

MICHAEL D. BRESLAUER [SBN 110259]  
mbreslauer@swsslaw.com  
SOLOMON WARD SEIDENWURM & SMITH, LLP  
401 B Street, Suite 1200  
San Diego, California 92101  
(t) 619.231.0303  
(f) 619.231.4755

Attorneys for Daymark Properties Realty, Inc.

**FILED & ENTERED**

**MAR 05 2015**

CLERK U.S. BANKRUPTCY COURT  
Central District of California  
BY penning DEPUTY CLERK

**CHANGES MADE BY COURT**

**UNITED STATES BANKRUPTCY COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**LOS ANGELES DIVISION**

In re  
NNN 1818 MARKET STREET 16, LLC, a  
Delaware limited liability company,  
Debtor.

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

In re  
NNN 1818 MARKET STREET 21, LLC, a  
Delaware limited liability company,  
Debtor.

Adversary Proc. No. 2:15-ap-01013-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, a  
Delaware limited liability company,  
Debtor.

Date: February 25, 2015  
Time: 2:00 p.m.

Courtroom 1345  
Honorable Thomas B. Donovan

NNN 1818 MARKET STREET 16, LLC, a  
Delaware limited liability company; NNN  
1818 MARKET STREET 21, LLC, a  
Delaware limited liability company; NNN  
1818 MARKET STREET 37, LLC, a  
Delaware limited liability company; GABOR  
CSUPO, an individual; DANIEL PATRICK  
O'KEEFE, individually and as trustee of the  
O'KEEFE FAMILY TRUST dated February  
27, 1997; JOHN RAY, an individual,

Plaintiffs,

1 v.

2 DAYMARK PROPERTIES REALTY, INC.  
3 f/k/a NNN PROPERTIES, INC.; DAYMARK  
4 REALTY ADVISORS, INC.; SOVEREIGN  
5 CAPITAL MANAGEMENT GROUP, INC.;  
6 TODD MIKLES, an individual; WILLIAM  
WHITE, an individual; DOES 1-20, inclusive,  
Defendants.

7  
8 On January 16, 2015, this Court entered its Order to Show Cause re: Remand (Removed  
9 Proceeding) and Notice of Status Conference ("OSC"). The OSC invited parties to file memoranda  
10 addressing whether this removed proceeding (the "Removed Action") together with two other  
11 removed proceedings (the "Other Central District Removed Actions", defined below) should be  
12 remanded. On February 4, 2015, Daymark Properties, Realty, Inc. ("Daymark") filed a  
13 memorandum in support of remand [Docket No. 12], and on February 11, 2015, the debtors filed a  
14 memorandum in opposition [Docket No. 13]. A status conference on the OSC was held on  
15 February 25, 2015, at 2:00 P.M., at which time the Court considered whether to remand the  
16 Removed Action under 28 U.S.C. §1452(b).

17 Also on February 25, 2015, at the same time, this Court heard Daymark's motion to  
18 dismiss the debtors' chapter 11 cases under section 1112(b) of the Bankruptcy Code.

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

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

3 **I. Findings of Fact**

4 The following facts are substantially undisputed.

5 1. On May 15, 2014 NNN 1818 Market Street 16, LLC and other plaintiffs filed a  
6 complaint in the Superior Court of the State of California County of Orange, commencing the  
7 action styled *NNN 1818 Market Street 16, LLC, et al. v. Daymark Properties Realty, Inc., et al.*,  
8 Orange County Superior Court Case No. 30-2014-00722965-CU-BC-CJC (the “State Court  
9 Action”). The complaint names as plaintiffs Daniel P. O’Keefe and Doris C. O’Keefe, individually  
10 and as trustees of the O’Keefe Family Trust dated February 27, 1997, John Ray, Gabor Csupo,  
11 NNN 1818 Market Street 16, LLC (the debtor in Case No. 15-bk-10111) (“NNN 16”), NNN 1818  
12 Market Street 21, LLC (the debtor in Case No. 15-bk-10317) (“NNN 21”), and NNN 1818 Market  
13 Street 37, LLC (the debtor in Case No. 15-bk-10121) (“NNN 37” , and together with NNN 16 and  
14 NNN 21, the “Jointly Administered Debtors”). The Complaint names as defendants Daymark  
15 Properties Realty, Inc. Daymark Realty Advisors, Inc., Sovereign Capital Management Group.  
16 Inc., Todd Mikles and William White.

