UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
NNN 123 NORTH WACKER, LLC, et al.,[1]	)	Case No. 13-39210 (JBS)
Debtors.	)	(Jointly Administered)

DEBTORS' OPPOSITION TO THOMAS'S
MOTION TO DISMISS CHAPTER 11 CASES

NNN 123 North Wacker, LLC ("TIC 0") and NNN 123 North Wacker Member, LLC ("TIC Member" and, collectively, the "Debtors"), as and for their opposition to the motion to dismiss (the "Motion") [Docket No. 155] filed by Troy Thomas ("Thomas"), state as follows:

Preliminary Statement

1. The Debtors took all the proper steps to file these cases, and their decision to file was made on an informed basis, in satisfaction of all of their respective fiduciary obligations.

2. The Debtors' prospects at the time of the filing were bleak. The Property had declined significantly in value since the tenant in common owners (with TIC 0, the "TICs") purchased it in 2005 for $175 million. When these cases were filed on October 4, 2013, the Property was worth considerably less than the current mortgage debt of $134.5 million; the loan was in payment default, the TICs having failed to make the required payments for August and September, and the loan, which is in a CMBS structure, was being transferred to special servicing.

3. Thus, when the Debtors determined to file these cases, they had legitimate concerns about the direction of the Property, and the growing likelihood that it could end up in

[1] The Debtors, along with the last four digits of each Debtor's federal tax identification number, are: NNN 123 North Wacker, LLC (4336) and NNN 123 North Wacker Member, LLC (7290).

foreclosure. The Debtors' decision to file was also influenced by the fact that the Non-Debtor TICs had engaged the lender in discussions for a year and had no agreement to show for it.[2]

4. Contrast that bleak picture with where the Debtors stand today. The Debtors have brokered a solution to the myriad problems facing the Property, the terms of which are embodied in the proposed restructuring support agreement (the "RSA") pending the Court's approval.

5. In a nutshell, the RSA would (i) keep the mortgage loan in place on terms fully-negotiated with the lender; (ii) raise $12-15 million of new equity; (iii) remove the Property from its tenant in common structure; (iv) avoid significant adverse tax consequences for those Non-Debtor TICs that consent to the transaction; (v) give consenting Non-Debtor TICs the option to invest additional money to acquire 10% of the new equity in the transaction; (vi) provide an additional guaranty of the mortgage debt from a new entity, Sovereign Capital, approved by the lender; and (vii) even allow existing equity holders like Thomas to retain their interests.

6. Under different circumstances, a debtor faced with opposition to a plan support agreement might proceed directly to the plan process. *Here, however, the Debtors need the protections afforded by the RSA.* The RSA "locks in" the support of the secured lender, always critical in a case like this one but even more critical now that the loan has been assigned to a new special servicer. The change was triggered by a decline in the lender's appraised value of the Property, as a result of which a new controlling class of certificate holders was entitled to

[2] Contrary to Thomas' assertions, the Debtors' manager, NNN Realty Investors, LLC ("NNN Realty"), was in communication with TIC Member's equity holders in advance of filing these cases. While the consent or those equity holders was not required under the Debtors' respective LLC Agreements (as discussed *infra*), the Debtors' manager solicited their input at the time and holders accounting for over 60% of TIC Member's equity gave verbal affirmation to the filing of these cases. A week ago, NNN Realty conducted a straw poll of TIC Member's equity holders, asking them to ratify the steps that were taken to file these cases and also to appoint a new Independent Manager for TIC 0. While ratification of the filing by TIC Member's equity holders *is not a requirement* (for reasons discussed *infra*), the poll was conducted in an effort to try and narrow the disputed issues before the Court. The results so far are inconclusive, but the manager has been advised that Thomas and the Non-Debtor TICs' advisors are lobbying the equity holders hard and inundating them with emails and phone calls to chill the outcome. It is not known what representations are being made to influence those results.

appoint the new special servicer. The RSA also "locks in" ND Investment, which is contributing 90% of the new equity capital of $12-15 million that the Property so desperately needs.

Thomas's Motion to Dismiss

7. The Motion itself is largely a rehash of arguments from Thomas's RSA Objection [Docket No. 135], which he provided to the Debtors on March 17, 2014. Instead of filing the Motion at that time (or at any other point in the last six months), Thomas waited to press the "file" button until the parties were walking into the hearing on the RSA on March 28, 2014.

8. That timing was no accident. Thomas waited until the last minute to file the Motion in an effort to disrupt the Court's consideration of the RSA. By waiting like he did, Thomas also ensured that the Debtors' time to respond to the Motion would expire on April 18, 2014,[3] which, of course, is the deadline for the Court's approval of the RSA.

9. The RSA was filed on February 21, 2014, and has been tied up in litigation for six weeks. Thomas is a nominal equity holder; he invested $25,000 to acquire what amounts to a 0.345% equity stake in TIC Member. He has incurred more than that in attorney's fees to date. Thomas and the Non-Debtor TICs are coordinating their efforts;[4] what they hope to accomplish by delaying the RSA, and who is funding the contested litigation, is unclear, however. The fact that their equity in the Property has no value suggests that they may be looking for additional "holdout" leverage. It also appears that they are buying time to try and convince other equity holders to join their crusade. Whatever the motive, and whether it is a single "out of the money" equity holder or all of the equity holders and Non-Debtor TICs seeking to dismiss these cases, the facts won't change -- the Debtors took all of the appropriate steps to file these cases.

[3] *See* Fed. R. Bankr. P. 2002(a)(4) (requiring 21 days' notice of a motion to dismiss a chapter 11 case).

[4] The Debtors are aware that Thomas has some referral or consulting arrangement with the group, CMS, serving as financial advisor to the Non-Debtor TICs. The financial terms of that arrangement are not known.

