

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

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

**DEBTORS' SUR-REPLY IN FURTHER 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 sur-reply in further opposition to Troy Thomas's motion to dismiss (the "Motion") [Docket No. 155], state as follows:

Preliminary Statement

1. Having failed to make his case for dismissal in two prior pleadings,² Thomas now takes a third bite at the apple in a wide-ranging submission styled as a "Reply" brief.³ In addition to yet another "supplemental" declaration and a 125-page exhibit package, Thomas's "Reply" includes brand new arguments and what Thomas characterizes as "newly found" documents that purportedly "correct" errors in the original exhibits he filed. Despite his latest round of arguments, it is clear that from a corporate governance perspective the Debtors were duly-authorized to file these cases, and, in doing so, exercised prudent business judgment.

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).

² Thomas first argued that these cases were filed without proper corporate authority in his opposition to the RSA. *See* Thomas RSA Obj. at pp. 3-5, 7-10 [Docket No. 135] The Motion largely rehashes those same arguments.

³ The Thomas's Reply brief is the *Reply of Troy Thomas Concerning Motion to Dismiss* [Docket No. 181] (the "Reply").

2. The burden belongs to Thomas to establish, by a “preponderance of the evidence,” that the Debtors failed to take the appropriate steps to file these bankruptcy cases. Thomas has not, and cannot, meet that burden. To the contrary, the facts of record establish that TIC Member was duly issued 100% of the equity (i.e., membership interests) of its subsidiary, TIC 0, and that each of these Debtors took all of the steps required under their respective LLC Agreements and governing Delaware law to file these bankruptcy cases.

3. Thomas has no meaningful response to the nine years of history where the parent, TIC Member, and its 100% subsidiary, TIC, operated as a “two tier” structure. Similarly, he offers no rebuttal for: (i) the *signed* LLC Agreements of TIC 0 and TIC Member; (ii) the fact that TIC Member was issued 100% of the equity of TIC 0 *two months* before Thomas was issued his equity of TIC Member (which he contends, wrongly, was equity of TIC 0); (iii) the mezzanine loan that required the two-tier structure, which structure *directly benefited* Thomas because the TICs needed the mezzanine loan in order to purchase the Property; (iv) the pledge of TIC Member’s 100% equity in TIC 0 to the mezzanine lender; and (v) the written consents executed by TIC Member, TIC 0’s Independent Manager and NNN Realty authorizing the filing of these bankruptcy cases.

4. Instead, Thomas repeats his mantra that the Court should recharacterize his equity as interests of TIC 0, not TIC Member, relying on his *unsigned, draft* of the TIC 0 LLC Agreement, and, in the Reply, adding: (i) his alleged subscription agreement, which, even after he “amended” it with the Reply, still appears to be a mix of agreements relating to different investments, and which he apparently reviewed two months after TIC 0 issued 100% of its equity to its sole member, TIC Member, and (ii) an alleged membership certificate in TIC 0 that was not “issued” by the correct entity and was not in compliance with the TIC 0 LLC Agreement.

5. Thomas has not, and cannot, establish “cause” to dismiss these cases.

I. The Alleged “New” Facts Offered by Thomas Have Little Probative Value

6. Thomas bases the bulk of his argument in the Reply on a purportedly “new” document, which he characterizes as a “corrected” subscription agreement. This document purports to evidence Thomas’ subscription of interests in TIC 0. (*See* Reply at p. 3, fn.2 and Ex. B). However, the “corrected” agreement only raises additional questions about the merits of Thomas’s position and, in any event, falls well short of carrying Thomas’s substantial evidentiary burden of establishing “cause” for dismissal.⁴

7. Thomas also offers an alleged “smoking gun” in his Reply, a membership certificate (*See* Reply at Ex. A) that purports to grant Thomas a nominal equity interest in TIC 0. Closer examination of the document reveals it has little probative significance, however.

