UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
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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)
Debtors.	**CHAPTER 7**

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OPPOSITION TO TRUSTEE'S MOTION FOR AN ORDER TO SHOW CAUSE AS TO WHY ATTORNEY KENNETH J. CATANZARITE, ESQ.'S PRO HAC VICE STATUS SHOULD NOT BE REVOKED

Objecting Creditors, Richard Carlson, NNN Capital Fund I, LLC, NNN Congress Center, LLC 1600 Barberry Lane 9, LC, Plantations at Haywood 1, LLC, and NNN 1818 Market Street 13, LLC ("Objecting Creditors"), along with their pro hac vice counsel, Kenneth J. Catanzarite ("Catanzarite'), hereby oppose the motion of Chad S. Paiva, Chapter 7 Trustee ("Trustee") for an order to show cause as to why Mr. Catanzarite's pro hac vice status should not be revoked. The Trustee contends Mr. Catanzarite's pro hac vice status should be revoked "in light of his repeated failure to comply with this Court's Orders, the Federal Rules of Bankruptcy Procedure, the Local Rules for the Southern District of Florida Bankruptcy Court, and the Florida Bar Guidelines for Professional Conduct." (Motion at p. 1.) The Motion is a contrivance – an example of strategic abuse to leave Objecting Creditors without their counsel of choice who has been litigating their claims for years. The Motion must be denied for the reasons detailed below and in Mr. Catanzarite's supporting declaration (and attached exhibits).

Relevant Facts

1. On November 1, 2019, the Trustee filed and served a Motion to (A) Approve Settlement Agreements with the Sovereign Parties, the Cottonwood Parties, and the Northwood

Parties, and (B) Request for Entry of Bar Orders (hereinafter the "Settlement Motion") in the Main Bankruptcy Case [ECF No. 319]. Citing to *Munford v. Munford, Inc.*, 97 F.3d 449 (11th Cir. 2013), the Trustee contends the bar orders are appropriate arguing Objecting Creditors, represented by Mr. Catanzarite, cannot meet their burden to establish they can prevail on their claims. (ECF No. 319 at ¶¶63-66.) Per the terms of the Settlement Agreement and Bar Order, it had to be approved by the Bankruptcy Court on or before January 31, 2020. (ECF No. 319 at ECF pp. 56, 79.)

2. Faced with Trustee's contention Objecting Creditors cannot meet their burden for establishing the veracity of their claims coupled with the intervening Thanksgiving and December/New Year holidays, Mr. Catanzarite unilaterally noticed the depositions of Gary Wescombe and Gary Hunt, disputed to be acting trustees of the GREIT Liquidating Trust, on November 15, 2019 with corrected notices/subpoenas issued on November 19, 2019. The deposition of Mr. Wescombe was noticed for December 2, 2019 in Irvine, California.

3. On December 10, 2019 the Court issued an Order Scheduling Pretrial Conference and Evidentiary Hearing and Setting Related Deadlines vis-a-vis the Settlement Motion (hereafter "Scheduling Order") [ECF No. 347]. Importantly, the Court set an evidentiary hearing for March 18 and 19, 2020 on the Settlement Motion and further set deadlines as follows: the discovery cut-off was set for February 28, 2020 [ECF No. 347 at ¶6]; disclosure of expert testimony was set for at least 45 days before the Evidentiary Hearing or ten days after an opposing party's disclosure of evidence giving rise to the need for the expert (whichever is later) [ECF No. 347 at ¶5B]; required expert reports no later than seven days before the Pretrial Conference (i.e., February 27) [ECF No. 347 at ¶5B]; and a March 3, 2020 cut-off for objections to the Settlement Motion with responses thereto due March 13, 2020 [ECF No. 347 at ¶¶3-4].

4. During the month of December 2019 thru January 2, 2020 attorneys for Objecting Creditors (including Mr. Catanzarite) met and conferred with Joe Campo, Esq. (counsel for Mr.

