To be Argued by:
RONALD S. GREENBERG
(Time Requested: 30 Minutes)

APL-2019-00028
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Court of Appeals

STATE OF NEW YORK

SUTTON 58 ASSOCIATES LLC,

Plaintiff-Appellant,

— against —

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

Defendants-Respondents.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

As demonstrated in plaintiff's opening brief, this lawsuit is not preempted by the Bankruptcy Code because it does not allege any wrongdoing either by the debtor-Borrowers or by anyone at all occurring within the Bankruptcy Cases.[1] Unable to rebut this simple truth, defendants submit a brief that is remarkable, both for what it says, and especially for what it fails to say.

With respect to the former:

- The very first sentence demonstrates defendants' fundamental misunderstanding of this lawsuit. There, defendants assert that an "authorized proceeding in bankruptcy" cannot be "used as the basis" for plaintiff's tortious interference claims against them. While defendants repeat this mantra throughout their brief (for example, at pages 10-11, 22, 23-24 and 30), it is plainly inapplicable. Both the complaint and our opening brief repeatedly make clear that plaintiff seeks to hold defendants responsible only for their own tortious interference with plaintiff's loan covenants with Borrowers, nothing more. *See, e.g.*, (R. 64-65 at ¶¶ 48-52; 70-71 at ¶¶ 74-82); Pl. Br. at 1, 8, 10, 11, 12, 13, 14, 26, 30-31. Plaintiff simply has not asserted any claim based on a "proceeding in bankruptcy" – authorized or otherwise.

- Closely related, defendants wish to cast this lawsuit as impermissibly seeking relief against them for a wrongfully filed

[1] In this brief, we use the same abbreviations as set forth in our opening brief ("Pl. Br.") and refer to defendants' brief as "Def. Br."

bankruptcy, so they can repeatedly assert that the only remedy for such a claim is dismissal of the debtor-Borrowers' bankruptcy. *See, e.g.*, Def. Br. at 2, 10, 22-23, 30, 34. But wishing does not make it so. To state the obvious, plaintiff brought this case against defendants, not the debtor-Borrowers, and asserts no claim whatsoever based on any Bankruptcy Court filing. The remedies for plaintiff's *actual* claims – rather than those defendants would have them be – are, again, based solely on these defendants' actions taken completely outside the Bankruptcy Cases and, therefore, lie solely in state court.

- While still on page 1 of their brief, defendants make another fanciful assertion, saying "[t]he only alleged purpose of the transactions sued on was to facilitate bankruptcy filings." Def. Br. at 1; *see also id.* at 6. However, the "purpose of the transactions" was for defendants to inject several hundred thousand dollars in capital into Borrowers – in blatant interference with plaintiff's Loan Agreements – in order to obtain a 49% interest in the Project, which was valued at nearly $200 million at the time, or roughly 1,000 times their investment. Holding defendants accountable for their purely self-interested, pre-bankruptcy tortious interference is not preempted by the Bankruptcy Code, no matter how many times defendants say they were merely "facilitating a bankruptcy."

- Also telling is defendants' statement that reversal "would impair the long-prevailing balance between creditors and debtors that has been, and should be, the special province of federal Bankruptcy

Courts." Def. Br. at 3. But defendants are not the debtors whose interests the Bankruptcy Courts must actually balance. Defendants' continuing to conflate their own interests with those of the debtors strikes at the very heart of why their arguments fail and why plaintiff's claims asserted *against them* are not preempted by any act of Congress or any prior decision of any court.

This last point is perhaps best illustrated by defendants' deafening silence on a host of issues central to this appeal.

- The starkest example is that defendants do not even once cite a single federal statute or Bankruptcy Code provision that they assert actually preempts plaintiff's tortious interference claims. As noted in our opening brief, one of defendants' principal cases, *MSR Exploration Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 915 (9th Cir. 1996), cites a half dozen specific federal statutes that preempt state law claims based on wrongful bankruptcy filings. Pl. Br. at 30. Defendants do not even attempt to cite any such statutes here, presumably because the claims at issue do not remotely touch upon any of them.

