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Parties in Interest

FILED & ENTERED

MAR 05 2015

CLERK U.S. BANKRUPTCY COURT
Central District of California
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CHANGES MADE BY COURT
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re
NNN 1818 MARKET STREET 16, LLC,
Debtor.

Case No. 2:15-bk-10111-TD

Chapter 11

Jointly Administered with:
2:15-bk-10317-TD
2:15-bk-10121-TD

In re
NNN 1818 MARKET STREET 21, LLC,
Debtor.

Adv. Pro. 2:15-ap-01012-TD

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW REGARDING
ORDER REMANDING PROCEEDING
(INCLUDING ALL CLAIMS AND
CAUSES OF ACTION THEREIN) TO
STATE COURT**

In re
NNN 1818 MARKET STREET 37, LLC,
Debtor.

Date: Feb. 25, 2015
Time: 2:00 P.M.

Courtroom 1345

Judge: Hon. Thomas B. Donovan

NNN 1818 MARKET STREET 1, LLC, a
Delaware limited liability company, *et al.*,

Plaintiffs,

v.

DANIEL P. O'KEEFE and DORIS C.
O'KEEFE, individually and as trustees of
the O'KEEFE FAMILY TRUST dated
February 27, 1997, *et al.*,

Defendants.

1 On January 16, 2015, this Court entered its Order to Show Cause re: Remand
2 (Removed Proceeding) and Notice of Status Conference ("OSC"). The OSC invited parties
3 to file memoranda addressing whether this removed proceeding (the "Removed Action")
4 should be remanded. On February 4, 2015, the "Non-Removing Parties"¹ filed a
5 memorandum in support of remand, and on February 11, 2015, the debtors filed a
6 memorandum in opposition. A status conference on the OSC was held on February 25,
7 2015, at 2:00 P.M., at which time the Court considered whether to remand the Removed
8 Action under 28 U.S.C. § 1452(b).

9 Also on February 25, 2015, at the same time, this Court heard the motion of
10 Daymark Properties Realty, Inc. to dismiss the debtors' chapter 11 cases under
11 section 1112(b) of the Bankruptcy Code. The Non-Removing Parties joined in that motion
12 to dismiss.

13 In reaching its decision to remand, the Court has considered the record in the jointly
14 administered chapter 11 cases of NNN 16, NNN 21, and NNN 37 (all as defined below),
15 including the motion to dismiss and all papers and argument offered in support of and
16 opposition to dismissal, and the papers and argument offered in support of and opposition
17 to remand of the Removed Action, as well as the papers and argument submitted in
18 connection with the order to show cause entered in the two other proceedings that one or
19 more of the debtors removed to this Court. Based on that record, for the reasons set forth
20 on the record at the hearing and as supplemented below, the Court finds and concludes that
21 there are substantial and compelling equitable grounds for remand of the Removed Action
22 under 28 U.S.C. § 1452(b).

23 In accordance with Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52(a)(1), the Court
24 makes its findings of fact and states its conclusions of law as follows.

27 ¹ The Non-Removing Parties are the fourteen plaintiffs in the state-court action and in
28 this removed action. The name of each Non-Removing Party is in the form "NNN 1818
Market Street __, LLC." The Non-Removing Parties are NNN 1818 Market Street 1, 2,
9, 10, 11, 14, 15, 20, 23, 24, 25, 26, 30, and 35.

1 A. **FINDINGS OF FACT**

2 The following facts are substantially undisputed.

3 1. On October 3, 2014, the Non-Removing Parties filed a complaint in the
4 Superior Court of the State of California County of Los Angeles, commencing the action
5 styled *NNN 1818 Market Street 1, LLC, et al., v. O'Keefe, et al.*, Case No. BC559541 (the
6 "State-Court Action"). The complaint names as defendants Daniel P. O'Keefe and Doris C.
7 O'Keefe, individually and as trustees of the O'Keefe Family Trust dated February 27, 1997
8 (collectively, "O'Keefe"), John Ray, Gabor Csupo, NNN 1818 Market Street 16, LLC
9 (currently the debtor in Case No. 15-bk-10111) ("NNN 16" or a "debtor"), NNN 1818
10 Market Street 21, LLC (currently the debtor in Case No. 15-bk-10317) ("NNN 21" or a
11 "debtor"), and NNN 1818 Market Street 37, LLC (currently the debtor in Case No. 15-bk-
12 10121) ("NNN 37" or a "debtor").

