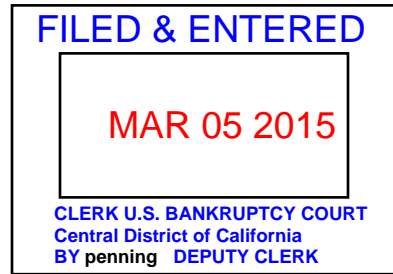


1 MICHAEL D. BRESLAUER [SBN 110259]  
mbreslauer@swsslaw.com  
2 SOLOMON WARD SEIDENWURM & SMITH, LLP  
401 B Street, Suite 1200  
3 San Diego, California 92101  
(t) 619.231.0303  
4 (f) 619.231.4755  
5 Attorneys for Daymark Properties Realty, Inc.



**CHANGES MADE BY COURT**

**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
LOS ANGELES DIVISION**

11 In re  
12 NNN 1818 MARKET STREET 16, LLC, a  
Delaware limited liability company,  
13 Debtor.  
14  Affects

Lead Case No. 2:15-bk-10111-TD  
Chapter 11  
Jointly Administered With:  
Case No. 2:15-bk-10317-TD  
Case No. 2:15-bk-10121-TD

15 In re  
16 NNN 1818 MARKET STREET 21, LLC, a  
Delaware limited liability company,  
17 Debtor.  
18  Affects

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW REGARDING  
DISMISSAL OF EACH JOINTLY  
ADMINISTERED CHAPTER 11 CASE**  
Date: February 25, 2015  
Time: 2:00 p.m.

19 In re  
20 NNN 1818 MARKET STREET 37, LLC, a  
Delaware limited liability company,  
21 Debtor.  
22  Affects

Courtroom 1345  
Honorable Thomas B. Donovan

23  Affects All Debtors.  
24  
25

26  
27  
28

I.

**PROCEDURAL BACKGROUND**

1  
2  
3 A. This hearing arises in the Chapter 11 cases commenced by each of NNN 1818  
4 Market Street 16 LLC, a Delaware limited liability company (“NNN 16”), NNN 181 Market Street  
5 21, LLC, a Delaware limited liability company (“NNN 21”), and NNN 1818 Market Street 37,  
6 LLC, a Delaware limited liability company (“NNN 37” and together with NNN 16 and NNN 21,  
7 the “Jointly Administered Debtors”).

8 B. NNN 16 commenced its Chapter 11 case on January 5, 2015; NNN 21 and NNN 37  
9 commenced their respective Chapter 11 cases on January 6, 2015. On February 23, 2015, each  
10 Jointly Administered Debtor filed a consent of its Independent Manager.

11 C. This Court entered its order administratively consolidating the Jointly Administered  
12 Debtors’ Chapter 11 cases on January 14, 2015 [Docket No. 25].

13 D. Daymark Properties Realty, Inc. (“Daymark”) filed and served its Motion for  
14 Dismissal of Each Jointly Administered Chapter 11 case on January 23, 2015 [Docket No. 39] and  
15 filed its Amended Notice of Motion for Dismissal of Each Jointly Administered Chapter 11 case  
16 on January 29, 2015 [Docket No. 46] (collectively, the “Dismissal Motion”). The Dismissal  
17 Motion was supported by a Memorandum of Points and Authorities and the Declarations of Todd  
18 Mikles and Frederick Gordon [Docket No. 40].

19 E. The Dismissal Motion seeks dismissal of each of the Jointly Administered Debtors’  
20 Chapter 11 cases for “cause,” pursuant to 11 U.S.C. §1112(b). The Dismissal Motion is in proper  
21 form and content, supported by sufficient, persuasive evidence and was timely filed and properly  
22 served on the Jointly Administered Debtors, creditors, and parties in interest.

