UNITED STATES BANKRPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
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In re:	Chapter 11
In re: DAYMARK REALTY ADVISORS, INC.,	Case No. 18-23750-RBR
In re: DAYMARK PROPERTIES REALTY, INC.,	Case No. 18-23751-RBR
In re: DAYMARK RESIDENTIAL MANAGEMENT, INC.	Case No. 18-23752-RBR
Debtors.	

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DEBTORS' JOINT RESPONSE TO
MOTION FOR RELIEF FROM AUTOMATIC STAY

Consolidated Debtors Daymark Realty Advisors, Inc. ("DRA Debtor"), Daymark Properties Realty, Inc. ("DPR Debtor"), and Daymark Residential Management, Inc. ("DRM Debtor", together the "Debtors"), by and through undersigned counsel, file this Joint Response in Opposition (the "Response") to the *Motion For Relief from the Automatic Stay* (ECF #42) (the "Stay Relief Motion") filed by purported creditors who have yet to file a claim in this bankruptcy case (the "Movants").

Summary

Debtors' filed their bankruptcy cases to, among other things, streamline a resolution of all claims and causes of action of all potentially interested parties before one court to avoid the considerable litigation costs that they can no longer afford to expend. To date, there are 464 filed claims exceeding $12,000,000. Movants would constitute 19 claims of unknown amount if they were filed (so far, they are not). Movants should not be permitted to drag Debtors back into protracted and expensive litigation to the detriment of the hundreds of other claimants.

Rather, as is commonly the purpose of a bankruptcy case, this Court should permit a streamlined claim filing and objection process to take place before this Bankruptcy Court.

Moreover, under a Plan proposed by Debtors, Debtors' burden to cover the expense of litigation over claims (or the litigation itself) may be entirely avoided and those resources available for other creditors. In short, Debtor seeks to avoid expense of litigation for the benefit of all constituencies. Movants seek to increase Debtors' administrative fees and costs to the detriment of the entire creditor body. Accordingly, Movants' Stay Relief Motion should be denied.

Introduction

1. DRA Debtor is a holding company that was formed in 2010 to own NNN Realty Advisors, Inc. ("NNNRA") and its subsidiaries, which at the time, included DPR Debtor and DRM Debtor. DPR Debtor and DRM Debtor were both national property managers for largely tenant-in-common ("TIC") owned properties.

2. Due in large part to the Great Recession, DRA Debtor's subsidiaries suffered to generate revenue from real estate-related services and began to wind down their affairs.

3. Generally ignoring the impact of the Great Recession, and DPR Debtor's and DRM Debtor's limited property management role with the TICs, certain of the TICs commenced litigation against Debtors and affiliates asserting a variety of far-fetched theories of liability.

4. Notwithstanding what Debtors' believe are frivolous claims, Movants have successfully caused the Debtors' estates to expend considerable resources in defending lawsuits across the country.

5. Moreover, thousands of others, no matter how unfounded or futile their claims may be, could theoretically bring similar lawsuits against Debtors potentially costing even more resources. Upon information and belief, Movants counsel continues to actively seek other potential plaintiffs to bolster his campaign against Debtors and their affiliates. *See, Debtors'*

Motion for an Injunction Against False and Misleading Statements By Catanzarite Law Corporation and Sanctions for Violation of 11 U.S.C. §§ 1121 and 1125 (ECF #83).

6. Debtors filed their proceedings for bankruptcy protection to consolidate their estates and resolve all claims (real and imagined) through a streamlined claim filing and objection process (if necessary) without incurring the costs and expenses of traditional litigation.

7. Debtors simply could not continue to fund litigation.

8. Movants' counsel is well aware of Debtors' economic situation. Movants have purposefully schemed their litigation to increase Debtors' costs as a strategy to claim victory where resolution on the merits would never be available.

9. The Stay Relief Motion is more of the same.

10. Essentially, Movants attempt to convince this Court that the most appropriate path towards a resolution is to walk backwards; straight into protracted and expensive litigation.

11. Movants proposal makes no sense and should not be permitted by this Court.

12. The Movants[1] fail to meet their burden to establish cause for obtaining relief from the automatic stay to proceed against the Debtors in three (3) pending arbitrations. Debtors are not participating in all three arbitrations and all Debtors do not have agreements to arbitrate related to the subject arbitrations. Moreover, lifting the automatic stay to allow certain parties to proceed with the pending arbitrations will undermine the purposes of these proceedings. The Movants cannot establish that cause exists to lift the automatic stay.