17 2. In the State Court Action, the plaintiffs do not assert any claims or causes of action  
18 that expressly refer to federal law. All alleged claims or cause of action arise under state law. The  
19 State-Court Action includes claims or causes of action asserted by the Jointly Administered  
20 Debtors in these cases and by O’Keefe, Ray, and Csupo, none of whom is a debtor in a case under  
21 the Bankruptcy Code against the defendants.

22 3. The State Court Action seeks damages under various theories of liability and seeks  
23 to audit and inspect the books of Daymark.

24 4. Daymark, the Jointly Administered Debtors, O’Keefe, Ray, Csupo, Mikles and  
25 White are parties to an American Arbitration Association Case No. 01 14 0000 9940 (the  
26 “Arbitration”). On December 17, 2014, AAA Arbitrator Harrison issued his “Final Phase 1  
27 Award” containing his decision pertaining to Daymark’s exercise of an Option at issue between  
28 Daymark and the Jointly Administered Debtors, and addressed other matters raised in connection

1 with Daymark's enforcement of an Option Agreement between the parties. The claims in the  
2 Removed Action are substantively identical to a cross-complaint filed against Daymark in the  
3 Arbitration by the Jointly Administered Debtors, O'Keefe, Ray and Csupo.

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

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

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

13 b. *NNN 1818 Market Street 1, LLC, et. al. v. Daniel P. O'Keefe and Doris C.*  
14 *O'Keefe, individually and as Trustees of the O'Keefe Family Trust dated February 27, 1997, et*  
15 *al.*, Los Angeles County Superior Court Case No. BC559541; filed as Adv. Pro. No. 2:15-ap-  
16 01012-TD;

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

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

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

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

1           7. Daymark denies that the Removed Action is core. Among other things, Daymark  
2 asserted that the Removed Action includes claims or causes of action *by* non-debtors (O'Keefe,  
3 Ray, and Csupo) *against* non-debtors (Daymark, Mikles and White). Daymark did not consent to  
4 the entry of final orders or judgment by this Court. Daymark also asserts a right to jury trial and  
5 does not consent to the entry of final orders or judgment by this Court

6           8. To the extent that any of the forgoing findings of fact is more appropriately  
7 construed as a conclusion of law, it shall be deemed and construed as such

## 8 **II. Conclusions of Law**

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

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

22           3. In evaluating whether there are equitable grounds for remand under 28 U.S.C.  
23 § 1452(b), this Court does not need to determine whether any particular claim or cause of action is  
24

---

25 <sup>1</sup> In *Stern v. Marshall*, 546 U.S. \_\_\_, 131 S.Ct. 2594 (2011), the Supreme Court held that there is  
26 a small class of proceedings that may be "core" under the statute, 28 U.S.C. § 157, but with  
27 respect to which a bankruptcy judge nevertheless may not, consistent with the Constitution,  
28 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 or is not core. Some of the claims or causes of action might be or become core proceedings. Others  
2 of the claims or causes action are indubitably noncore, involving as they do claims or causes of  
3 action arising under state law asserted by non-debtors (O'Keefe, Ray, and Csupo) against other  
4 non-debtors (Daymark, Mikles and White).

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

- 9 (1) the effect of the action on the administration of the bankruptcy estate;  
10 (2) the extent to which issues of state law predominate;  
11 (3) the difficulty of applicable state law;  
12 (4) comity;  
13 (5) the relatedness of the action to the bankruptcy case;  
14 (6) any jury trial right; and  
15 (7) prejudice to plaintiffs from removal.

