No. 20-____

IN THE

Supreme Court of the United States

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

Petitioners,

v.

SUTTON 58 ASSOCIATES LLC,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITION FOR A WRIT OF CERTIORARI

ERIC S. SEILER
ROBERT S. SMITH
LANCE J. GOTKO
ANIL VASSANJI
FRIEDMAN KAPLAN SEILER & ADELMAN LLP
7 Times Square
New York, NY 10036
(212) 833-1100

DONALD B. VERRILLI, JR.
ELAINE J. GOLDENBERG
Counsel of Record
RACHEL G. MILLER-ZIEGLER
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001
(202) 220-1100
Elaine.Goldenberg@mto.com

Counsel for Petitioners

QUESTION PRESENTED

Whether the federal Bankruptcy Code preempts state-law tort claims that are premised on an alleged misuse of bankruptcy proceedings or that seek to impose liability based on the very fact of bankruptcy.

PARTIES TO THE PROCEEDINGS

Petitioners Philip Pilevsky, Michael Pilevsky, Seth Pilevsky, Prime Alliance Group, Ltd., and Sutton Opportunity LLC were defendants in the trial court, appellants in the intermediate appellate court, and respondents below.

Respondent Sutton 58 Associates, LLC was plaintiff in the trial court, respondent in the intermediate appellate court, and appellant below.

RULE 29.6 DISCLOSURE STATEMENT

There is no parent corporation of Prime Alliance Group, Ltd., or Sutton Opportunity LLC, and there is no publicly held company that owns 10% or more of either entity's stock.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Sutton 58 Associates LLC v. *Pilevsky*, No. 80 (N.Y. Nov. 24, 2020)

Sutton 58 Associates LLC v. *Pilevsky*, No. 654917/16 (N.Y. App. Div. Jan. 10, 2019)

Sutton 58 Associates LLC v. *Pilevsky*, Index No. 654917/2016 (N.Y. Sup. Ct. Mar. 8, 2018)

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INTRODUCTION

The decision below deepens a longstanding and entrenched division of authority as to whether the Bankruptcy Code preempts state-law tort claims that require deciding whether there has been an abuse of the bankruptcy process or whether the existence of that process is itself grounds for liability. Splitting from the majority of federal and state courts, the New York Court of Appeals concluded that such claims are not preempted. That decision on a frequently recurring issue of federal bankruptcy-preemption law as to which courts across the country have reached disparate results—and most have disagreed with the approach taken by the majority below—strongly warrants this Court's review, so that similarly situated litigants are not treated differently based on the happenstance of where the relevant state-law claims are brought.

The decision below also is wrong on the merits, and it is likely to give rise to very significant negative consequences. Most notably, it threatens to chill the activities of those who provide assistance to low-income debtors or other debtors who need help filing for bankruptcy. Many debtors could not afford to enter bankruptcy in the first place, and could not successfully navigate bankruptcy proceedings once they have begun, without such assistance. Yet, as the dissent below warned, under the majority decision anyone who plays any causative role in bringing about a bankruptcy filing may face the prospect of a state-law tort suit—if, for example, the filing amounts to a violation of a loan agreement into which the debtor has previously entered. That means that debtor-assistance groups, and even debtors' friends and family members,

are far less likely to step in to help, even when bankruptcy may be the best and most orderly outcome for the debtor and his or her creditors. See, *e.g.*, *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934) (explaining that central purpose of federal bankruptcy law is to allow debtors to obtain "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt"); see also *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 528 (1984). Allowing state law to undermine and discourage federal bankruptcy filings in that way should not be countenanced.

In short, this case presents an excellent vehicle to resolve a longstanding split in authority, to address a decision with harmful effects, and to bring much-needed uniformity to an important question of federal law. This Court's review is essential.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 164 N.E.3d 984 and reprinted in the Appendix (App.), *infra*, at 1a-59a. The opinion of the New York Supreme Court, Appellate Division (App. 60a-61a), is reported at 168 A.D.3d 477. The opinion of the New York Supreme Court (App. 62a-82a) is unpublished.

JURISDICTION

The judgment of the New York Court of Appeals was entered on November 24, 2020. By order dated March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari to 150 days from (as relevant here) the date of a lower-court judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). See pp. 31-32, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix to the petition. App. 140a.

STATEMENT

1. In June 2015, respondent Sutton 58 Associates LLC loaned $147,250,000 to BH Sutton Mezz LLC (Mezz Borrower) and Sutton 58 Owner LLC (Mortgage Borrower) (collectively, the borrowers) to finance a residential apartment project in Manhattan. App. 1a, 90a. Mezz Borrower, which owned 100% of the membership interest in Mortgage Borrower, pledged that interest to respondent as security for respondent's loan. App. 2a.

The loan agreements documenting the transaction required the borrowers to agree to a number of provisions intended to limit their ability to pursue bankruptcy. According to the complaint in this case, the agreements stated that the borrowers (1) would not "file * * * petition[s] for bankruptcy," App. 91a; (2) would "remain * * * special purpose bankruptcy remote entit[ies]," App. 91a, *i.e.*, entities "organized for the sole purpose of owning property, engag[ing] in no unrelated business, and hold[ing] no unrelated assets," App. 2a n.1; and (3) would incur only certain narrow kinds of debt and would not acquire any unrelated assets or engage in other business, see App. 91a.

When the loans came due in January 2016, the borrowers defaulted. App. 2a. Respondent then scheduled a UCC foreclosure sale of Mezz Borrower's membership interest in Mortgage Borrower. App. 2a. The borrowers attempted to enjoin the sale in state court,

but a New York trial court denied their preliminary-injunction motion. App. 3a.

Mezz Borrower subsequently filed a voluntary petition for Chapter 11 bankruptcy in federal court. That filing resulted in an automatic stay of the sale. App. 3a, 96a; see 11 U.S.C. 362.

Contending that Mezz Borrower's bankruptcy petition was "a classic bad-faith filing," App. 132a, respondent moved to dismiss the bankruptcy case or, in the alternative, to modify the automatic stay. See App. 3a; see also 11 U.S.C. 1112(b) (permitting "dismiss[al]" of "a case under this chapter"); 11 U.S.C. 362(d)(1) (permitting "relief from the [automatic] stay"). In that motion, respondent argued that the bankruptcy filing was "a litigation tactic without the intention or serious hope of reorganizing." App. 126a; see *id.* at 128a ("The petition was filed to obtain a litigation advantage * * * and thus lacks a good-faith basis for invoking bankruptcy jurisdiction.") (capitalization omitted). Respondent also contended that the bankruptcy filing reflected "a single asset dispute between two parties—a debtor and its sole secured creditor—that can be fully resolved in the state court system" and therefore did not "belong in Bankruptcy Court." App. 116a.

