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

In Re: **CHAPTER 7**

DAYMARK REALTY ADVISORS, INC., **CASE NO. 18-23750-SMG**
DAYMARK PROPERTIES REALTY, INC., **CASE NO. 18-23751-SMG**
DAYMARK RESIDENTIAL MANAGEMENT, INC., **CASE NO. 18-23752-SMG**
(substantively consolidated)

Debtors.

_____/

OBJECTION TO CLAIM
(Proof of Claim #s 760 & 997)

IMPORTANT NOTICE TO CLAIMANT:
THIS IS AN OBJECTION TO YOUR CLAIM

This objection seeks either to disallow or reduce the amount or change the priority status of the claim filed by you or on your behalf. Please read this objection carefully to identify which claim is objected to and what disposition of your claim is recommended.

If you disagree with the objection or the recommended treatment, you must file a written response WITHIN 30 DAYS from the date of service of this objection, explaining why your claim should be allowed as presently filed, and you must serve a copy to the undersigned OR YOUR CLAIM MAY BE DISPOSED OF IN ACCORDANCE WITH THE RECOMMENDATION IN THIS OBJECTION.

Any written response must contain the case name, case number, and must be filed with the Clerk of the United States Bankruptcy Court:

U.S. Courthouse
299 E. Broward Blvd., Room 112
Fort Lauderdale, FL 33301

Further, if any amendment to such claim is filed by the claimant without the claimant filing a response to this objection, such claim and any amendment to the claim should be disallowed, whether or not such amendment is filed before

or after an order is entered by the Court disallowing the claim.

I. OBJECTION TO CLAIM FILED BY 1600 BARBERRY LANE 8, LLC *et al.*

CHAD S. PAIVA, as Chapter 7 Trustee (the "Trustee") for Debtors, Daymark Realty Advisors, Inc. ("DRA"), Daymark Properties Realty, Inc. ("DPR"), and Daymark Residential Management, Inc. ("DRM"), (collectively, the "Debtors")[1], by and through counsel, and pursuant to 11 U.S.C. §502(b), Federal Rule of Bankruptcy Procedure 3007 and Local Rule 3007-1, files the following Objection to Claim (the "Objection") to the entire proof of claim filed by "1600 Barberry 8, LLC and 1600 Barberry 9, LLC on behalf of itself/themselves and all others similarly situated, *et al*." ("Claimants" or "1600 Barberry"), Proof of Claims #997 and #760, in the alleged amount of **$96,100,000** (collectively, the "Claim") and states, as follows:

A. The Claim Fails to Comply with Fed. R. Bank. P. 7023 & 2019.

1. On November 4, 2018 (the "Petition Date"), each of the above-referenced Debtors, DRA, DPR, and DRM, filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Cases").

2. Prior to the Petition Date, the Debtors were engaged in the business of managing a national portfolio of Tenant-In-Common ("TIC") owned commercial and residential investment properties through various property management agreements ("PMA") and related documents, while DRA served as a holding company for DPR and DRM (the "Business").

3. The Claimants have filed the Claim as the purported putative plaintiffs or representatives of an undisclosed and unknown "class of similarly situated persons" in the Bankruptcy Cases and in connection with the matters styled: *1600 Barberry Lane 8, LLC and 1600 Barberry Lane 9, LLC v. Daymark Realty Advisors, Inc., et al.*, Adv. Case No. 19-01052-SMG (the "1600 Barberry Adversary") which has been voluntarily dismissed by the Claimants [Adv. ECF No. 32]; (ii) *1600 Barberry Lane 8, LLC and 1600 Barberry Lane 9, LLC v. Todd Mikles, et al.*, Case No. 37-2016-00019030-CU-BT-CTL, Superior Court of California, San Diego County (the "California State Court Action"); and *1600 Barberry Lane 8, LLC and 1600 Barberry Lane 9, LLC v. Cottonwood Residential, et al*., Case No. 170904221, Third Judicial District in and for Salt Lake County, Utah (the "Utah State Court Action"); and (iv) *1600 Barberry Lane 8, LLC and*

[1] The above-referenced bankruptcy cases of Debtors were substantively consolidated under the lead bankruptcy case *In re Daymark Realty Advisors, Inc.*, Case No. 18-23750-SMG (the "Bankruptcy Cases"). Accordingly, to the extent certain claims were filed separately or in both original cases, this objection intends to eliminate any duplicative claims.

