest the same. Moreover, the Trustee has expressly declined to object to the application of class procedures to Objecting Creditors Class Proofs of Claim: "Here, the Objecting Creditors intend to invoke Rule 7023 and apply class action procedures without the necessary adversary proceeding or contested matter. Indeed, the Trustee has not objected to the Proofs of Claim and, therefore there is no contested matter or similar mechanism to invoke Rule 7023 under Rule 9014." (Court Doc. No. 313, p. 5.) The Trustee's Procedure Motion and related Motion to Approve Settlement and Compromise makes no objection to the application of class proofs of claim (Court Doc. Nos., 319, 321.) Additionally, Trustee's Motion to Approve Settlement acknowledges that it seeks to settle pending class actions of a readily recognizable class and persons:

> "15. By way of brief explanation, the Objecting Creditors were TIC investors, members and/or beneficiaries of limited liability companies and/or real estate investment trusts ("REITS"). The TIC Ownership interests were in various large-scale multi-unit commercial and residential properties. The Debtors maintained and serviced a

> national management portfolio of these assets but the Litigation primarily concerned properties located in California, Pennsylvania, Illinois Texas, Georgia, and South Carolina."

(Court Doc. No. 319, p. 5.)

Similarly, the Motion to Approve Settlement discusses the barred claims solely in the context of their relationship to Objecting Creditors and their Claims. (Court Doc. No. 319, p. 8-10, 20, 27-30.)

Objecting Creditors, having actively participated in the instant bankruptcy[2] since its commencement will fairly and adequately protect the interests of the class as required by Rule 23(a)(4). "[A]ssuming the requirements of subdivision (a) have been met, reference must also be made to subdivisions (b) and (c) as to whether the class action may be maintainable." 10 COLLIER ON BANKRUPTCY ¶ 7023.02 (16th ed. 2018). For a class action to be maintainable, the court must find that the class action is part of at least one of the three categories of class actions set forth in subdivision (b), which provides:

> A class action may be maintained if Rule 23(a) is satisfied and if:
>
> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class

---

[2] Objecting Creditors' Opposition to the Disclosure Statement resulted in denial of the Proposed Disclosure Statement and Plan with the same bar order and virtually the same settlement numbers, here net of the increased costs of the trustee and counsel. Further Objecting Creditors brought the motion to dismiss or convert the Chapter 11 case which resulted in the current Chapter 7 case.

> action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)

Additionally, Rule 23(c)(1)(A) provides that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). Subsection (c)(2) dictates the form of notice to be sent to the class. See Fed. R. Civ. P. 23(c)(2).

Finally, Rule 23(e), in pertinent part, conditions any dismissal or settlement of a class action upon approval by the court, and directs the procedures to be applied to a proposed settlement or voluntary dismissal of the class action:

> (e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified **class—or a class proposed to be certified for purposes of settlement**—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> (1) ***Notice to the Class.***
>
> (A) *Information That Parties Must Provide to the Court*. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.
>
> (B) *Grounds for a Decision to Give Notice*. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:
>
> (i) approve the proposal under Rule 23(e)(2); and
>
> (ii) certify the class for purposes of judgment on the proposal.
>
> (2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is **fair, reasonable, and adequate** after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was **negotiated at arm's length**;
>
> (C) the **relief provided for the class is adequate**, taking into account:

> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.
>
> (3) Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> (4) New Opportunity to Be Excluded. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (5) Class-Member Objections.
>
> (A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.
>
> (B) Court Approval Required for Payment in Connection with an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:
> (i) forgoing or withdrawing an objection, or
> (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.
>
> (C) Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

Fed. R. Civ. P. 23(e)(emphasis added.)

B. The Proposed Notice Procedures and Motion to Approve Settlement Fails to Provide Meaningful Information.

The Procedures Motion provides that the Motion to Approve Settlement will be sent to about 25,000 persons or entities. This would constitute communications with putative class members in at least three pending California and Utah cases, of which procedural safeguards need to be implemented. Of these 25,000 persons or entities, approximately 13,142 of them are beneficiaries of the G REIT Liquidating Trust, a terminated trust as to which each beneficiary has direct claims, to which we have a pending class claims and class certification motion in California,

which has been delayed because of the injunction. These claims are asserted against the Settling Parties, including Sovereign Capital Management Group, Inc., Sovereign Strategic Mortgage Fund, LLC, Todd Mikles, Etienne Locoh, and GCL, LLC, and Northwood. The Motion to Approve Settlement proposes to fundamentally compromise these claims by barring any further litigation against these third parties, even though the G REIT action preceded the Daymark debtors petitions for bankruptcy and includes direct claims by the beneficiaries included within the class.