Summary of Thomas's Arguments

10. Thomas argues that these cases should be dismissed under section 1112(b) of the Bankruptcy Code on grounds that the petitions were filed without proper corporate authority:

	Thomas' Arguments	Debtors' Responses
1.	Thomas alleges that unanimous consent of the equity holders was required to file bankruptcy, which they did not give. His argument is based on an *unsigned draft* of the TIC 0 LLC Agreement, and he argues that the equity of TIC Member should be recharacterized as equity of TIC 0. (*See* Mot. at ¶¶ 22 - 25).	TIC Member - TIC Member is the multi-member LLC. The consent of its equity holders, which include Thomas, was not required to file bankruptcy under the terms of the TIC Member LLC Agreement. TIC 0 - TIC 0 is the single member LLC. Its 100% member, TIC Member, approved TIC 0's filing. There is no basis for the Court to recharacterize the equity of TIC Member as equity of TIC 0.
2.	Thomas alleges that replacing TIC 0's Independent Manager was improper. (*See* Mot. at ¶ 25).	TIC 0's Independent Manager was replaced pursuant to the terms of the TIC 0 LLC Agreement, which required the consent of TIC 0's 100% member, TIC Member, not TIC Member's equity holders.
3.	Thomas alleges that TIC Member's manager, NNN Realty Investors, LLC, was never approved by TIC Member's equity holders and, thus, not authorized to file TIC Member. (*See* Mot. at ¶¶ 32 - 36)	NNN Realty Investors, LLC, f/k/a Triple Net Properties, LLC, is the same manager TIC Member's equity holders approved when they invested. It was duly authorized to file TIC Member's bankruptcy.

11. Thomas bases much of his argument on an *unsigned draft* of the TIC 0 LLC Agreement. He contends that the unsigned draft was attached to offering materials he allegedly relied on when he invested. It is not clear what Thomas received from, or was told by, the promoters, Triple Net Properties, LLC ("Triple Net") and Thompson, when he invested in 2005.[5] However, he is not entitled to rely on an unsigned draft, and the *signed, final* versions of the LLC Agreements for TIC Member and TIC 0[6] *do not contain* the provision in his unsigned draft,

[5] Nor can the Debtors say precisely what Thomas knew about the transaction at the time. It should be noted, however, that Thomas is a practicing attorney and a licensed broker who holds himself out as having substantial experience with tenant in common investments. Also, in addition to his personal investment in the transaction, Thomas sold at least one TIC interest to a Non-Debtor TIC, and received a commission for such sale.

[6] A true and correct copy of the TIC Member LLC Agreement is attached to Declaration of Todd Mikles (the "Mikles Declaration") as Exhibit 1. A true and correct copy of the TIC 0 LLC Agreement is attached to Mikles

(continued...)

Section 18.3, that he argues required the equity holders' unanimous consent to file these cases.

12. Thomas also argues that his interests should in effect be recharacterized as equity of TIC 0, not TIC Member. He is trying to take advantage of a consent provision in the signed, final TIC 0 LLC Agreement *that is not in the signed, final TIC Member LLC Agreement*. As his basis, Thomas argues that when he invested, the promoters contemplated a structure where each TIC would be organized as a single limited liability company. Ultimately, the lender required that each TIC be organized as two limited liability companies, a parent and 100% subsidiary, to allow for the mezzanine loan the TICs needed to purchase of the Property. If TIC Member's equity holders were deemed to hold equity of TIC 0, as Thomas now proposes, nine years after the fact, the lender never would have financed the TICs' purchase of the Property.

13. Notably, the PPM that Thomas says he relied on states that it was being circulated *before* the equity was fully subscribed, *before* the promoters settled on a lender, and *before* the loan documents were negotiated. In fact, the PPM contains an *express reservation* that the unsigned draft TIC 0 LLC Agreement relied on by Thomas was subject in all respects "to revision and approval" by the lender.[7] The PPM also provides that, depending on the amount of equity raised, the TICs could need to "fill the gap" with a mezzanine loan to purchase the Property. The Court should decline the request to recharacterize TIC Member's equity.

Timetable -- Motion and RSA

14. Given its facial deficiencies, including Thomas's reliance on an unsigned draft of

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Declaration as Exhibit 2. The Mikles Declaration is filed separately and contemporaneously with this Objection.

[7] *See* Thomas Decl. at Exhibit 1, p. 62. In any event, Thomas was not entitled to rely on the PPM he referenced in connection with his investment. The PPM states that the it constitutes an offer "only to the offeree whose name appears in the appropriate space on the cover page." On the cover page, the "Name of Offeree" was *left blank*. Thomas, an attorney and a licensed broker, offers no explanation for the discrepancy.

the TIC 0 LLC Agreement, the Court should dispose of the Motion quickly. The Debtors took all required steps to file these cases. Furthermore, the Court has discretion to deny the Motion today because dismissal would contravene the "best interests of creditors and the estate." 11 U.S.C. § 1112(b). Significant work has gone into the RSA, and the RSA provides a viable path to restructure the Property and conclude these cases in the near term. Thomas and the Non-Debtor TICs oppose the RSA; however, they have proposed no realistic alternative, and the lender has given them every opportunity to come up with one over the last 18 months.[8]

15. Conversely, if these chapter 11 cases were dismissed, there is a substantial likelihood that the Property would end up in foreclosure, with an accompanying morass of litigation as the lender pursue remedies against all of the TICs, who are jointly and severally liable for the loan, as well as each TICs' owners, who guaranteed a portion of the loan.