At a hearing on the motion, the bankruptcy court expressed concern that the motion was "premature." Record on Appeal 1346 (N.Y. Ct. Appeals). Respondent subsequently withdrew the motion without prejudice, App. 3a, and never refiled it.

Mortgage Borrower also filed its own Chapter 11 bankruptcy petition. App. 3a. Respondent did not file a motion to dismiss that petition. App. 3a.

The two bankruptcy cases were ultimately consolidated in the Southern District of New York. Respondent and a creditors' committee filed a joint plan of liquidation, which the bankruptcy court approved. App. 3a-4a. Pursuant to that plan, the project site was sold at an auction sale in December 2016. App. 3a-4a. Respondent placed the winning bid of $86 million. App. 3a-4a.

2. In September 2016, respondents filed the instant suit in New York state court, claiming that petitioners Philip Pilevsky, Michael Pilevsky, Seth Pilevsky, Prime Alliance Group, Ltd., and Sutton Opportunity LLC were liable for tortious interference with contract on the ground that they had interfered with the loan agreements between respondent and the borrowers by facilitating the borrowers' bankruptcies. App. 4a.

As to Mezz Borrower, respondent alleged that in February 2016 petitioners loaned $50,000 to Mezz Borrower to allow it to retain bankruptcy counsel. App. 4a. That counsel, in turn, filed Mezz Borrower's bankruptcy petition. App. 4a.

As to Mortgage Borrower, respondent alleged that in February 2016 petitioners transferred cash and their interest in three rental properties to Mortgage Borrower in exchange for a 49% ownership stake in Mezz Borrower's parent company. App. 102a-103a. According to respondent, Mortgage Borrower used a portion of that cash to pay bankruptcy counsel a retainer, thus enabling Mortgage Borrower to file its own bankruptcy petition. App. 103a. Respondent also contended that the transfer of property interests caused Mortgage Borrower to lose its status as a special purpose bankruptcy remote entity, thus removing protections that creditors would otherwise have had

relating to the automatic stay and leading to bankruptcy proceedings that were more protracted than they otherwise would have been. App. 5a; see 11 U.S.C. 362(d)(3).

Respondent's tort claims were premised on the notion that the bankruptcies were wrongful. See, *e.g.*, App. 85a-86a, 101a-102a. Respondent asserted that, by smoothing the way for the bankruptcy filings, petitioners had caused the borrowers to breach various covenants in their loan agreements with respondent, including the covenants forbidding any bankruptcy filing at all. See App. 4a-5a. Respondent also argued that the existence of the bankruptcies gave rise to all of the damages it allegedly suffered due to the claimed tortious interference. In respondent's view, if it had been able to proceed with the UCC foreclosure sale in February 2016, rather than acquiring the project-site property after months of bankruptcy proceedings, the property would have been worth $100 million more at the time of respondent's acquisition. See App. 4a & n.4, 5a. That was so, respondents contended, because the months of bankruptcy proceedings happened to coincide with zoning issues and other market changes that depressed the value of the property. See App. 4a & n.4, 5a.

3. a. Petitioners moved for summary judgment, arguing (as relevant here) that the U.S. Bankruptcy Code preempts respondent's state-law tort claims. App. 5a. As petitioners explained, respondent's allegations were "all about the bankruptcy" and "[i]f you took the words bankruptcy out of the complaint, there would be nothing left." App. 75a-76a. The trial court denied the motion, concluding that the "case does not involve the bankruptcy itself." App. 71a.

b. The New York Appellate Division (First Department) unanimously reversed, concluding that respondent's claims are preempted. The court explained that respondent's asserted damages—a necessary element of its tort claims—"ar[o]se only because of the bankruptcy filings." App. 60a. The court also noted that respondent had tacitly acknowledged that its remedy, if any, lay in bankruptcy: respondent had filed a motion to dismiss one of the bankruptcy filings "as filed in bad faith[,] but voluntarily withdrew that motion." App. 60a.

c. In a 4-3 decision, the New York Court of Appeals reversed.

The four-judge majority explained that "the Bankruptcy Code thoroughly governs the litigation and settlement of controversies between debtors and creditors in connection with the bankruptcy estate." App. 11a-12a. And the majority acknowledged that most courts to address the issue had found tort claims "premised upon a bankruptcy filing, itself, or other alleged wrongful conduct within a bankruptcy proceeding" to be preempted. App. 14a (citing cases).

But the majority ruled that no preemption exists here. The majority focused almost exclusively on the fact that respondent "seeks to sue non-debtor third parties for alleged wrongful conduct that occurred prior to, and separate from, the bankruptcy proceedings." App. 15a. Because respondent had not sued bankruptcy debtors (the borrowers) directly, the majority concluded that "the state[-court] action has no impact on the borrowers' ability to obtain a 'fresh start'" through bankruptcy. App. 16a (citation omitted). The majority also stated that petitioners "may be found to have tortiously interfered with [respondent's] contractual rights prior to the bankruptcy proceedings

without any inquiry by the state court into whether any provision of the Bankruptcy Code was violated." App. 17a. And the majority discounted, without extensive explanation, the potential problems associated with subjecting individuals or entities who assist debtors into bankruptcy, whether by providing loans or through other forms of assistance. App. 22a-23a.

In a lengthy and thorough dissent, three judges concluded that the state claims are preempted. Those judges undertook a close examination of what respondent would have to prove in state court to succeed on the tortious interference claims and noted numerous ways in which the claims depend on an assessment of the validity of the bankruptcy proceedings. As the dissent explained, "[d]amages are an essential element of the tort" of tortious interference with contract, meaning that respondent's suit "would require the [trial] court to calculate the loss flowing from the automatic stay and any additional delay caused by" Mortgage Borrower's change "from a special purpose bankruptcy remote entity to a holder of multiple assets." App. 42a, 43a. The dissent also stated that respondent's suit would require a showing that petitioners "*improperly* induced debtors to breach their contractual obligations," App. 43a—and to determine whether respondent had made that showing, the trial court would have "to opine on the legitimacy of the debtors' bankruptcy proceedings and [petitioners'] interest and role in facilitating debtors' filings." App. 43a. Finally, the dissent reasoned, respondent would have to show a "causal relationship between [respondent's] damages and [petitioners'] alleged tortious conduct," thus requiring the trial court to evaluate "the propriety of borrowers' bankruptcy proceedings." App. 43a.

The dissent concluded that a state court that addressed those issues would necessarily "invade the precinct of bankruptcy law," which is an area of "exclusive [federal] jurisdiction." App. 45a. Indeed, the dissent viewed respondent's state-law suit as an obvious "attempt to avoid the remedies of the Bankruptcy Code." App. 54a. Accordingly, the dissent found this case indistinguishable from a number of other cases in which various courts have preempted state-law claims that were predicated on bankruptcy proceedings. See App. 45a-54a. The dissent also noted the deleterious consequences to which the majority's contrary ruling would likely give rise, including "disincentiviz[ing] lawyers and potential secondary lenders from assisting debtors who wish to file for bankruptcy but need legal counsel and financial assistance to do so." App. 56a-57a.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Deepens A Recognized And Entrenched Conflict In Authority.