23 F. Several parties in interest joined in Daymark’s Dismissal Motion as reflected in  
24 their joinder filed February 4, 2015 [Docket No. 49]. Each of these joining parties (the “Joining  
25 TICs”) owns a tenancy-in-common interest in the same property in which each Jointly  
26 Administered Debtor owns an interest.<sup>1</sup>

27  
28 <sup>1</sup>The name of each Joining TIC is in the form “NNN 1818 Market Street \_\_, LLC”, and the Joining  
TICs are NNN 181 Market Street 1, LLC, 2, 9, 10, 11, 14, 15, 20, 23, 24, 25, 26, 30 and 35.

1 G. The Jointly Administered Debtors filed a memorandum and evidence opposing the  
2 Dismissal Motion on February 11, 2015 [Docket No. 56].

3 H. Daymark filed its reply memorandum in support of the Dismissal Motion on  
4 February 18, 2015 [Docket No. 64], and certain other parties in interest filed their reply to the  
5 Debtors' opposition on February 18, 2015 [Docket No. 65].

6 I. The Court held a hearing to consider the Dismissal Motion and the opposition  
7 thereto on February 25, 2015 at 2:00 p.m.

8 Based on all of the documents and evidence submitted by Daymark, the Jointly  
9 Administered Debtors and the Joining TICs in connection with the Dismissal Motion and the  
10 argument at the hearing, this Court makes the following findings of fact and conclusions of law in  
11 its ruling on the Motion, to supplement its reasons announced on the record at the hearing.

12 **II.**

13 **FINDINGS OF FACT**

14 1. Each of the three Debtors filed voluntary petitions under Chapter 11 of the United  
15 States Bankruptcy Code.

16 2. Shortly after the Chapter 11 petitions were filed, the Debtors removed the  
17 following non-bankruptcy matters (collectively, the "Removed Actions") to the bankruptcy court:

18 a. *Daymark Properties Realty, Inc. v. NNN 1818 Market Street 16, LLC, et al.*,  
19 Orange County Superior Court Case No. 30-2014-00763758-CU-PA-CGC; filed as Adversary  
20 Proceeding No. 2:15-ap-01011-TD;

21 b. *NNN 181 Market Street 1, LLC, et. al. v. Daniel P. O'Keefe and Doris C.*  
22 *O'Keefe, individually and as Trustees of the O'Keefe Family Trust dated February 27, 1997, et.*  
23 *al.*, Los Angeles County Superior Court Case No. BC559541; filed as Adversary Proceeding No.  
24 2:15-ap-01012-TD;

25 c. *NNN 1818 Market Street 16, LLC, et al. v. Daymark Properties Realty, Inc.,*  
26 *et al.*, Orange County Superior Court Case No. 30-2014-00722965-CU-BC-CJC; filed as  
27 Adversary Proceeding No. 2:15-ap-01013-TD; and,

28 \_\_\_\_\_

1                   d.       *NNN 1818 Market Street 13, LLC, et.al., v. Daymark Realty Advisors, Inc.,*  
2 *et al.* San Diego Superior Court Case No. 37-2014-00040421-CU-FR-CTL, filed in the United  
3 States Bankruptcy Court for the Southern District of California as Adversary Proceeding No. 15-  
4 90017-PB.

5           3.       Each of the Jointly Administered Debtors is a single member limited liability  
6 company formed under the laws of the state of Delaware. Each of the Jointly Administered  
7 Debtors is a tenant-in-common (“TIC”) with 31 other limited liability companies which together  
8 own the fee interest in real and personal property and improvements located at 1818 Market Street,  
9 Philadelphia, Pennsylvania (the “Property”). The two individuals and a family trust which are the  
10 respective sole equity holders in the three Jointly Administered Debtors’ Chapter 11 cases are  
11 Gabor Csupo (Case No. 15-10111), Daniel P. O’Keefe and Doris C. O’Keefe, Trustees of the  
12 O’Keefe Family Trust (Case No. 15-10317), and John Ray (Case No. 15-10121). The equity  
13 ownership in the Property of the Jointly Administered Debtors totals 11.625%. There are  
14 approximately 134 other equity investors in the Property whose collective equity interests total  
15 88.375%

16           4.       Each of the TIC investors signed a tenant-in-common agreement (the “TIC  
17 Agreement”) which was recorded in the Official Records of the City of Philadelphia, Pennsylvania  
18 on April 20, 2006.