16. Even if the Court were to determine that there is not a sufficient basis to deny the Motion today, it is not necessary to decide the Motion prior to approval of the RSA. There is no reason the plan process and the Motion cannot proceed on parallel tracks. If there is going to be contested litigation, the Debtors are entitled to discovery. The Debtors have a firm deadline for Court approval of the RSA of April 18, 2014, and a new special servicer administering the loan. There are no assurances that the new special servicer would extend the RSA deadlines, and too

[8] The Court saw the latest proposal from the Non-Debtor TICs, which the lender rejected. The Court also heard lender's counsel that there was no interest in a deal proposed by the Non-Debtor TICs, and the Non-Debtor TICs' counsel suggest that, if exclusivity were terminated, they would consider pursuing a "cramdown" plan over the lender's objection. *See* Hearing Transcript dated February 28, 2014 at 21:23-25 to 22:1-2 ("Also, Your Honor, we still would have cramdown rights, as plan proponent, and we think that we could also achieve confirmation through cramdown again . . . ."). A copy of the relevant portion of the February 28, 2014 Hearing Transcript is attached hereto as Exhibit A. A cramdown plan is not a viable option here. Last week, the Delaware court dismissed a chapter 11 case filed by a tenant in common of an unrelated property chiefly on grounds that the plan it proposed was "non-confirmable" because it sought to "cramdown" the lender. *See In re PEM Thistle Landing TIC 23, LLC*, 13-12273 (Bankr. D. Del.) (April 2, 2014) (Gross, J.) (attached hereto as Exhibit B) at p.4 ("Most importantly, the Debtor has filed a non-confirmable plan of reorganization . . . [t]hat would require a "cramdown" since DOV IV [the secured lender] has made it clear that it will reject the plan.").

much work has gone into these cases to subject the Property to that risk; especially where the Motion was orchestrated by one or more parties whose interests in the Property have no value.

OBJECTION

I. Thomas Cannot Meet His Burden To Establish "Cause" For Dismissal

17. Thomas cannot satisfy his burden of establishing "cause" for dismissal of these cases. In fact, it is clear from the Motion that Thomas has not alleged even a *prima facie* case.

18. Thomas is seeking dismissal pursuant to section 1112(b) of the Bankruptcy Code. The Court's analysis must start from the general presumption that the bankruptcy filings were properly authorized. *See, e.g., In re Storay*, 364 B.R. 194, 196 (Bankr. D.S.C. 2006). In order to rebut that presumption, Thomas must establish, by a preponderance of the evidence, "cause" requiring dismissal. *See In re Bovino*, 496 B.R. 492, 499 (Bankr. N.D. Ill. 2013) (internal citations omitted) (conversion or dismissal is a "drastic measure" and the movant bears the burden of proving that such relief is "warranted and not premature"); *In re Woodbrook Assoc.*, 19 F.3d 312, 317 (7th Cir. 1994) (The "movant bears the burden of proving by a preponderance of the evidence that cause exists for dismissal of the debtor's bankruptcy case."); *see also In re Momentum Hospitality II, LLC*, 418 B.R. 439, 441-42 (Bankr. M.D. Fla. 2009) ("If under any theory the party [debtor] can prevail, the court may not dismiss the case as all doubts are resolved in favor of the debtor and the burden is on the moving party.").

19. There are sound policies that support placement of the burden with the movant, including that placing the burden with the debtor would "invariably allow any party in interest to force a debtor to expend its diminished resources litigating over the issue whether it could seek to rehabilitate or liquidate itself in an orderly fashion under the auspices of the Bankruptcy Code." *In re Quad–C Funding LLC*, 496 B.R. 135, 142 (Bankr. S.D.N.Y. 2013).

20. That same concern is implicated here. The Non-Debtor TICs' interest in the Property (and, indirectly, TIC Member's equity), *has no value -- a fact which is not in dispute.* Thomas filed the Motion as a collateral attack on the RSA. As shown below, his threadbare arguments, which are based on an unsigned draft of an operating agreement or improper construction of the actual final agreements, are insufficient as a matter of law and fact.

II. The Debtors Took The Proper Steps to File These Cases

A. The Steps Taken to File TIC Member Were Proper

21. TIC Member's authority to file bankruptcy derives from the TIC Member LLC Agreement. Section 7.3.20 of that Agreement provides that TIC Member's manager, NNN Realty, may "[i]nitiate legal actions, settle legal actions and defend legal actions on behalf of the Company." No consents are required under the TIC Member LLC Agreement to file bankruptcy other than the consent of its manager, NNN Realty. NNN Realty's consent to file the TIC Member bankruptcy is provided in the *Written Consent of the Sole Manager of NNN 123 North Wacker Member, LLC* (the "TIC Member Consent"), which authorized the filing of both cases.[9]

22. Notwithstanding the foregoing, Thomas contends that Section 7.4.16 of the TIC Member LLC Agreement precludes a bankruptcy filing on TIC Member's behalf unless all of TIC Member's members consent. *See, e.g.,* Thomas Mot. at ¶ 25 (arguing that Section 7.4.16 of the TIC Member LLC Agreement "requires unanimous member approval as well an Independent Manager consent for a bankruptcy filing"); Thomas Mot. at ¶ 30 (alleging that Section 7.4.16 precludes the "Debtors from filing for bankruptcy unless all their members consent[.]")

23. Thomas has taken considerable liberties with the plain and unambiguous language of that provision. Section 7.4.16 of the TIC Member LLC Agreement provides that approval of

[9] The TIC Member Consent was attached to its petition and is attached as Exhibit 3 to the Mikles Declaration.

TIC Member's Independent Manager and the unanimous vote of TIC Member's equity holders is required *only for so long as the "Mezzanine Loan" is outstanding.* (*See* TIC Member LLC Agt. at § 7.4.16) The original "Mezzanine Loan" referred to in that provision was a mezzanine loan in the amount of $14 million the TICs required to close their purchase of the Property in 2005. The lender was MMA/Transwestern Mezzanine Realty Partners II, LLC and the mezzanine borrowers were the "Member" entities (i.e., the parent) of each TIC. The $14 million mezzanine loan was subsequently satisfied. Thus, Section 7.4.16 does not apply by its terms and there was no requirement that TIC Member obtain the consent of its equity holders to file bankruptcy.