Wescombe), Barry Gruher, Esq. (counsel for the Trustee) and Adam Kent (counsel for Todd A. Mikles ("Mikles"); Etienne Locoh; and Sovereign Capital Management Group, Inc.; Sovereign Strategic Mortgage Fund, LLC; Infinity Urban Century, LLC; and GCL, LLC (collectively "Sovereign")) on an agreeable date and time for Mr. Wescombe's deposition, the scope of that deposition and documents to be produced in connection therewith. (Declaration of Kenneth J. Catanzarite ["Catanzarite Decl."] at ¶¶3-4 and Exhibits "1" thru "3" thereto.) Meet and confer efforts occurred in writing and a December 30, 2020 telephonic call between Messrs. Campo, Catanzarite and Gruher. (*Ibid*.) Of particular relevance: on December 24, 2019 Objecting Creditors' counsel explained the need to depose Mr. Wescombe without delay because of expert timing and the need to complete discovery vis-a-vis the Court's Scheduling Order. (Catanzarite Decl., Ex. "2" at p.1.) Mr. Gruher was included on the email. (*Ibid.*) Again, the Court's Scheduling Order concerned the Settlement Motion. Further, during the December 30 telephonic call Messrs. Campo, Catanzarite and Gruher discussed Mr. Wescombe's deposition in the context of the Settlement Motion and Mr. Campo asked Mr. Gruher to review the documents requested by Objecting Parties to ensure they were within the scope of the Settlement Motion. (Catanzarite Decl., ¶4.) Mr. Gruher did not advise of any objections. (*Ibid.*)

5. Objecting Creditors agreed to hold off on deposing Mr. Hunt pending testimony of Mr. Wescombe. (Catanzarite Decl., Ex. 2 at p.1.) Ultimately Mr. Hunt was not deposed.

6. On January 2, 2020 Mr. Campo emailed Messrs. Catanzarite, Gruher and Kent offering January 20 and 21, 2020 as available dates for Mr. Wescombe's deposition to which Mr. Catanzarite responded with January 20 for the deposition date. (Catanzarite Decl., Exhibit "3.") Mr. Gruher and Mr. Kent did not object to January 20 as the deposition date for Mr. Wescombe.

7. Consistent with the foregoing meet and confer efforts, on January 3, 2020 Mr. Catanzarite, on behalf of Objecting Creditors, issued a Notice of Subpoenas for Deposition and

Document Production ("Wescombe Subpoena") in the Main Bankruptcy Case and the adversary case initiated by Sovereign against Objecting Creditors as Adversary Pro. No. 19-01291 ("Adversary Case") [Case No. 19-01291 ECF No. 1] for the deposition of Mr. Wescombe on January 20, 2020. (ECF No. 377 at Ex. A.) The Wescombe Subpoena was served on counsel for the Trustee, Sovereign, Cottonwood and Northwood, as well as Mr. Wescombe and his counsel. (*Id.* at pdf pages 3-4.)

8. On January 17, 2020 this Court held a hearing on Objecting Creditors' Emergency Motion to Deem 9019 Motion "Settling Parties" as Parties Under Bankruptcy and Federal Rules [ECF No. 352] and ruled that neither Cottonwood Parties, Northwood Parties nor Sovereign Parties were "parties to the contested matter regarding the Settlement Motion" as confirmed in the later-issued order on January 24, 2020 [ECF No. 363]. Although the Court also granted Western Alliance Bank's oral request first made at the January 17, 2020 hearing to participate in discovery as concerns the 1818 Market Street arbitration [ECF No. 363], no order has issued denominating Western Alliance Bank a "party" under bankruptcy and/or federal rules.

9. Despite being served with the Wescombe Subpoena on January 3, 2020 and having actual notice of same, Mr. Gruher did not appear at Mr. Wescombe's deposition until after the lunch break. (Catanzarite Decl., Exhibit "4" [Deposition Transcript of Mr. Wescombe] at 160:20-161:2.) At no point prior to Mr. Gruher's appearance did Mr. Kent object to Mr. Gruher's absence or otherwise insist the deposition not go forward until Mr. Gruher appeared – all despite acknowledging Mr. Wescombe's deposition was being taken in the Main Bankruptcy Case and objecting to certain questions he believed were beyond the Trustee's Settlement Motion. (Catanzarite Decl., Exhibit "4" at 160:20-161:2.)

10. Upon appearing at Mr. Wescombe's deposition Mr. Gruher, on behalf of the Trustee, actively participated in the deposition for two hours before objecting to any error or irregularity in

the deposition notice or the scope of the deposition itself – and Mr. Gruher made the objection only after Mr. Catanzarite turned Mr. Wescombe over to Messrs. Gruher and Kent for questioning. (Catanzarite Decl., Exhibit "4" at 160:24-246:9; 243:17-246:9.) In fact, for two hours the majority of Mr. Gruher's non-form objections were that the questions were beyond the scope of the Trustee's Settlement Motion. (*See e.g.*, Catanzarite Decl., Exhibit "4" at 170:23-25, 177:1-178:7, 213:12-15.)