Comparatively, the Motion to Approve Settlement and Procedures Motion seeks to send notices to Objecting Creditors' class members about a settlement with a bar in Florida in the bankruptcy case that adversely impacts them in the cases pending in California and Utah- thus these members may have concluded the bankruptcy will not yield them anything and are not reviewing any communications. Those communications must fairly and adequately describe the claims to be adversely affected (i.e. settled and barred) and allow us to communicate our contrary view of the reasonableness of the position taken)

Several Federal Court s have discussed the general contours of what is a proper communication to a putative class:

1. The communication should include the plaintiff's claims, contact information for the plaintiff's counsel (this to include our state law claims websites), and the status of the case, although it can be allowably partisan if even-handed for the most part, and attach the complaint. *Cty. of Santa Clara v. Astra USA, Inc.*, No. C 05-03740 WHA, 2010 WL 2724512, at *4 (N.D. Cal. July 8, 2010); *In re M.L. Stern Overtime Litig.*, 250 F.R.D. 492, 498-99 (S.D. Cal. 2008); *Maddock v. KB Holmes, Inc.*, 248 F.R.D. 229, 237 (C.D. Cal. 2007); MCL 4th § 21.12.
2. The communication should inform the potential class members that they have a right to an attorney, that defense counsel represents the defendant, and that class members are not required to speak with defense counsel. *Maddock*, 248 F.R.D. at 237.
3. It must explain that the defendant may be adverse to potential class members, and that any statements may be used to oppose class certification or liability. See *Mevorah v. Wells Fargo Home Mortg., Inc.*, No. C 05-1175 MHP, 2005 WL 4813532, at *5 (N.D. Cal. Nov. 17, 2005); *Maddock*, 248 F.R.D. at 237.

Rule 23(d) requires a court to protect class members and fairly conduct the action, giving appropriate notice to some or all class members of 1) any step in the action, 2) the proposed extent of the judgment, and 3) the class members opportunity to signify whether they consider the representation fair and adequate or to intervene.

> Settlement offers to putative class members must advise of the class action lawsuit. In this regard, the Court acknowledges Jeld–Wen's ability to send communications to putative class members relating to settlement as long as such communications provide notice to the putative class members of their right to be included in the class action. See *Freeman v. Celebrity Cruises, Inc.*, 1994 WL 689809 at *5 (S.D.N.Y.1994) (emphasizing that putative class members should be "afforded the right to settle their claims and be relieved of the burden of ongoing litigation."). Furthermore, Jeld–Wen may make offers to settle the case for less than the full amount claimed, provided that Jeld–Wen fully discloses the relief sought in the class action.

Jones v. Jeld-Wen, Inc., 250 F.R.D. 554, 558 (S.D. Fla. 2008)(emphasis added).

"Regardless of the category under which a class suit may be or potentially may be certified, however, rule 23(e) requires that absent class members be informed when the lawsuit is in the process of being voluntarily dismissed or compromised. *Juris v. Inamed Corp.*, 685 F.3d 1294, 1317 (11th Cir.2012)(emphasis added.). The notice should be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985)." *Saccoccio v. JP Morgan Chase Bank*, N.A., 297 F.R.D. 683, 691 (S.D. Fla. 2014).

As it stands now, the proposed Notice of Informational Website and Motion to Approve Settlement contains no reference at all to the putative class actions, much less disclosure of the actions, an analysis of damages, with only minimal reference Objecting Creditors class counsel in the Motion to Approve itself (which contains no contact information and is otherwise inflammatory

demonstrating the Trustee's personal distaste[3] for Objecting Creditors class counsel, as well as what will be shown to be demonstrably false statements and adversely describing the claims and probability of success). Indeed, the proposed "Notice of Informational Website" and Motion to Approve Settlement makes little reference at all to the pending class action litigation and what little information that is provided is inaccurate with not pertinent information about the amount of damages sought in that separate and distinct cases. Additionally, the Motion to Approve Settlement is on its face misleading, never clearly stating that it will operate as a bar against third party claims against the Settling Parties regardless of whether or not they have participated in the instant bankruptcy, regardless of any benefit they may receive from the estate, and that if they have not filed a proof of claim, their claims will be barred and they will receive no benefit from the estate.