As the dissent below recognized (App. 40a-41a), the Court of Appeals' decision conflicts with the decisions of numerous other courts, including federal courts of appeals and state courts of last resort. Indeed, some courts have found that state law must yield to federal law in the very factual circumstances presented here—that is, where a plaintiff has brought state-law claims against non-debtors for conduct occurring prior to the bankruptcy itself, but premised on some alleged misuse of or other flaw in the bankruptcy process. More broadly, the decision below is irreconcilable with the reasoning of the many courts that have found preemption as to state tort claims that are based on conduct by debtors or non-debtors that occurs within

the confines of a bankruptcy case. Because of substantial conflict and confusion on this frequently recurring preemption issue in courts across the country, this Court's review is warranted.

1. a. i. Unlike the decision below, decisions of various other courts have held that state-law tort claims brought against non-debtors involving conduct preceding a debtor's entry into bankruptcy are preempted by federal bankruptcy law if those claims are inextricably tied to some alleged wrongfulness in connection with a bankruptcy case.

For instance, in *Choy* v. *Redland Insurance Co.*, 127 Cal. Rptr. 2d 94 (Cal. App. 2002), the California Court of Appeal confronted facts that are extremely similar to those here and held that the state-law claims before it were preempted. The plaintiff in *Choy* was owed money by a debtor that filed for bankruptcy. *Id.* at 96-97. The plaintiff alleged that the purpose of the bankruptcy filing was "to frustrate [the plaintiff's] ability to seek and obtain a judgment" against the debtor. *Id.* at 97-98. The plaintiff then brought state-law claims against a non-debtor defendant who was alleged to have facilitated the bankruptcy filing, including by supplying funds to file the debtor's bankruptcy petition. See *id.* at 98 (claims for intentional infliction of emotional distress and abuse of process); *ibid.* (explaining plaintiff's allegation that bankruptcy filing "was done on the initiative of [the non-debtor defendant], which paid all of the necessary filing fees"). The plaintiff argued against preemption on the ground that cases finding preemption in similar circumstances had "involved suits by or against bankruptcy debtors," while he was merely "seek[ing] to proceed

against non-bankruptcy parties for their act of inducing and causing the bankruptcy of [his] alleged debtor in order to benefit themselves." *Id.* at 102.

The California Court of Appeal rejected that argument as resting on "a distinction without a difference." 127 Cal. Rptr. 2d at 103. The court noted that the plaintiff's claims would require the state trial court to assess whether the bankruptcy "petition had been filed in 'good faith' within the meaning of the Bankruptcy Code"—the "very same activity" that triggered a preemption finding in other cases. *Ibid.* And those other authorities "place[d] no emphasis upon the circumstance that the questioned proceeding was brought 'by or against a debtor.'" *Ibid.* What they instead "clearly emphasize[d]," the court explained, was "the principle 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." *Ibid.* The bankruptcy proceeding was the basis for the *Choy* plaintiff's tort claims—and the claims were therefore preempted.[1]

[1] A number of federal district courts have adopted that analysis and found preemption in cases presenting facts similar to those at issue in *Choy*. See, *e.g.*, *Astor Holdings, Inc.* v. *Roski*, 325 F. Supp. 2d 251, 262 (S.D.N.Y. 2003) (Lynch, J.) (concluding that claims "involv[ing] allegations that the defendant induced a third party to file for bankruptcy" were preempted and agreeing with *Choy* that "the fact that the particular defendant in the state-law suit was not the debtor 'is a distinction without a difference'" (quoting *Choy*, 127 Cal. Rptr. 2d. at 103)); *Nat'l Hockey League* v. *Moyes*, 2015 WL 7008213, at *5-7 (D. Ariz. Nov. 12, 2015) (holding preempted a claim for aiding and abetting a breach of fiduciary duty, even though claim was "brought against a non-bankruptcy party, rather than the debtor").

The Seventh Circuit's decision in *In re Repository Technologies, Inc.*, 601 F.3d 710 (7th Cir. 2010), is consistent with *Choy*. Although that decision does not directly rule on preemption, it treats claims analogous to those at issue in the instant case as inseparable from the bankruptcy process. In that case, Repository Technologies, Inc. (RTI) filed for Chapter 11 bankruptcy, and the bankruptcy was later dismissed. *Id.* at 714-715. Subsequently, a creditor filed suit in state court against an attorney and law firm that had represented RTI in the bankruptcy, alleging that they conspired with RTI's shareholders to enrich themselves through the bankruptcy, "tortiously interfered with RTI's loan contract" with the creditor, and "abused the bankruptcy process." *Id.* at 716. The claims were subsequently removed to federal district court. The Seventh Circuit ruled that federal subject-matter jurisdiction existed as to those claims because of their close relationship to the bankruptcy, noting that the "claims could not have been the subject of a lawsuit absent the filing of a bankruptcy case." *Id.* at 720 (citation omitted). Moreover, the court of appeals extended that ruling to the creditor's allegations regarding "the defendants' conduct before the official commencement of RTI's bankruptcy case" and other "events that happened outside the bankruptcy context," because those allegations were "'inextricably bound to the bankruptcy proceeding' and [the creditor's] claim of abuse of the bankruptcy process.'" *Id.* at 720-721, 725 (citations omitted); see *id.* at 725-727.[2]

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[2] The Seventh Circuit did consider whether federal law completely preempted the state-law claims—that is, whether a federal cause of action "includes the same ingredients as the state claim and provides some recovery." 601 F.3d at 723 (citation omitted). Although no such federal claim existed, and complete

ii. The Ohio Supreme Court's decision in *PNH, Inc.* v. *Alfa Laval Flow, Inc.*, 958 N.E.2d 120 (Ohio 2011), is of a piece with those decisions. There, non-debtors who allegedly sustained damages from an adversary proceeding sued the non-debtor that filed the proceeding (and that had originally filed an involuntary bankruptcy petition seeking to initiate the bankruptcy). See *id.* at 122. All of the parties were "nondebtors," and "the actions that gave rise to the claim of tortious interference with a contract occurred before the involuntary-bankruptcy petition was filed." *Id.* at 130-131 (Lanzinger, J., dissenting); see *id.* at 128 ("the elements of the state-law claim of tortious interference with a contract arose before the filing"). Adopting the same approach as the majority decision below, the *PNH* dissent would have allowed the claims to proceed, reasoning that the claims were not preempted where "neither party is the bankruptcy debtor" and "resolution of the litigation will not affect the bankruptcy estate." *Id.* at 128; see App. 16a.