- Notably, defendants also do not cite a single preemption case in the portions of their brief that purport to explain the applicability of conflict and field preemption. Thus, their "Conflict Preemption" section merely cites one case and several scholarly articles standing for the uncontroversial proposition that the Bankruptcy Code serves salutary purposes – but none has

anything to do with preemption. *See* Def. Br. at 12-15. And defendants' discussion of field preemption consists of a single paragraph that cites nothing. *Id*. at 15. Waving the white flag, neither section even makes a pretense of responding to the detailed discussion of both principles in plaintiff's opening brief, which demonstrated why neither concept has any applicability here. *See* Pl. Br. at 16-21 (and cases cited therein). Defendants' silence on this score speaks volumes.

- Also noteworthy is defendants' studious avoidance of the facts of three of the most relevant cases. Indeed, defendants spend nearly five full pages of their brief straining to explain why *In re Extended Stay Inc.*, 435 B.R. 139 (S.D.N.Y. 2010), is purportedly "irrelevant," without once addressing the elephant in the room: namely, that *Extended Stay* denied preemption of a tortious interference claim on facts identical to those present here. Defendants also ignore that both *Davis v. Yageo Corp.*, 481 F.3d 661 (9th Cir. 2007) and *F.D.I.C. v. Barton*, No. Civ. A. 94-3294, 1998 WL 169696 (E.D. La. Apr. 8, 1998), permitted tort claims to proceed against directors of the debtors *based on their decisions to file the debtors for bankruptcy.* Faced with these dispositive decisions, defendants tellingly avoid any discussion of their facts, and instead throw up their hands, saying they are "exceptions to the general rule" and contained "loose language." Def. Br. at 24.

- Finally, defendants do not at all address the violence that the Decision does to "Bankruptcy Remote Entity" provisions

> common in real estate loan agreements throughout this State. The words are unspoken in defendants' brief. This is understandable, as the Decision would render these provisions ineffectual. Rather than address the problems this would cause that has led to widespread reported industry concern, defendants offer only conspiracy theories to explain away the criticisms set forth in a respected industry publication, and simply shrug at the practitioners who have called the Decision "bad precedent," "wrongly decided," and "in apparent tension with" *Extended Stay*. *See* Def. Br. at 31-34.

We respectfully submit that, both for what it says and for what it fails to say, defendants' own brief makes clear that preemption is wholly unwarranted here. The Decision should be reversed.[2]

ARGUMENT

THE BANKRUPTCY CODE DOES NOT PREEMPT PLAINTIFF'S CLAIMS

A. Defendants Have No Response to Plaintiff's Showing that the Principles Governing Preemption Refute Their Position

Plaintiff's opening brief demonstrated – based both on controlling preemption principles and paradigmatic preemption cases – that no theory of preemption bars plaintiff's claims. *See* Pl. Br. at 16-21 (and cases cited therein). In

[2] Defendants' brief also fails to attach a Disclosure Statement as required by Section 500.1(f) of this Court's Rules of Practice, rendering it subject to rejection by the Clerk of the Court pursuant to Section 500.1(p).

those pages of the brief, we demonstrated why neither type of conflict preemption ("impossibility" and "obstacle" conflict preemption) nor field preemption could conceivably apply here.

Defendants respond to this showing with remarkably little. In the "Conflict Preemption" section of their brief, defendants fail to cite a single preemption case. Instead, they merely refer to one case and several scholarly articles discussing the benefits of allowing "certain insolvent debtors" who file for bankruptcy an opportunity to seek a fresh start. Def. Br. at 12-15 (quoting *Grogan v. Garner*, 498 U.S. 279, 286 (1991)). Of course, defendants are not "insolvent debtors." So this principle – no matter how salutary – is of no moment here.[3]

In this portion of their brief, defendants also toss around loose arguments, which come without a scintilla of support, such as:

- "In many, perhaps most, cases a debtor who files a bankruptcy petition will be breaching contractual obligations." Def. Br. at 12.