Still further the Motion to Approve Settlement contains false information or material omissions. If the Motion to Approve Settlement is allowed to be posted on a website then the 25,000 person class would be exposed to false information or material omissions under the imprimatur of the Chapter 7 Trustee. The following are *non-exclusive* examples of how the Settlement Motion or its attached exhibits A - C contain <u>false information</u>:

1) <u>Carlson/ G REIT Matter and GCL, LLC</u>: As concerning land owned by Defendant GCL, LLC and assets to pay a judgment, the statement in the Motion that "the secured debt on the property far exceeds its original value" is false. (Mtn., p. 22, sect. "ii".) In sum, the loan and mortgage on the GCL property was an insider transaction by Todd Mikles, where he granted a $30 million lien via trust deed in favor of GLOBAL LENDING,

---

[3] E.g., Court Doc. No. 319, p. 30 ¶66 providing: "The Objecting Creditors cannot meet their burden to establish that they would prevail on the merits if permitted to proceed. The unrefuted evidence will show that Attorney Catanzarite has fruitlessly been pursing these Claims for years, across multiple jurisdictions, with the Settling Parties routinely acquiring dismissals and other rulings in their favor."

another of his Cook Islands entities, to himself via a first deed on the GCL land in San Diego. There is no legitimate secured debt on the GCL, LLC property. An investigation by the Trustee would have uncovered this fact. Moreover, review of the property records discloses that in addition to the $30 million fraudulent conveyance by lien, there are two sales of approximately 700 acres of the 1,700 acres of land that yielded Mikles $14,000,000 in November 2016 and February 2017 that is being pursued by creditors. Finally, the Trustee misrepresents this case because Mikles and GCL have been ordered to answer the fraudulent conveyance claims to GCL that the class Plaintiffs pursue. Therefore class plaintiffs pursue not less than $43 million of fraudulent transfers in their case filed before the bankruptcies even commenced. Moreover, it is believed and will be the subject of appraisal that the 1,000 remaining acres is valued at $100 million and not as the trustee posits $0.

2) G REIT Matter and Congress Center Property: The Summary attached as Exhibit "A" to the Settlement Motion purports to give information on each case that is proposed to be barred. It includes a statement that the Congress Center property was sold "approximately a year later ... for a profit." (¶18.) This is false, it was actually sold for a $40 million profit less than three years later. Further, Plaintiffs have an appraisal by Duff & Phelps at $114,100,000 on October 1, 2012 using accurate rent roles rather than the false rent roles provided by Mikles. And Mikles bought out one of the owners at a valuation of $107,500,000 to keep him quiet so that he and Northwood could buy the property at $95 million when it was worth $114 million.

3) G REIT Matter and Congress Center Property: The Summary also states that "Northwood Investors had the highest and best bid" on the Congress Center property. (¶18.) This is false. Offers on the property were made by a bona fide third party at $10 million and

$15 million higher than Northwood's offer.

4) Plantations and NNN Capital Fund Matters: The summary states that Sovereign Parties and Cottonwood Parties are under common control, without evidence. (¶¶ 5, 11.) This is inaccurate. The proffered Settlement Agreement itself shows a lack of common control–Todd Mikles signs on behalf of himself, the Sovereign Parties and GCL, LLC, while Daniel Shaeffer signs on behalf of the Cottonwood entities. The entities are not under common control.

5) 1818 Market Street Matter and Prior Arbitration: The Summary (exhibit "A" to the motion) states that duplicative claims were asserted in a 2014 arbitration and the Award from that arbitration "acts to bar these claims." (¶24.) This is inaccurate, and such an assertion could only be made if the Trustee received false information from debtors or proposed third party bar order persons and entities and did not inquire on such an issue from the Plaintiffs/Claimants or their counsel. In the arbitration, Arbitrator and Ret. Appeals Court Justice Chris Cottle already denied Respondents' (i.e., the proposed third party bar order recipients) AAA Rule 33 Request, which asserted the same grounds in the underlying arbitration, namely that a 2014 arbitration before Arbitrator Howard Harrison barred the claims under res judicata or collateral estoppel. Notably the denial was not upon a motion but rather for *leave to file a motion* under Rule 33, showing the Arbitrator had determined the purported "bar"by the prior arbitration did not even warrant leave to file a motion on such grounds. The class arbitration concerns different owners who allege different breaches of fiduciary duty and damages flowing from a sale of the property to a third party in April 2015, which act occurred after the arbitration in 2014.