13 2. In the State-Court Action, the Non-Removing Parties do not assert any
14 claims or causes of action that expressly refer to federal law. All alleged claims or causes
15 of action arise under state law. The State-Court Action includes claims or causes of action
16 asserted by the Non-Removing Parties, none of whom is a debtor in a case under the
17 Bankruptcy Code, against O'Keefe, Ray, and Csupo, none of whom is a debtor in a case
18 under the Bankruptcy Code. In the State-Court Action, the Non-Removing Parties demand
19 trial by jury.

20 3. The defendants in the State-Court Action filed a demurrer. According to the
21 notice of removal filed by NNN 16 on January 8, 2016, all six defendants (that is, O'Keefe,
22 Ray, Csupo, NNN 16, NNN 21, and NNN 37) filed a demurrer, which was set for hearing
23 in March 2015.

24 4. NNN 16 filed its chapter 11 petition on January 5, 2015; NNN 21 and
25 NNN 37 filed their chapter 11 petitions on January 6, 2015.

26 5. Based on the debtors' schedules, the three debtors own less than 12% of the
27 total tenancy-in-common interests in the property, that is, the office building (real estate,
28 improvements, and personal property) in Philadelphia, Pennsylvania. According to the

1 Non-Removing Parties and based on the evidence submitted by Daymark in support of its
2 motion to dismiss, the Non-Removing Parties own more than 36% of the tenancy-in-
3 common interests.

4 6. Shortly after the commencement of the chapter 11 cases, one or more of the
5 debtors filed notices of removal in the bankruptcy court of various pending state-court
6 litigation and filed the corresponding papers in the relevant state courts to effect the
7 removal of the litigation and all claims and causes of action therein:

8 a. *Daymark Properties Realty, Inc. v. NNN 1818 Market Street 16, LLC,*
9 *et al.*, Orange County Superior Court Case No. 30-2014-00763758-CU-PA-CGC;
10 filed as Adv. Pro. No. 2:15-ap-01011-TD;

11 b. *NNN 1818 Market Street 1, LLC, et al. v. Daniel P. O'Keefe and*
12 *Doris C. O'Keefe, individually and as Trustees of the O'Keefe Family Trust dated*
13 *February 27, 1997, et al.*, Los Angeles County Superior Court Case
14 No. BC559541; filed as Adv. Pro. No. 2:15-ap-01012-TD;

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

18 d. *NNN 1818 Market Street 13, LLC, et al., v. Daymark Realty Advisors,*
19 *Inc., et al.*, San Diego Superior Court Case No. 37-2014-00040421-CU-FR-CTL,
20 filed in the United States Bankruptcy Court for the Southern District of California
21 as Adv. Pro. No. 15-90017-PB.

22 As noted previously, item b is the "Removed Action." Items a and c are the "Other Central
23 District Removed Actions."

24 7. In the Notice of Removal of the Removed Action filed in this Court,
25 NNN 16 asserted that all the claims and causes of action therein are core. And to the extent
26 that they are not core, NNN 16 (with the consent of the other two debtors) expressly
27 consented to the entry of final orders and judgments by the bankruptcy court.
28

1 8. The Non-Removing Parties deny that the Removed Action is core. Among
2 other things, they point out that the Removed Action includes claims or causes of action *by*
3 nondebtors (the Non-Removing Parties) *against* nondebtors (O'Keefe, Ray, and Csupo).
4 The Non-Removing Parties also assert a right to jury trial and do not consent to the entry
5 of final orders or judgment by this Court.

6 If any of the findings of fact above is more appropriately considered a conclusion of
7 law, it shall be considered and treated as a conclusion of law.