The *PNH* majority took a different approach. Focusing on the adversary proceeding, the majority sided with the many courts that have found preemption of claims "that allow the recovery of damages for a litigant's abuse of a bankruptcy court proceeding." *PNH*, 958 N.E.2d at 125-126. Those courts, the majority explained, "generally recognize that not only would the threat of litigation in state court potentially chill the exercise of federal rights created by the Bankruptcy Code but also that state law would define the standard of conduct for litigants in federal bankruptcy court

preemption was therefore unavailable, the court made clear that "the bankruptcy statutes have significant preemptive force" and that a conflict-preemption argument remained viable on remand. *Ibid.*

proceedings, establishing standards that vary from state to state and disrupt the uniformity of bankruptcy law that Congress had intended to promote." *Id.* at 126. That Congress had created "remedies designed to preclude the misuse of the bankruptcy process," the majority reasoned, "demonstrates that Congress recognized the need" for such deterrence "and therefore did not * * * intend for states to supplement the federal remedies it provided." *Ibid.*[3]

b. In contrast, the majority below ruled that preemption does not bar the state-law tort claims here, which likewise require addressing whether there has

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[3] *In re Miles*, 430 F.3d 1083 (9th Cir. 2005), which held state-law claims brought against non-debtors who filed involuntary bankruptcy petitions to be preempted, is similar. All of the parties before the court in *Miles* were non-debtors. Moreover, no bankruptcy was ever properly commenced in that case, since the involuntary bankruptcy petitions were immediately dismissed and since an involuntary petition does not actually make the debtor a bankruptcy petitioner or meaningfully place the debtor into bankruptcy. See *id.* at 1086-1087; 11 U.S.C. 303(f) (after involuntary petition is filed, until further action by a court, "any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced"); see also 2 *Norton Bankruptcy Law and Practice 3d* § 22:12 ("Upon service of an involuntary petition, the case is treated very much like a nonbankruptcy civil proceeding."). The Ninth Circuit's preemption reasoning turned on the fact that the state-law claims at issue alleged abuse of the bankruptcy process. See *Miles*, 430 F.3d at 1090-1091. The Ninth Circuit subsequently characterized *Miles* narrowly in *Davis* v. *Yageo Corp.*, 481 F.3d 661, 678 (9th Cir. 2007), but the allegations at issue in *Davis* bear no resemblance to those at issue in *Miles* or here. See App. 51a-52a (Rivera, J., dissenting); see also *Nat'l Hockey League*, 2015 WL 7008213, at *6 ("The plaintiffs in *Davis* sought damages that accrued pre-petition and would have accrued whether or not the bankruptcy petition was filed.").

been an abuse of the bankruptcy process. The majority principally relied on the fact that respondent "seeks to sue non-debtor third parties for alleged wrongful conduct that occurred prior to, and separate from, the bankruptcy proceedings." App. 15a. In the majority's view, the Bankruptcy Code "is overwhelmingly concerned with *the debtor's* estate." App. 15a-16a. But that rationale cannot be reconciled with the decisions discussed above in which claims involving non-debtors and conduct preceding a formal bankruptcy were deemed to be necessarily entangled with the bankruptcy case.

The majority attempted to distance itself from those conflicting decisions by asserting that, although there might be "some tension between the state court action and the bankruptcy proceeding" here, the tort claims before it were not "premised upon a bankruptcy filing itself." App. 14a, 22a. But that assertion does nothing to ameliorate the conflict; as the dissent explained, it is clear that multiple independent elements of respondent's claims were indeed premised on the commencement and continuation of the bankruptcy. See App. 43a. Among other things, establishing a claim of tortious interference under New York law requires showing "improper[] induce[ment]," App. 17a, and assessing whether there was such "improper" conduct here would "require the [state] court to opine on the legitimacy of the debtors' bankruptcy proceedings and [petitioners'] interest and role in facilitating debtors' filings," App. 43a (Rivera, J., dissenting); see App. 44a (noting that complaint "alleged repeatedly that the bankruptcy was commenced for an improper purpose, at the behest and for the benefit of [petitioners]"). Apart from an unexplained assertion that respondent's claims did not require a determination of "whether the borrowers' bankruptcy petitions were

filed in bad faith," App. 17a, the majority's opinion is silent as to how a court could evaluate the improper-inducement element of the tort claims without assessing the legitimacy of the bankruptcy filings.

In addition, a tortious-interference claim requires a showing of causation and damages. See *Lama Holding Co.* v. *Smith Barney Inc.*, 668 N.E.2d 1370, 1375 (N.Y. 1996). Here, respondent alleged that the bankruptcy "delayed its ability to exercise its contractual remedies," which "in turn resulted in a significant loss in value of the development site." App. 5a. Respondent's tort claims thus could not exist without the bankruptcy—or, as the dissent below put it, "[i]f there's no bankruptcy filing, there's no delay, and no damages. Without damages, there is no viable state claim." App. 58a. Respondent's claims thus were unquestionably "premised upon [the] bankruptcy filing" in multiple respects. App. 14a.

In deciding that state-law claims premised on a bankruptcy filing in those ways are not preempted, the decision below reached a conclusion contrary to that of numerous other courts.[4] That creates an intolerable forum-based disparity under which the resolution of the preemption question varies depending on where a suit happens to be filed. This Court should bring nationwide uniformity to this important area of the law.

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[4] Other decisions are consistent with the decision below—which merely illustrates the seriousness of the disagreement. *Rosenberg* v. *DVI Receivables XVII, LLC*, 835 F.3d 414, 416 (3d Cir. 2016) (expressly rejecting the analysis in *Miles* and holding that federal law did not preempt a state-law tortious-interference claim "for damages allegedly caused by the filing of * * * involuntary petitions"); *U.S. Express Lines Ltd.* v. *Higgins*, 281 F.3d 383, 393 (3d Cir. 2002).