19           5.       Litigation arose between Daymark on the one hand and the Jointly Administered  
20 Debtors on the other hand, first in Pennsylvania state court and later in California state court,  
21 regarding, among other issues, the provisions of the TIC Agreement.

22           6.       Daymark sought to compel arbitration of its disputes and arbitration proceedings  
23 were commenced with the American Arbitration Association in Orange County, California (AAA  
24 Case No. 01 14 000 9940). Howard Harrison was appointed as arbitrator and the arbitration was  
25 binding on the parties. The Jointly Administered Debtors asked that additional issues and claims  
26 be included in the Arbitration and such additional issues and claims were included.

27           7.       The arbitration proceeding was divided into three phases, with the first phase  
28 determining whether Daymark had validly exercised an option to acquire the TIC interests held

1 respectively by the Jointly Administered Debtors. The second phase is to decide how much, if any,  
2 consideration is owed to the Jointly Administered Debtors upon the exercise of the option and the  
3 third phase, if necessary, is to decide the Jointly Administered Debtors' cross claims against  
4 Daymark and others.

5 8. On December 17, 2014, Arbitrator Harrison issued his "Final Phase 1 Award of  
6 Arbitrator." Among many other findings, the arbitrator ruled that the purchase option to acquire  
7 the Jointly Administered Debtors' TIC interests in the Property had been validly exercised and  
8 that none of the defenses to its exercise had been established.

9 9. The Jointly Administered Debtors have argued that the Arbitrator's Final Phase 1  
10 Award used "tortured logic" and was an "unfair and incorrect result" following a 7-day trial which  
11 proceeded at "breakneck speed." None of the Jointly Administered Debtors has claimed in  
12 opposition to the Dismissal Motion that the Arbitration has been tainted by fraud, corruption, an  
13 undisclosed conflict or by the exclusion of evidence.

14 10. The Phase 2 hearing of the arbitration was scheduled to begin on January 6, 2015.  
15 As set forth above, the three Jointly Administered Debtors commenced their Chapter 11 cases on  
16 January 5 and 6, 2015.

17 11. The Jointly Administered Debtors each filed their schedules and statement of  
18 financial affairs identifying an identical set of creditors. Most of the creditors are those whose  
19 claims arose in the ordinary course of business and the operation of the Property. The Jointly  
20 Administered Debtors have no individual business operations other than their ownership of the  
21 Property. The Jointly Administered Debtors have no employees, and have no income and no  
22 independent expenses, except as handled by the manager for the Property.

23 12. On February 24, 2015, the Jointly Administered Debtors filed their joint motion to  
24 reject the option agreement, which comprises four paragraphs within the TIC Agreement [Docket  
25 No. 74] (the "Rejection Motion").

26 13. The Removed Actions contain many claims among and between non-debtor parties  
27 and contain no claims under federal or bankruptcy law. The Removed Actions and the Rejection  
28

1 Motion evidence the Jointly Administered Debtors' intention to use the bankruptcy process for  
2 improper purposes, including to evade an adverse ruling in a non-bankruptcy forum.

3 14. The Jointly Administered Debtors filed their Chapter 11 cases without good faith  
4 and in an effort to avoid the consequences of the arbitration rulings rendered against them,  
5 specifically the "Final Phase 1 Award of Arbitrator." This is an impermissible "second bite at the  
6 apple" and the Chapter 11 cases are an inappropriate use of the bankruptcy process. In essence,  
7 the Chapter 11 cases represent a blatant forum-shopping effort by the Jointly Administered  
8 Debtors which shows that each of the Jointly Administered Debtors acted without "good faith."

9 15. To the extent that any of the forgoing findings of fact is more appropriately  
10 construed as a conclusion of law, it shall be deemed such.