[3] In any event, *Grogan* undercuts defendants' argument. In addition to not being a preemption case, *Grogan* rejects as "unpersua[sive]" an overly aggressive view of the principle that bankruptcy is available to give a debtor a "fresh start," and instead applies "limits [to that] opportunity." 498 U.S. at 286-87. Specifically, the *Grogan* Court rejected an attempt by a debtor who had been found liable for fraud to invoke the "fresh start" concept, and instead said the principle is limited to an "honest but unfortunate debtor." *Id.* (citation omitted). Here, defendants – all of whom are also accused of intentionally tortious conduct – are a step further removed from the protection of this "fresh start" principle because they are *non*-debtors, and their attempt to invoke that concept as a get-out-of-jail-free card should similarly be rejected.

- Reversal would put anyone who merely "facilitates a bankruptcy . . . at risk," even "non-profit organizations and pro bono lawyers." *Id.* at 13, 14.
- And such an outcome would also have a "chilling" effect on bankruptcies. *Id*. at 14.

None of these musings has the slightest relevance here.

For example, that *debtors* may sometimes breach their contracts is completely beside the point. Defendants are not the debtors. Nor are defendants pro bono lawyers or non-profit organizations. Just the opposite, they are vulture capitalists who acted in their own self-interest. And, contrary to defendants' arguments, those organizations are not at risk if plaintiff prevails unless they, like defendants here, tortiously cause a breach of contract – in this case, in an effort to misappropriate a 49% interest in a Project valued at $200 million for a few hundred thousand dollars. No one is preventing a non-debtor from lending to or investing in an insolvent company. But any such loan or investment needs to be done either (a) pre-bankruptcy filing, without tortiously interfering with another non-debtor's contracts, or (b) post-bankruptcy filing, in accordance with the Bankruptcy Code's debtor-in-possession financing rules. None of defendants' unsupported rhetoric – and no case they have cited or we have found – remotely supports the notion that the Bankruptcy Code in any way "conflicts" with New York's tortious interference law.

In the "Field Preemption" section of their brief (Def. Br. at 15), defendants do even less. They fail to cite a single case or authority whatsoever –

whether relating to preemption or otherwise – and instead purport to rely on their own *ipse dixit* suggestion that bankruptcy law should trump state law concerning tortious interference claims among non-debtors. But, as demonstrated in our opening brief, there is no basis to say that a tort claim between two non-debtors involves a field so pervaded by federal law that state law must yield. Pl. Br. at 19-21.

Defendants' inability to meaningfully respond to plaintiff's discussion of fundamental preemption principles and basic preemption cases is clear proof that their preemption arguments have no merit and should be rejected.

B. All of the Relevant Authorities Demonstrate that Preemption Is Unwarranted Here

In our opening brief, we cited a number of authorities demonstrating that there is no basis to preempt plaintiff's tortious interference claims on the present facts. *See* Pl. Br. at 21-26 (and cases cited therein). To the extent defendants attempt to distinguish those cases, their efforts are unconvincing.

As an initial matter, defendants have no answer at all for either *Davis* or *Barton*. As noted in our opening brief, both cases permitted breach of fiduciary claims to proceed against the subject debtors' board members based on their decision to file the debtors into bankruptcy. Of course, if claims for tortiously "facilitating" a bankruptcy were preempted, these claims would not have been permitted to proceed. Pl. Br. at 22-23. In response, defendants claim these cases "involved very unusual facts," but do not suggest why their supposition in that regard is relevant, and, without

any reasoning whatsoever, nakedly conclude that both cases are "rare exceptions to the general rule." Def. Br. at 24. But this does nothing to distinguish these on-point cases; on the contrary, defendants' treatment of them is a virtual admission that they cannot do so.