In addition, the Summary also contains critically omitted information or *material omissions*,

including *but not limited to* the following:

1) FINRA Arbitration: The Summary attempts to insert an arbitration currently in evidentiary hearing into the list of barred cases, the "FINRA" arbitration in Los Angeles (Summary, head note "d", last entry, page 6.) FINRA is an acronym for the Financial Industry Regulatory Authority, and the seven Claimants in the FINRA proceeding allege wrongdoing against the broker-dealer of securities on the roll up of their interests in the Congress Center property. The evidentiary hearing on this arbitration against the broker-dealer of ARP OP securities has already commenced and a full five days of hearing were held in Los Angeles, and it will continue on February 17, 2020. The Proposed Order in the motion does not reference the FINRA arbitration directly as does the Summary, but it does state that the barred cases "are not limited to" those listed. (Ex. B, sub. Ex. A, p. 5.) Aside from a reference in a head note, there is no other reference to the FINRA Arbitration, in the motion or the Summary.

2) GCL, LLC and Land in San Diego County: The Summary contains no reference to GCL, LLC or its role in the G REIT matter and other California matters. GCL is an entity that would be barred from litigation in the settlement motion as a proposed third party bar party.

3) Capital Fund Matter and Investment Committee: The Summary contains no reference to the Investment Committee of NNN Capital Fund, LLC, their role in the case, nor how the case against these persons should be barred as well. The Investment Committee Defendants are not proposed third party released parties but the 9019 motion purports to bar the action against the Investment Committee Defendants all the same. (See proposed Order, Ex. B, sub. Ex. A.)

4) Capital Fund Matter: The Summary fails to include any reference at all to the CapFund Oak Park Note, which was taken by Mikles and SSMF without any authorization, in an Amendment or otherwise. (See Mikles Adv Pro. No. 19-01291, Docket 56, Omnibus RJN, Ex. 7, California Third Amended Complaint ("TAC"), ¶¶44-45, 75-80, inter alia .) This is crucially omitted information and alone accounts for a $10 million direct claim against Mikles and his affiliates including SSMF and SCMG. The Summary only references a Plantations Loan and a Barberry Loan, completely omitting the Oak Park Loan and Note. (Summary, ¶¶14-16.)

5) G REIT Matter and the Trustees of the G REIT Liquidating Trust: Neither the motion nor summary contain any explanation as to how Plaintiffs claims would be barred against the Trustees of the G REIT Liquidating Trust. The Trustees are not proposed third party released parties, but the 9019 motion purports to bar the action against the Trustees all the same. (See proposed Order, Ex. B, sub. Ex. A.) Moreover, the Chapter 7 Trustee attempts to carve out a $12 million promissory note against only Sovereign Strategic Mortgage Fund, LLC ("SSMF") (Mtn., ¶74) contains no explanation that the Chapter 7 Trustee would be in effect re-writing and amending the claims in the G REIT class action, and barring such an action against the Trustees or other responsible parties on the Note. Still further, the action in G REIT is not centered on the Note but rather the improper issuance of the Note itself. Any exercise of a Put Option by the G REIT Trust did not call for a promissory note by SSMF, but instead the payment of $12 million in cash once the Put Option was exercised. (See Mikles Adv Pro. No. 19-01291, Docket 56, Omnibus RJN, Ex. "9", SAC, ¶¶ 84, 97f, 120-123.) The GREIT claims are not on the note but on the undervalued sale of the Wester Place Property in Texas wherein the beneficiaries were

entitled to $15 million as of April 2012, not the deflated $12 million. That amount with interest is $20 million not the $12 million and it is against Mikles not SSMF. Thus the Summary improperly implies that the issuance of the SSMF promissory note in response to the exercise of the Put Option was proper when it was not.