[1] The Movants do not all have claims pending in arbitration, there are only three (3) pending arbitrations which consist of a sub-set of the Movants. The Movants' counsel has been over-inclusive.

I. Background: The Movants' Claims Lack Merit.

13. The Movants are not scheduled creditors and they have not filed claims in these proceedings. The Movants are each plaintiffs in various lawsuits brought against the Debtors and affiliates **by the same law firm**.

14. Four of the lawsuits pending in state court have been stayed and ordered to proceed in arbitration, three (3) arbitrations have been initiated; two (2) of the arbitrations are currently stayed for reasons unrelated to the bankruptcy filings and all dates were vacated in the remaining arbitration to consider respondents' motion to dismiss based on claimants' lack of standing to bring claims.

15. Tellingly, Movants recently argued that the arbitration was stayed because of the bankruptcy filings.[2]

16. Movants seek to lift the automatic stay (or argue that it does not apply) and pursue their claims against the Debtors in the three (3) pending arbitration proceedings[3]—one that is stayed pending an appeal where no arbitrator has yet been assigned;[4] one that is stayed on

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[2] Claimants' response to the motion to dismiss based on Claimants' lack of standing was due December 31, 2018, but on December 24, 2018 Claimants' Counsels' office emailed the arbitrator a "Notice of Stay" and argued that the matter was stayed due to the bankruptcies. The Arbitrator has not responded to the Notice.

[3] On June 29, 2018, NNN Plantations at Haywood 1, LLC, NNN Plantations at Haywood 2, LLC, NNN Plantations at Haywood 13, LLC, and NNN Plantations at Haywood 23, LLC initiated arbitration, AAA Case Number 01-18-0002-4830; On September 1, 2017, NNN 1600 Barberry Lane 8, LLC and NNN 1600 Barberry Lane 9, LLC initiated arbitration, AAA Case Number 01-17-0005-0462; and on May 8, 2017, Dennis Dierenfield, William Gilmer, NNN 1818 Market Street 13, LLC, and Tyrone Wynfield initiated arbitration, AAA Case Number 01-17-0002-5456. No other arbitrations have been initiated. On September 24, 2018, the Orange County Superior Court in Case Number 30-2017-00910991 ordered Tyrone Wynfield to arbitration, but Wynfield has not initiated arbitration.

[4] On October 9, 2018, Counsel for defendants/respondents Plantations at Haywood M, LLC, Plantations at Haywood O, LLC, Haywood Storage, LLC and Plantations at Haywood, LLC informed the AAA case administrator that the parties would be filing a petition for a writ of mandate; and on November 16, 2018 defendants/respondents Plantations at Haywood M, LLC,

agreement of the parties for a decision in the Supreme Court of California, but still in the clause construction phase of the arbitration to determine what parties and claims are in the arbitration;[5] and one that is currently stayed pending the arbitrator's determination of whether Movants lack standing, also still in the clause construction phase, and recently where Movants argue the bankruptcy filings caused the entire matter to be stayed.[6] These claims would proceed more efficiently in bankruptcy.[7]

17. The "*Carlson Matter*": There is no pending arbitration related to this case and the case is still in its infancy. Richard Carlson is a beneficiary of G REIT Liquidating Trust, Inc. ("GREIT"), a liquidating trust managed by five (5) independent trustees. While Movants' Counsel argues that the action is brought on behalf of 13,856 investors, the Trust Agreement explicitly provides that any beneficiary lacks standing to bring any claims on behalf of GREIT, or its beneficiaries, and a beneficiary can only bring an action against the trustees. In addition, there has been no attempt to certify a class. That is the start of the deficiencies with the Movants' claims as there are issues with statute of limitations and failure to allege a basic duty. The state

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Plantations at Haywood O, LLC, Haywood Storage, LLC and Plantations at Haywood, LLC filed a petition for writ of mandate with the California Court of Appeal. Accordingly, the Plantations Matter is currently stayed pending the outcome of the writ of mandate. There has been no arbitrator appointed.

[5] On October 31, 2018, the claimants in the 1818 Matter and respondent Western Alliance Bank agreed to vacate the briefing schedule regarding clause construction of the arbitration clause "in order to await a decision in the case of Lamps Plus v. Varela" pending before the United States Supreme Court. Accordingly, there has been no activity in the 1818 Matter.