11. On the morning of January 20, 2020, prior to the start of Mr. Wescombe's deposition, counsel for Objecting Creditors gave Western Alliance Bank written notice of Mr. Wescombe's deposition, and explained that Mr. Wescombe's deposition concerned GREIT and not the 1818 Market Street arbitration. (Catanzarite Decl., ¶6 and Exhibit "5" thereto.) As of this date Objecting Creditors have not received any objection from Western Alliance Bank concerning Mr. Wescombe's deposition. Indeed, Western Alliance Bank did not hold any of the GREIT Trust account deposits – all were held at Bank of America.

12. In belatedly asserting an objection for errors and irregularities with the Wescombe Subpoena, Mr. Gruher stated his intent to move to strike the deposition back on January 20. (Catanzarite Decl., Exhibit "4" at 244:3-9.) Notably, no such motion has been filed.

13. Given the Scheduling Order and shortened timeframe for discovery, as well as concerns for evasion of service, Objecting Creditors unilaterally sought to depose certain persons and entities (in addition to Messrs. Wescombe and Hunt) but always worked with counsel on scheduling. For example, on January 24 Mr. Catanzarite sent an email to numerous attorneys, including counsel for the Trustee, Mikles, Sovereign, Cottonwood, Northwood and Western Alliance Bank meeting and conferring on the scheduling of depositions of Mr. Mikles, the Trustee, Mr. Shaeffer (for Cottonwood) and the person most knowledgeable for Northwood. (Catanzarite Decl., ¶7 and Exhibit "6" thereto.)

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14. On January 31, 2020 Mr. Kent advised Mr. Mikles was not available on February 10 but was available on February 11. That same day Mr. Catanzarite agreed to depose Mr. Mikles on February 11 as requested. (Catanzarite Decl., ¶8 and Exhibit "7" thereto.)

15. During the deposition of Mr. Mikles on February 11, 2020, Mr. Catanzarite interrupted his own questioning so that counsel for Western Alliance Bank, Gregory Davis, Esq., could question Mr. Mikles and make his return flight. (Catanzarite Decl., ¶9 and Exhibit "8" thereto at 207:24-208:7 and 228:11-14.)

16. Objecting Creditors did not go forward with certain depositions, including the deposition of Messrs. Hunt and Kries.

Argument and Authority

17. In *Schlumberger Technologies, Inc. v. Wiley*, 113 F.3d 1553, 1561 (11th Cir. 1997), the Eleventh Circuit analyzed the standards by which a court may disqualify an attorney already admitted pro hac vice and compared this to the standard by which the court may deny an attorney's initial application for admission pro hac vice: "The standards governing a district court's denial of a pre-trial motion for admission pro hac vice are set out in [In re Evans, 524 F.2d 1004 (5th Cir. 1975)]: Absent a showing of unethical conduct rising to a level that would justify disbarment, the court must admit the attorney." *Id.* at 1561. Disqualification of an attorney already admitted to appear pro hac vice has been found to be proper where there has been (I) in-court misconduct which threatens disruption of the court proceedings (*see e.g.*, *U.S. v. Dinitz*, 538 F.2d 1214 (5th Cir. 1976) [attorney misconduct during trial]);4 (ii) a deliberate challenge to the authority of the district court (*see e.g.*, *Kleiner v. First Nat. Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985) [attorney deliberately advised client to disobey a court order]); or (iii) violation of specific rules of professional or ethical conduct. *Ibid.*

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18. Mr. Catanzarite has not engaged in any in-court misconduct which has threatened disruption of court proceedings nor does the Trustee make such a contention. Nor has Mr. Catanzarite continually violated the Court's orders, Bankruptcy Rules or Local Rules.

19. Not only did Objecting Creditors give notice to Western Alliance Bank of Mr. Wescombe's deposition – notwithstanding it is not a party and is only a creditor/involved with the 1818 Market Street arbitration – but Western Alliance Bank has not objected to the Wescombe deposition. Indeed, Mr. Wescombe has absolutely no relevance to the issues involving Western Alliance Bank.

20. The Trustee contends Mr. Catanzarite's conduct violates Florida Rules of Professional Conduct 4-3.4(c) and 4-3.4(d). Rule 4-3.4(c) provides that "[a] lawyer must not: . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists" while Rule 4-3.4(d) provides that "[a] lawyer must not: . . . in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party".

