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To be Argued by:
ROBERT S. SMITH

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New York Supreme Court
Appellate Division – First Department

Appellate Case No.: 2018-1123

SUTTON 58 ASSOCIATES LLC,

Plaintiff-Respondent,

– against –

PHILIP PILEVSKY, MICHAEL PILEVSKY, SETH PILEVSKY, PRIME ALLIANCE GROUP, LTD., and SUTTON OPPORTUNITY LLC,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

PRELIMINARY STATEMENT

Plaintiff-respondent ("plaintiff") sues defendants-appellants ("defendants") for the "tort" of helping two insolvent debtors file federal bankruptcy petitions. Defendants allegedly (1) loaned money to a company so that that company could hire a bankruptcy lawyer; and (2) did a transaction with another company, an affiliate of the first, designed to make a bankruptcy filing by that entity viable. Plaintiff, a creditor of the two filing entities, claims that it was injured by their bankruptcies. It says that it could have foreclosed on its collateral more quickly, and lost less of its investment, if the bankruptcies had never occurred. No injury unrelated to the bankruptcies is alleged.

Plaintiff's case is based on the theory that the transactions in suit – which had no purpose but to facilitate the bankruptcy filings – placed the debtors in breach of some of their loan covenants, and that defendants were guilty of inducing those breaches. But many, probably most, bankruptcies entail breaches of contracts. The whole point of bankruptcy is to protect debtors who have binding obligations they are not able to pay. The Bankruptcy Code severely limits, and often eliminates for all practical purposes, the remedies that creditors can seek against debtors for such breaches. If creditors could do what plaintiff is trying to do here – recover the full amount of their contract damages from third parties who facilitated a bankruptcy filing, on the theory that they induced breaches of contract that were essential to the bankruptcy – the way would be open for an end run around Bankruptcy Code restrictions.

For that and other reasons, actions like this one – tort actions under state law to recover damages stemming from federal bankruptcy filings – are preempted by the Bankruptcy Code. (Some of the many cases so holding are cited and discussed at pages 17-24 below.) Federal and state courts have recognized that such lawsuits, if permitted, would seriously disrupt the federal bankruptcy scheme. Anyone who helps a debtor seek bankruptcy protection would be at risk – and third parties, aware of the risk, would not give such help, which is often essential to a bankruptcy filing.

The claims here are based on loan covenants that prohibited the debtors from borrowing money, or making any use of funds other than their own, except as permitted by the loan agreements; and from engaging in transactions – principally the acquisition of assets – that could make a successful bankruptcy possible. Such loan covenants are very common. Supreme Court pointed out that they appear "all the time" in loan transactions. And it is often impossible for debtors contemplating bankruptcy to comply with these covenants, if only because, as here, they need to borrow money to hire a bankruptcy lawyer.

If every third party that helped a debtor seek bankruptcy protection by means that breached loan covenants could be sued, the chilling effect on bankruptcies would be severe. Bankruptcy would become significantly more difficult, and the purpose of the bankruptcy laws would be thwarted. Supreme Court, in denying defendants' motion for summary judgment, did not comment on these problems, and it did not cite or discuss any of the cases holding suits like this to be preempted. Supreme Court's decision on this issue was mistaken, and its order should be reversed for that reason.

This action is also barred under the *Noerr-Pennington* doctrine, as an interference with the exercise of the right, protected by the First Amendment, to seek judicial redress. And in any event, it is plain from the record that there is no basis for any claim against the individual defendants, who are alleged to have acted only through the entities of which they were owners. For these independent reasons, Supreme Court should have granted defendants' motion for summary judgment.

QUESTIONS PRESENTED

1. Is a state-law tort action preempted by the federal bankruptcy laws, where the alleged tortious acts consisted of enabling debtors to file federal bankruptcy petitions, and the only injury alleged resulted from the bankruptcy filings? Supreme Court answered no.

2. Is a state-law tort action based on the filing of bankruptcy proceedings barred by the *Noerr-Pennington* doctrine? Supreme Court answered no.

3. Will the record support a claim against the individual defendants, as distinct from the entities in which they own interests? Supreme Court answered yes.

THE FACTS

Defendants' motion for summary judgment is based entirely on undisputed facts. No depositions, or affidavits of parties or witnesses, were presented to Supreme Court. The factual record consists of the allegations of the complaint, which defendants assume to be true for present purposes, and of documentary evidence, consisting largely of written agreements and Bankruptcy Court filings.

A. The Loan Agreements

By three similar agreements dated as of June 19, 2015 (the "Loan Agreements"), plaintiff, Sutton 58 Associates LLC, made loans totaling $147,250,000 to finance a planned residential apartment project at Sutton Place and East 58th Street in Manhattan (the "Project"). (R52, 59, 818-1014)[1] The borrowers were two limited liability companies (collectively the "Borrowers"): Sutton 58 Owner LLC, the owner of the real property on which the Project would be located ("Mortgage Borrower"), and Mortgage Borrower's parent, BH Sutton Mezz LLC ("Mezz Borrower" – so-called because it was in the middle, or "mezzanine" of the capital structure, between Mortgage Borrower and a parent entity). (R57-58) The Borrowers were owned by Joseph Beninati, a Beninati family trust, and two other individuals. (*Id.*)

Plaintiff's complaint summarizes several covenants in the Loan Agreements as follows:

> Mezzanine Borrower and Mortgage Borrower each agreed: (a) *not to file a petition for bankruptcy*; (b) not to incur debt other than "Permitted Indebtedness"; (c) to pay their liabilities out of their own funds and assets; (d) not to have assets or businesses unrelated to the Property;

[1] "R" refers to the Record on Appeal.