B. The Proper Steps Were Taken to File TIC 0

24. The signed, final TIC 0 LLC Agreement provides that, for so long as the mortgage loan is outstanding, a bankruptcy case may be filed on TIC 0's behalf only if approved by TIC 0's Independent Manager and the unanimous vote of TIC 0's members. (*See* TIC 0 LLC Agt. at § 2.01(b)) The TIC 0 LLC Agreement further provides that TIC 0 has a single member, TIC Member. (*See* TIC 0 LLC Agt. at §§ 3.02(b) and 5.01; *see also* n.14 *infra*) On October 3, 2013, TIC 0's Independent Manager and TIC 0's sole member, TIC Member, executed the *Joint Written Consent Of the Sole Member and the Independent Manager of NNN 123 North Wacker, LLC*, (the "TIC 0 Consent"), properly authorizing the filing of TIC 0's bankruptcy case.[10]

C. Thomas' Reliance Upon An Unsigned Draft Of The TIC 0 LLC Agreement Is Not Valid

25. Thomas argues that the unanimous consent of TIC 0's members was required to file bankruptcy on TIC 0's behalf.[11] As support for his contention, Thomas relies on an unsigned

[10] The TIC 0 Consent was attached to its petition and is also attached as Exhibit 4 to the Mikles Declaration.

[11] This argument is based upon Thomas's assertion that he and the other equity holders are equity holders, not of the parent, TIC Member, but of the 100% subsidiary, TIC 0. The argument is easily dispensed with for reasons (continued...)

draft of the TIC 0 LLC Agreement, which he contends was attached to the offering materials that the promoters, Triple Net and Thompson, used to solicit his investment in 2005. Specifically, Thomas relies on Section 18.3 of the unsigned draft of the TIC 0 LLC Agreement which, if it had gone effective, would have required the consent of TIC 0's members to file bankruptcy.

26. The unsigned draft submitted by Thomas is just that -- an unsigned draft. He fails to offer any valid reason, nor does one exist, as to why an unsigned draft would govern in lieu of the signed agreement. Notably, the provision he relies on, Section 18.3, is not found in the signed, final versions of the Debtors' LLC Agreements. (*See* Mikles Decl. at Exhibits 1 and 2)

27. It appears that the PPM relied upon by Thomas contemplated, at that stage, a structure where each TIC would organize as a single limited liability company. However, the signed, final versions of the LLC Agreements reflect a change to a two-tier structure, with each borrower consisting of a parent (TIC Member) and its wholly-owned subsidiary (TIC ##), which was the actual owner of the respective tenant in common interest in the Property.[12]

28. Consistent with the two-tier structure in these cases, the parent, TIC Member, was organized as a multi-member limited liability company, and its signed, final LLC Agreement contains the types of provisions you would expect in a multi-member LLC agreement (*e.g.*, voting provisions, distributions, tax treatment).[13] The subsidiary, TIC 0, was organized as a

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discussed *infra.* Thomas was forced to make this argument to get around the fact that, under the terms of the TIC Member LLC Agreement, consent of the equity holders was not required to file bankruptcy (*see infra*).

[12] The purpose for the two-tier structure of each borrower (*i.e.*, each TIC) was to allow for the mezzanine loan that was ultimately required by the TICs to complete their purchase of the Property. This makes the mezzanine loan structurally subordinate to the mortgage loan. It is customary in mezzanine financings for the mortgage loan to be made to the subsidiary that holds the property, and secured by a lien against the property, while the mezzanine loan is made to the parent, and secured by a lien against the parent's 100% equity in the subsidiary.

[13] The relevant provisions of the signed, final TIC Member LLC Agreement include:

- Section 1.3 provides that "[t]he business and purpose of the Company shall be solely to own 100% membership interest . . . in [TIC 0] . . . together with such other activities as may be necessary, incidental

(continued...)

single member limited liability company, with a single member LLC agreement[14] devoid of the types of multi-member provisions found in the TIC Member LLC Agreement.

29. The likelihood that the acquisition would require mezzanine financing was disclosed in the PPM that Thomas alleges he relied upon when he made his investment. *See* Thomas Decl. at Ex. 1-B, p. 4 ("A third party lender, not an Affiliate of the Manager, may make a loan to the Company if the Minimum Offering, but not the Maximum Offering, has been attained (the "Bridge Loan") at the time of the initial closing of the Offering."). Thomas, an attorney and a licensed broker who holds himself out as experienced in tenant in common investments and who sells these investments, knew or should have know there was a likelihood that an institutional lender would require a two-tier structure to allow for a mezzanine loan.

30. In fact, the PPM referenced by Thomas states that the lender had not yet been selected, and contains a disclosure that the unsigned draft LLC agreement attached thereto remained subject in all respects to "revision and approval" by the lender. (*See id*. at p.62)

31. It is also significant that provisions like Section 7.4.16 of the TIC Member LLC Agreement and Section 2.01(b) of the TIC 0 LLC Agreement *are lender protections.* Those provisions require consent of their respective members (for TIC Member, its various equity

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or appropriate in connection therewith, including pledging the Company's interest in [TIC 0] as security for the Mezzanine Loan";

- Section 3.14 provides for the execution and tender of subscription agreements in exchange for membership units in TIC Member;
- Section 4 provides for the allocation of tax items for the members of TIC member; and
- Section 5 provides for the distribution of cash to TIC Member's members from operations.

[14] The relevant provisions of the signed, final TIC 0 LLC Agreement include:

- Section 3.02(b) provides that "[t]he Company shall issue one Certificate . . . in the name of [TIC Member]. Such Certificate shall be denominated such that it evidences a 100% Membership Interests in the Company and shall be signed by Member on behalf of the Company."
- Section 5.01 provides that TIC Member owns 100% of the membership interests of TIC 0.

holders, and for TIC 0, its sole member TIC Member) only for so long as the relevant loan is outstanding (for TIC Member, the mezzanine loan, and for TIC 0, the mortgage loan).

32. Thomas attempts to muddle the issue of proper authority to file the bankruptcy cases with the question of whether his nine-year old subscription agreement named TIC Member or TIC 0 as the subscribing entity.[15] Thomas's assertion contradicts the terms of the signed, final versions of the TIC Member LLC Agreement (a multi-member limited liability company agreement) and TIC 0 LLC Agreement (a single-member liability company agreement). Moreover, Thomas and the other equity holders benefited from the two-tier structure because it was required by the lender and the financing was required for the TICs to acquire the Property.