6) 1818 Arbitration and Western Alliance Bank: Neither the motion nor summary contain any reference at all to Western Alliance Bank ("WAB"), a Respondent in the 1818 Market Street arbitration. WAB is not a proposed third party release party, but the 9019 motion purports to bar the action against WAB all the same. (See proposed Order, Ex. B, sub. Ex. A.)

7) Cook Islands Trusts and Companies: The Trustee ignores the trail of transfers to the Cook Islands companies made by Mikles. A review of the DRA tax return itself discloses that DRA loaned $875,000 as of December 31, 2014, $1,500,000 to SSMF which is owed by SCMG itself with ownership traced to the Cook Islands. The Trustee appears to have not pursued these transfers at all.

8) Priority Tax Claims and Late Filed Returns Creditors Likely to Receive $0.00: The Trustee does not address priority tax claims although the claims register itself reflects over $200,000 in tax claims. The Debtors 2014, 2015, 2016 and 2017 returns were all filed and signed by Mikles prepared by his mother in law Karron Wardwell on October 4, 2018. These returns are open at this time for audit and assessment- there is no closing agreement for tax liability. The filed returns take millions in deductions that are likely to be challenged as well as claiming millions in net operating loss carryforwards that would not appear to be allowed. Moreover, there are payments clearly to foreign entities that require 30% at the source withholding and returns that are not filed. The motion does not discuss what amount

if any that would be paid out on claims nor does it address the real likelihood that tax claims will exceed $1 million and result in $0 to the creditors. "Thus, there are two prongs – or two different types of activity by a debtor – that can lead to nondischargeability of taxes under Section 523(a)(1)(C): (i) filing a fraudulent return; or (ii) attempting to evade or defeat a tax obligation. The Section 523(a)(1)(C) exception to discharge contains no time restrictions or limitations period. As a result, any tax liability involving a fraudulent return or a willful attempt to evade or defeat payment of the tax liability is nondischargeable, regardless of when it arose.14 *Klayman v. United States* (In re Klayman), 333 B.R. 695, 699 (Bankr. E.D. Pa. 2005); *Myers v. IRS (In re Myers)*, 216 B.R. 402, 405 (6th Cir. BAP 1998). Like other exceptions to discharge, Section 523(a)(1)(C) must be strictly construed in favor of the debtor. United States v. Fegeley (In re Fegeley), 118 F.3d 979, 983 (3d Cir. 1997) (citing Dalton v. IRS, 77 F.3d at 1300)." *In re Terrell* (Bankr. W.D. Okla. 2018) 594 B.R. 792, 811. IRC sections 382 and 383 provide that, where the ownership of a company changes by more than 50 percentage points in any 3-year period, the ability of the company to deduct its tax carryforwards in any future year is limited to the value of the company on the date the 50-percentage point threshold is crossed. Under IRC sections 871(a) and 881(a) of the Code, nonresident alien individuals and foreign corporations are subject to a 30 percent tax on gross income they receive from sources within the United States that are not effectively connected with the conduct of a trade or business in the United States.

Objecting Creditors assert the above false information and material omissions are mere examples, and that the motion contains many more examples of false statements, material omissions, or misleading information.

C. Objecting Creditor Request That Estate Creditors Be Identified by Investment (e.g. GREIT trust, NNN Congress Center, LLC member, etc.)

Previously the court allowed debtors to simply list creditors by name and address without any reference to the nature of their investment. Because of the class claims, Objecting Creditors request the name lists of all members of the classes for equal class communication.

D. Objecting Creditors Requested Relief.

Objecting Creditors believe, due to the impact on unrepresented class parties as well as persons who have not (and need not) filed proofs of claims in the instant proceeding, that the Court deny Trustee's Procedures Motion, defer determination on the Motion to Approve Settlement until the Court first determines class certification of the effected parties. Alternatively, Objecting Creditors propose that the Notice be amended to include Objecting Creditors version of a Joint Notice and reference to objecting creditors' website www.daymarycreditors.com.

Form of Objecting Creditors Amended Notice is attached hereto as Exhibit 1.

IV. CONCLUSION

For the reasons set forth above, Objecting Creditors pray that the Trustee's request for an order approving their proposed procedures for serving Trustee's 9019 Motion to Approve Settlement should be denied.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was filed and served via the CM/ECF system on November 11, 2019.