> (e) not to make, permit, or suffer the sale or transfer of an indirect interest in Mezz Borrower or Mortgage Borrower, respectively; (f) to consider the interests of plaintiff in connection with all corporate actions; (g) *to remain a special purpose bankruptcy remote entity*; and (h) that any event of default under one Loan Agreement would be an event of default under the other Loan Agreements.

(R59; emphasis added)

The complaint's central allegation is that defendants caused the Borrowers to breach all but the last of these covenants – including the two italicized above, which are explicitly designed to prevent the Borrowers from taking advantage of the bankruptcy laws. Plaintiff has now abandoned its reliance on the first of these contractual provisions, the one directly prohibiting a bankruptcy filing. We show below that all the other alleged breaches stemmed from two acts that enabled the debtors to prepare to file and to file their bankruptcy proceedings. The bankruptcies themselves are the only injury from the breaches of which plaintiff complains.

B. The Non-Payment of the Loans and the Bankruptcy Filings

The planned Project did not go well. The loans were not paid on their maturity date, January 19, 2016. (R62) Plaintiff began proceedings to foreclose on the collateral Mezz Borrower had pledged to it, a 100% interest in Mortgage

Borrower. (*Id.*) After an unsuccessful attempt to get an injunction against the foreclosure, Mezz Borrower filed a voluntary bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York on February 26, 2016. (R79-82) Mortgage Borrower filed its petition several weeks later, on April 6, 2016. (R103-109)

C. <u>The Alleged Tortious Acts</u>

Defendants are a corporation, Prime Alliance Group, Ltd. ("Prime Alliance"); a limited liability company, Sutton Opportunity LLC ("Sutton Opportunity"); and the individuals who own and manage these entities, Philip Pilevsky and his sons Michael and Seth Pilevsky. (R56) Plaintiffs claim that at some point before the bankruptcy filings defendants and the Borrowers entered an arrangement or "scheme" whereby defendants would "obtain an ownership interest" in the proposed Project. Plaintiff asserts that "the Pilevsky Scheme had two parts." (R53) These two "parts" – the tortious acts defendants are accused of committing – were transactions that, as described by plaintiff, had only one purpose and one significant effect: to enable the Borrowers to file for bankruptcy.

The first of these alleged acts consisted of loaning money to Mezz Borrower so that it could hire a bankruptcy lawyer. Plaintiff alleges: "Philip Pilevsky caused

Prime Alliance to lend Mezz Borrower $50,000 …to retain a law firm …to file a petition for bankruptcy….” (*Id.*) The second alleged wrong was to transfer property to Mortgage Borrower so as to facilitate Mortgage Borrower’s bankruptcy filing. The complaint explains that Mortgage Borrower was previously a “Single Asset Real Estate Entity” and therefore “faced a formidable obstacle in using bankruptcy” because the Bankruptcy Act “disfavors” filings by such entities. (R53-54) Plaintiff asserts that “Michael Pilevsky and Seth Pilevsky caused Sutton Opportunity to transfer three rental apartments” to Mortgage Borrower so that Mortgage Borrower would no longer own only a “Single Asset”. (*Id.*) According to the complaint this was an attempt to “evade” and “dodge” what the complaint calls “a fundamental protection of plaintiff under bankruptcy law”. (*Id.*) But, as we show below, plaintiff never chose to litigate the validity of Mortgage Borrower’s filing in the Bankruptcy Court.

There is nothing in the complaint suggesting that any of the allegedly tortious acts were committed by the individual defendants in their personal capacities. On the contrary, the complaint specifically alleges the acts were performed by Prime Alliance (a corporation) and Sutton Opportunity (an LLC). (R53) And the complaint is devoid of any detail that could possibly support piercing the corporate veils of these two entities. The allegations on this subject are purely conclusory: the complaint says that the individuals “completely dominated, managed and controlled” the companies they owned and that “adherence to the fiction of a separate corporate existence… would result in injustice to plaintiff”. (R 74-75, 76)

D. The Proceedings in Bankruptcy Court

On March 10, 2016, plaintiff moved in the Bankruptcy Court to dismiss Mezz Borrower’s bankruptcy petition on the ground that it was a “bad-faith filing”. (R1151) After the Bankruptcy Judge commented unfavorably on the motion during oral argument (R121: “my initial impression is, you’re asking for relief…that could only be given if I adopt your view of the case”), it was withdrawn without prejudice by agreement. (R163 [#82]) The motion in Mezz Borrower’s case was never renewed, and plaintiff never moved to dismiss Mortgage Borrower’s bankruptcy filing.