2. The decision of the New York Court of Appeals in this case also implicates a closely related and equally entrenched split in authority over whether state-law claims alleging wrongdoing solely within the four corners of a bankruptcy are necessarily preempted by federal bankruptcy law. The facts of the decisions in question are not exactly the same as the facts at issue here—although many of those decisions, like this case, do involve state-law claims against non-debtors. As the dissent below recognized, however, the reasoning of those decisions is equally applicable in this case, and the decision of the majority below is irreconcilable with that reasoning.

a. As the majority below acknowledged (App. 14a), numerous federal courts of appeals and state courts of last resort have found preemption in cases in which plaintiffs have attempted to bring state-law claims alleging that actions taken in commencing a bankruptcy or in the course of the bankruptcy are tortious in some way. For example, in *Gonzales* v. *Parks*, 830 F.2d 1033 (9th Cir. 1987), a creditor alleged—much as respondent does here—that a bankruptcy petition was filed "solely to delay [a] creditor foreclosure sale" and that the debtors "were ineligible to file" their petition. *Id.* at 1034 & n.1. The creditor in *Gonzales* brought a tort claim in state court directly against the debtors, alleging that they had abused the bankruptcy process. *Id.* at 1033-1034. The creditor also brought a similar tort claim against the debtors' attorney (a non-debtor) for his action in filing the petition in bankruptcy court. See *ibid.*

The Ninth Circuit concluded that the tort claims were preempted by federal bankruptcy law. That conclusion did not turn on the specific identity of the parties that were the object of the claim. Instead, the

court of appeals explained that "[s]tate courts are not authorized to determine" whether a bankruptcy petition is "appropriate" and that "[t]he ability collaterally to attack bankruptcy petitions in the state courts" would "threaten the uniformity of federal bankruptcy law, a uniformity required by the Constitution." 830 F.2d at 1035. The court of appeals also found support in "the fact that remedies have been made available in the federal courts to creditors who believe that a filing is frivolous," including remedies for a bad-faith filing and sanctions under Bankruptcy Rule 9011. *Id.* at 1035-1036. The court reasoned that those remedies "should be read as an implicit rejection of other penalties, including the kind of substantial damage awards that might be available in state court tort suits." *Id.* at 1036.

In particular, the Ninth Circuit was concerned that "[e]ven the mere possibility of being sued in tort in state court could in some instances deter persons from exercising their rights in bankruptcy," and it viewed "Congress and the federal courts, not the state courts," as the appropriate bodies "to decide what incentives and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties shall be utilized." 830 F.2d at 1036. And as to the claim against the debtors' attorney, the court of appeals explained that "[p]ermitting state courts to award damages against bankrupts' attorneys based on the filing of a bankruptcy petition would subvert exclusive federal jurisdiction in much the same manner as allowing similar awards against the bankrupt parties." *Id.* at 1036-1037.

The Ninth Circuit has applied *Gonzales* to other factual contexts as well. Relying on *Gonzales*, the

Ninth Circuit held in *MSR Exploration, Ltd.* v. *Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1996), that federal law preempted a debtor's state-law malicious-prosecution claim brought against creditors who had filed allegedly improper claims in the debtor's bankruptcy. See *id.* at 911-912, 915-916. The debtor plaintiff did not bring its claim until "its reorganization plan was confirmed and substantially consummated," *id.* at 912—so (as here) the suit "d[id] not risk interference with the Bankruptcy Court's control over, or disposition of, the bankruptcy estate," App. 16a. But the Ninth Circuit was unwilling to permit "a world where the specter of additional litigation must haunt virtually every actor in a bankruptcy proceeding." *MSR Expl.*, 74 F.3d at 916. The court concluded that "even slight incursions and disruptions" of the bankruptcy process are impermissible under a conflict-preemption analysis. *Id.* at 914.[5]

Decisions of the Connecticut and Pennsylvania Supreme Courts and the Sixth Circuit rest on similar reasoning. Aligning with "the majority of federal as well as state courts," the Connecticut Supreme Court held in *Metcalf* v. *Fitzgerald*, 214 A.3d 361 (Conn. 2019), that federal law preempted vexatious litigation and unfair trade-practices claims that challenged an adversary proceeding that certain creditors were alleged to have maliciously filed and maintained. *Id.* at 365, 370. The court reasoned that Congress had "le[ft] no room for state law to supplement" federal "penalties and sanctions for abuse of the bankruptcy process" and that "the federal interest in uniformity is so dominant" that it "precludes enforcement of state laws that

[5] The decision in *Davis*, discussed above (see n.3, *supra*), is not relevant to the holdings in *Gonzales* and *MSR Exploration* for the same reason that it is not relevant to the holding in *Miles*.

threaten the uniformity and finality of the bankruptcy process." *Id.* at 370. In *Stone Crushed Partnership* v. *Kassab Archbold Jackson & O'Brien*, 908 A.2d 875 (Pa. 2006), the Pennsylvania Supreme Court similarly held that "the Bankruptcy Code preempts a state law claim of abuse of process based upon a frivolous claim filed in Bankruptcy Court proceedings." *Id.* at 880. The court observed that Congress had provided various remedies that, although "not directly applicable to the case" before the court, "implie[d] an intent to govern sanctions as they relate to Bankruptcy Court proceedings," thus "preempt[ing] state law remedies for frivolous claims in the field of bankruptcy." *Id.* at 886. And in *Pertuso* v. *Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000), the Sixth Circuit held state-law unjust enrichment and accounting claims to be preempted on the ground that allowing "state law causes of action to redress wrongs under the Bankruptcy Code would undermine the uniformity the Code endeavors to preserve." *Id.* at 426.

b. The majority decision below flies in the face of those courts' reasoning. If faced with the facts of this case, those courts could not possibly reach the same conclusion about preemption that the majority did.

The courts that have found preemption of state-law claims based on actions taken solely within the confines of a bankruptcy case have focused on the Bankruptcy Code's mechanisms to address abuse of process and on concern with disruption of Congress's uniform scheme. Those concerns are equally applicable here. In order to obtain relief for the debtors' alleged contractual violation in filing for bankruptcy, respondent here could have made use of Bankruptcy Code provisions "authorizing dismissal of bad-faith filings and empowering the Bankruptcy Court to take measures

to prevent any abuse of process." App. 15a. Indeed, respondent made a filing along those lines in the bankruptcy court, and withdrew it only after the court expressed skepticism about respondent's prospects of success. See App. 38a-39a, 52a (Rivera, J., dissenting). Moreover, respondent's state-law tort claims do threaten the uniformity of federal bankruptcy law, because they require a state court to assess whether the very existence of the bankruptcy was wrongful and whether its continued pendency over a period of time should give rise to damages. See App. 43a (Rivera, J., dissenting).

The majority here did not view the existence of Bankruptcy Code remedies as relevant to the preemption analysis, noting that respondent could not have used those remedies to obtain relief directly against petitioners. App. 11a; see App. 20a. But *Gonzales* and similar decisions do not rest on a determination of whether the Bankruptcy Code provides a remedy that directly overlaps with the state-law claim in question. Rather, those decisions treat "the existence of federal remedies" aimed at abuse of the bankruptcy process as "demonstrat[ing] that Congress recognized the need to deter [such] abuse * * * and therefore did not * * * intend for states to supplement the federal remedies it provided." *PNH*, 958 N.E.2d at 126; see *MSR Expl.*, 74 F.3d at 916 ("Whether creditors should be deterred, and when, is a matter unique to the flow of the bankruptcy process itself—a matter solely within the hands of the federal courts."); *Metcalf*, 333 Conn. at 12. That remains true even if a plaintiff cannot avail itself of some or all of the Code's remedies for abuse of process. See, *e.g.*, *Miles*, 430 F.3d at 1091 (treating 11 U.S.C. 303(i) as exclusive even though it did not provide a

"remedy for [non-debtor] third parties" like the plaintiffs in that case); see also *Gonzales*, 830 F.2d at 1034-1036.