//

//

//

//

I hereby certify that the undersigned attorney is appearing pro hac vice in this matter pursuant to court order dated 12/6/18.

Kenneth J. Catanzarite
Catanzarite Law Corporation
2331 West Lincoln Avenue
Anaheim, CA 92801
(714) 540-5544
kcatanzarite@catanzarite.com
By: /s/ Kenneth J. Catanzarite
CA Bar No. 113750

LAW OFFICES OF TODD S. FRANKENTHAL
LOCAL ATTORNEY

By: /s/ Todd S. Frankenthal
TSKLaw01@bellsouth.net
(954) 356-0464
FBN 350451

EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
www.flsb.uscourts.gov

IN RE:

DAYMARK REALTY ADVISORS, INC.,	**CASE NO.: 18-23750-RBR**
DAYMARK RESIDENTIAL MANAGEMENT, INC.	**CASE NO.: 18-23751-RBR**
DAYMARK PROPERTIES REALTY, INC.	**CASE NO.: 18-23752-RBR**
	(Jointly Administered)
	CHAPTER 7

Debtors.
_____/

NOTICE OF INFORMATIONAL WEBSITES CONCERNING:

Motion By Chad S. Paiva, As Chapter 7 Trustee, To (A) Approve Settlement Agreements With The Sovereign Parties, The Cottonwood Parties, And The Northwood Parties And (B) Request For Entry Of Bar Orders;

And

Objections and Response by Objecting Creditors (Including Class Action Creditors: GREIT Trust Beneficiaries, NNN Capital Fund I members, NNN Congress Center, LLC members, NNN 1818 Market Street, LLC members, NNN Barberry Lane 8 members... [Which May Include Claims on Your Behalf]) Opposed to (1) Approval of Settlement Agreements With The Sovereign Parties, The Cottonwood Parties, And The Northwood Parties Which Bar Creditors' Direct Claims Against These Third Parties, (2) Request For Entry Of Bar Orders of any Third Party Bar in Favor of Non-Debtors For Objecting Creditors' Direct Claims, (3) GREIT Trust Beneficiaries Objections to Carve out for Purported $12,000,000 Note to Only Insolvent Sovereign Strategic Mortgage Fund, LLC, owned by a Cook Islands Trust and Currently in Liquidation and Preventing Claims Against GCL, LLC and GLOBAL LENDING RESOURCES, LLC, a Cook Islands limited liability company, which Objecting Creditors and related Cook Islands Trusts all Creditors Contend are Controlled by Todd Mikles and valued at over $40,000,000, and (4) Analysis of Payout at $.0014 per Dollar (e.g. $50,000 Claim payout $70.00) and Priority Administrative and Tax Claims Likely to Result in a $0.000 Payout from the Settlement Proceeds ($50,000 Claim payout $0.00 and $1,000,000,000 in Claims Paid $0.000).

PLEASE TAKE NOTICE THAT Chad S. Paiva, as Chapter 7 Trustee (the "Trustee") for the substantively consolidated bankruptcy estates of the Debtors, Daymark Realty Advisors, Inc. ("DRA"), Daymark Properties Realty, Inc. ("DPR"), and Daymark Residential Management, Inc. ("DRM") (collectively, the "Debtors"), by and through counsel, and pursuant to the Order Granting Chapter 7 Trustee's Expedited Motion to Modify Service Procedures Relating to Settlement Motion (the "Order") [ECF No. __] entered in the above-referenced bankruptcy cases (the "Bankruptcy Cases"), is seeking approval of certain Settlement Agreements by the United States Bankruptcy Court for the Southern District of Florida (the "Bankruptcy Court") which, among other relief, provides for the recovery to the Estate totaling $1,775,000.00 and shall bar any and all claims, causes of action and demands, by creditors and parties-in-interest that may exist against the following Settling Parties:

(a) the "Sovereign Parties" consisting of (I) Sovereign Capital Management Group, Inc., (ii) Sovereign Strategic Mortgage Fund, LLC, (iii) Todd Mikles, (iv) Etienne Locoh, (v) GCL, LLC and (vi) Infinity Urban Century LLC;

(b) the "Cottonwood Parties" consisting of (I) Cottonwood Residential O.P., LP, (ii) Cottonwood Capital Property Management II, LLC, (iii) Cottonwood Capital Management, Inc., (iv) Daniel Shaeffer, (v) Plantations at Haywood M, LLC, (vi) Plantations at Haywood O, LLC, (vii) Plantations at Haywood, LLC and (viii) Haywood Storage, LLC; and

(c) the "Northwood Parties" consisting of: (I) Northwood Investors, LLC, (ii) NW Congress Center Owner, LLC, (iii) NW Congress Center, LLC, (iv) Northwood Employees, LP, (v) Northwood Real Estate Partners TE LP, and (vi) Northwood Real Estate Partners LP.