Instead, the two bankruptcies were combined, and plaintiff cooperated with a creditors’ committee appointed by the Bankruptcy Court to develop a plan of reorganization in which plaintiff obtained control of the Project. (R487-534) The plan, dated November 14, 2016, was filed jointly by plaintiff and the creditors’ committee (R588-589) and was approved by the Borrowers’ creditors without a dissenting vote (R680-682). The creditors' committee, in certifying the vote to the Bankruptcy Court, represented that plaintiff ("[t]he Class 2 claimant") "has accepted the Plan". (R 681) The plan was confirmed by the Bankruptcy Court on January 18, 2017. (R600-678)

E. <u>Plaintiff's Alleged Damages</u>

Although the outcome of the bankruptcies was that plaintiff controlled the Project, plaintiff complains that that result would have come sooner, and the Project would be more lucrative, if the bankruptcies had never been filed. The "delay" attendant on the bankruptcies, the complaint says, "has damaged and continues to damage plaintiff." (R73) Plaintiff specifies two ways in which the delay allegedly hurt it: it gave "[c]ommunity opponents of the Project" a chance to advance a proposed rezoning of the property; and the Project suffered from "declining prices and troubles in the market". (*Id.*) Plaintiff adds that it "has paid significant attorneys' fees and has incurred other costs". (R74) It is plain from the complaint that the alleged delay, attorneys' fees and costs resulted from the bankruptcies. No other cause for the damages is alleged.

THE PROCEEDINGS BELOW

The action was commenced on September 16, 2016. After a motion to dismiss (made on grounds not relevant here) was denied, defendants moved for summary judgment on October 23, 2017. (R43) Defendants argued in substance that summary judgment dismissing the complaint should be granted on three grounds: preemption by the federal Bankruptcy Code; the *Noerr-Pennington* doctrine; and, as to the individual defendants, the absence of any basis for piercing the corporate veils. In support of and in opposition to the motion, both sides submitted only attorneys' affirmations, attaching pleadings and documentary evidence. (R45-50, 787-791, 1410, 1420-1421) No significant facts were in dispute.

Supreme Court heard argument on the motion on March 6, 2018, and denied it in an oral opinion. (R7-33) As a reason for its decision, the court stressed that the loan covenants at issue were typical covenants found in many loan agreements. The court said that "the loan papers are similar to loan papers I see all the time" (R10), and told defendants' counsel: "What you are asking me to do is to throw this out, upend the way contracts are written here in New York City and upend the whole development industry…." (R15) In these remarks, we submit, the court missed an important point. These loan covenants are indeed used "all the time" and no one is asking to "throw [them] out". But it is also true that bankrupt debtors default on their loan covenants "all the time", and bankruptcy limits the creditors' remedies. The key question is whether creditors may use a tort action against a third party as a way around the limitations bankruptcy imposes. That is a question Supreme Court did not discuss.

Supreme Court also implied that it disapproved of what defendants had allegedly done (R22: "Are you advocating what your clients did here as something good…. [t]hat the Court should look kindly upon what your clients did?") and suggested also some displeasure with the federal Bankruptcy Judge (R16: "I'm not going to comment on the bankruptcy judge. I have had him in front of me before. I have made, unfortunately, comments about him. I will not comment about him again.").

The court addressed only briefly each of the three specific grounds for the summary judgment motion. As to bankruptcy preemption and *Noerr-Pennington*, the court reasoned that: "This case does not involve the bankruptcy itself. It involves separate contractual arrangements." (R18; *see also* R23-24) As to the liability of the individuals, the court said that "there is an interesting issue of piercing the corporate veil…. [T]here is certainly enough here where all these entities were acting on behalf of each other." (R19). As to this issue, the court relied on *Cortlandt Street Recovery Corp. v. Bonderman*, 31 N.Y.3d 30 (2018) – the only case cited in the court's opinion. (R23-24)

ARGUMENT

I.

PLAINTIFF'S CLAIMS ARE PREEMPTED BY THE FEDERAL BANKRUPTCY CODE

Plaintiff claims that if defendants had not "induced" the Borrowers to breach their contracts, the Borrowers would never have filed bankruptcy proceedings. But in filing those proceedings, the Borrowers were exercising a right given them by the federal Bankruptcy Code. Plaintiff has suggested that the Borrowers were abusing the bankruptcy process – but that was a matter for the federal courts to decide.

Plaintiff did originally move, in the federal Bankruptcy Court, to dismiss Mezz Borrower's bankruptcy case on the ground it was filed in bad faith (R1151), but plaintiff withdrew that motion after the Bankruptcy Judge made a skeptical comment about it. (R121, 163) Plaintiff's complaint here says that Mortgage Borrower's bankruptcy was an effort to "evade" or "dodge" the restrictions on bankruptcy filings by Single Asset Real Estate Entities (R53-54), but plaintiff chose not to make that argument to the Bankruptcy Court. It never moved to dismiss Mortgage Borrower's bankruptcy case, but instead cooperated in working out a plan to resolve the bankruptcies – a plan plaintiff supported in Bankruptcy Court, and from which it got what it wanted, control of the Project. (R487-534)

Plaintiff cannot challenge, in a state-law tort action, the validity or legitimacy of the Borrowers' bankruptcy filings. Nor can it base a state law tort claim on filings that were legitimate and valid under federal law. Plaintiff's claims in this case are preempted by the Bankruptcy Code.