8. As an initial matter, Thomas’ certificate is dated November 17, 2005. (*See* Reply at Ex. A). The TICs’ acquisition of the Property closed almost two months earlier, on September 28, 2005. On September 26, 2005, two days prior to the closing, TIC 0 issued 100% of its equity to its parent, TIC Member. That issuance was evidenced by, among other things, the TIC 0 LLC Agreement, which provides that TIC Member is the sole member and 100% owner of TIC 0.

⁴ Previously, the Debtors noted that Thomas’s original exhibit was invalid on its face because it appeared to be a mix of agreements relating to two different investments, 123 N. Wacker Dr. and One Nashville Place, and because it was a joint investment with his wife, Melanie Thomas, but the signature line for his wife was blank. (*See* Debtors’ Opp. to Mot. at p. 12, fn.15). The “corrected” version now offered by Thomas includes a signature for his wife which appears to be identical to Troy Thomas’s signature on the line above it. The corrected version also includes what appears to be a modified version of the same signature page with a handwritten change -- in the “Escrow Agent” section, “NNN One Nashville Place, LLC” is crossed out and replaced with “NNN 123 N. Wacker LLC.” Notably, there continues to be other deficiencies on the face of the “corrected” exhibit. For example, on the signature page, the “Broker/Dealer Representations and Warranties” section still says that the document relates to an investment in “NNN One Nashville Place, LLC.” It is also curious that Thomas signed the document both as the investor buying the securities and as the broker/dealer selling the securities. If Thomas has questions about how the securities were issued, perhaps he should look to himself for answers. The Debtors reserve the right, if it becomes necessary, to take discovery from Thomas and his wife regarding their investment, and to see originals of both the previous and “corrected” exhibits.

(See TIC 0 LLC Agt. (attached to Mikles Declaration [Docket No. 175] at Ex. 2) at §§ 3.02(b), 5.01). The TIC 0 LLC Agreement reflects that TIC Member contributed capital of \$14 million to its subsidiary, TIC 0 (i.e., the total proceeds of the mezzanine loan, discussed below), in exchange for 100% of the equity of TIC 0. (See TIC 0 LLC Agt. at Ex. A (capital contribution) and Ex. B (membership certificate)).

9. As further evidence, the Mikles Supplemental Declaration⁵ attaches a copy of the membership certificate that TIC 0 issued to TIC Member dated September 26, 2005. (Mikles Suppl. Decl. at Ex. 1).⁶ That certificate provides that “NNN 123 North Wacker Member, LLC . . . is the registered owner of *all of the limited liability company interests of [TIC 0]*” (emphasis added). In other words, *two months before* Thomas claims to have received his TIC 0 membership certificate, TIC 0 had already issued 100% of its interests to TIC Member.

10. Thomas’s argument that he owns equity of TIC 0 is further belied by the fact that his “newly found” certificate appears to have been executed by Triple Net Properties, LLC as “Manager” of TIC 0. Triple Net Properties, LLC was Manager of TIC Member, *not TIC 0*. See TIC 0 LLC Agt. at § 6.02 (“Management by Member. [TIC Member] shall be entitled to make all decisions and take all actions for [TIC 0] . . .”; see also TIC Member LLC Agt. at § 7.1 (“The business and affairs of [TIC Member] shall be managed solely by [Triple Net Properties, LLC]”). Nor was Triple Net Properties, LLC authorized to admit new members to TIC 0 (see TIC 0 LLC Agt. at § 8.01(c)(“[o]ne or more additional members of [TIC 0] may be admitted to the Company with the written consent of [TIC Member]”).

⁵ The Supplemental Declaration of Todd A. Mikles in Support of the Sur-Opposition (the “Mikles Suppl. Decl.”) is attached hereto as Exhibit A.

⁶ A true and correct copy of the Membership Interest Certificate of NNN 123 North Wacker, LLC is attached to the Mikles Suppl. Decl. as Exhibit 1.

11. Thomas notes, correctly, that under the TIC 0 LLC Agreement, TIC 0's sole member, TIC Member, could assign its equity in TIC 0 and/or TIC 0 could admit new members "with the written consent" of TIC Member. (*See* TIC 0 LLC Agt. at §§ 8.01(a), (c)). However, his suggestions that he "could" have been assigned an interest in TIC 0 or "could" have been admitted to TIC 0 as an additional member (*see* Reply at p. 4) are specious and have no basis in fact.