1600 Barberry Lane 9, LLC v. Cottonwood Residential O.P., L.P., Cottonwood Capital Property Management, LLC, Cottonwood Capital Property Management, Inc. and Daniel Shaffer Case No. 20180105-CA (the "Utah Appeal").

4. Notably, the Claim was also the subject of the Motion to Apply Class Action Rules and Procedures Filed by Claimant 1600 Barberry Lane 9, LLC (the "Motion to Apply Class Action Rules and Procedures") seeking relief pursuant to Federal Rule of Bankruptcy 7023 and 9014 [ECF No. 170]; which was subsequently withdrawn.

5. However, the Claim fails to identify the purported class claimants[2] nor provide any reasonable basis for the exorbitant damage calculation as set forth in the Claim. In fact, as Claimants previously made clear, Claimants do not intend to seek class action certification in the Bankruptcy Court, rather "[t]he class claimants emphasize that they do not….seek to have this Court decide whether their action is suitable for treatment as a class action. Any such determination that is required may be made by the United States District Court. The claimants are merely asking this Court to apply the appropriate class actions rules to their class proof of claim, so they may later present this Court with a liquidated claim on behalf of the class." [ECF No. 170].

6. More importantly, according to the Claimants, 1600 Barberry Lane 8, LLC and 1600 Barberry Lane 9, LLC were formed as Delaware limited liability companies for purposes of holding a fractional ownership interests in twenty-six multifamily apartment properties (the "Properties"). As such, the Properties were capitalized with investor funds which it obtained from separate individuals, each contributing different amounts of monies at varying points in time in exchange for different percentages of membership interests or units in the company. Because each member's investment in and right to receive distributions from the Properties are distinguishable from one another, there is no logical basis to allege that the members constitute a "class of similarly situated persons."

7. Oddly, Claimants fail to provide any verification of authority or support for the State Court Actions and/or Adversary Proceeding to have been filed on their behalf. The Claim is also devoid of any reference to any operating agreement, members or member of the Properties or any statutory authority to file the Claim and/or prosecute the State Court Actions. Further, there is no support or verification as to whether or not the Claimants are operating entities or alternatively,

[2] Claimants allege the purported class exceeds "one thousand persons" but has never identified such persons.

non-operating entities with authority to bring claims on behalf of the alleged 330 "Members" who may have invested in the Properties.

8. On October 16, 2019, Claimants, along with other Objecting Creditors (as defined in the 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 (the "Settlement Motion") [ECF No. 319]), filed their Omnibus Notice of Withdrawal of Motions to Apply Class Action Rules and Procedures to Class Proofs of Claim [ECF No. 314] and effectively withdrew the Motions to Apply Class Action Rules and Procedures.

9. In addition, the Claimants failed to file a verified statement in support of the Claim and their alleged representation of more than one claimant during the Debtors' Chapter 11 Bankruptcy Cases. Moreover, the Claimants failed to include a statement that includes the copy of the instrument, if any, whereby 1600 Barberry is empowered to act on behalf of the claimants it purports to represent. The Claimants also failed to include the names, addresses, and nature of each disclosable interest of the claimants that 1600 Barberry purports to represent or act on behalf of and failed to include the specific circumstances regarding his appointment as agent for those claimants.

10. Accordingly, the Claim fails to comply with Federal Rules of Bankruptcy Procedure 7023 and 2019 and must be stricken.

B. Claimants Lack Standing to File the Claim.

11. In 2015, Claimants sold their combined 2.956% interest in the 312 unit garden apartment community known then as AMLI at Peachtree City Apartments located in Peachtree City, a suburb of Atlanta, Georgia (the "Property") to a third party in a general assignment (the "Assignment"). Pursuant to the Assignment and Section 13.1 of the PMA, Claimants assigned all rights, title, interest and property rights, including choses in action, related to the Property and relevant PMA to the third party. (PMA § 13.1). Choses in action are intangible property as a matter of law and therefore they were assigned. Claimants do not own an interest in any property and they have no standing to bring the Claim. In addition, as part of the sale of their interests, the Claimants agreed to a broad release of claims arising out of or relating to Claimants' acquisition of their TIC interests in the Property, but nevertheless brought this Claim in three different jurisdictions.