[6] On November 5, 2018, the arbitrator in the Barberry Matter granted respondents' request to file a dispositive motion to resolve the threshold issue of whether claimants have standing to bring claims; all dates were vacated and the standing issue is still pending.

[7] It is worth noting that Debtors are not all parties to any arbitration agreements. DRA Debtor is not a party to any arbitration agreement; DPR Debtor is party to one arbitration agreement, DRM Debtor is party to the other two arbitration agreements.

court sustained challenges to the complaint and first amended complaint and Carlson must file a second amended complaint subject to challenge.

18. The "*Cap Fund Matter*": There is no pending arbitration related to this case and the case is still in its infancy. Tyrone Wynfield is a member of NNN Capital Fund I, LLC and he argues that he is the "liquidating trustee" for the entity without proof that he has been appropriately appointed. Wynfield lacks standing to bring claims on behalf of NNN Capital Fund I, LLC. On August 2, 2018, the state court stayed discovery and on September 24, 2018, the state court ordered certain claims to arbitration. Wynfield never initiated arbitration; instead, he improperly sought discovery in the Superior Court action related to the claims ordered to arbitration. The defendants filed for a protective order. Debtors initiated the instant proceeding on November 4, 2018.

19. The "*Congress Center Matter*": There is no pending arbitration related to this case and the case is still in its infancy. Milton Brown was a member of NNN Congress Center, LLC, a Delaware limited liability company, and he argues that he is the "liquidating trustee" for NNN Congress Center, LLC despite failing entirely to comply with the requirements of the Operating Agreement and Delaware law regarding termination and appointment of the Manager or appointment of a "liquidating trustee." Brown lacks standing to bring claims. Several defendants have challenges to the complaint pending with the state court.

20. The "*Barberry Lane Matter*": While this matter does have a pending arbitration, the arbitrator is currently considering the threshold issue of whether claimants have standing to bring claims, thus this case is also in its infancy. NNN 1600 Barberry Lane 8, LLC and NNN Barberry Lane 9, LLC alleged that they bring claims on behalf of 1,000 investors, but they have never certified a class. Moreover, these entities lack standing to even bring any claims for

themselves as they sold their interests in the subject property and assigned all rights to bring claims through a general assignment. The Utah Court dismissed the entire action and the Arbitrator is currently considering a challenge on standing. The arbitration was commenced on August 23, 2017, not August 23, 2018. Movants failed to file a response to the motion attacking standing and Movants argued that the matter is stayed due to the bankruptcy filings.

21. The "*Plantations Matter*": There has been no arbitrator appointed and this matter is stayed pending the outcome of a writ of mandate. The plaintiffs in the "Plantations Matter" recently sold their interests in the subject property for a substantial gain. While there are numerous deficiencies in the claims, the fact is that plaintiffs have suffered no damages. Plaintiffs were represented by independent counsel at the time of the subject transaction, plaintiffs decided to reorganize their ownership structure with their fellow tenant-in-common owners, Cottonwood managed the property and the property now sold for a gain; Movants have not suffered any damages.

22. The "*1818 Matter*": The parties agreed to vacate all dates in arbitration for the threshold clause construction issues and await a Supreme Court of California decision. There is no present indication when a decision will be issued and when dates will be re-set. These are claims that are entirely duplicative of those that Movants' Counsel brought years ago on behalf of other tenant-in-common owners of the same property. In that prior arbitration, the arbitrator determined that the claims failed. Yet, Movants Counsel refiled the same claims subjecting them to arguments of *res judicata* and collateral estoppel.

23. The "*350 Seventh Matter*": There is no pending arbitration related to this case. On May 17, 2018, plaintiffs dismissed all securities fraud claims based on a ruling from the California Court of Appeal holding those claims failed as a matter of law. The remaining claims

relate to a contract between plaintiffs and NNN Realty Investors, LLC ("NNNRI") an affiliate of the Debtors that was placed into an assignment for the benefit of creditors proceding in 2015. Those claims are not against the Debtors.

24. The "*Willowbrook Matter*": There is no pending arbitration related to this case. Like in the 350 Seventh Matter, plaintiffs dismissed all securities fraud claims based on a ruling from the California Court of Appeal holding that those claims failed as a matter of law. The remaining claims relate to a contract between plaintiffs and NNNRI, not Debtors.