12. Thomas alleges that "he never heard of TIC Member" (*see* Reply at p. 4) until a few weeks ago, which belies his suggestion that TIC Member "could" have assigned him its equity of TIC 0. Thomas also fails to offer any evidence that TIC Member consented in writing to add new members to TIC 0. Finally, Thomas's suggestion that TIC Member "could" have assigned its TIC 0 equity to him, or consented to adding new members to TIC 0, would contravene the purpose of the two-tier structure, which required that TIC Member pledge its 100% equity of TIC 0 as collateral for the mezzanine loan, which loan was required by the TICs to purchase the Property.

13. Lastly, Thomas takes a gratuitous swipe at the Debtors' business judgment, suggesting that the bankruptcy filings were unnecessary and, thus, improper, because the TICs made the mortgage payments on time for August and September 2013. (*See* Reply at p. 1).

14. Tellingly, Thomas refers to loan histories but offers nothing to support this allegation. The Debtors' assertion was correct -- the TICs did not make the payments for August and September 2013 when due. This is evidenced by correspondence at the time from the property manager, Thompson National Properties, LLC, which directly contradicts Thomas's position. On August 28, 2013, the property manager sent the TICs a report for Q2 2013, which stated that "the property has been struggling to make its debt service payments since September

2012”; that the property manager was dipping into operating accounts to fund shortfalls in mortgage payments; that cash was running low; that the property manager only made a partial payment for August 2013 (“Debt service is current through July, but the August payment was short” and “The August payment was not made in full”); and that the building’s largest tenant was “vacating their space at the end of their lease, which is September 30, 2013. Once the tenant vacates, the property will not be able to support debt service payments.”).⁷

15. It is also worth noting that the Debtors’ decision to file was based on the totality of circumstances at the time. When these cases were filed on October 4, 2013, the Property was worth considerably less than the mortgage debt of \$135 million; the TICs had failed to make the mortgage payments for August and September 2013 when due; the loan, which is in a CMBS structure, was being transferred to special servicing; and the Non-Debtor TICs had engaged the lender in discussions for over a year, with no agreement to show for it. Thus, the Debtors had legitimate concerns about the Property and the likelihood that it could end up in foreclosure.

II. The Debtors Relied on the Operative Membership Documents and Duly Issued Membership Certificate

A. The Two-Tier Ownership Structure

16. The TICs closed their purchase of the Property on September 28, 2005. At the time, there were 15 TICs, including TIC 0.⁸ Each TIC was structured as a two-tier entity, consisting of the parent (here, TIC Member) and its wholly-owned subsidiary (here, TIC 0). The parent owns 100% of the equity of the subsidiary, which it pledged as collateral to secure the parent’s obligations under the \$14 million mezzanine loan. The subsidiary holds its tenant-in-

⁷ A true and correct copy of the Property Update Report for Q2 2013 is attached to the Mikles Suppl. Decl. as Exhibit 2.

⁸ After the initial TIC group purchased the Property, the promoters of the transaction and certain broker-dealers, including Mr. Thomas, continued to solicit investors. Ultimately, there was a total of 33 TICs.

common interest in the Property, which it pledged as collateral to secure the subsidiary's obligations under the \$136 million mortgage loan. The investors actually investing the money (in the Debtors' case, the 159 equity holders) own the equity of the respective parent (here, TIC Member).

17. Consistent with this parent/subsidiary structure, the TIC 0 LLC Agreement provides that TIC Member holds "100% of the Membership Interest in [TIC 0]" and that "the Member's Membership Interest shall be represented by the Certificate . . . issued to Member by the Company." (TIC 0 LLC Agt. at § 3.02(b)).

18. TIC 0 issued a Membership Certificate to TIC Member, dated September 26, 2005, which certified that "NNN 123 North Wacker Member, LLC . . . is the registered owner of *all of the limited liability company interests* in [TIC 0]" (emphasis added). That is, two months prior to the time that Thomas claims to have subscribed to interests in TIC 0 or received a membership certificate, TIC 0 had duly authorized and issued a membership certificate for 100% of its membership interests to TIC Member.