In the same vein, defendants do not even attempt to distinguish *Long v. Bank of America, N.A.*, 17 CV 2756, 2018 WL 5830794 (N.D. Ill. Nov. 7, 2018). There, the district court recently denied preemption of a state court claim for breach of a settlement agreement that resolved a sanctions motion in a bankruptcy proceeding. In words that could have been written for this case, the *Long* Court held that "the Bankruptcy Code does not preempt a state law claim where it exists absent the Code, and can be determined without doing violence to the Code's purpose of adjudicating all competing claims to a debtor's property in one forum and one proceeding." *Id.* at *2. Defendants fail even to address *Long*, which is yet another case that is fatal to their position.

Worse than silence, defendants' attempt to distinguish *Dougherty v. Wells Fargo Home Loans, Inc.*, 425 F. Supp. 2d 599 (E.D. Pa. 2006), makes no sense. There, plaintiff-mortgagor, the debtor in bankruptcy, brought breach of contract and unfair trade practices claims based on defendant-mortgagee's charging post-petition attorneys' fees incurred in plaintiff's bankruptcy. The court denied defendant's motion to dismiss on preemption grounds because, as here, plaintiff's claims did "not

presuppose violations of the Bankruptcy Code . . . [so] there [was] no risk of conflict between enforcement of the state laws and enforcement of the federal bankruptcy laws." *Id.* at 609 (quoted in Pl. Br. at 24). Defendants' inexplicable response is that *Dougherty* is "completely inapposite" because the plaintiff was the debtor in the bankruptcy. Def. Br. at 24 n.4. But, if anything, that would be a reason to apply preemption, as it might make sense in some cases to require the debtor to adjudicate all of its claims in Bankruptcy Court. In any event, this purported "distinction" is no distinction at all, had nothing to do with the *Dougherty* Court's decision, and merely further confirms the intellectual bankruptcy of defendants' position.[4]

And then there was *Extended Stay*. Although defendants use a substantial portion of their brief imploring the Court to view *Extended Stay* as "irrelevant" (*see* Def. Br. at 25-29), they cannot avoid its striking resemblance to this case. There, a mezzanine lender (Line Trust) sued non-debtor defendants for tortious

[4] To underscore just how specious defendants' purported "distinction" of *Dougherty* truly is, no fewer than *eight of their own cases* preempted claims brought *by the debtors*. *See* Def. Br. at 18, 20-22, citing *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000); *MSR Exploration*, 74 F.3d 910; *Cox v. Zale Del., Inc.* No. 97 C 4464, 1998 WL 397841 (N.D. Ill. July 13, 1998); *Raymark Indus., Inc. v. Baron*, No. Civ. 96-7625, 1997 WL 359333 (E.D. Pa. June 23, 1997); *Knox v. Sunstar Acceptance Corp. (In re Knox)*, 237 B.R. 687 (Bankr. N.D. Ill. 1999); *Holloway v. Household Auto. Fin. Corp.*, 227 B.R. 501 (Bankr. N.D. Ill. 1998); *Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115 (Bankr. D. Md. 1995); *Lewis v. Chelsea G.C.A. Realty P'ship, L.P.*, 862 A.2d 368 (Conn. App. Ct. 2004). Thus, if *Dougherty* is "completely inapposite," then so are all of these cases upon which defendants purport to rely.

interference and related state law claims, including for "procuring the breach of covenants in [Line Trust's] financing documents" with a borrower (Extended Stay) that had filed for bankruptcy. 435 B.R. at 151. In particular, Line Trust's "tort-based claims . . . ar[o]se from the bankruptcy-remote aspects of the Extended Stay financing arrangements." *Id.* In declining to preempt these claims, Judge Swain stressed that "the gravamen of the Line Trust Plaintiffs' tort claims is the alleged violation of contractual and state law duties to continue or consummate arrangements outside of bankruptcy under which Line Trust and its creditor peers could have received more favorable treatment than they appear likely to see in bankruptcy." *Id.* Tellingly, defendants' lengthy discussion of *Extended Stay* addresses none of this.[5]

Despite the clear factual parallels, defendants insist that *Extended Stay* is irrelevant because Judge Swain analyzed the claims at issue in terms of complete