II. Argument

A. The Movants Do Not Have Enforceable Arbitration Agreements With Debtors.

25. The Eleventh Circuit set out the prevailing case law regarding enforcement of arbitration agreements in bankruptcy in *Whiting-Turner Contracting Co. v. Electric Machinery Enterprises, Inc. (In re Electric Machinery Enterprises, Inc.)*, 479 F.3d 791 (11th Cir. 2007). *In re Certified HR Services Co.*, No. 05-22912-BKC-RBR, 2007 WL 3342752 *2 (Bankr. S.D. Fla. Nov. 6, 2007). The Eleventh Circuit first examined whether the parties "entered into a valid arbitration agreement to resolve any and all claims or issues between them." *Whiting-Turner*, 479 F.3d at 795; *see also*, *Certified HR Services*, 2007 WL 3342752 *2.

26. Here, it is clear that the Movants fail to establish that they have entered into valid arbitration agreements with Debtors to resolve all claims. The Movants are not all participating in the pending three (3) arbitrations, nor are Debtors. Claimants in the Barberry Matter named DPR Debtor and DRM Debtor in that action, but an agreement to arbitrate claims only exists between DRM Debtor and those claimants. Claimants in the Plantations Matter named Debtors in that action, but an agreement to arbitrate claims exists only between DRM Debtor and those claimants. Finally, Claimants in the 1818 Matter named DRA Debtor and DPR Debtor in that

action, but an agreement to arbitrate claims exists only between DPR Debtor and those claimants. The Movants fail to establish that the subject arbitration agreements are enforceable by the moving parties against the Debtors. *See*, *Certified HR Services*, 2007 WL 3342752 *3-4 ("the burden of proof is on [the moving party] to show that the Trustee is somehow bound by the agreement . . . there is no evidence to demonstrate that Debtor is a party to the Contract.")

27. Moreover, as argued below, these agreements do not include class claims, which the Movants have argued are brought in the subject arbitrations. Therefore, all claims that the Movants wish to pursue in arbitration are not subject to arbitration. The Movants fail to meet their burden to show that the parties and claims belong in arbitration.

B. Debtors Have Not Agreed to Arbitrate Class Claims.

28. The United States Supreme Court held that in contrast to private individualized arbitrations, class-wide arbitrations are slower, more costly, pose increased risks, are not private, and are less predictable.[8] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2010). Movants argue that they have brought class claims in arbitration; however, given the vastly

[8] "[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348-49 (2011). "[A]bsence of multilayered review [in arbitration] makes it more likely that errors will go uncorrected [which] Defendants are willing to accept . . . since their impact is limited to the size of individual disputes, . . . [b]ut when damages . . . are aggregated and decided at once, the risk of an error will often become unacceptable." *Id*., at 350. Construing an arbitration provision to include an agreement to class-wide arbitration changes the parties' assumptions when they entered into the arbitration agreement. The Supreme Court pointed out that "[u]nder the Class Rules, 'the presumption of privacy and confidentiality' that applies in many bilateral arbitrations 'shall not apply in class arbitrations . . . thus potentially frustrating the parties' assumptions when they agreed to arbitrate." *Stolt-Neilson S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 686 (2010); *see also,* Rule 9 of the AAA Supplementary Rules for Class Arbitrations ("The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public.") The law is not clear on how an arbitration award impacts a nonparticipating class member or a noncontracting party. *Stolt-Neilson*, 559 U.S. at 686. Therefore, there is less certainty about the impact of class-wide arbitrations.

different nature of class-wide arbitrations, there is no clear indication that any Debtor that is a party to the subject arbitration agreements (which are not all Debtors) agreed to arbitrate class claims, and, silence is not sufficient as a matter of law.[9] More importantly, the Movants do not meet their burden to show that the subject arbitration agreements include class claims. *See*, *Certified HR Services*, 2007 WL 3342752 *4 (moving party "has failed to establish that the claim or issue to be arbitrated is subject to the arbitration agreement."). Very simply, there are no agreements to class-wide arbitration.[10]

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[9] The U.S. Supreme Court held that a party cannot be compelled to submit to class arbitration unless "there is a contractual basis for concluding that the party agreed to do so" and an arbitrator cannot infer that the parties agreed to class-wide arbitration "solely from the fact of the parties' agreement to arbitrate . . . . because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it simply by agreeing to submit their disputes to an arbitrator." *Stolt-Neilson*, 559 U.S. at 684-85. "[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id*. The differences between individual arbitration and class-wide arbitration explain why parties would not agree, unless explicitly, to class-wide arbitration: "the relative benefits of class-wide arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration." *Id*. "Arbitration is poorly suited to the higher stakes of class litigation . . . [and the Supreme Court] find[s] it hard to believe that defendants would bet the company with no effective means of review." *Concepcion*, 563 U.S. at 350.