12. In addition, as argued above, Claimants have not set forth any evidence to support the position that they are somehow authorized to act on behalf of, or as representatives for, a class

of undisclosed persons with separate property interests. Claimants' self-imposed right to file its Claim on behalf of such persons is improper and does not constitute the requisite legal standing to bring this Claim.

C. <u>Lack of Legal Sufficiency and Support For the Claim.</u>

i. Court Order Dismissing the Claim, Affirmed on Appeal, Bars the Claim Through Collateral Estoppel/Res Judicata Principles.

a. ***The Claim is Likely Time Barred.***

13. The Claim is time barred by the applicable statute of limitations. In the complaints filed in the Utah State Court Action, the California State Court Action, and the 1600 Barberry Adversary, Claimants allege numerous causes of action which would form the basis of the Claims.

14. On June 6, 2016, Claimants filed the California State Court Action against DRM and other co-defendants asserting a cause of action for breach of fiduciary duty, which appears to be outside the applicable statute of limitations.

15. The Claimants knew, or should have known, about the facts surrounding the alleged Claim of breach at the time of the various disclosures and failed to allege any facts as to why they did not know the facts or could not have discovered the facts through a reasonable investigation. Therefore, any delayed discovery rule may not be applicable to avoid the statute of limitations with respect to the Claim.

b. There is No Fiduciary Duty as a Matter of Georgia Law.

16. The Claimants primarily base the Claim, the Utah State Court Action, and the California State Court Action on an alleged breach of a fiduciary relationship established by the PMA. The choice of law provision in the PMA states that Georgia law controls the agreement. The PMA expressly provides that "the parties contractually agreed that either party may compete with the Property that is being managed, and competitive relationships are not fiduciary relationships;" that "the parties agreed that 'Property Manager shall act solely in the capacity of an independent contractor for the Tenants in Common' . . . [and] as a matter of Georgia law, neither party is a fiduciary of the other because the parties contractually agreed that their relationship was not fiduciary in nature." The Utah Superior Court found this language operated to reject the existence of any fiduciary duty between the parties. The Utah Court of Appeals affirmed this decision. As found by the Utah Courts, the Claim should ultimately fail here, as a matter of law.

a. ***The Management Fees Are Not Actionable***.

17. The Claimants allege they were damaged by the excessive charging of above market fees and commissions, but the terms of the PMA do not limit management fees to market value. Section 9.1 of the PMA makes clear that the parties agreed that "The Property Management Fee shall be up to three percent (3%) of Gross Revenues . . . and the Asset Management Fee shall be up to two percent (2%) of the Gross Revenues." (PMA, § 9.1) Thus, not only were the management fees contractually authorized, but Claimants never exercised their right to terminate the PMA on the basis of any issue with those fees.

a. The Economic Loss Rule Bars the Claim and there is No Breach.

18. The alleged fiduciary duty "arises from the PMA" and the economic loss rule bars the Claim. The Claimants' allegations regarding a breach of the PMA "by charging property and asset management fees in excess of fair value lacks merit. The PMA expressly authorizes the fees that were charged, and the [Claimants] approved the budget disclosing such fees year after year. As such the Claimants cannot state a claim for breach of contract against the Debtors.

a. Claimants Fail to Show They Suffered Millions of Dollars in Damage.

19. Claimants have not provided any evidence of damage. Claimants invested $281,759 each, received $49,256 in distributions each, and sold their interests for a combined $1,300,200, less financing, for a net profit of $604,000. In addition, they received continuous distributions for the seven (7) years they owned interests in the Property. Any management fees that Claimants paid while they owned the Property were pursuant to the PMA; agreements that each TIC could terminate for any reason, but they never did. (PMA, § 10.) Claimants had notice of all fees and chose not to object or terminate year over year.