21. The Motion does not identify any discovery requests propounded by an opposing party with which Mr. Catanzarite failed to comply nor does it identify any frivolous discovery request by him. The Trustee does not contend Mr. Wescombe's deposition was frivolous and the Court's rulings on February 11 and 12, 2020 granting the motions for protective order by Cottonwood Parties and Sovereign Parties on the ground the discovery was disproportionate is not tantamount to a finding the discovery was frivolous [ECF Nos. 393, 395].

22. With respect to Florida Rule of Professional Conduct 4-3.4(c), the Trustee accuses Mr. Catanzarite of violating Fed. R. Civ. P. 30(b)(1) (as incorporated into contested matters by Fed. R. Bank. P. 9014), Local Rule 7030-2 and Florida Bar Guidelines for Professional Conduct, Sections B(1) and F(2).

23. Fed. R. Civ. P. 30(b)(1) requires that reasonable notice of the deposition be given to all **parties**, that the notice identify the date, time, place of deposition as well as the deponent's name and address if known. The January 3, 2020 Wescombe Subpoena – and thus notice of the deposition – was served on the Trustee, as a party in the Main Bankruptcy Case, and Sovereign, parties in the Adversary Case. The Wescombe Subpoena – and thus notice of the deposition – was also given to Cottonwood and Northwood. The January 3, 2020 Wescombe Subpoena was served in more than reasonable time prior to the January 20 deposition date and the notice contained the date, time and place for deposition as well as Mr. Wescombe's name and address. (Motion at Ex. A.) Notably, on January 17, 2020 the Court ruled Cottonwood, Northwood and Sovereign were not parties in the Main Bankruptcy Case and, while it allowed Western Alliance Bank to participate in discovery, the Court did not rule it was a party to the Main Bankruptcy Case. (ECF No. 363.)

24. Local Rule 7030-2 provides that "[u]nless otherwise stipulated by all interested parties or directed by the court or by these rules, the deposition of any person upon oral examination may be taken upon actual delivery of at least 14 days' notice in writing to the deponent and to every other party to the action." The Trustee contends Mr. Catanzarite violated Local Rule 7030-2 when he served the Notice of Deposition for Mr. Wescombe on January 3, 2020. The undisputed facts establish otherwise. The January 3, 2020 Wescombe Subpoena is in writing and was served 17 days before the deposition and thus more than the 14-days called for by Local Rule 7030-2. Moreover, not only does the January 3, 2020 Wescombe Subpoena contain the captions for both the Main Bankruptcy Case and Adversary Case, but the meet and confer discussions concerning Mr. Wescombe's deposition leading up to its issuance concerned deposition scheduling in light of the Scheduling Order (issued in the Main Bankruptcy Case) and the scope of Mr. Wescombe's deposition vis-a-vis the Settlement Motion (filed in the Main Bankruptcy Case). The Trustee's counsel, Mr. Gruher, participated in those meet and confer discussions. As such, Mr. Gruher had

actual knowledge Mr. Wescombe's deposition was being taken on January 20, 2020 in the Main Bankruptcy Case. Still further, Mr. Gruher actively participated in Mr. Wescombe's deposition for two hours without objecting as to any perceived error or irregularity in the Wescombe Subpoena. (Catanzarite Decl., Exhibit "4" at 160:24-246:9.) In fact, Mr. Gruher asserted objections that certain questions went beyond the scope of his client's Settlement Motion which was filed in the Main Bankruptcy Case. (*See e.g.*, Catanzarite Decl., Exhibit "4" at 170:23-25, 177:1-178:7, 213:12-15.) These irrefutable facts belie the Trustee's central contention Mr. Gruher did not appear at the start of Mr. Wescombe's deposition because he did not believe it had to do with the Main Bankruptcy Case. (Motion at ¶22.) If the Trustee's contention were true, Mr. Gruher most certainly would have asserted such an objection upon immediately appearing at the deposition after the lunch break. And assuming arguendo the Trustee's contention were true, then Mr. Gruher's failure to so object constitutes waiver of any error or irregularity in the deposition notice under FRCP 32(d)(1) & (d)(3)(B).