8 **B. CONCLUSIONS OF LAW**

9 1. The district court has jurisdiction over these chapter 11 cases and
10 proceedings under 28 U.S.C. § 1334, and this Court has authority to hear these cases and
11 proceedings under 28 U.S.C. § 157 and General Order 13-05 of the United States District
12 Court for the Central District of California filed July 1, 2013. Without regard to whether
13 the Removed Action or claims or causes of action therein are "core" or whether this Court
14 may enter final orders or judgments with respect to any of those matters, the question
15 whether to remand the Removed Action under 28 U.S.C. § 1452(b) is "core," and this
16 Court may enter a final order or judgment with respect to that question.²

17 2. Under Ninth Circuit law, removal statutes must be strictly construed.
18 *California v. Dynegy, Inc.*, 375 F.3d 831, 838 (9th Cir. 2004); *Salveson v. Western States*
19 *Bankcard Ass 'n*, 731 F.2d 1423, 1426 (9th Cir. 1984). There is a "strong presumption"
20 against removal jurisdiction, and the removing party (here, the debtors) always has the
21 burden of establishing that removal is proper. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th
22 Cir. 1992).

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24
25 ² In *Stern v. Marshall*, 546 U.S. ___, 131 S.Ct. 2594 (2011), the Supreme Court held that
26 there is a small class of proceedings that may be "core" under the statute, 28 U.S.C.
27 § 157, but with respect to which a bankruptcy judge nevertheless may not, consistent
28 with the Constitution, enter a final order or judgment. That fine distinction is not
relevant here, and in this document the terms "core proceedings" and "proceedings as to
which a bankruptcy judge may enter final orders or judgments" are used
interchangeably.

1 3. In evaluating whether there are equitable grounds for remand under
2 28 U.S.C. § 1452(b), this Court does not need to determine whether any particular claim or
3 cause of action is or is not core. Some of the claims or causes of action might be or become
4 core proceedings. Others of the claims or causes action are indubitably noncore, involving
5 as they do claims or causes of action arising under state law asserted by nondebtors (the
6 Non-Removing Parties) against other nondebtors (O'Keefe, Ray, and Csupo).

7 4. The Non-Removing Parties have suggested that at least some of the claims or
8 causes of action in the Removed Action are not even within the related-to jurisdiction of
9 28 U.S.C. § 1334(b), notwithstanding the broad any-conceivable-effect test applied in the
10 Ninth Circuit in evaluating related-to jurisdiction. For purposes of considering remand, the
11 Court assumes that all claims and causes of action within the Removed Action are, at a
12 minimum, within the related-to jurisdictional ambit of 28 U.S.C. § 1334(b).

13 5. In their memorandum in opposition to remand, the debtors assert that the
14 rejection of the so-called "Option Agreement" in accordance with their recently filed
15 motion to reject will somehow make remand unnecessary and that this Court will be best
16 situated to resolve claims with respect to the Option Agreement. The debtors also assert
17 that the Removed Action should be stayed, but of course, the action against the debtors, at
18 least, is subject to the automatic stay irrespective of the court in which the action is
19 pending. The automatic-stay question does not suggest anything one way or the other
20 about remand and does not suggest anything about the court in which the claims against
21 O'Keefe, Ray, and Csupo, nondebtors not protected by the automatic stay, should proceed.

22 6. The cases list various factors that the court should consider in deciding
23 whether to remand an action. Under *Hopkins v. Plant Insulation Co.*, 349 B.R. 805, 813
24 (N.D. Cal. 2006) (citing *Williams v. Shell Oil Co.*, 169 B.R. 684, 692–93 (S.D. Cal. 1994)),
25 this Court should consider the following seven factors in determining whether equity
26 favors remand:

- 27 (1) the effect of the action on the administration of the bankruptcy
28 estate;

- (2) the extent to which issues of state law predominate;
- (3) the difficulty of applicable state law;
- (4) comity;
- (5) the relatedness of the action to the bankruptcy case;
- (6) any jury trial right; and
- (7) prejudice to plaintiffs from removal.

7. With respect to factor 2, state-law issues predominate entirely: there are no questions of substantive federal law. Other than under 28 U.S.C. § 1334, there is no basis for federal jurisdiction over the Removed Action. There is no federal-question jurisdiction under 28 U.S.C. § 1331 and no diversity jurisdiction under 28 U.S.C. § 1332. The debtors have not suggested any other basis for federal jurisdiction. Although this Court is of course competent to consider state-law issues, viz. factor 3, the Removed Action involves complicated factual matters regarding alleged breaches of fiduciary duty by nondebtors O'Keefe, Ray, and Csupo, etc. In addition, factor 4, comity, or deference to other courts (such as the Superior Court of California), probably also suggests that remand is appropriate, although that factor, either alone or in combination with others, is not decisive.