20. In addition, Claimants did not attach nor provide an itemized statement of interest, fees, expenses, or other charges in support of the Claim as required by Federal Rule of Bankruptcy Procedure 3001(c)(2)(A).

D. <u>The Claim Amount is Not Supportable.</u>

21. As argued above, Claimants are single members of twenty-six multi-family apartment properties and none of the individual members have been identified. The Debtors assert that as a matter of law, Claimants are not the liquidating trustees nor the managers of the Property, nor are they class representatives to file claims on behalf of any other members or owners of the Property.

22. In addition, Claimants no longer own any interest in the Property and are not class representatives nor do they have authority to file claims on behalf of any other owner of any other property. Nevertheless, the Claimants' Claim includes a component for compensatory damages, punitive damages, and attorneys' fees and costs—none of these are supportable.

23. Claimants cannot support $24,000,000 in compensatory damages.

a. Claimants received a significant profit from the sale of their Property interests in 2015.

b. Claimants' speculative recovery of an $8,000,000 "kickback" is also unsupported. Claimants paid DPR and/or Cottonwood property management fees pursuant to the PMA for services rendered, but such fees did not amount to $8,000,000.

c. There is no basis to recover $16,000,000 in "excess fees and costs". The language of the PMA expressly authorized the property and asset management fees that were charged and Claimants approved the budget disclosing such fees. This issue has already been addressed by the Utah Superior Court and affirmed on appeal.

24. Claimants cannot support a Claim for punitive damages. There is no evidence of any wrongdoing or fraudulent conduct the part of the Debtors that rise to level of punitive and exemplary damages. Therefore, Claimants cannot support $72,000,000 in punitive damages or meet any legal standard to obtain such an award given the allegations.

25. Claimants cannot support recovery of $100,000 in attorneys' fees and costs. Although the relevant PMA contains an attorneys' fees provision, it has been conclusively determined that there is no basis for the Claim under the PMA. In any event, Claimants have failed to provide an affidavit of costs or other verified statement itemizing the alleged attorney's fees they seek to recover.

E. <u>The Claim Amount is Incorrect.</u>

26. As argued above, the Claim fails to provide support for the amount that the Claimants seek to recover. Although Claimants received a profit from the sale of the Property, they nevertheless seeks to recover arbitrary, unsupportable, speculative damages for themselves and others whom they have no authority to represent. At best, the Claim amount is incorrect.

F. <u>The Claim Seeks Improper Interest Amounts, Damages, and Attorneys' Fees.</u>

27. As argued above, the Claim fails to provide support for the amount that it seeks to recover. Claimants seek to recover arbitrary, unsupportable, and speculative damages for themselves and others whom they have no authority to represent, and seek to recover interest on

improper and overstated damage amounts and recover attorneys' fees without any basis. In any event, Claimants failed to attach an itemization to verify such charges as required by Fed. R. Bank. P. 3001(c)(2)(A).

G. Duplicative Claims Must be Stricken.

28. Proof of Claim #997 is duplicative of Proof of Claim #760, as set forth in the Debtors' Claims Register, and, in addition to the reasons set forth above, must be stricken.

II. RELIEF REQUESTED

29. For the reasons stated above, the Claim is not supported by the allegations and causes of action set forth in the State Court Actions, and therefore, should be stricken in its entirety.

30. The Trustee reserves the right to amend any objection to any claim set forth herein, to object on additional grounds not set forth herein and/or to object to any further claims not presently set forth herein. By filing this Objection, the Trustee does not waive the right to file further objections or to pursue avoidance actions or other causes of action.

WHEREFORE, the Trustee, Chad S. Paiva, respectfully requests the entry of an Order (i) sustaining the Objection; (ii) disallowing and striking the Claim (Proof of Claim #997); (iii) disallowing and striking the Claim (Proof of Claim #760) and (iv) awarding any other or further relief that this Court deems just and proper.

Dated this 28th day of August, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Objection was served via CM/ECF upon all interested parties registered to receive electronic notification on the attached service list and/or via U. S. Mail on this on the 28th day of August, 2020.

By: /s/ *Barry P. Gruher*
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Via CM/ECF Notification

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