Pursuant to the Order and this Notice of Information Websites (the "Notice"), the Trustee and Objecting Creditors have each established two separate informational Websites, as set forth below, which provide all creditors and parties-in-interest receiving this Notice an opportunity to review two sets of pleadings, one in favor of the motion and the other in opposition to the motion.

The first site is sponsored by Chad S. Paiva, as Chapter 7 Trustee, along with the Daymark Debtors and the Settling Parties, to (A) Approve Settlement Agreements With The Sovereign Parties, The Cottonwood Parties, And The Northwood Parties And (B) Request For Entry Of Bar Orders [ECF No. 319] (the "Settlement Motion"), by accessing the following website address:

Website: http://www.daymarksettlement.com

(See also Objecting Creditors Separate website: http://www.daymarkcreditors.com)

The second site is sponsored by Objecting Creditors including representatives of Class Claims in Class Action State Court Litigation and Arbitrations (which may include your claims) Objecting Creditors and members of those classes, presently stayed by an injunction filed by Todd Mikles and Sovereign over Objecting Creditors' objections. Objecting Creditors include the following plaintiffs and classes of plaintiffs with pending litigation and arbitrations in California and Utah, who have filed approximately $1,000,000,000 in claims, individually and on behalf of classes of persons, of which you may be a member of a class of Plaintiffs or a member of a trust or limited liability company adversely affected by the Settlement:

1) G REIT Breach of Fiduciary Duty and Fraudulent Conveyance against Mikles and GCL, Trustees and Northwood: Richard Carlson on behalf of a class of approximately 13,142 G REIT Beneficiaries, Superior Court of California for Orange County, Case No. 30-2018-00982195;

2) Congress Center Breach of Contract, Fiduciary Duty etc. against Mikles and

Northwood : NNN Congress Center I, LLC et al. v. Etienne Locoh et al., Superior Court of California for Orange County, Case No. 30-2018- 01015717;

3) Congress Center Arbitration Breach of Fiduciary Duty against White and Primex: FINRA Arbitration, Los Angeles, Case No. 18- 03614, concerning Congress Center owners who in October, 2012 exchanged ownership interests in Congress Center for limited partnership units in American Recovery Property O.P., L.P.;

4) Capital Fund Company Breach of Fiduciary Duty against Mikles and Cottonwood: NNN Capital Fund I, LLC, et al. v. Cottonwood Residential, O.P., LP, et al., Third Judicial District Court for Salt Lake County, Utah, Case No. 170904222; and NNN Capital Fund I, LLC, et al. v. Todd Mikles et al., Superior Court of California for Orange County, Case No. 30-2017- 00910991;

5) Plantations at Haywood Breach of Contract against Mikles and Cottonwood: Plantations at Haywood 1, LLC, et al. v. Cottonwood Residential, O.P., LP, et al., Third Judicial District Court for Salt Lake County, Utah, Case No. 170904220 and Plantations at Haywood 1, LLC, et al. v. Plantations at Haywood M, LLC, et al., Superior Court of California for Orange County, Case No. 30-2017-00901157; Plantations at Haywood 1, LLC et al. v. Plantations at Haywood M, LLC et al., AAA Case No. 01-18-0002-4830.

6) 1818 Market Street Breach of Fiduciary Duty, Fraud etc. against Mikles and GCL: Dennis Dierenfield, et al. v. Todd Mikles et al., Superior Court of California for San Diego County, Case No. 37-2016-00018180; Dennis Dierenfield, et al. v. Todd Mikles et al., AAA Case No. 01-17-0002-5456, a class arbitration for 1818 Market Street owners;

7) 1600 Barberry Lane 8 et al. Breach of Contract and Fiduciary Duty against Mikles and Cottonwood, v. Cottonwood Residential et al., Utah Case No. 170904221,. Barberry Lane v. Mikles et al. San Diego, California, Case No. 37-2016-00019030, 1600 Barberry Lane 8 et al. v. Mikles, American Arbitration, California Case No. 01-17-0005-0462; a class arbitration pending in California concerning 26 separate residential properties with property management services transferred to Cottonwood Residential in 2012 - 2013.