33. Thomas argues that he owns equity of TIC 0, and not TIC Member, in an attempt to avail himself of a provision in the TIC 0 LLC Agreement, Section 7.4.16., that is not in the TIC Member LLC Agreement. Section 7.4.16 of the TIC 0 LLC Agreement was added for sole protection of the mortgage lender. That provision requires the additional consents for TIC 0 to file bankruptcy only if the mortgage loan is outstanding. The mortgage lender is not seeking to enforce that provision, has participated actively in the Debtors' chapter 11 cases since inception, and agreed to be bound by the restructuring terms in the RSA, which it signed.

34. The Court should not permit one or more equity holders, whose equity has no value, to disrupt efforts to restructure the Property because of a tangential issue related to a nine-

[15] Thomas swore in his Declaration that Exhibit 1-A to the Thomas Declaration is the subscription agreement he signed when he made his investment. (Thomas Decl. at ¶ 6) [Docket No. 155-3]. However, the exhibit is invalid on its face and of no probative value. First, it appears from the four corners of the exhibit that it is a mix of at least two different documents, one relating to 123 North Wacker Drive and another relating to One Nashville Place. (*Compare* page 3 of 5 (referring to "Comerica Bank as Escrow Agent for NNN 123 North Wacker, LLC" in the first paragraph) against page 5 of 5 (referring to "Comerica Bank as Escrow Agent for NNN One Nashville Place, LLC" in Section E.)). Second, the exhibit only reflects one signature, which appears to belong to Thomas, even though a box is checked that he and his wife planned to own the investment as "Husband and Wife as community property." (Thomas Decl. at Ex. 1-A, page 3 of 5)

year old subscription agreement. *See Quad-C*, 496 B.R. at 143 ("Additional investigation of [a] collateral issue would be wrong as a matter of federal policy because it would permit parties to obstruct a bankruptcy filing, damage creditor interests, possibly doom a chance at rehabilitation . . . ."). In *Quad-C*, the Court denied a motion to dismiss filed by a member of the debtor alleging that certain of the debtor's members who voted in favor of the bankruptcy were not "accredited." In reaching its conclusion, the Court noted that even if accreditation was relevant to the determination of proper authority, the movant should not be permitted to "challenge a corporate action on such technical grounds years after the fact." *See id.*[16]

35. Like in *Quad-C*, the issue raised by Thomas's nine year-old subscription agreement should not derail the Debtors' reorganization, especially in light of the fact that the Debtors' bankruptcy cases were properly authorized under the TIC 0 and TIC Member LLC Agreements. *See also In re Soundview Elite, Ltd.*, 503 B.R. 571, 578 (Bankr. S.D.N.Y. 2014) (courts may reject a "formalistic approach" in determining whether corporate formalities were

[16] The cases cited by Thomas in paragraphs 29 and 30 of the Motion to Dismiss either do not stand for the facts or legal conclusions reached by Thomas or are inapposite to the situation at bar. The Debtors agree that *In re Gen-Air Plumbing & Remodeling, Inc.*, 208 B.R. 426 (Bankr. N.D. Ill. 1997) stands for the proposition that authority to file a bankruptcy petition is derived from state law; however, the facts of *Gen-Air* are not directly on point as the debtor in *Gen-Air* was an Illinois corporation and the individual that filed the *Gen-Air* petition was not authorized pursuant to the corporation's bylaws and Illinois corporate law. *In re H&W Food Mart, LLC*, 461 B.R. 904 (Bankr. N.D. Ga. 2011), does not, as Thomas suggests, involve the dismissal of a bankruptcy case because the manager did not have the approval of the majority of the members of the LLC. Rather, the court dismissed that case because the manager who executed the bankruptcy petition was, at the time of execution, no longer the manager of the LLC. *In re Orchard at Hansen Park, LLC*, 347 B.R. 822 (Bankr. N.D. Tex. 2006), involves a Washington state LLC operating agreement and a Washington statute, which is inapposite to the Delaware LLCs that are the Debtors in these cases. *In re DB Capital Holdings, LLC*, 462 B.R. 142 (B.A.P. 10th Cir. 2010), which is an unpublished decision upholding certain provisions in LLC agreements designed to impede a debtor's entry into bankruptcy, has been soundly criticized. *See Quad-C*, 496 B.R. at 143 (criticizing *DB Capital Holdings* and noting that restrictive clauses in LLC agreements, which tend to cause "mischief," "would permit minority equity holders to hold a bankruptcy filing hostage even where there is no dispute that there should be a judicial dissolution or reorganization of the debtor"). In any event, *DB Capital* is not relevant to the facts at bar because the Debtors have complied with the requirements in their respective operating agreements. Finally, *In re N2N Commerce, Inc*, 405 B.R. 34 (Bankr. D. Mass. 2009), which is cited by Thomas for the proposition that a board of directors of a corporation could not delegate the authority to file bankruptcy to an assignee for the benefit of creditors, is of no relevance to the facts of these cases.

adhered to, and instead may "consider flawed processes in authorizing chapter 11 petitions" if the equities permit); *In re Am. Globus Corp.*, 195 B.R. 263, 264–65 (Bankr. S.D.N.Y. 1996) (denying a motion to dismiss even though debtor failed to comply with a bylaws provision requiring a unanimous vote of the shareholders to authorize the filing).

36. Finally, Thomas argues that "[w]ithout member approval at the TIC Member level, there was no authority for TIC Member to consent to TIC 0's filing." (Thomas Mot. at ¶ 27) There is nothing in the TIC Member LLC Agreement requiring its members' consent to approve a bankruptcy on TIC 0's behalf, and the Court should not read in such a requirement.