[5] Indeed, defendants' understandably brief recitation of the facts does not dispute any of their blatant acts of tortious interference, including their creation of what is defined in our opening brief as the "Pilevsky Scheme." There is, however, at least one glaring factual error in their brief that should be corrected. Defendants mistakenly claim that "Borrowers cooperated with a creditors' committee appointed by the Bankruptcy Court to develop a *plan of reorganization* in which plaintiff obtained control of the Project." Def. Br. at 7 (emphasis added). As the Record citation immediately following this misstatement makes clear, what was filed was a "Plan of Liquidation," *not* reorganization. *Id.*, citing (R. 487-534). The difference is significant. Because the bankruptcy of the Mezz Borrower – which was the owner of the Project – was always a two-party dispute between a borrower and its lender, there was never any hope of reorganization. Defendants' tortious interference with Borrowers' "Bankruptcy Remote Entity" covenants in their Loan Agreements merely delayed the inevitable, while severely harming plaintiff.

preemption, not ordinary preemption. But that distinction is no reason to ignore *Extended Stay* given its highly relevant discussion of preemption principles generally, its distinction of the cases defendants themselves cite, and its identical facts. *See* Pl. Br. at 24-26 & n.10.[6] At bottom, *Extended Stay* analyzed the extent to which alleged tortious conduct had "a connection with the bankruptcy process." 435 B.R. at 152. Critically, the determinative factor precluding preemption was that Line Trust's tort claims concerned "actions taken by non-debtors prior to the commencement of bankruptcy proceedings." *Id.* A similar inquiry, involving indistinguishable facts, should lead to the same result here.[7]

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[6] Moreover, as they are forced to acknowledge, defendants themselves purport to rely on a complete preemption case. *See* Def. Br. at 28 (conceding that "*MSR* is indeed a complete preemption case"). And two of defendants' main cases, *Astor Holdings, Inc. v. Roski*, 325 F. Supp. 2d 251 (S.D.N.Y. 2003) and *Choy v. Redland Insurance Co.*, 103 Cal. App. 4th 789 (2002), also relied on *MSR*. Indeed, defendants' brief describes how *MSR* was a building block for *Choy*, which in turn informed the *Astor* decision, to constitute what defendants call "the *Choy/Astor* principle." *See* Def. Br. at 15-18, 24. Thus, for defendants to argue that a complete preemption case can offer no guidance here is not only incorrect, but is also inimical to their own argument.

[7] As noted in our opening brief, on remand, each of the *Extended Stay* defendants – all of whom had argued vigorously for preemption in federal court – moved to dismiss, but not one of them continued to assert preemption as grounds for their motions. *See* Pl. Br. at 26 n.10. Defendants acknowledge that the preemption defense was still available, but urge the Court to simply ignore that it suddenly disappeared from the case. Def. Br. at 29. However, the reason the *Extended Stay* defendants abandoned their preemption arguments on remand could not be more obvious: those arguments had become plainly untenable in the wake of Judge Swain's decision. This is why, given the identical facts present here, the Decision has been justly criticized as being "in apparent tension with . . . *Extended Stay*." *See* Law360 Article at 4.

* * *

In stark contrast to these cases, and as demonstrated in our opening brief, all of the cases upon which defendants mistakenly rely *directly implicated the Bankruptcy Code* – remedies for which, of course, lie solely in the Bankruptcy Court. *See* Pl. Br. at 27-31 (distinguishing all of defendants' cases on this basis). While we do not repeat that discussion here, it is useful to refer back to one of defendants' principal cases, *MSR Exploration*, which found that "state malicious prosecution actions for events taking place within the bankruptcy court proceedings are completely preempted by federal law." 74 F.3d at 912. In so holding, the court cited a litany of federal statutes and rules passed by "Congress . . . designed to preclude the misuse of the bankruptcy process." *Id*. at 915[8]; *see also Astor Holdings*, 325 F.Supp. 2d at 263 (noting "Bankruptcy Code contains . . . remedies for the misuse of the . . . process").