[10] Justice Alito, joined by Justice Thomas, explained that "[i]f we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he **improperly inferred** '[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate.'" [emphasis added] *Oxford Health Plans v. Sutter* (2013) 569 U.S. 564, 574. Justice Alito reasoned that *"[a]rbitration 'is a matter of consent' . . . and the absent members of the plaintiff class have not submitted themselves to this arbitrator's authority in any way*." *Id*. (finding that the fact that the other members of the plaintiff class signed contracts with arbitration clauses *materially identical* to the plaintiff that brought the suit did not change the analysis as "an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination" and the other class members did not authorize the arbitrator to make such a determination). Moreover, Justice Alito explained that a "distribution of op-out notices does not cure this fundamental flaw . . . [because] an offeree's silence does not normally modify the terms of a contract." *Id*. at 547-75. The Supreme Court has consistently upheld the importance of enforcing arbitration agreements as written, mentioning that "some parties have sometimes chosen to arbitrate on a classwide basis," but courts may not reshape "traditional individualized

C. The Automatic Stay Should Not be Lifted as it Would Conflict With the Underlying Purposes of the Chapter 11 Proceedings.

29. Movants conclude that "the totality of the circumstances favors relief from stay," but fail to explain why. The Movants rely on a case where a Chapter 11 Trustee was compelled to bring claims in arbitration through an arbitration agreement. *See*, *Hay & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 885 F.2d 1149, 1149 (3d. Cir. 1989). There, the Third Circuit found that the arbitration caused the least delay and the parties should arbitrate "unless that effect would seriously jeopardize the objectives of the Code." *Id*. at 1161; *see also*, *In re Trident Shipworks, Inc.*, 243 B.R. 130, 133 (Bankr. M.D. Fla. 1999) (explaining how the Third Circuit reached its opinion in *Hay & Co*.).

30. Likewise, in *Whiting-Turner*, the Eleventh Circuit instructed courts to look to "whether enforcing the parties' arbitration agreement would inherently conflict with the underlying purposes of the Bankruptcy Court." *Whiting-Turner*, 479 F.3d at 798-99; *see also*, *Certified HR Services*, 2007 WL 3342752 *2 (never reaching this question).

31. Here, Debtors initiated these proceedings to resolve **ALL** claims through a consolidated planned liquidation; obtaining assets in the estates to pay creditors with legitimate claims. The three (3) pending arbitrations are currently not proceeding forward for reasons independent of the bankruptcies.[11] Moreover, Debtors are not parties to all pending arbitrations, Debtors are not all parties to the subject arbitration agreements, and there is no agreement to arbitrate class claims. The pursuit of claims in separate forums conflicts with this underlying purpose of an organized plan of liquidation.

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arbitration by mandating classwide arbitration procedures without the parties' consent." *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1620, 1623 (2018) (holding in the employment context collective bargaining schemes do not undercut individualized agreements to arbitrate).

[11] *See supra* footnotes 2 through 6.

32. Proceeding in this forum towards a planned liquidation will cause the least delay for all creditors and result in the highest benefit to all creditors.

33. Movants argue that the "stay ought to be lifted if it would be more appropriate to permit proceedings to continue in their original forum without great prejudice to the bankruptcy estate." Yet, that is not the case here; proceeding with the various lawsuits outside of the bankruptcy forum greatly prejudices the estates by (i) subjecting the estates to lawsuits that the Debtors can no longer afford to defend, (ii) interfering with the Debtors ability to formulate and confirm a plan, (iii) further weakening the financial situation of the Debtors, and (iv) negatively impacting the Debtors' estates. The present plan proposes to obtain assets in the estates to make distributions to creditors with legitimate claims.

34. *The law does not force co-defendants to share the cost of defense with debtors.* The Movants cite no case law to support their claim that the Debtors can force co-defendants to pay for their defense costs, or otherwise share defense costs. In fact, all claims are alleged to be direct claims against Debtors, not the third party co-defendants who are named in the above-referenced lawsuits through theories of successor liability. Therefore, these third parties actually have claims of equitable indemnification, contractual indemnification, and contribution against the Debtors; direct claims are alleged against the Debtors, not the other way around. Accordingly, there is no benefit of shared defense costs.