19. In contrast to the TIC 0 LLC Agreement, the LLC agreement of TIC Member (attached to Mikles Declaration [Docket No. 175] at Ex. 1) is designed for ownership by multiple members. Section 3.12 of the TIC Member LLC Agreement specifies that TIC Member is authorized to sell "Investor Units as described in the Memorandum and to admit persons who acquire such Investor Units . . . as Members."⁹ Memorandum is defined as the "Company's

⁹ TIC Member's LLC Agreement includes all of the relevant provisions of a multi-member limited liability company holding 100% of the interests in TIC Member:

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

(continued...)

Confidential Private Placement Memorandum dated August 5, 2005 for the sale of Investor Units, as amended or supplemented from time to time.” (TIC Member LLC Agt., Definitions). The current ownership of NNN Realty did not become involved with the Property until 2011 and does not have first-hand knowledge as to why, in 2005, membership certificates were apparently issued by NNN Realty Investors, LLC in the name of TIC 0 instead of TIC Member. However, if Thomas does own an interest in the Debtors, the LLC Agreements make clear that the interests are equity of TIC Member, not TIC 0.

B. The Steps Taken to File TIC Member Were Proper

20. TIC Member’s filing was duly-authorized. The Debtors are Delaware limited liability companies and, under governing Delaware law, a limited liability company’s operating agreement specifies the rights and duties of its members and managers.¹⁰ TIC Member’s authority to file for bankruptcy derives from the TIC Member LLC Agreement. In filing these

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- 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.

¹⁰ See Del. Code. Ann. title 6, § 18–215 ((a) “A limited liability company agreement may establish or provide for the establishment of 1 or more designated series of members, managers, limited liability company interests or assets”; (e) “A limited liability company agreement may provide for classes or groups of members or managers associated with a series having such relative rights, powers and duties as the limited liability company agreement may provide.”). See also *Huatuco v. Satellite Healthcare*, CV 8465-VCG, 2013 WL 6460898, at *1 (Del. Ch. Dec. 9, 2013) (“Delaware law with regard to limited liability companies is contractarian; individuals may create an organization that reflects their perception of the appropriate relationships among the parties, most conducive to their interests, as represented by their mutual agreement.”); *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999) (noting that the basic approach of Delaware’s Limited Liability Company Act is to permit members to have broad discretion in drafting their operating agreements and to furnish answers only where the members have not expressly made provision in their partnership agreement); *Walker v. Res. Dev. Co.*, 791 A.2d 799, 813 (Del. Ch. 2000) (“Thus, LLC members’ rights begin with and typically end with the Operating Agreement.”); *Kidd v. Symbion, Inc.*, CIV.A. 10-3361, 2011 WL 4020814, at *12 (E.D. La. Sept. 9, 2011) (“Under Delaware law, the obligations of the LLC and its members are defined by the terms of the Operating Agreement.”) *Kahn v. Portnoy*, 2008 WL 5197164, at *1 (Del. Ch. Dec. 11, 2008) (“The well settled policy of the Delaware Limited Liability Company Act is to give maximum effect to the principle of freedom of contract.”).

bankruptcy cases, the Debtors were careful to follow the requirements set forth in their respective LLC agreements:

- **Manager Has Full Authority:** The manager of TIC Member, NNN Realty, is granted “full and complete authority to manage and control the business, affairs and all property of [TIC Member], to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of [TIC Member’s] business.” (TIC Member LLC Agt. at § 7.1); the Manager “shall have all authority, rights and powers conferred by law (subject only to Section 7.4) and those for or appropriate to the management of [TIC Member’s] business” including certain non-limiting powers enumerated therein (TIC Member LLC Agt. § 7.3) (emphasis added).
- **Approval of TIC Member’s Members and Independent Manager Not Required:** The consent of both the members of TIC Member and the Independent Manager to file a bankruptcy proceeding is only required when the Mezzanine Loan “remains outstanding and not discharged in full.” (TIC Member LLC Agt. at § 7.4.16). The Mezzanine Loan was paid in full on or about March 3, 2006.¹¹ Accordingly, the vote of the members of TIC Member and the Independent Manager were not required in connection with TIC Member’s decision to commence a bankruptcy proceeding.
- **Voting By Members is Limited to Certain Matters:** The members of TIC Member have limited voting rights and “shall have the right to vote only upon” (emphasis added) the matters specifically enumerated in Section 8.2 of the TIC Member LLC Agreement. (TIC Member LLC Agt. at § 8.2). The authority to file bankruptcy is not one of the limited matters in which the members of TIC Member have a right to vote.
- **The Manager Issued a Written Consent Authorizing the Bankruptcy Proceeding:** On October 3, 2013, NNN Realty issued a written consent, the *Written Consent of the Sole Manager of NNN 123 North Wacker Member, LLC*, authorizing the filing of TIC Member’s bankruptcy proceeding.¹²

21. It is of no consequence that TIC Member’s LLC Agreement does not specifically provide the Manager the right to file bankruptcy. The Manager was granted full authority to manage the affairs of TIC Member except in certain limited, enumerated circumstances; the only restrictive covenant limiting the Manager’s ability to commence a bankruptcy proceeding

¹¹ A true and correct copy of evidence of the final payoff of the Mezzanine Loan is attached to the Mikles Suppl. Decl. as Exhibit 3.

¹² The Written Consent of the Sole Manager of NNN 123 North Wacker Member, LLC was attached to the original Mikles Declaration [Docket No. 175] as Exhibit 3.

was mooted when the Mezzanine Loan was paid in full in March 2006.

22. A decision recently issued by the Bankruptcy Court for the Eastern District of New York, *In re East End Development, LLC*, 491 B.R. 633,640 (Bankr. E.D.N.Y. 2013), is directly on point. In *East End*, the Bankruptcy Court examined a managing member's authority to file a bankruptcy proceeding. There, the limited liability company's operating agreement did not specifically provide authority to the managing member to file the proceeding, but granted broad authority to the managing member to manage the affairs of the entity (i.e., the member had the authority to manage the "business and affairs" of the entity and was granted "all necessary powers to carry out the business" of the LLC). *Id.* at 637. Despite the lack of a clause in the operating agreement specifically granting the power to file for bankruptcy protection, the Court found that, "[b]ased on the language of the Operating Agreement, and the clear intent to give the Managing Member broad authority to act on behalf of the Debtor and to bind third parties with respect to the Debtor . . . the Managing Member had the authority to file the petition for relief under Chapter 11." *Id.* at 640. The Court further noted that "[t]he Operating Agreement contains other provisions regarding the effect of bankruptcy by a member of the Debtor and the parties could, but did not, restrict the Managing Member's authority to file a petition in bankruptcy on behalf of the Debtor." *Id.*

23. Although *East End* dealt with a New York limited liability company, the Court's reasoning should apply with equal force to the Debtors' circumstances. Like in *East End*, the TIC Member LLC Agreement only restricts the Manager's right to commence a bankruptcy proceeding when the Mezzanine Loan is outstanding; once that loan was paid off, the Manager had full authority to cause TIC Member to file bankruptcy.

C. The Steps Taken to File TIC 0 Were Proper

24. As with TIC Member, TIC 0's bankruptcy filing was properly authorized:

- **Independent Manager and TIC Member Have Authority:** So long as the mortgage loan is outstanding (which it is), TIC 0 may “file a voluntary petition or otherwise initiate proceedings to have the Company adjudicated as bankrupt or insolvent” only with (i) approval of the Independent Manager of TIC 0, and (ii) unanimous consent of the member of TIC 0 (which is TIC Member, *see supra*) (TIC 0 LLC Agt. at § 2.01(b)).
- **TIC Member Properly Replaced TIC 0’s Independent Manager:** TIC Member, as the sole member of TIC 0, was authorized to remove and replace TIC 0’s Independent Manager. (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* removing Douglas Britton and appointing Neal Gibbons as Independent Manager.¹³
- **TIC Member and the Independent Manager Issued a Joint Written Consent Authorizing the Bankruptcy Proceeding:** On October 3, 2013, TIC 0’s Independent Manager (Neal Gibbons) and TIC 0’s sole member, TIC Member (by its Manager, NNN Realty), executed the *Joint Written Consent Of the Sole Member and the Independent Manager of NNN 123 North Wacker, LLC*, authorizing the filing of TIC 0’s bankruptcy proceeding.¹⁴