Objecting Creditors' Opposition to the motion will include the grounds it is not fairly, adequately and equitably described, would offer *at best* $.0014 per dollar of the $1,000,000,000 amount claimed ($1,775,000 less estimated administrative expenses of $375,000, yielding $1,400,000, which means at best a $50,000 claim, if allowed, will receive only $70.00.)

However, the Daymark Debtors' tax returns for the years 2014, 2015, 2016 and 2017 were all filed by Todd Mikles on October 9, 2018 (2014, 2015 and 2016 late filed), just one month before the Bankruptcy Cases were commenced. The Internal Revenue Service has until October 9, 2021 to assess taxes and file either a proof of claim or an amended proof of claim. If the returns are fraudulent as creditors contend (including 2011, 2012 and 2013), and include deductions for payment to Mikles controlled companies and trusts in the Cook Islands, then substantial priority taxes exceeding the net of administrative expenses (Chapter 7 Trustee expenses, attorney's fees and costs) would result in creditors receiving nothing from the settlement.

The Objecting Creditors and their classes seek to recover on behalf of the classes' members $1,000,000,000 in claims against non-debtors Mikles, Sovereign parties, Cottonwood parties, and Northwood parties, which claims are not subject to the IRS and related state priority tax claims.

Objecting Creditors also pursue the 1,000 acre property held by Mikles' controlled GCL,

LLC, which is believed to be worth in excess of $50,000,000, and is subject to a fraudulent conveyance $30,000,000 trust deed in favor of Mr. Mikles' Cook Islands company, as well as two payments for land sales totaling $14,000,000 in 2016 and 2017, which certain Objecting Creditors have sued to set aside. Moreover, Objecting Creditors have pending claims against Cottonwood and Northwood Investors, whose combined net worth easily exceeds $1,000,000,000. You may access the Objecting Creditors' website by accessing the following website address to learn of Objecting Creditors' position on the settlement and this bankruptcy case:

Website: http://www.daymarkcreditors.com

(See also Trustee and Settling Parties' website: http://www.daymarksettlement.com)

These two Websites allow creditors and parties-in-interest to download a full electronic copy of the Settlement Motion and all Exhibits attached thereto as well as all Objecting Creditors' Oppositions, exhibits, expert witness declarations, and separate objections of the multiple classes of creditors claims asserted against those seeking to be barred by the motion. The Settlement Motion, if approved, will adversly affect your rights and claims because it would bar forever your direct and separate claims against the bar order recipients (i.e., *Mikles, his companies, Cottonwood Residential,, Northwood Investors, the G REIT Trustees, the Investment Committee of Cap Fund, and others)* who are **not** putting up substantially all of their assets to satisfy the $1,000,000,000 of pending claims and pending class claims asserted by Plaintiffs..

Any and all objections, including joinders, to the Settlement Motion must be filed via CM/ECF or received by the Bankruptcy Court at the following address: United States Bankruptcy Court, Attn: Clerk's Office, 299 East Broward Blvd., Fort Lauderdale, FL 33301 on or before _____, 2019, with a copy provided to undersigned counsel and Objecting Creditors' counsel. Objecting creditors will be filing objections on behalf of the creditor classes that

are proposed to be adversely affected and all those creditors that have engaged Objecting Creditors.

Dated: November __, 2019.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was filed and served via the CM/ECF system on _____, 2019.

I hereby certify that the undersigned attorney is appearing pro hac vice in this matter pursuant to court order dated 12/6/18.

Respectfully Submitted,

Kenneth J. Catanzarite
Catanzarite Law Corporation
2331 West Lincoln Avenue
Anaheim, CA 92801
(714) 540-5544
kcatanzarite@catanzarite.com
By: /s/ Kenneth J. Catanzarite
CA Bar No. 113750

LAW OFFICES OF TODD S. FRANKENTHAL
LOCAL ATTORNEY

By: /s/ Todd S. Frankenthal
TSKLaw01@bellsouth.net
(954) 356-0464
FBN 350451