D. Replacement of TIC 0's Independent Manager Was Proper

37. Thomas further alleges, without providing any support for his position, that the independent manager of TIC 0 was replaced without proper authority immediately prior to the petition date. (*See* Thomas Mot. at ¶ 26) That is simply not correct. Section 5.05 of the TIC 0 LLC Agreement authorizes its sole member, TIC Member, to remove and replace TIC 0's Independent Manager. (*See* TIC 0 LLC Agt at § 5.05). On October 3, 2013, TIC Member issued the *Written Consent of the Sole Member of NNN 123 North Wacker, LLC* (the "Gibbons Consent"), removing Douglas Britton and appointing Neal Gibbons as Independent Manager.[17] The replacement of the Independent Manager, in accordance with the terms of the organizational documents, is a valid and binding legal act and was wholly appropriate under the circumstances. *See, e.g., In re General Growth Properties, Inc.*, 409 B.R. 43, 68 (Bankr. S.D.N.Y. 2009).

E. NNN Realty Is The Duly-Authorized Manager of TIC Member

38. Thomas argues that NNN Realty is not the duly-authorized Manager of TIC Member and, thus, lacked authority to approve a bankruptcy on TIC Member's behalf. (*See*

[17] A true and correct copy of the Gibbons Consent is attached to the Mikles Declaration as Exhibit 5.

Thomas Mot. at ¶¶ 32-36). Thomas made the same argument in his RSA Objection [Docket No. 135, pp. 8-9]. The Debtors refuted Thomas's original argument by establishing that the original Manager of TIC Member, Triple Net Properties, LLC, changed its name at least twice, in 2008 and 2011, in connection with a change in the ultimate ownership of Triple Net. As a result, the current manager, NNN Realty Investors, LLC,[18] is the entity f/k/a Triple Net Properties, LLC.

39. Thomas now alleges that, in addition to the name changes, there was an intervening merger of an entity called TNP Merger Sub, LLC into Triple Net, which he claims invalidated Triple Net's status as TIC Member's manager. As support, Thomas submitted Articles of Merger of TNP Merger Sub, LLC With and Into Triple Net Properties, LLC, attached as Exhibit B to the Thomas Declaration (the "Articles").[19] However, according to Thomas, it was a merger "into" Triple Net, which was the surviving entity. (*See* Thomas Mot. at ¶ 34) The Articles themselves provide that Triple Net's articles of organization would continue "in full force and effect[.]" (*See* Articles at § 2). Thus, even accepting Thomas' argument, NNN Realty is the same entity f/k/a Triple Net Properties, LLC, and there is nothing in the TIC Member LLC Agreement that requires the members' consent to an acquisition or merger by its Manager.

40. Lastly, Thomas contends that, when the ultimate ownership of TIC Member's Manager changed hands, his right as a member to approve who manages his investment was "negated." (Thomas Mot. at ¶ 35) Thomas does not cite to any provision in the TIC Member LLC Agreement that would require the consent of TIC Members' members to a "change in control" of TIC Member's Manager, or to a merger of TIC Member's Manager for that matter.

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[18] Thomas alleges that NNN Realty is an "affiliate" of Sovereign since both entities have a common controlling person. (Thomas Mot. at ¶ 34) That is not sufficient to confer "affiliate" status for purposes of section 101(2) of the Bankruptcy Code. See Debtors' Reply in Support of RSA [Docket No. 148] at ¶ 20.

[19] The Articles are dated as of 2006, five years before the current management acquired NNN Realty in 2011. Thomas neglects to mention that the current management was not involved in that 2006 transaction.

The Court should decline Thomas's invitation to read new requirements into the TIC Member LLC Agreement that do not exist within the four corners of the document. NNN Realty, formerly known as Triple Net, is and remains the Manager of TIC Member.

III. Dismissal Is Barred by the Equitable Doctrine of Laches

41. Thomas's Motion was filed six months after these cases were commenced, and five months after the Non-Debtor TICs filed their motion to dismiss [Docket No. 25]. Thomas also waited to file the Motion until almost two weeks after filing his RSA Objection, which included similar "lack of authority" arguments. Thomas has not explained why he sat on his hands and waited to file the Motion until moments before the start of the hearing on the RSA.

42. Although section 1112(b) of the Bankruptcy Code places no time limitations on filing a motion to dismiss, a court may exercise discretion to deny a motion to dismiss as untimely based on the doctrine of laches. *In re Mirant Corp.*, 2005 WL 2148362, at * 11 (Bankr. N.D. Tex. Jan. 26, 2005); *In re Shea & Gould*, 214 B.R. 739, 749 (Bankr. S.D.N.Y. 1997); *In re I.D. Craig Serv. Corp.*, 118 B.R. 335, 338 (Bankr. W.D. Pa. 1990). For laches to apply, the following factors must be shown: (1) delay in assertion of a claim; (2) the delay is inexcusable; and (3) undue prejudice results from the delay. *Geyen v. Marsh*, 775 F.2d 1303, 1310 (5th Cir. 1985); *Mut. Life Ins. Co. of N.Y. v. Bohart (In re Bohart)*, 743 F.2d 313, 325 (5th Cir. 1984).

43. Each factor exists here. Thomas waited six months to file the Motion. The consents executed by the Debtors just prior to filing the bankruptcy cases were attached to the Debtors' petitions. The issues now raised by Thomas relate to the Debtors' nine-year old operating agreements and a similarly-dated subscription agreement. There is no legitimate basis for Thomas to have delayed filing his Motion, especially in light of the fact that a motion to dismiss raising similar concerns was filed by the Non-Debtor TICs in October 2013 (and withdrawn in January 2014). *See Mirant*, 2005 WL 2148362, at *12 (denying motion to dismiss

because movant waited over a year to seek dismissal on the basis that the debtor was solvent at the time of filing, an issue that the movant could have raised "right after the petition date").

44. In addition, the Debtors will be unfairly prejudiced if the result of Thomas's belated Motion is that the Court further delays ruling on the RSA. The RSA was filed on February 21, 2014. There is a hard deadline of April 18, 2014 for approval of the RSA; otherwise, the lender can terminate. The Debtors have no assurance that, if the deadline is in jeopardy, the lender will extend, and that concern is magnified by the fact that there is a new special servicer for the loan and lender's counsel made it clear at the last hearing that there will be no extension. If the RSA were to terminate, the Property will likely end up in foreclosure.