Federal preemption of state law "has its roots in the Supremacy Clause", Article VI, clause 2 of the United States Constitution. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-153 (1982). Several forms of preemption have been recognized. "Express preemption" occurs where Congress declares that a federal law is intended to supersede state law. *E.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002). "Conflict preemption" occurs where a state law is inconsistent with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *E.g., Ray v. Atl. Richfield Co.*, 435 U.S. 151, 158 (1978), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). "Field preemption" occurs where "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *E.g., Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (internal citations omitted). This case is an example of both conflict preemption and field preemption.

"[A] central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) quoting *Local Loan Co. v. Hunt,* 292 U.S. 234, 244 (1934). State-law causes of action that make bankruptcy filings difficult or impossible "stand[] as an obstacle" to that purpose – and actions like this one for inducing breach of contract, brought against third parties who did nothing more than facilitate or encourage a bankruptcy filing, present a particular threat.

In many, perhaps most, cases a debtor who files a bankruptcy petition will be breaching contractual obligations. As Supreme Court correctly observed, loan covenants like those plaintiff relies on here are encountered "all the time." (R10) Thus, many loan agreements, like those in this case, provide that a bankruptcy filing is an event of default under the loan (R854, 912, 972); require the debtor to maintain a status inconsistent with a successful bankruptcy (R839-840, 901, 961); and prohibit or severely restrict the incurring of more indebtedness or the use of funds other than the debtor's own (R840, 875, 902, 934, 962, 1015) – even though some new financing will often, as in this case, be indispensable to a bankruptcy filing. To state the obvious, debtors who file for bankruptcy are usually short of money. Debtors who need, as Mezz Borrower here did, to borrow money to hire a bankruptcy lawyer can hardly be rare. It will very often be simply impossible for a debtor to file for bankruptcy without violating loan covenants.

Under Supreme Court's decision here, anyone who facilitates a bankruptcy, where that bankruptcy entails the breach by the debtor of loan covenants or other contractual obligations, is at risk. A lender, like Prime Alliance, that does nothing more than lend money so that a debtor can hire a bankruptcy lawyer can be sued by a lender for any adverse consequences the lender suffers from the bankruptcy. An investor, like Sutton Opportunity, that makes a deal with a prospective debtor in contemplation of a bankruptcy filing, and, as a necessary predicate to that filing, enters a transaction contrary to a loan covenant could be sued also. The result, inevitably, will be that many debtors will not get the financial or other help they need to file bankruptcies. This will frustrate the central purpose of the Bankruptcy

Code – to give qualifying debtors an opportunity to clean up their debts and make a fresh start.

This is also a case of field preemption. The Bankruptcy Code is a classic example of comprehensive federal regulation that thoroughly occupies a legislative field. The federal regulatory scheme is disrupted when a creditor of a bankrupt entity can seek a state-court remedy against a third party for alleged "wrongs" that consisted of facilitating the bankruptcy, and tries to recover all the loss that the bankruptcy proceeding allegedly caused. If the sort of activity that forms the basis for this lawsuit is to be regulated, it is for the federal courts, interpreting the commands of Congress, to decide the extent of the regulation – what is permitted, what prohibited, and what remedies are available. It is not consistent with uniform enforcement of nationwide bankruptcy laws for 50 states to make their own separate judgments on what is or is not lawful assistance to an entity that wants to file for bankruptcy, or what if any damages shall be available to creditors who claim that a bankruptcy filing injured them.

Of the many cases holding state-law tort claims based on bankruptcy to be preempted by the Bankruptcy Code, one with several resemblances to this case is *Astor Holdings, Inc. v. Roski*, 325 F. Supp. 2d 251 (S.D.N.Y. 2003), decided by then District Judge Gerard Lynch, now on the Second Circuit Court of Appeals. There a creditor, Astor, claiming injury resulting from the bankruptcy of one Thorpe, sued Roski, claiming that Roski had "tortiously interfered with … contractual agreements Astor had executed with Thorpe." *Id.* at 253. The tort claim was based on New York law. *Id.* at 259.

Thorpe and Astor were parties to a contract giving each a 50% interest in a business known as Robot Wars. Astor claimed that Thorpe had breached the contract by (among other things) "fil[ing] for bankruptcy in an effort to divest [Astor] of its interest in the Robot Wars business" and that Roski had induced him to do so. *Id.* at 259-260 (quoting Astor's complaint; alterations by the *Astor* court). The record showed that Roski had, for reasons of his own, been "helping Thorpe to free himself from the [contractual] relationship with Astor." *Id.* at 256. To that end, Roski caused his family's law firm to "become involved" with the Thorpe-Astor dispute. *Id.* A lawyer at that firm "suggested that Thorpe file for bankruptcy." *Id.* at 257.