8. The Non-Removing Parties have asserted a right to trial by jury. They have not yet done anything that would waive their right to jury trial against the three debtors, and in all events they have preserved their right to a jury trial on their claims or causes of action against the nondebtors. At best, if this Court retained the Removed Action, the claims and causes of action against those nondebtors could not be heard in this Court; the withdrawal of the reference back to the district court would be required.

9. Factors 1 and 5 consider the connections between the Removed Action and the chapter 11 cases. To be sure, on a trivial or tautological basis, the disposition of the Removed Action "affects" the administration of the chapter 11 cases, as does almost every action plausibly "related to" the cases. But the Removed Action does not affect the day-to-day administration of the cases. The mere fact that the disposition of the Removed Action

1 might affect in some way, for example, the ultimate prospects of reorganization is not,
2 without more, a reason to retain these cases. This is especially so when consideration is
3 taken of those aspects of the Removed Action that are, as noted elsewhere, by nondebtors
4 against nondebtors.

5 10. Similarly, from a merely mechanistic perspective, there is some logical
6 "relatedness" between the Removed Action and the chapter 11 cases generally. If, for
7 example, this Court determined that an effort to reject the Option Agreement constituted a
8 breach of the fiduciary duty owing from one tenant-in-common to another, that could
9 "affect" these chapter 11 cases, whether or not this Court approved a rejection of the
10 Option Agreement under section 365 of the Bankruptcy Code. But without more, that does
11 not suggest that there is a compelling connection between the Related Action and the
12 debtors' claimed "reorganization efforts." That connection is even more attenuated when
13 considering the relationship between the litigation between or among various groups of
14 nondebtors on the one hand and these chapter 11 cases on the other.

15 11. Ultimately, however, it is factor 7, prejudice to the nondebtor plaintiffs (i.e.,
16 the Non-Removing Parties) that by itself provides the compelling equitable grounds to
17 remand the Removed Action. On the one hand, there is no particular reason why the
18 Removed Action must or should remain in bankruptcy court, a court that is unable to hear
19 all matters and afford complete relief to the parties. On the other hand, there is the
20 substantial prejudice to the Non-Removing Parties, who own roughly three times more of
21 the property at issue than do the debtors together, being dragged into this Court, especially
22 (but not solely) regarding their claims against nondebtors who are not entitled to the
23 protection of the automatic stay or the broader protection of this Court. The Removed
24 Action involves not merely "claims" against the debtors and certain nondebtors: it also
25 involves the disposition of the Non-Removing Parties' property rights, that is, their TIC
26 interests.

27 12. In sum, there is no reason, compelling or otherwise, that the Non-Removing
28 Parties should be forced to litigate their state-law claims, especially against nondebtors, in

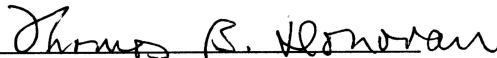
1 this Court, and there is no reason that this Court, or the district court, should be burdened
2 by these matters as to which the state court has full jurisdiction and with respect to which
3 litigation is already pending. The equitable grounds for remand under 28 U.S.C. § 1452(b)
4 are compelling.

5 13. In a separate set of findings of fact and conclusions of law filed on the
6 docket for the jointly administered chapter 11 cases, this Court explains its decision to
7 dismiss the cases under section 1112(b) for cause, specifically, for not having been filed in
8 good faith. That lack of good faith provides additional equitable grounds for remand under
9 28 U.S.C. § 1452(b). Likewise, the forum-shopping and similar concerns reflected in this
10 Court's decisions to remand the Other Central District Removed Actions underscore that
11 remand is appropriate for this Removed Action. Nevertheless, without regard to the
12 dismissal or the Court's view regarding the debtors' lack of good faith in commencing the
13 chapter 11 cases or the removal or remand of the Other Central District Removed Actions,
14 there are ample sufficient and independent equitable grounds to remand this Removed
15 Action and all claims and causes of action therein, looking at the facts and circumstances
16 of this Removed Action in isolation.

17 If any of the conclusions of law above is more appropriately considered a finding of
18 fact, it shall be considered and treated as a finding of fact.

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23 Date: March 5, 2015


Thomas B. Donovan
United States Bankruptcy Judge