16 5. With respect to factor 2, state-law issues predominate entirely: there are no  
17 questions of substantive federal law. Other than under 28 U.S.C. § 1334, there is no basis for  
18 federal jurisdiction over the Removed Action. There is no federal-question jurisdiction under  
19 28 U.S.C. § 1331 and no diversity jurisdiction under 28 U.S.C. § 1332. The debtors have not  
20 suggested any other basis for federal jurisdiction. Although this Court is of course competent to  
21 consider state-law issues, viz. factor 3, the Removed Action seeks to impose on this Court issues  
22 which are the subject of the Arbitrator's Final Phase 1 Award already rendered as between  
23 Daymark and the Jointly Administered Debtors. In addition, factor 4, comity, or deference to  
24 other courts (such as the Superior Court of California or the AAA), strongly suggests that remand  
25 is appropriate. The Removed Action is evidence of blatant forum shopping and constitutes an  
26 improper attempt to get a "second bite at the apple," providing compelling equitable grounds to  
27 remand the Removed Action.

1           6. Factors 1 and 5 consider the connections between the Removed Action and the  
2 chapter 11 cases. To be sure, on a trivial or tautological basis, the disposition of the Removed  
3 Action "affects" the administration of the chapter 11 cases, as does almost every action plausibly  
4 "related to" the cases. But the Removed Action does not affect the day-to-day administration of  
5 the cases. The mere fact that the disposition of the Removed Action might affect in some way, for  
6 example, the ultimate prospects of reorganization is not, without more, a reason to retain these  
7 cases. This is especially so when consideration is taken of those aspects of the Removed Action  
8 that are, as noted elsewhere, by non-debtors against non-debtors.

9           7. Similarly, from a merely mechanistic perspective, there is some logical  
10 "relatedness" between the Removed Action and the chapter 11 cases generally.

11           8. Ultimately, however, it is factor 7, prejudice to the non-debtors (Daymark, Mikles  
12 and White) and the Court's conclusion that the chapter 11 cases constitute an impermissible use of  
13 the Bankruptcy Code and removal of the Removed Action is evidence of blatant forum shopping,  
14 prejudicial to Daymark, Mikles and White that provides the compelling equitable grounds to  
15 remand the Removed Action.

16           9. In sum, there is no reason, compelling or otherwise, that this Court, or the district  
17 court, should be burdened by these matters as to which the state court has full jurisdiction and with  
18 respect to which litigation is already pending. The equitable grounds for remand under 28 U.S.C.  
19 § 1452(b) are compelling.

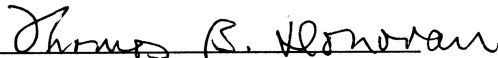
20           10. In a separate set of findings of fact and conclusions of law filed on the docket for  
21 the jointly administered chapter 11 cases, this Court explains its decision to dismiss the cases  
22 under section 1112(b) for cause, specifically, for not having been filed in good faith. That lack of  
23 good faith provides additional equitable grounds for remand under 28 U.S.C. § 1452(b). Likewise,  
24 the concerns reflected in this Court's decisions to remand the Other Central District Removed  
25 Actions underscore that remand is appropriate for this Removed Action. Nevertheless, without  
26 regard to the dismissal or the Court's view regarding the Jointly Administered Debtors' lack of  
27 good faith in commencing the chapter 11 cases or the removal or remand of the Other Central  
28 District Removed Actions, there are ample sufficient and independent equitable grounds to

1 remand this Removed Action and all claims and causes of action therein, looking at the facts and  
2 circumstances of this Removed Action in isolation.

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

5  
6 ###  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

22  
23 Date: March 5, 2015

  
Thomas B. Donovan  
United States Bankruptcy Judge