35. *Debtors are located in Florida.* DRA Debtor is not qualified to do business in California and other than acting as a holding company for NNNRA, DRA Debtor has no other principal assets or operations. Along with DRA Debtor, NNNRA is located in Florida. DRA Debtor is located in 6750 North Andrews Avenue, Suite 200, Fort Lauderdale, Florida 33309 and it had a separate office at 110 E. Broward Boulevard, Suite 1700, Fort Lauderdale, Florida 33309

for years. DPR Debtor and DRM Debtor are also located in 6750 North Andrews Avenue, Suite 200, Fort Lauderdale, Florida 33309, and they were both previously owned by NNNRA.

36. The Debtors' books and records, and files are located in the Southern District of Florida. The Movants argue something different and cite to paragraph 26 of each of Debtor's statement of financial affairs. The statement of financial affairs for the Debtors provides that Todd Mikles maintained the books and records of each at "6750 N. Andrews Ave. Suite 200 Fort Lauderdale, FL 33309." At best, the Movants mischaracterize the evidence before the Court.

37. *The automatic stay does not automatically extend to non-debtors.* **The Movants** took the position that all of the lawsuits are stayed due to these proceedings.

38. **The Movants** have filed various notices of stay in an effort to stay cases even as to non-debtors; however, such an effect is not automatic. *See*, *In re Charles P. Young Co.*, 111 B.R. 410, 417 (Bankr. S.D.N.Y. 19990) ("the automatic stay applies to the interest arbitration proceedings only to the extent that they go forward against [ ], the debtor."). Thus, the Movants have invited the situation of which they now complain—the Movants could very well continue in the lawsuits against those non-debtor entities as there is no automatic stay currently in effect against those parties.

39. In fact, Movants' counsel broadly advertised on his website that, "Kenneth Catanzarite will petition the court to appear for his investor clients including to dismiss the cases, seek relief from the automatic stay to continue the litigation and other appropriate relief." If granted, even in the form of a comfort order that the automatic stay does not apply to non-debtors, such order would be used to further misinform potential parties in interest.

40. The Stay Relief Motion is thinly veiled marketing propaganda; not a legitimate request for relief.

41. *Co-counsel for Movants is a Florida resident.* The Movants are currently represented, by competent local counsel, Todd Frankenthal. Therefore, there is no prejudice in a "cross-country" forum.

42. *Counsel does not represent a majority of the creditors.* The Movants' Counsel inflates his represented clients as he has not certified any class actions and he does not represent a majority of the creditors. As argued above, the clients that are represented by Movants' Counsel have serious threshold issues with standing. Moreover, the Movants have not filed proofs of claims in these proceedings, and any claims are subject to challenge.

D. Movants Fail to Meet Their Burden to Show Cause.

43. The automatic stay applies to arbitration proceedings. *In re Drexel Burnham Lambert Group, Inc.*, 160 B.R. 508, 511 (Bankr. S.D.N.Y. 1993); *In re Charles P. Young Co.*, 111 B.R. 410, 417 (Bankr. S.D.N.Y. 19990). The legislative history for the automatic stay provision specifically indicates that it should apply to arbitration proceedings by stating "[a]ll proceedings are stayed, including arbitration." H.R. Rpt. 95-595, at 340 (1977) (reprinted in 1978 U.S.C.C.A.N. 5963, 6297).

44. The Movants have the burden of proof regarding showing cause for lifting the stay. 11 *U.S.C.* §§362(g)(1)-(2). The Movants argue that the stay does not apply to the pending arbitrations and that "[a] contractual provision requiring mandatory arbitration of disputes constitutes 'cause' for granting relief from stay." The Movants utterly fail to prove that cause exists to lift the automatic stay in favor of the three (3) pending arbitrations.

45. Arguably, the claims that the Movants seek to arbitrate in the pending three (3) arbitrations are core matters. The allowance or estimation of a claim against a debtor is a purely core matter. *In re Trident Shipworks, Inc.*, 243 B.R. 130, 134 (Bankr. M.D. Fla. 1999) (holding

pending arbitration dispute "could equally be resolved in this Court as speedily as the arbitration."); *see also*, 28 *U.S.C.* §157(b)(2)(B). Core matters also include matters concerning the administration of the estate and any proceeding affecting the liquidation of assets of the estate. 29 *U.S.C.* §157(b)(2)(A); 29 *U.S.C.* §157(b)(2)(O). Yet, even if the Court finds that those claims are not core matters, "A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." 28 *U.S.C.* §157(c)(1).