45. The Debtors, the lender and the new equity investors have expended significant time and resources formulating the RSA and the attendant documents. These efforts should not be prejudiced because of what amounts to a litigation ploy by Thomas. *See Mirant*, 2005 WL 2148362, at *12 ("Were this court now to dismiss [the Debtor's] bankruptcy case, a meaningful portion of Debtors' plan architecture could be unraveled, and Debtors would be sent back to the drawing board which would, in turn, result in further cost to Debtors' estates.").

WHEREFORE, the Debtors request that the Court deny Thomas' Motion to Dismiss.

Dated: April 7, 2014
Chicago, Illinois

NNN 123 NORTH WACKER, LLC AND NNN 123 NORTH WACKER MEMBER, LLC

KAYE SCHOLER LLP

By: /s/ *D. Tyler Nurnberg*

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EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)
	)
NNN 123 NORTH WACKER, LLC.,	)
	) No. 13B39210
	)
	)
	) Chicago, Illinois
	) February 28, 2014
Debtor.	) 11:00 a.m.

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE JACK B. SCHMETTERER

APPEARANCES:

MR. TYLER NURNBERG,
on behalf of the Debtors;

MR. TOM KIRIAKOS,
on behalf of the Lender;

MS. GRETCHEN SILVER,
on behalf of the U. S. Trustee's Office;

MR. STEPHEN BOBO,
MS. THERESA DAVIS,
on behalf of one of the Equity Members;

MR. LENARD PARKINS, (Telephonically)
MR. BRAD LAVENDER, (Telephonically)
on behalf of ND Investment;

MR. BARNEY GIVEN, (Telephonically)
MS. JEANNE WANLASS, (Telephonically)
on behalf of Certain TIC Members;

fact debtors' counsel knew that I was out of town in depositions in Texas on the Friday that it got filed. But the long story short is, Your Honor, there is a whole lot more to the story Mr. Bobo indicated. It would be absolutely procedurally inappropriate to grant that motion today. And 21 days is not unreasonable for what potentially is a sub rosa plan.

THE COURT: Thank you. Have you any comment on the noteholders' or the creditors' rather firm position today seeming to reject your term sheet?

MR. GIVEN: Yes, Your Honor. My comment would be that I think if we are allowed to engage in further negotiations when some of these issues come out that we may be able to achieve a resolution. Again, because a lot of this was prepetition, we were on the verge of agreement and that's why we think they might have filed this to stop it. We were on the verge of an agreement with the lenders when this bankruptcy got filed without notice to everybody.

Also, Your Honor, we still would have cramdown rights, as the plan proponent, and we think that we could also achieve a confirmation

through cramdown again for all -- these workers being locked out of that -- and millions of dollars of equity are being wiped out without the opportunity to even try and save it, notwithstanding all of the serious ethical questions in terms of how it filed. When you look at the plan proponent, they marked it Sovereign. There are some serious questions about their contents, Your Honor, but again I think 21 days is a reasonable request.

THE COURT: All right, thank you.

Brad Lavender, are you there on the phone?

MR. LAVENDER: Yes, Your Honor.

THE COURT: Is there any comment you have for me now?

MR. LAVENDER: Again, if you wouldn't mind, I would defer to my bankruptcy partner, Lenard Parkins.

THE COURT: Thank you. Lenard Parkins, have you any comment? Mr. Parkins, Lenard? Going once, going twice --

MR. PARKINS: Your Honor.

THE COURT: Go ahead, sir.

MR. PARKINS: Okay, thank you. Yes, I do have a few comments, Your Honor. Number one, the

EXHIBIT B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
PEM THISTLE LANDING TIC 23, LLC,	)	
	)	Case No. 13-13273(KG)
Debtor.	)	
	)	**Re: Dkt No. 56**

MEMORANDUM OPINION

The pending matter before the Court is a motion to dismiss or grant relief from stay (the "Motion") (D.I. 56). The Debtor is PEM Thistle Landing TIC 23 ("Debtor"). The movant is DOF IV Reit Holdings, LLC ("DOF IV"), Debtor's secured lender by assignment. The Court will dismiss the case for the reasons which follow.

FACTUAL AND PROCEDURAL BACKGROUND

The undisputed facts of this case are unusual. The Debtor, a Delaware limited liability company, is one of thirty-one tenants-in-common ("TICs") which own a commercial property in Phoenix, Arizona, known as Thistle Landing (the "Property"). The TICs purchased the Property in October 2005. The Debtor owns a .97% (less than one percent) interest in the Property.

On October 31, 2005, PEM Thistle Landing H, LLC and PEM Thistle Landing S, LLC (the "Initial Borrowers") executed and delivered to PNC Bank, National Association ("PNC"), a promissory note (the "Note") in the principal sum of $37 million, to be secured by the Property. The amount Debtor and the TICs now owe, with principal and interest, is now approximately $38.9 million. Affidavit of Abbey Kosakowski in Support of the Motion (D.I. 59-1). The Initial Borrowers thereafter granted a first secured interest in the Property by a Deed of Trust, Security Agreement, Assignment of Leases and Rents and Fixture Filing (the "Security Interest"), which PNC

properly recorded. For purposes of the Motion, the Property has a value of $39.5 million.

In February 2006, the Debtor and each of the other TICs executed consent and assumption agreements whereby they undertook obligations of the Initial Borrowers under the Security Interest and, as such, became borrowers. The Debtor and the TICs consequently received their ownership interests in the Property, Debtor receiving its .97% interest.

DOF IV became the holder of the Security Interest through a series of assignments and allonges, none of which are germane to the present dispute. The Debtor and the TICs thus became obligated to make monthly installment payments to DOF IV. However, beginning April 1, 2013, the Debtor and the TICs failed to make payments required by the Security Interest, and also have failed to make subsequent payments to date. Thus, with Debtor and the TICs in default, DOF IV commenced a non-judicial foreclosure sale of the Property which was scheduled for December 20, 2013. On December 17, 2013, the Debtor filed its voluntary petition for bankruptcy protection under Chapter 11 of the Bankruptcy Code. Debtor's admitted purpose for filing the bankruptcy case was to stop the foreclosure sale of the Property.