The New York court's contrary conclusion therefore cannot be squared with the approach taken by most courts to have addressed the issue, including the Ninth Circuit, the Sixth Circuit, and the highest courts of several states. Rather, the reasoning adopted by the majority below closely echoes the reasoning of courts that have adopted the minority position as to preemption of state-law claims premised on actions taken within the confines of a bankruptcy. For instance, in *Graber* v. *Fuqua*, 279 S.W.3d 608 (Tex. 2009), the Texas Supreme Court held that federal law did not preempt a claim for malicious prosecution arising from the filing of an adversary proceeding in a bankruptcy case. *Id.* at 610. Just as the decision below relied on the proposition that respondent's claims here would not disturb the debtors' estate, the Texas Supreme Court stated that "Texas claims for malicious prosecution arise only after the underlying case reaches a final judgment and all appeals are exhausted," such that "nothing occurring in the malicious prosecution claim could disturb the matters already decided in [the] adversary proceeding." *Id.* at 617. And, echoing the New York majority's lack of concern with "tension between the state court action and the bankruptcy proceeding," App. 22a, the Texas court concluded that "preemption is not triggered by the mere fact that a claim requires state courts to interpret federal bankruptcy law," *Graber*, 278 S.W.3d at 619.

Thus, the decision below deepened an intractable division among the lower courts that reflects widespread confusion about and disparate approaches

to a centrally important bankruptcy-preemption question. That untenable state of affairs calls out for this Court's resolution.

B. The Decision Below Is Wrong.

Pursuant to its power to establish "uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const. art. I, § 8, cl. 4, Congress created the Bankruptcy Code, which is "a comprehensive federal system of penalties and protections," *E. Equip. & Servs. Corp.* v. *Factory Point Nat'l Bank, Bennington*, 236 F.3d 117, 120 (2d Cir. 2001). To the extent a conflict exists between the Bankruptcy Code and state law, such as when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000), then "federal law prevails and state law is preempted," *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1476 (2018). As the dissent below correctly recognized, respondent's state-law claims conflict with the Bankruptcy Code in just that way, because they are premised on alleged impropriety in the bankruptcy proceedings and seek to impose penalties based on the very fact of bankruptcy.

1. As a general matter, the Bankruptcy Code seeks to ensure that bankruptcy proceedings are legally permissible and cannot be encroached on by other sources of law. Thus, for instance, the exclusive jurisdiction of the federal bankruptcy courts and district courts over matters relating to bankruptcy is broad, and provisions exist to bar penalties associated with bankruptcy filings. See, *e.g.*, *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 (1995); 11 U.S.C. 525.

Congress also provided various specific mechanisms "to preclude the misuse of the bankruptcy process." *MSR Expl.*, 74 F.3d at 915 (citing as examples

Fed. Bankr. R. 9011, 11 U.S.C. 105(a), 11 U.S.C. 303(i)(2), 11 U.S.C. 362(h), 11 U.S.C. 707(b), 11 U.S.C. 930, and 11 U.S.C. 1112); see App. 11a; see also *Marrama* v. *Citizens Bank of Massachusetts*, 549 U.S. 365, 383 (2007) (Alito, J., dissenting) (noting that "[b]ankruptcy courts have used their statutory and equitable authority to craft various remedies for a range of bad faith conduct"). Most pertinent here, a debtor's bad faith in filing a petition is a ground for dismissal under 11 U.S.C. 1112(b) and for relief from the automatic stay under 11 U.S.C. 362(d). See *In re SGL Carbon Corp.*, 200 F.3d 154, 160-162 (3d Cir. 1999) (dismissal, citing cases); *In re Laguna Assocs. Ltd. P'ship*, 30 F.3d 734, 737 (6th Cir. 1994) (relief from the automatic stay, citing cases); see also, *e.g.*, *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1394-1395 (11th Cir. 1988) (identifying standards for determining whether bad faith exists).

State law that purports to provide an additional mechanism to address misuse of the bankruptcy process or to impose penalties associated with the mere existence of a bankruptcy is preempted because it conflicts with that detailed federal scheme and threatens to disrupt the uniformity of relevant federal remedies. See App. 37a (Rivera, J., dissenting). For instance, state tort claims for "wrongful" conduct related to a bankruptcy need not adopt the same standards that the bankruptcy courts have adopted for deciding what constitutes bad faith. That creates a risk that individuals who are fully compliant with federal bankruptcy law will nonetheless be subject to liability for conduct that individual States deem problematic. See *PNH*, 958 N.E.2d at 126 (identifying concern that "state law would define the standard of conduct for litigants in federal bankruptcy court proceedings, establishing standards that vary from state to state and disrupt the

uniformity of bankruptcy law that Congress had intended to promote"); *Gonzales*, 830 F.2d at 1035 (refusing to "allow[] state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating"); see also *Metcalf*, 333 Conn. at 12.

Interference with bankruptcy law by state courts is especially problematic in that regard. Although "in many circumstances state courts can, and do, resolve questions of federal law," because of "the unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws," Congress "wished to leave the regulation of parties before the bankruptcy court in the hands of the federal courts alone." *MSR Expl.*, 74 F.3d at 915. In other words, the need for uniformity is so great in bankruptcy that Congress intended to entirely disable state courts from adjudicating questions about the propriety of a bankruptcy proceeding. See *id.* at 916. Allowing States to both regulate and adjudicate what constitutes proper use of the bankruptcy process is inconsistent with that federal scheme.

2. The tortious interference claims here are preempted because the crux of those claims is that petitioners abused the bankruptcy process and that there was something wrongful about the process itself. For instance, as the dissent below explained, a necessary element of the tortious interference claims is that petitioners "*improperly* induced debtors to breach their contractual obligations, which would require the [state] court to opine on the legitimacy of the debtors' bankruptcy proceedings and [petitioners'] interest and role in facilitating debtors' filings." App. 43a. The majority disagreed, asserting that the state court would

not need to inquire into whether bad faith existed under the Bankruptcy Code because petitioners' conduct could be tortious even if "lawful" under the Code. App. 17a. But that only *highlights* the need for preemption: respondent's state-law claims conflict with the Code precisely because respondent seeks to hold petitioners liable for bankruptcy-related conduct that a federal court might deem fully appropriate as a matter of federal law.