Judge Lynch granted summary judgment dismissing the complaint, holding that Astor's claims against Roski, insofar as they were based on Thorpe's bankruptcy filing, were preempted by federal law. The court relied on "the broad scope of federal bankruptcy preemption" described by the Second Circuit Court of Appeals in *Eastern Equipment & Services Corp. v. Factory Point National Bank*, 236 F.3d 117, 121 (2d Cir. 2001). *Id.*at 262. The *Astor* court quoted the factors considered by the *Eastern Equipment* court as favoring preemption:

> (1) Congress placed bankruptcy jurisdiction exclusively in the [federal] district courts under 28 U.S.C. § 1334(a); (2) Congress created a lengthy, complex and detailed Bankruptcy Code to achieve uniformity; (3) the Constitution gives Congress exclusive jurisdiction over the bankruptcy law, see U.S. Const. art. I, § 8, cl. 4; (4) the Bankruptcy Code establishes several remedies designed to preclude the misuse of the bankruptcy process; and (5) *the mere threat of tort actions could prevent individuals from exercising their rights in bankruptcy, thereby disrupting the bankruptcy process*.

236 F.3d at 121, quoted 325 F. Supp. 2d at 262 (emphasis added).

The *Astor* court also relied on the decision of a California Court of Appeals in *Choy v. Redland Insurance Co.*, 103 Cal. App. 4th 789, 801, 127 Cal. Rptr. 2d 94, 103 (2002), which held that "no *authorized proceeding* in bankruptcy can be questioned in a state court *or used as the basis for the assertion of a tort claim in state court against any defendant.*" (Second emphasis added.) In *Choy*, the plaintiff in a personal injury case alleged that the defendant corporation's liability insurer had caused the defendant to go bankrupt solely to prevent the entry of a judgment against the defendant that would then be the basis for a bad-faith claim against the insurer. It was alleged that the insurer "paid all the necessary filing fees" for the bankruptcy, "so that [the insurer] could avoid liability for its bad faith conduct." 103 Cal. App. 4th at 794, 127 Cal. Rptr. 2d at 97. The court held the plaintiff's action against the insurer to be preempted, relying among other authorities on *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1995), which held a state-law tort claim preempted by the bankruptcy laws and warned against "state courts, in effect, interfering with the whole complex, reticulated bankruptcy process itself."

The *Choy* court also relied on *Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987). There a creditor, Parks, sought to foreclose on property owned by Richard and Juliana Gonzales, but was prevented from doing so when the Gonzaleses filed a bankruptcy petition. Parks brought suit in state court, claiming that the bankruptcy was an abuse of process and naming as defendants not only the Gonzaleses but also Dodge, the attorney who helped the Gonzaleses file the bankruptcy petition. A federal bankruptcy court held the state court action as brought against all three defendants - including Dodge, who was not a party to the bankruptcy - "void from the outset" because it was preempted by the Bankruptcy Code. *See id.* at 1036. A district court and the Ninth Circuit Court of Appeals affirmed that holding.

A state-law tort claim based on an injury resulting from bankruptcy is preempted even where, as here, the defendants' allegedly tortious conduct occurred prior to the bankruptcy filing. This principle is illustrated by *Astor* and *Choy*, among other cases, and is explicitly stated in *National Hockey League v. Moyes*, 2015 WL 7008213 (D. Ariz. Nov. 12, 2015). There the NHL sued the "Moyes Parties", controlling owners of the Coyotes professional hockey team, alleging that the Moyes Parties had aided and abetted a breach of fiduciary duty by the Coyotes in entering into an agreement to sell the team to a purchaser who planned to move the Coyotes to Canada. The agreement "required authorization from a bankruptcy court before the sale could be finalized", and the Moyes Parties then caused the companies that owned the Coyotes to file bankruptcy proceedings. *Id.* at *2. The court held the NHL's tort claim to be preempted, rejecting the argument that "to the extent [the] tort claim comprises pre-filing conduct, the claim is not preempted." *Id. at* *5. The court held that "[w]hen damages arise only after and because of the bankruptcy filing, a claim based on pre-filing conduct is preempted." *Id.* at *6.

The court in *National Hockey League* cited *Casden v. Burns*, 504 F. Supp. 2d 272, 281-282 (N.D. Ohio 2007), *aff'd* 306 F. Appx. 966 (6th Cir. 2009), in which a claim for breach of fiduciary duty against a corporation's directors was held preempted, where the directors had allegedly caused the corporation to file a bankruptcy petition to protect themselves from shareholder claims. The *Casden* court explained: "Where, as here, injury to shareholders might never occur, and thus plaintiff's claim would not accrue, if at all, until after the company files its bankruptcy petition, and accrual of the claim depends on what happens in the Bankruptcy Court, the potential future claim would interfere sufficiently with the bankruptcy process to trigger preemption." 504 F. Supp. 2d at 281. This holding applies to the present case: the injury of which plaintiff complains would never have accrued but for the Mezz Borrower and Mortgage Borrower bankruptcy filings, the accrual of the claim depended on what happened in the Bankruptcy Court, and therefore the claim "would interfere sufficiently with the bankruptcy process to trigger preemption."