Of course, unlike these cases, defendants cite no statute or remedy available to plaintiff for defendants' tortious interference, whether in the Bankruptcy Code or otherwise; indeed, precisely to the contrary, they claim that plaintiff's tortious interference claims should be preempted, even though that would deprive

[8] Citing 11 U.S.C. § 105(a) (prevention of abuse); 11 U.S.C. § 303(i)(2) (bad faith filings); 11 U.S.C. § 362(h) (violation of stays); 11 U.S.C. § 707(b) (dismissal for abuse); 11 U.S.C. § 930 (Chapter 9 dismissal); 11 U.S.C. § 1112 (Chapter 11 dismissal); Fed. Bank. R. 9011 (frivolous and harassing filings).

plaintiff of any remedy at all. *See* Def. Br. at 30. As also previously noted (at Pl. Br. 12 n.6), while dismissal of the Bankruptcy Cases as filed in bad faith was a potential remedy for plaintiff *against the debtors*, defendants here most certainly are not the debtors, and Congress has provided no statute or rule preempting plaintiff's state law tort claims *against them for their conduct outside of and prior to the bankruptcy*.[9]

At bottom, while we have no quarrel with defendants' shopworn quote from *Choy* – 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" (Def. Br. at 23-24 (internal quotation marks omitted; emphasis in original)) – it provides no help for defendants here. That is because, in this lawsuit, plaintiff does not seek to question anything occurring in the Bankruptcy Cases or to

[9] Defendants argue that claims based on pre-filing conduct can be preempted. But the two cases they cite for this proposition addressed claims that *an actual bankruptcy filing* had been made for an improper purpose. *See* Def. Br. at 19-20, citing *Nat'l Hockey League v. Moyes*, No. CV-10-01036-PHX-GMS, 2015 WL 7008213, at *5-6 (D. Ariz. Nov. 12, 2015) (preempting claims involving "tortious conduct relating to an attempted unauthorized sale . . . by means of filing bankruptcy," which "amounts to an assertion that the bankruptcy filing was for an improper purpose or in bad faith"); *Casden v. Burns*, 504 F. Supp. 2d 272, 281-82 (N.D. Ohio 2007) (preempting shareholder's claim against directors based on their decision to file for bankruptcy "[b]ecause it is distinctly the province of bankruptcy law to determine liability for improper actions relating to bankruptcy filings"). Here, unlike these cases, plaintiff alleges neither that Borrowers' decision to file for bankruptcy was improper nor that it was damaged by anything that happened in the Bankruptcy Cases. Rather, the alleged improper conduct is defendants' tortious interference with Borrowers' loan covenants, and the principal damages to plaintiff are the loss in value of the Property and legal fees incurred in exercising its contractual remedies due to those breached loan covenants.

use them as the basis for its tort claims – which are grounded solely on defendants' pre-bankruptcy tortious interference with plaintiffs' contractual loan covenants. Nothing about those claims is "preempted" by any act of Congress, and no case cited by either side remotely suggests otherwise.

C. Preemption Would Deny Plaintiff Any Forum for Its Claims

As defendants themselves acknowledge, it is "no doubt true" that preemption would deny plaintiff any forum for its claims against them. *See* Def. Br. at 30. And as demonstrated in our opening brief, this strongly disfavored result militates against preemption. *See* Pl. Br. at 31-32 (and cases cited therein). Defendants do not deny this, or even address it. Rather, their predictable response is to return to their jack-of-all-trades argument: namely, that seeking purported dismissal of the Bankruptcy Cases against the debtor-Borrowers was the "remedy for the alleged wrong [plaintiff] complains of." Def. Br. at 29. But the fallacy of this argument could not be more apparent. Again, the wrongful conduct for which plaintiff seeks relief *in this lawsuit* was *not* committed *by Borrowers* and was *not* contained in any of *Borrowers'* Bankruptcy Court filings; rather, it was *defendants'* tortious interference with plaintiff's loan covenants that harmed plaintiff by causing Borrowers to no longer be "Bankruptcy Remote Entities." And defendants' citation to an ERISA case standing for the proposition that Congress sometimes leaves parties without state-law remedies could not be less relevant. Def. Br. at 30. As already

noted, defendants fail to cite a single statute enacted by Congress that they claim controls here. Accordingly, the absence of a federal forum for plaintiff's claims against defendants is an additional factor weighing in favor of reversal.