Indeed, this case presents a particularly stark example of the concerns that have motivated courts to deem state-law abuse-of-process claims preempted. As noted above, respondent initially moved to dismiss one of the bankruptcy petitions on the ground that the petition was filed in bad faith, but withdrew that motion after the bankruptcy court expressed skepticism about the motion's likelihood of success. See App. 3a. Rather than pressing that argument further in the bankruptcy court, respondent instead sought "to avoid the remedies of the Bankruptcy Code," App. 54a (Rivera, J., dissenting), opting to present essentially the same allegations repackaged in the form of state-law tort claims brought against petitioners.[6] In bringing

[6] Indeed, the bankruptcy-court motion to dismiss and the state-court tort complaint are, in many places, phrased in essentially the same way. Compare, *e.g.*, App. 125a (bankruptcy-court motion: "[Mezz Borrower] Files for Bankruptcy to Avoid Foreclosure"), with App. 86a (Complaint: "Mezz Borrower filed for bankruptcy in order to avoid that foreclosure"); compare, *e.g.*, App. 134a (bankruptcy-court motion: arguing that bankruptcy petition "reflects an attempt to frustrate [respondent's] bargained for rights"), with App. 102a (Complaint: arguing that petitioners' conduct "was intended to frustrate [respondent's] maturity default remedies"); compare, *e.g.*, App. 127a-128a (bankruptcy-court motion: arguing that bankruptcy petition was filed "to

that subsequent state action, respondent essentially mounted a "collateral[] * * * attack" on the "bankruptcy petitions in * * * state court[]." *Gonzales*, 830 F.2d at 1035. Such a collateral attack "threaten[s] the uniformity of federal bankruptcy law." *Ibid.*; see *Metcalf*, 214 A.3d at 375 ("Congress' interest in uniformity in the bankruptcy process is so dominant as to preempt collateral attacks through state law vexatious litigation and [unfair competition] claims.").

Moreover, the majority below was wrong to rely on the assertion that "the state action has no impact on the borrowers' ability to obtain a 'fresh start'" on the ground that "resolution of [respondent's] claims" would not affect "the debtors' estates." App. 16a (citation omitted). Preemption of state law based on conflict with federal bankruptcy law may exist even if a reorganization plan in the underlying bankruptcy action has already been approved. Respondent itself alleged that the borrowers were able to file for bankruptcy—that is, to get their "fresh start"—only because petitioners facilitated their filings. And the only reason that respondent can claim tortious interference in the first place is the borrowers' pursuit of bankruptcy. See App. 58a (Rivera, J., dissenting) ("If there's no bankruptcy filing * * * there is no viable state claim.").

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thwart creditors and escape the effects of non-bankruptcy litigation"), with App. 85a (Complaint: contending that petitioners acted "to evade a fundamental protection in favor of [respondent] under bankruptcy law").

C. The Question Presented Here Is Important And Recurring, And The Legal Rule Adopted By The Court Below Will Give Rise To Serious Negative Consequences.

The question presented here is an important one, with the potential to have significant effects on federal bankruptcy law. Moreover, as illustrated by the decision below (and the discussion above), the question is frequently litigated in federal and state courts across the country, with widely varying results. See pp. 9-23, *supra*. As things stand, federal and state courts confronting bankruptcy-preemption issues have little guidance from this Court on how to approach the analysis. And litigants seeking to pursue state-law tort claims like the ones at issue in this case have a significant incentive to forum shop, in search of a jurisdiction with some connection to the defendant or to the alleged tort in which a state-law claim will not be preempted even if it hinges on an allegation that something has gone awry with the bankruptcy process.

In addition, the no-preemption rule adopted by the majority below, and applied by courts in several other jurisdictions, has deeply pernicious effects. Most notably, as the dissent recognized (App. 56a), if state tort liability may be the consequence for assisting debtors who are facing bankruptcy, individuals and entities are far less likely to provide that assistance. In some circumstances, that may mean that a party who desperately needs to file for bankruptcy simply lacks the resources to do so, thus "potentially chill[ing] the exercise of federal rights created by the Bankruptcy Code." *PNH*, 958 N.E.2d at 126; see *Gonzales*, 830 F.2d at 1036; see also *MSR*, 74 F.3d at 916 (discussing chilling effect of "[t]he threat of later state litigation");

Gene R. Smith Corp. v. *Terry's Tractor, Inc.*, 257 Cal. Rptr. 598, 600 (Cal. App. 1989) (similar). In others, it may mean that a party that could otherwise have avoided insolvency—for instance, by obtaining a loan from an entity that works with distressed individuals and entities—will lose that opportunity entirely, with cascading consequences for the party's employees (if any) and creditors.

Those chilling effects are especially pronounced as to "those with * * * little to no resources and a low credit rating," App. 56a, who often depend on some outside assistance in order to file for bankruptcy and successfully navigate bankruptcy-court proceedings. With respect to tort claims premised (like the claims here) on the notion that facilitating a bankruptcy was a wrongful act, potential targets for state-law tort suits include not only lenders who service those in distress but also debt-counseling entities, organizations that assist potential debtors in finding subsidized or other low-cost legal assistance, friends or family members who provide a potential debtor with funds to hire a bankruptcy lawyer, and anyone who simply advises the potential debtor that filing for bankruptcy would be a good idea. And the risk that those targets will face a tortious interference suit is hardly theoretical, since under nearly every loan agreement in existence the filing of a bankruptcy case is an event of default and therefore a breach of contract.

The mere risk of facing such a suit, without the ability to rely on a preemption argument that will immediately stop the suit in its tracks as a matter of law, may well be enough to ensure that those who would otherwise smooth a debtor's entry into bankruptcy will refrain from offering any assistance or advice. See App. 56a-57a (Rivera, J., dissenting) (explaining how

"[t]he fear of state litigation may disincentivize lawyers and potential secondary lenders from assisting debtors who wish to file for bankruptcy but need legal counsel and financial assistance to do so"); see also, *e.g.*, *Gonzales*, 830 F.2d at 1036 (noting the "kind of substantial damage awards that might be available in state court tort suits" and explaining that "[e]ven the mere possibility of being sued in tort in state court could in some instances deter persons from exercising their rights in bankruptcy"); *MSR Expl.*, 74 F.3d at 916 (discussing "specter of additional litigation"). The assurances of the majority below (App. 23a) that some such suits will fail on the merits in the end are thus cold comfort.

Finally, permitting tort claims like the ones asserted here to proceed inevitably creates inconsistent state and federal standards as to what constitutes abuse of the bankruptcy system. See pp. 24-25, *supra*. As noted, the core of respondent's claim is that petitioners helped debtors misuse the bankruptcy process to prevent respondent from recovering its collateral. When state courts are allowed to assess the legitimacy of bankruptcy filings through state-law tort claims, they are likely to develop different legal standards than those applied by bankruptcy courts, or even reach different results on the same facts. Borrowers and lenders alike are ill served by such unpredictable and varying liability, which destroys the uniformity that the Bankruptcy Code is intended to secure.