Other cases holding state-law tort claims that arose out of bankruptcy filings to be preempted include: *In re Repository Techs., Inc.*, 601 F.3d 710, 720-23 (7th Cir. 2010) (state law claims of tortious interference, based on allegation that defendants "caus[ed] RTI to file for bankruptcy," "concern[ed] the defendants' conduct before the official commencement of RTI's bankruptcy case" but were "inextricably bound to the bankruptcy proceeding," and thus could be "preempted by the [Bankruptcy] Code to preclude the misuse of the bankruptcy process.")

(internal quotations omitted); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 426 (6th Cir. 2000) (state law claims for unjust enrichment brought against secured creditor who had collected debts from plaintiffs during pendency of bankruptcy proceedings were preempted because they "presuppose a violation of the Bankruptcy Code"); *Cox v. Zale Del., Inc.*, 1998 WL 397841 *6 (N.D. Ill. July 13, 1998) (debtor's claims for unfair debt collection and unjust enrichment, based on debt collection agreements signed with creditor during pending bankruptcy, were preempted); *Raymark Indus., Inc. v. Baron*, 1997 WL 359333 *10 (E.D. Pa. June 23, 1997) (Raymark's state law claims based upon the filing of a bankruptcy petition were preempted; a finding to the contrary would "lead to a world where the specter of additional litigation must haunt virtually every actor in a bankruptcy proceeding."); *Knox v. Sunstar Acceptance Corp. (In re Knox)*, 237 B.R. 687, 702 (Bankr. N.D. Ill. 1999) (claim brought pursuant to the Illinois Consumer Fraud Act essentially seeking remedies for violations of the Bankruptcy Code was preempted by the Bankruptcy Code); *Holloway v. Household Auto. Fin. Corp.*, 227 B.R. 501, 508 (Bankr. N.D. Ill. 1998) (claim under the Illinois Consumer Fraud and Deceptive Practices Act was preempted because the "claim is wholly dependent upon the Bankruptcy Code"); *Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115, 125 (Bankr. D. Md. 1995) (disallowing state tort actions based on violations of the

Bankruptcy Code because to allow them "ultimately would have the effect of permitting state law standards to modify the incentive structure of the Bankruptcy Code and its remedial scheme"); *Brandt v. Swisstronics, Inc. (In re Shape, Inc.)*, 135 B.R. 707, 708 (Bankr. D. Me. 1992) (where the Bankruptcy Code "is applicable ... and has its own enforcement scheme and separate adjudicative framework, it must supersede any state law remedies"); *Longnecker v. Deutsche Bank Nat. Tr. Co.*, 842 N.W.2d 680 (Iowa Ct. App. 2013) (finding that claims of tortious interference against mortgagor who defaulted on mortgage and repeatedly filed bankruptcy petitions to stall foreclosure were preempted and noting that "the mere possibility of being sued in tort in state court" could "deter persons from exercising their rights in bankruptcy"); *PNH, Inc. v. Alfa Laval Flow, Inc.*, 130 Ohio St. 3d 278, 284-85, 958 N.E.2d 120, 126-27 (2011) (finding that state law claims for abuse of process and tortious interference based on misconduct that allegedly occurred during a bankruptcy proceeding were preempted); *Lewis v. Chelsea G.C.A. Realty P'ship, L.P.* 862 A.2d 368, 372-73 (Conn. App. Ct. 2004) (finding that plaintiff's state tort claims were preempted by the Bankruptcy Code and stating that "the threat of such tort actions and the potential for a large recovery may itself deter individuals from exercising their rights in bankruptcy").

We respectfully submit that Supreme Court failed to appreciate the applicability of federal preemption to this case, and its order should be reversed.

II.

PLAINTIFF'S CLAIMS ARE BARRED BY THE NOERR-PENNINGTON DOCTRINE

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the United States Supreme Court held that the Sherman Antitrust Act does not prohibit concerted efforts to influence governmental action, observing that "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot … lightly impute to Congress an intent to invade these freedoms." *Noerr*, 365 U.S. at 138. Later cases establish that the right of access to the courts is included in the First Amendment "right to petition" that the *Noerr-Pennington* doctrine protects and that the doctrine, because of its constitutional underpinnings, is not limited to antitrust cases. As this Court recognized in *I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 A.D.3d 206, 208 (1st Dep't 2005): "The filing of litigation falls within the protection of the *Noerr-Pennington* doctrine, which has been applied to bar claims of tortious interference predicated on the commencement of litigation." *See also Concourse Nursing Home v.*

Engelstein, 278 A.D.2d 35, 35 (1st Dep't 2000) (affirming dismissal of tortious interference with contract claim under *Noerr-Pennington* doctrine); *Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 268 A.D.2d 101, 106-107 (2d Dep't 2000) (finding that defendant was shielded from tort liability based upon petitions it filed with the city opposing zoning applications filed by plaintiff pursuant to the *Noerr-Pennington* doctrine and noting that the doctrine applies "even when the petitioning activity include[s] the use of questionable or underhanded activity.").