D. Policy Considerations Strongly Favor Reversal

Defendants' refusal even to address plaintiff's policy arguments is apparent from the very title of that subsection of their brief: "The Articles Plaintiff Relies on Provide No Valid Reason for Reversal." Def. Br. at 31. As defendants would have it, discrediting the publications is the point of the exercise, rather than addressing the policy concerns reflected in them. But those valid concerns, completely ignored by defendants, are not so easily dismissed.

It therefore bears repeating the Law360 Article's warning that the Decision "lay[s] out an unfortunate playbook for developers and insolvent guarantors to seek assistance from third parties in violating their loan covenants to maintain their status as an SPE . . . and given the lack of reasoning in the . . . [D]ecision, could call into question the efficacy of those provisions." Pl. Br. at 33-34 (quoting Law360 Article, at 1). Nor are the respected journalists and practitioners whose integrity defendants would impugn the only ones who were alarmed by the likely ramifications of the Decision.[10] As Justice Kornreich observed before the Decision became a

[10] Defendants' inappropriate sarcasm aside, the reporting of Mack Burke, co-author of the Commercial Observer article, has been recognized with at least two journalism

(footnote continued…)

reality, preemption "would undermine the way business is dealt with in New York City when it comes to lenders and developers" and "upend[] all of these contracts and the way business has been done for years." (R. 21). In the absence of the clearest statutory language or precedent requiring preemption – which plainly is lacking here – there is no sensible reason to invite such chaos.

Indeed, if upheld, defendants' position would nullify any number of bankruptcy remoteness provisions common in commercial finance contracts. Under defendants' logic, those provisions could not be enforced either against a debtor (which is protected by the bankruptcy stay) or against a non-debtor tortfeasor (due to preemption). They would therefore be (quite literally) good for nothing. Springing guarantees – a cornerstone of commercial lending – are no different. Under defendants' reasoning, a guarantor (typically the principal of a borrower) who causes his or her company to file for bankruptcy could not be held liable under the guaranty because claims against one who "facilitates a bankruptcy" must be preempted. *See*,

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(…footnote continued)
awards: The Society of Professional Journalists Mark of Excellence Award (Online News Reporting, Region 1) (Abbi Martzall and Maggie LaMar, *Region 1 Mark of Excellence Awards winners announced in New Haven, Conn.*, Society of Professional Journalists News, Apr. 11 2016, https://www.spj.org/news.asp?ref=1425) and the Online Journalism Award (Students Projects, Large) (Craig Newmark Graduate School of Journalism Staff, *NYCity News Service "Missing" Project Earns National Online Journalism Award*, The City University of New York Craig Newmark Graduate School of Journalism, Sept. 27, 2015, https://www.journalism.cuny.edu/2015/09/nycity-news-service-missing-project-earns-national-online-journalism-award/).

e.g., Def. Br. at 13; *see also* Pl. Br. at 34 n.15. Defendants' position would also preempt enforcement of other common commercial lender protection vehicles – such as bonds, letters of credit, indemnification agreements, and the like. This is precisely what Justice Kornreich and the commentators feared. Defendants utterly fail to address the upheaval to established commercial finance practice threatened by the Decision. It should be reversed.

CONCLUSION

For the foregoing reasons, as well as those set forth in plaintiff's opening brief, the Decision of the Appellate Division, First Department, should be reversed, the case should be remanded for further proceedings, and plaintiff should be granted such other and further relief as the Court deems proper. Plaintiff further respectfully requests that the Court's Order reversing and remanding makes clear that the case should continue to proceed in Supreme Court during any further appeals by defendants in the First Department.

Dated: New York, New York
October 24, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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October 24, 2019

Ronald S. Greenberg