JURISDICTION AND VENUE

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory bases for the relief requested are Sections 105, 1129(b) and 362(d) of the Bankruptcy Code, and Bankruptcy Rules 2002 and 9014.

DISCUSSION

The Court begins its discussion with the obvious but important observation that only the Debtor, whose sole asset is a less than one percent interest in the Property located in Arizona, is before the Court. The value of the Property is of incidental concern because Debtor owns a minor stake. As DOF IV's attorney stated, this is the proverbial case of the tail -- and a bobbed one at that -- wagging, or attempting to wag the dog.

DOF IV argues that the Court should dismiss the case for cause and as a bad faith filing pursuant to Bankruptcy Code Section 1112(b). DOF IV cites to *In re 15375 Memorial Corp.*, 589 F.3d 605 (3d Cir. 2009) for the proposition that the totality of the facts and circumstances of the case show that Debtor cannot establish good faith because the filing serves no valid business purpose and that Debtor filed the case to obtain a tactical litigation advantage, namely, to stop the foreclosure proceeding. *See also*, *NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc.*, 384 F.3d108 (3d Cir. 2004). DOF IV argues that there is no valid business purpose for the bankruptcy, which requires the preservation of a going concern or maximization of value. *Integrated Telecom*, 84 F.3d at 120. Debtor has no employees or operations and, as such, is not a going concern. Factors which courts consider in determining whether a case is valid or filed in bad faith include whether the case is or has:

> (1) single asset case, (2) few unsecured creditors, (3) no operating business or employees, (4) petition filed on eve of foreclosure, (5) two party dispute which a state court action can resolve, (6) no cash or income, (7) no possibility of reorganization, (8) filing solely to create automatic stay.

In re Primestone Inv. Partners, L.P., 272 B.R. 554 (D. Del. 2002).

Debtor plainly satisfies most of the factors which favor dismissal -- single asset case, few unsecured creditors, no operating business, no employees, petition filed on eve of foreclosure and no cash or income.

Most importantly, Debtor has filed a non-confirmable plan of reorganization (the "Plan"). The Plan calls for DOF IV's entering into an amended loan with Debtor and the non-debtor TICs. That would require a "cramdown" since DOF IV has made it clear that it will reject the Plan. Debtor, with its .97% interest, will also have to reorganize the debt to DOF IV of the other 30 TICs. Doing so is not legally possible.

Several points of Arizona law apply.[1] First, in the absence of an agreement a tenant in common does not have authority to bind other co-tenants in common. *Jolly v. Kent Realty, Inc.,* 729 P.2d 310 (Ariz. Ct. App. 1986). Second, without a written agreement, common tenancies does not establish a partnership. A.R.S. § 29-1012(C)(1). Here, there is no written agreement between Debtor and the other TICs. Debtor is acting for itself.

The case which is particularly instructive is *In re Geneva ANHX IV LLC*, 496 B.R. 888 (C.D. Ill. 2013) ("*Geneva*"). There, like here, fewer than all tenant-in-common owners of real estate filed for bankruptcy. The lender had commenced a foreclosure proceeding which led to the bankruptcy filing. The lender moved to modify the automatic stay so it could proceed with the foreclosure. In *Geneva*, thirteen of thirty-three tenants-in-common owning a combined 29.22% interest in the property filed for bankruptcy. The Debtor's plan of confirmation required debtors to file an adversary proceeding to substantively consolidate 100% of the ownership into the bankruptcy case.

[1] The Court is applying Arizona law because the Property is in Arizona and the Security Interest documents provide that the applicable law is that of the state in which the encumbered property is located.

The court modified the automatic stay to permit the foreclosure case to proceed. The court ruled that "Nothing in the Bankruptcy Code gives the Debtors the power to eliminate or modify the rights held by the non-debtor co-owners as a result of their status as tenants-in-common." *Geneva*, 496 B.R. at 903. The court further held that the Debtor's plan proposal to substantively consolidate the ownership interests of the non-debtor TICs in order to impose bankruptcy jurisdiction over the non-debtor TICs was impermissible.

The fatal flaw in Debtor's case is that as a tenant-in-common with less than a one percent interest, it cannot bind or do the bidding of the non-debtor TICs (owning interests of more than 99%). Debtor cannot force DOF IV to restructure the Security Interest. As a result, Debtor cannot establish a "reasonable possibility of a successful reorganization within a reasonable time." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76. The Court is dismissing the case for cause. The Court also finds that Debtor did not file the case in bad faith. The Debtor filed the case in the face of foreclosure to save the Property after DOF IV refused to negotiate. While the Court disagrees with Debtor's legal right to have filed the bankruptcy petition, Debtor did so for a valid business purpose, *i.e.*, to preserve its sole asset under pressure of foreclosure. Under such circumstances, a bad faith finding would be inappropriate. Dismissal on the ground of bad faith should be reserved for cases of clear abuse. *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 375 n. 11 (2007), *Carolin Corp. v. Miller*, 886 F.2d 693, 700 (4th Cir. 1989). The Court is dismissing the case without prejudice to enable Debtor and the other TICs, but not fewer than all of them, to refile.

CONCLUSION

For the foregoing reasons, the Court is dismissing the Debtor's bankruptcy case. An Order will follow.

April 2, 2014

KEVIN GROSS, U.S.B.J.

CERTIFICATE OF SERVICE

I, D. Tyler Nurnberg, an attorney, certify that the **DEBTORS' OPPOSITION TO THOMAS'S MOTION TO DISMISS CHAPTER 11 CASES** was served on the parties listed below by electronic notice through the CM/ECF system of the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, and by U.S. First Class Mail, postage prepaid on April 7, 2014.

/s/ D. Tyler Nurnberg
D. Tyler Nurnberg

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