Similarly, the Supreme Court of California has explained: "[C]ourts have applied the *Noerr–Pennington* doctrine to shield good faith litigants from tort liability for bringing a lawsuit." *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1133, 791 P.2d 587, 595 (1990). More specifically, "the scope of the interference torts is limited by the constitutional right to petition for redress of grievances." *Id.* In other words, under *Noerr-Pennington*, an action for an "interference tort" like inducing breach of contract may not be based on the filing of a court proceeding. *Id.*

When Mezz Borrower and Mortgage Borrower filed their bankruptcy petitions, they were exercising their constitutional right of access to the courts.

There can be no doubt that, under *I.G. Second Generation Partners* and *Concourse Nursing Home*, an action against either of these debtors based on their bankruptcy filings would be prohibited by the *Noerr-Pennington* rule. The result should not be different because defendants here did not themselves file for bankruptcy, but only assisted others in doing so.

The constitutionally-guaranteed right to petition the government would be seriously impaired if states could penalize conduct that is necessary to make a petition possible. This was recognized in *Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155, 159 (9th Cir. 1993), where the court found that the defendant, who solicited parties to bring an action against the plaintiff and who funded the costs of that action, was protected from liability pursuant to the *Noerr-Pennington* doctrine, notwithstanding that the defendant himself was not a party to the earlier case. The federal Court of Appeals for the Fourth Circuit has said that "[f]unding of litigation by a non-party can be petitioning to the same extent that filing a lawsuit itself is petitioning." *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 401 (4th Cir. 2001). *See also Procurement, LLC v. Ahuja*, 2018 WL 2324356 *16 (Conn. Super. Ct. May 3, 2018) (finding that the act of petitioning the government through others does not deprive non-parties of *Noerr-Pennington* immunity, citing *Baltimore Scrap* and *Liberty Lake*).

Supreme Court rejected defendants' *Noerr-Pennington* argument for essentially the same reasons it rejected their bankruptcy preemption argument: Supreme Court thought that this case "is not based upon the bankruptcy. It's based upon various clauses in the contract that were breached." (R23-24) This, we submit, is simply incorrect. The alleged breaches of contract – the loan that enabled Mezz Borrower to hire a bankruptcy lawyer, and the real estate transaction that eliminated a legal obstacle to Mortgage Borrower's bankruptcy – were part and parcel of the bankruptcies: plaintiff's own description of them shows that they had no purpose except to facilitate the bankruptcies and would have done plaintiff no harm but for the bankruptcies. If there had been no bankruptcies this case would not exist.

The *Noerr-Pennington* doctrine furnishes an independent ground for summary dismissal of plaintiff's complaint.

III.

<u>IN ANY EVENT, THE CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS SHOULD BE DISMISSED</u>

It is clear from this record that the individual defendants do not belong in this case. Plaintiff has never even tried to show that they committed any alleged torts in their individual capacities. The two acts of which plaintiff complains, Prime Alliance's loan to Mezz Borrower and Sutton Opportunity's transfer of real property to Mortgage Borrower, were the acts of those two entities. Even if plaintiff could recover against Prime Alliance and Sutton Opportunity, it could not recover against the individuals unless it had a basis for piercing the corporate veils.

No such basis exists. The complaint makes only the most perfunctory and flimsy attempt to state a veil-piercing claim. It says that the individuals "dominated, managed and controlled" the entities they owned, but of course almost all entities are controlled by their owners; plaintiff has never provided any basis for thinking that these owners are different from any others, or somehow more dominating. There is no claim that corporate formalities were not observed. The complaint also asserts that respect for the corporate form here would cause some unidentified "injustice", but no supporting detail is offered, and no evidence submitted on the summary judgment motion gives the slightest support to this allegation. Facts like these simply do not come close to establishing a veil-piercing case. *See Maggio v. Becca Constr. Co.*, 229 A.D.2d 426, 427-28 (2d Dep't 1996) (affirming grant of summary judgment; "the plaintiffs have not provided any evidence that there were no corporate minutes, no board of directors, no shareholders, and no corporate books, records, or bank accounts"); *Abelman v. Shoratlantic Dev. Co.*, 153 A.D.2d 821, 823 (2d Dep't 1989) ("Mere conclusory statements that an entity is an 'alter ego' of a corporation are insufficient to sustain a cause of action against it."); *Metro. Transp. Auth. v. Triumph Advert. Prods., Inc.*, 116 A.D.2d 526, 528 (1st Dep't 1986) (reversing denial of motion to dismiss; "There are no facts indicating that Percival's degree of control over Triumph made it his *alter ego*. Mere conclusory allegations that the corporate structure is a sham are insufficient to warrant piercing the corporate veil.") (emphasis in original).

At the oral argument before Supreme Court, the court mentioned in colloquy two facts that, the court suggested, might support veil piercing: that the funds and other assets provided by Prime Alliance and Sutton Opportunity were transferred at the individuals' behest and were "all coming out of the same pocket" (R25); and that the same lawyer acted for both entities and for the Pilevskys individually (R26-27). Neither of these facts, we submit, provides even tenuous support for a veil-piercing case. Indeed, the management of most United States corporations would be dismayed to learn that veil-piercing becomes a possibility every time a parent causes a subsidiary to take corporate action funded by the parent, or every time a company's general counsel acts for more than one member of a corporate group.