11 **III.**

12 **CONCLUSIONS OF LAW**

13 1. The district court has jurisdiction over these chapter 11 cases and proceedings  
14 pursuant to 28 U.S.C. §1334, and this Court has authority to hear these cases and proceedings  
15 under 28 U.S.C. §157 and General Order 13-05 of the United States District Court for the Central  
16 District of California filed July 1, 2013. The Dismissal Motion is a core proceeding under 28  
17 U.S.C. §157(b)(2)(A). The statutory basis for dismissal of these chapter 11 cases is 11 U.S.C.  
18 §1112.

19 2. A lack of good faith in the filing of a Chapter 11 petition is grounds for dismissal.  
20 *In re Marsch* 36 F. 3d 825 (9<sup>th</sup> Circuit 1994) and *In re Little Creek Development Company* 779 F.  
21 2d 1068 (5<sup>th</sup> Circuit 1986). If a Chapter 11 petition is not filed in good faith, dismissal is an  
22 appropriate remedy. *In re Pacific Rim Investment* 243 Bankr. 768, 771 (D. Colo. 2000).

23 3. It is the Jointly Administered Debtors' ultimate burden to establish good faith in  
24 filing these Chapter 11 cases. *In re Integrated Telecomm Express, Inc.* 384 F. 3d 108, 118 (3<sup>rd</sup>  
25 Circuit 2004). *In re Mense*, 509 Bankr. 269, 277 (Bankr. C.D. Cal. 2014).

26 4. Although the courts have identified various factors to be considered in connection  
27 with a ruling on a motion to dismiss a Chapter 11 case for "cause", no single factor is dispositive  
28 and each case must be viewed in total to determine whether a case serves a proper bankruptcy

1 purpose. Not all factors or circumstances are necessary to support a finding that a case was filed  
2 in bad faith. *In re Can Alta Properties*, 87 Bankr. 89, 91 (Bankr. 9<sup>th</sup> Cir. 1988) and the list of  
3 factors that may constitute “cause” under Section 1112(b) is not exclusive. The existence of good  
4 faith depends on “an amalgam of factors and not upon a specific fact” *In re Arnold*, 806 F. 2d  
5 937, 939 (9th Cir. 1986).

6 5. Daymark brought its motion to dismiss pursuant to Bankruptcy Code Section  
7 1112(b) for “cause.”

8 6. The factual patterns endemic to cases lacking good faith have been assembled in *In*  
9 *re Little Creek* and most of the indicia identified by the courts are present in the Jointly  
10 Administered Debtors’ chapter 11 cases: (a) the Jointly Administered Debtors’ cases are single  
11 asset cases; (b) the Jointly Administered Debtors’ sole assets are the TIC interests in the Property  
12 and the claims they purport to hold against Daymark and others for damages; (c) the Jointly  
13 Administered Debtors have no income and no cash flow; (d) the Jointly Administered Debtors  
14 have no employees; and (e) the Jointly Administered Debtors have litigated with Daymark in a  
15 non-bankruptcy forum and lost a proceeding which they have removed, together with related  
16 litigation to this Court. The Jointly Administered Debtors filed their Chapter 11 cases in an  
17 unreasonable and bad faith attempt to forum shop and to gain a tactical litigation advantage not  
18 within the legitimate scope of bankruptcy laws.

19 7. The case of *In re Argus Group 1700, Inc.*, 206 Bankr. 757 (D. E.D. Penn. 1997) is  
20 instructive and the Court adopts the reasoning and applicability of *In re Argus Group* to the facts  
21 and circumstances before the Court in this case. See also, *In re Mense* 509 Bankr. 269, 277  
22 (Bankr. C.D. Cal. 2014).

23 8. The Arbitrator’s filing of his Final Phase 1 Award, albeit not yet confirmed,  
24 significantly restricts the Jointly Administered Debtors from escaping the conclusions reached  
25 therein or the results obtained. *In re Ter Bush* 273 Bankr. 625 (Bankr. S.D. Cal. 2004), *In re*  
26 *Smith* 269 Bankr. 629 (Bankr. E.D. Tex. 2001).

27 9. The Jointly Administered Debtors filed their Chapter 11 cases without good faith  
28 and for an improper purpose inconsistent with the requirements of the Bankruptcy Code.