25. Moreover, the Trustee's contention Mr. Wescombe's deposition should have been limited solely to discovery related to the Adversary Case and not the Main Bankruptcy Case is simply not true because the sole relief sought in the Adversary Case is injunctive relief against Objecting Creditors pending completion of the Main Bankruptcy Case or the Court's ruling on the Settlement Motion. (Case No. 19-01291 ECF No. 1, p. 18.) Said another way, any discovery conducted in the Adversary Case would necessarily concern the Main Bankruptcy Case and the Trustee's Settlement Motion thereby further exposing the contrivance of the instant motion which is simply to try to knock out Objecting Creditors' counsel of choice.

26. The Trustee represents to the Court that "the Trustees, the Settling Parties, and Western Alliance Bank [objected] to the improperly noticed Wescombe Deposition" and argues that once Mr. Catanzarite learned of these objections he should have ended the deposition, rescheduled it

for a mutually convenient time and agreed not to use for any purpose in the Contested Matter. (Motion at ¶38.) The Trustee offers no supporting evidence for his representation nor does any exist. Mr. Kent was present for the entirety of Mr. Wescombe's deposition and did not object that the deposition was improperly noticed in the Main Bankruptcy Case or as to the Settlement Motion. (*See generally*, Catanzarite Decl., Exhibit "4.") On the contrary, Mr. Kent sought confirmation the deposition was being taken in the Main Bankruptcy Case and responded with "Perfect" and "Great" when so confirmed by Mr. Catanzarite. (Catanzarite Decl., Exhibit "4" at 11:21-12:23.) Further, Mr. Kent asserted non-form objections that certain questions went beyond the Settlement Motion, reconfirming his understanding the deposition concerned the Settlement Motion. (*See e.g.*, Exhibit "4" at 17:11-18, 54:19-23, 107:5-7.) Despite being served with the Deposition Notice, neither Cottonwood nor Northwood objected to Mr. Wescombe's January 20, 2020 deposition as being improperly noticed. Likewise, Western Alliance Bank did not object to Mr. Wescombe's January 20, 2020 deposition as being improperly noticed.

27. Florida Bar Guidelines for Professional Conduct, Section B(1) states that "Attorneys must, **except in extraordinary circumstances**, communicate with opposing counsel before scheduling depositions, hearings, and other proceedings — to schedule them at times that are mutually convenient for all interested persons." (Emphasis added.) As the evidence proffered herein establishes, Mr. Wescombe's January 20, 2020 deposition was noticed after considerable meet and confer efforts involving the Trustee's counsel. The January 20 date was offered by Mr. Wescombe's counsel to Messrs. Catanzarite, Gruher and Kent, and was accepted by Mr. Catanzarite without any objection from Mr. Gruher or Mr. Kent. Although Mr. Catanzarite, on behalf of Objecting Creditors, served deposition notices/subpoenas unilaterally, he did so because of abbreviated discovery period and anticipated avoidance of service by non-party deponents which is more than sufficient to satisfy Section B(1)'s extraordinary circumstances exception. Moreover, Mr.

Catanzarite did not hold the deponents/counsel to the noticed dates but worked with the deponents and counsel to reach mutually agreeable dates. Indeed, the deposition notice appended to the Motion was served only after meet and confer efforts and agreement on a deposition date had been reached.

28. Florida Bar Guidelines for Professional Conduct, Section F(2) states that "[w]hen scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and deponents, when it is possible to do so without prejudicing the client's rights." Again, Mr. Wescombe's counsel offered the January 20 date for deposition in an email to Messrs. Catanzarite, Gruher and Kent, and Mr. Catanzarite accepted the January 20 date without any objection from Mr. Gruher or Mr. Kent. The deposition date for Mr. Mikles' deposition was chosen after meet and confer efforts between Messrs. Catanzarite, Gruher and Kent. Objecting Creditors withdrew the subpoenas for Messrs. Hunt and Kries.

29. The Trustee accuses Mr. Catanzarite of non-cooperation in discovery yet the foregoing establishes Mr. Catanzarite has very much cooperated in discovery, including interrupting his own examination of Mr. Mikles to enable Western Alliance Bank's counsel to question Mr. Mikles and make his return flight. As shown, unilateral noticing of depositions was not done to harass but simply to ensure issuance/service in light of the shortened timeframe. Mr. Catanzarite worked with counsel on the dates ultimately set for the deposition. (*See generally*, Catanzarite Decl. and Exhibits "1"-"8.")

Requested Relief

Objecting Creditors request the instant Motion be denied.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was filed and served via the CM/ECF system on March 3, 2020.

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

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