D. Thomas Continues to Rely on Non-Operative Documents

25. In comparison to the Debtors’ executed and duly issued documents, Thomas claims that the Court should rely on an *unsigned draft* of the limited liability company operating agreement of TIC 0 attached to the private placement memorandum (the “PPM”) cited by Thomas.¹⁵ That PPM specifically provided that the unsigned TIC 0 LLC Agreement is in all respects subject “to revision and approval” by the lender.¹⁶ The LLC agreement attached to the PPM was not adopted by TIC 0 and could not have been because it does not contemplate the two-tiered ownership structure necessitated by the requirements of the Mezzanine Loan. Despite

¹³ The Written Consent of the Sole Member of NNN 123 North Wacker, LLC was attached to the original Mikles Declaration [Docket No. 175] as Exhibit 5.

¹⁴ The Joint Written Consent Of the Sole Member and the Independent Manager of NNN 123 North Wacker, LLC was attached to the original Mikles Declaration [Docket No. 175] as Exhibit 4.

¹⁵ The cited PPM is attached as Exhibit 1 to Thomas’s Original Decl. to the Motion. Thomas’s reliance on the PPM is misplaced. The PPM states on its face that it constitutes an offer “*only* to the offeree whose name appears in the appropriate space on the cover page” (emphasis added), and the “Name of Offeree” section on the cover page is completely blank. The PPM does not help Thomas satisfy his substantial evidentiary burden.

¹⁶ *See id.* at p. 62.

having written three briefs (so far) on the subject, Thomas has yet to cite to any authority to support his contention that the executed and duly authorized LLC agreements should be ignored in favor of an earlier, draft version of an agreement. The Court should not give any weight to Thomas's unsigned, draft documents.

III. The TIC/Member Structure Was Essential to the Transaction

26. As described above, each TIC was structured with a "TIC" subsidiary that owned an interest in the Property and a "member" entity that held 100% of the membership interests in the respective TIC. The TIC/Member structure was necessary because the TIC purchasers of the Property required the use of \$14 million in mezzanine financing to bridge the gap between the amount of the senior loan and the equity raised.¹⁷ In his Reply, Thomas does not deny the existence of the mezzanine loan nor the fact that the Property purchase would not have occurred unless the TIC owners of the Property were each owned 100% by a "member" entity.¹⁸

27. As security for the Mezzanine Loan, TIC Member executed an Assignment, Pledge and Security Agreement, dated as of September 26, 2005. In connection therewith, TIC

¹⁷ MMA/Transwestern Mezzanine Realty Partners II, LLC (the "Mezzanine Lender") acted as mezzanine lender to TIC Member and the other TIC "member" entities that executed a secured non-recourse guaranty in favor of the Mezzanine Lender. A true and correct copy of the Mezzanine Loan Agreement, dated as of September 26, 2005, by and between the Mezzanine Lender and TIC Member (the "Mezzanine Loan") is attached to the Mikles Suppl. Decl. as Exhibit 4. Mezzanine financing is a used in real estate financing to bridge the gap between existing financing and the amount of new equity contributed to the purchase. In a mezzanine financing transaction, the "lender makes a further loan, ordinarily at a higher interest rate, to a single-purpose entity formed to hold the equity interest in the mortgage-level borrower. The loan to the single-purpose entity is secured only by the stock or other equity interest of the mortgage level borrower. The single-purpose entity typically has no other debt and its business is limited to its equity interest in the property-owning subsidiary." *In re General Growth Props.*, 409 B.R. 43, 51 (Bankr. S.D.N.Y. 2009).