46. In addition to focusing on the core versus non-core nature of a dispute, Courts have applied the following factors when considering lifting the automatic stay for a pending arbitration proceeding: (1) "the degree to which the nature and extent of litigation and evidence would make the judicial forum preferable to arbitration;" (2) "the extent to which special expertise is necessary to resolve the dispute;" and (3) "the identity of the persons comprising the arbitration panel and their track record in resolving the disputes." *In re Trident Shipworks, Inc.*, 243 B.R. 130, 133 (Bankr. M.D. Fla. 1999) (considering these factors, Courts have the "discretion to decline to permit arbitration" even for non-core matters). Consideration of these factors weighs in favor of denying relief from stay:

(1) *The nature and extent of litigation and evidence making the judicial forum preferable to arbitration.* The *Trident Shipworks Court* found that even in a complex Chapter 11 case in "an embryonic stage" "the dispute could equally be resolved in this Court as speedily as the arbitration." *Id*., at 134. The primary concern was the speed of reaching a resolution. All three (3) arbitrations are currently stayed for reasons beyond these bankruptcy filings. Moreover, all three (3) arbitrations are in the preliminary stages, determining threshold issues and procedural issues of what parties and claims should be part of the arbitration proceeding. Finally, in addition to the factual underpinnings of the corporate structure of Debtors, and the structure of

the subject tenant-in-common investments, two (2) of the arbitrations have overlapping legal and factual issues.[12] The Movants can easily submit their claims in these proceedings and they can be resolved as speedily, and most likely faster, as they would be in arbitration. Therefore, this factor weighs heavily in favor of denying relief from stay.

(2) *The extent to which special expertise is necessary.* The *Trident Shipworks Court* found that even cases "loaded with highly technical esoteric specialized . . . issues . . . [are] not much different from other disputes requiring expert testimony" and that "[i]n sum, the extent that special expertise is necessary will be the same whether the matter is arbitrated or litigated." *Id*. This Court is very familiar with the subject tenant-in-common investments as it has handled related cases and it is capable of considering any necessary expert testimony. This factor weighs in favor of denying relief from stay.

(3) *The identity of persons comprising the arbitration panel and track record for resolving disputes*. In *Trident Shipworks*, the moving party did not present any evidence regarding the arbitration panel or its track record for resolving disputes. *Id*., at 134-35. The *Trident Shipworks Court* concluded that "considering the totality of the picture, this record is insufficient to find 'cause' to lift the stay." *Id*. at 135. Likewise, the Movants present no evidence regarding the arbitration panel or the track record for resolving disputes. Therefore, this factor does not weigh in favor of lifting the automatic stay, and, considering the totality of the circumstances, weighs in favor of denying relief from the automatic stay.

[12] Claimants in the Plantations Matter bring a claim for breach of duty related to the alleged payment of $8 million in a sub-management transaction with Cottonwood, a claim identical to the claim brought in the Barberry Matter.

E. The Policies of the Bankruptcy Code Conflict with Allowing Parallel Arbitrations.

47. "The overriding principle of current bankruptcy legislation is that claims against the estate of a debtor shall be resolved in one single forum." *See*, *In re Trident Shipworks, Inc.*, 243 B.R. 130, 132 (Bankr. M.D. Fla. 1999) (refusing to lift stay for a pending arbitration). In addition, the Bankruptcy Code favors maintaining the assets of the estate for creditors. *In re Knepp*, 229 B.R. 821, 844-45 (Bankr. N.D. Ala. 1999). Here, allowing the Movants to proceed against the Debtors in arbitration jeopardizes the Debtors' ability to formulate and confirm a plan, weakens the financial situation of the Debtors, and adversely impacts the estates of the Debtors.

III. Conclusion

48. For all of the reasons stated herein, there is no cause to lift the stay, stay relief should not be granted, the Stay Relief Motion should be denied.

WHEREFORE, Debtors respectfully request that this Court enter and order denying the Stay Relief Motion and granting such other and further relief as it deems just and proper.

Dated January 30, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via the Court's CM/ECF system on all parties registered to receive notice electronically in connection to this matter on this the 30th day of January 2019.

/s/ Morgan B. Edelboim
Morgan B. Edelboim