Supreme Court said that it believed *Cortlandt Street Recovery Corp. v. Bonderman*, 31 N.Y.3d 30 (2018) to be "directly on point" on the veil-piercing issue. (R24). We respectfully submit that the cases could hardly be more dissimilar. *Cortlandt* involved a scheme by which (according to allegations accepted as true for purposes of the decision) a group of private-equity investors acquired a profitable, nearly debt-free company and engaged in a series of transactions that loaded the company with debt and diverted huge sums to the investors' pockets. The Court of Appeals held that the plaintiff had sufficiently alleged that defendants "misused the corporate form", in that they "employed … shell companies to acquire long-term debt which dwarfed shareholder equity, all the while distributing … loan proceeds and certificate redemptions to the private equity defendants." 31 N.Y.3d at 48. The court added: "Critically, the complaint alleges these shell companies were created both to facilitate this flow of funds … and to conceal the true nature of these transactions from the noteholders." *Id.* Nothing remotely like that is alleged in this case. The worst offense of which plaintiff accuses defendants here is facilitating the Borrowers' breach of loan covenants.

The claims against the individual defendants should be dismissed.

CONCLUSION

For the reasons given above, the order appealed from should be reversed and defendants' motion for summary judgment granted.

Dated: August 3, 2018

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR § 600.10(d)(1)(v) that the foregoing brief contains 6,608 words, excluding those parts of the brief exempted by 22 NYCRR § 600.10(d)(1)(i), and that it was prepared using Microsoft Word 2010 in 14-point Times New Roman.

Dated: New York, New York
August 3, 2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-------------------------------------- X

SUTTON 58 ASSOCIATES LLC,

Plaintiff,

v.

PHILIP PILEVSKY, MICHAEL PILEVSKY, SETH PILEVSKY, PRIME ALLIANCE GROUP, LTD., and SUTTON OPPORTUNITY LLC,

Defendants.

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INDEX NO. 654917/2016

PRE-ARGUMENT STATEMENT WITH RESPECT TO NOTICE OF APPEAL FILED BY DEFENDANTS

Defendants PHILIP PILEVSKY, MICHAEL PILEVSKY, SETH PILEVSKY, PRIME ALLIANCE GROUP, LTD., and SUTTON OPPORTUNITY LLC ("Defendants") each hereby submits this Pre-Argument Statement with respect to their notice of appeal filed together herewith:

1. Title of the action: As per the above caption.

2. Full names of original parties and any change in the parties:

Plaintiff-Respondent:

SUTTON 58 ASSOCIATES LLC

Defendants-Appellants:

PHILIP PILEVSKY
MICHAEL PILEVSKY
SETH PILEVSKY
PRIME ALLIANCE GROUP, LTD.
SUTTON OPPORTUNITY LLC

3. Names, addresses and telephone numbers of attorneys for the Appellant and Respondent:

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4. State whether appeal is from an order or a final judgment, the date, the court, and county from which appeal is taken:

The appeal is from an interlocutory Decision and Order of the Supreme Court, New York County, dated March 6, 2018, together with the transcript of the record referenced in said Decision and Order.

5. State whether there is any additional appeal pending in the same action, the date of entry of the order or judgment, and attach a copy of the notice of appeal and the pre-argument statement: No other appeal is pending.

6. State whether there is any related action or proceeding now pending in any court of this or any other jurisdiction, and if so, the status of any such case:

In re: BH SUTTON MEZZ LLC, a Delaware Limited Liability Company, SUTTON 58 OWNER, LLC, a Delaware Limited Liability Company, and SUTTON 58 OWNER, LLC, a New York Limited Liability Company, Debtors, Case No. 16-10455 (SHL) (Jointly Administered), pending before the United States Bankruptcy Court for the Southern District of New York; plan of reorganization confirmed by confirmation order entered January 18, 2017 and related adversary proceeding entitled *BH Sutton Mezz LLC et al. v. Sutton 58 Associates, LLC*, Adv. Pro. No.: 16-01187 (SHL) before the United States Bankruptcy Court for the Southern District of New York; post-trial memorandum of decision issued December 1, 2016 and order entered on December 7, 2016 (I) Dismissing Adversary Proceeding And (II) Establishing The Amount Of Lender's Claims.

7. State the nature and object of the cause of action or special proceeding: Two causes of action alleging tortious interference with contract in connection with the filing for bankruptcy by two entities.

8. State as briefly as possible the result reached in the court below: The trial court denied Defendants' motion for summary judgment.

9. State as briefly as possible the grounds for seeking reversal, annulment or modification: The trial court erred in not granting summary judgment because the claims are barred by federal preemption and the *Noerr-Pennington* doctrine and, as to the individual defendants, for lack of sufficiently pleaded allegations to pierce the corporate veil.

Dated: New York, New York
March 30, 2018

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