¹⁸ 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. attached to the Motion at Ex. 1, 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.").

Member pledged 100% of the interests it holds in TIC 0 to the Mezzanine Lender.¹⁹ That is, as of September 26, 2005, TIC Member had pledged to the Mezzanine Lender its 100% of the equity interests of TIC 0 to secure the Mezzanine Loan, and that pledge remained outstanding until the Mezzanine Loan was paid off in full. Thomas asserts without any support whatsoever that the Mezzanine Loan was “apparently paid off in September 2005 by the existing B Note held by Northstar.” (Reply at p. 8). Thomas offers nothing to support this new claim and, in fact, the Mezzanine Loan was not paid off until on or about March 3, 2006.²⁰ Thus, there was no requirement that TIC Member’s bankruptcy filing be approved by its members, and Thomas not carried his evidentiary burden of establishing that there was such a requirement.

28. Like TIC 0 and TIC Member, the other TIC owners of the Property were two-tier structures. For example, NNN 123 North Wacker 25, LLC (“TIC 25”), which was formed on November 8, 2005, is owned 100% by NNN 123 North Wacker Member 25, LLC (“TIC Member 25”).²¹ This example has particular relevance because Thomas acted as the broker in

¹⁹ A true and correct copy of the Assignment, Pledge and Security Agreement between TIC Member, as borrower, and Mezzanine Lender, as the secured party, dated as of September 26, 2005, is attached to the Mikles Suppl. Decl. as Exhibit 5. A true and correct copy of the Irrevocable Transfer Power assigning in blank TIC Member’s 100% interest in TIC 0 to the Mezzanine Lender is attached to the Mikles Suppl. Decl. as Exhibit 6.

²⁰ See evidence of Mezzanine Loan payoff, cited *supra*.

²¹ The certificate of formation and limited liability operating agreement of TIC 25 (the “TIC 25 LLC Agreement”) is attached to the Mikles Suppl. Decl. as Exhibit 7. Like the TIC 0 LLC Agreement, the TIC 25 LLC Agreement provides that TIC Member 25 holds 100% of the member interests of TIC 25. See TIC 25 LLC Agreement at the initial recital and § 3.02(b) (“NNN 123 North Wacker Member 25, LLC, a Delaware limited liability company, [is] the sole member of [TIC 25]”; “[TIC 25] shall issue one Certificate . . . in the name of [TIC Member 25].” The TIC 25 LLC Agreement also references in Section 8.02 thereof the pledge of TIC 25 Member’s 100% membership interest in TIC 25 as required under the Mezzanine Loan: “This Section 8.02 shall not limit or restrict the [TIC Member 25’s] ability to pledge or transfer its Membership Interest [in TIC 25] pursuant to the MMA/Transwestern Mezzanine Realty Partners II, LLC’s . . . exercise of its rights pursuant to that certain pledge agreement whereby [TIC Member 25] has pledged its Membership Interest [in TIC 25] as collateral to the Mezz Lender.”

the sale TIC 25.²² It is difficult to fathom how Thomas, an attorney, investor, and a broker in the sale of one of the TICs, could not have been aware of the existence of mortgage loan, the mezzanine loan and the two-tiered ownership structure of the TICs when he sold TIC 25 in November 2005 or when he made his own equity investment in TIC Member, for that matter.

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

Dated: April 22, 2014
Chicago, Illinois

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

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²² A true and correct copy Thomas's Broker/Dealer Representations in respect of the sale of TIC 25 is attached to the Mikles Suppl. Decl. as Exhibit 8. Thomas was either blissfully unaware of the structure of the transaction and the obligations of the borrowers when he sold TIC 25 to a third party and purchased his own equity interest or, perhaps, Thomas was complicit in the same "fraud" that he accuses Mr. Thompson and TNP of perpetrating. *See* Reply at p. 4, fn.3. The Debtors reserve the right if it becomes necessary to take Thomas's deposition and propound discovery to determine exactly what Thomas knew, when he knew it, and what information he relied on when he sold TIC 25 and made his own investment.