D. This Case Is An Excellent Vehicle To Address The Question Presented.

This case is an excellent vehicle for resolving the question presented. The preemption issue is outcome determinative here and was thoroughly addressed by both the majority and dissent below.

The fact that the case was remanded for further proceedings is no barrier to this Court's review, as the issue presented is final under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). *Cox* provides that a state-court judgment is final "where [1] the federal issue has been finally decided in the state courts [2] with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, * * * [3] reversal of the state court on the federal issue would be preclusive of any further litigation," and "[4] a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 482-483.

This case readily satisfies those four criteria. The New York Court of Appeals finally decided whether the Bankruptcy Code preempts respondent's state-law claims. Petitioners may prevail on remand on nonfederal grounds—among others, the lack of any basis for holding the individual petitioners liable for the acts of the corporate petitioners, and respondent's inability to prove that it would not have suffered its claimed damages absent the alleged tortious conduct.[7] And were

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[7] Indeed, subsequent to the decision of which petitioners seek review, the intermediate New York appellate court ruled that individual petitioners should be dismissed from this case on state-law grounds. See 137 N.Y.S.3d 359, 362-363 (N.Y. App. Div. Dec. 29, 2020) (ruling that corporate veil could not be pierced to reach individuals). The individuals remain proper petitioners in this Court because further state-court proceedings could vitiate that ruling—and, indeed, respondent has already sought to circumvent it through amended pleadings. See Plaintiff's Memorandum of Law in Support of Its Motion for Leave to File a Supplemental Summons and an Amended Complaint, *Sutton 58 Associates LLC* v. *Pilevsky et al.*, No. 654917/2016, at 1 (N.Y. Sup. Ct. Jan. 8, 2021).

this Court to conclude that respondent's claims are preempted, the case would be entirely over.

Finally, and critically, allowing the New York court's decision to stand would "seriously erode" the important "federal policy" of ensuring uniform bankruptcy law that is interpreted by federal bankruptcy courts. *Cox*, 420 U.S. at 483; see U.S. Const. art. I, § 8, cl. 4. When state regulation encroaches on an area otherwise subject to federal control, destruction of the uniformity of federally mandated standards is virtually inevitable. Not surprisingly, then, this Court has regularly treated state-court decisions rejecting preemption defenses as within its jurisdiction, even if that rejection allows proceedings to continue on in state court. See, *e.g.*, *Hawaiian Airlines, Inc.* v. *Norris*, 512 U.S. 246, 252 (1994); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 136 (1990); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 179-180 (1988); *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-7 (1984); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497 n.5 (1983). And the Court has noted that the risk of eroding federal policy is particularly great where, as here, federal law not only preempts state-law claims but also prevents state *courts* from addressing a particular subject. See *Belknap*, 463 U.S. at 497 n.5 (relying on *Cox*, 420 U.S. at 483); *Local No. 438 Const. & Gen. Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 550 (1963), *cited in Cox*, 420 U.S. at 483.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIC S. SEILER
ROBERT S. SMITH
LANCE J. GOTKO
ANIL VASSANJI
FRIEDMAN KAPLAN SEILER & ADELMAN LLP
7 Times Square
New York, NY 10036
(212) 833-1100

DONALD B. VERRILLI, JR.
ELAINE J. GOLDENBERG
Counsel of Record
RACHEL G. MILLER-ZIEGLER
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001
(202) 220-1100
Elaine.Goldenberg@mto.com

April 2021

APPENDIX

APPENDIX A

No. 80

COURT OF APPEALS OF NEW YORK.

SUTTON 58 ASSOCIATES LLC, Appellant,

v.

PHILIP PILEVSKY, et al., Respondents.

[Filed] November 24, 2020

OPINION

STEIN, J.:

On this appeal, we are asked to determine whether federal bankruptcy law preempts plaintiff's state law claims asserted against non-debtor third parties for tortious interference with a contract. Giving due consideration to the presumption against preemption, we hold that plaintiff's state law claims are not preempted under the circumstances presented here.

I.

Plaintiff Sutton 58 Associates, LLC loaned $147,250,000 to nonparties BH Sutton Mezz LLC (Mezz Borrower) and Sutton 58 Owner LLC (Mortgage Borrower) (collectively, the borrowers) in order to finance the development and construction of an apartment complex on a Manhattan property owned by Mortgage Borrower. Mezz Borrower owned 100% of the membership interest in Mortgage Borrower. The loan contracts consisted of a mezzanine loan agreement between plaintiff and Mezz Borrower, as well as acquisition and building loan agreements between plaintiff and Mortgage Borrower. These agreements forbade the borrowers from incurring any debt other than short-term trade debt, from acquiring any unrelated assets and from engaging in other

business, and compelled them to remain "Special Purpose Bankruptcy Remote" entities.[1] The agreements also prohibited the sale or transfer of any direct or indirect interest in either the property or the borrowers without plaintiff's consent. It is undisputed that these provisions were intended to ensure that, if the borrowers filed for bankruptcy, they would be single-asset real estate entities and the bankruptcy process would, at the very least, be expedited.[2] Plaintiff and Mezz Borrower also entered into a pledge and security agreement, in which Mezz Borrower pledged its 100% membership interest in Mortgage Borrower as collateral for the mezzanine loan. This agreement gave plaintiff the right to foreclose upon and sell that membership interest—and, by extension, the development site—in the event of a default.

When the loans matured in January 2016, the borrowers defaulted. Plaintiff issued notices of default and sought to conduct a UCC foreclosure sale of Mezz Borrower's membership interest in Mortgage Bor-

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[1] As defined in the agreements, a special purpose bankruptcy remote entity is one which, among other limitations, is organized for the sole purpose of owning property, engages in no unrelated business, and holds no unrelated assets.

[2] The Bankruptcy Code defines single asset real estate as "real property constituting a single property or project, other than residential real property with fewer than [four] residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto" (11 USC § 101[51B]). When a debtor is a single asset real estate entity, the Bankruptcy Code provides for expedited filing of a reorganization plan or the commencement of payments to a creditor in order to avoid lifting of the automatic stay and foreclosure on the property (*see* 11 USC § 362[d][3]).

rower pursuant to the pledge and security agreement. Shortly before the scheduled sale, the borrowers unsuccessfully moved in Supreme Court for a preliminary injunction to block the sale. A few days after Supreme Court ordered that the sale proceed at the end of February 2016, Mezz Borrower filed a voluntary petition for chapter 11 bankruptcy in federal court.

Plaintiff initially moved to dismiss Mezz Borrower's bankruptcy petition on the ground that it was filed in bad faith or, alternatively, sought to lift the automatic stay imposed under bankruptcy law in order to permit plaintiff to pursue the sale.[3] Thereafter, in April 2016, Mortgage Borrower separately filed a voluntary petition for chapter 11 bankruptcy in federal court. After the Bankruptcy Court commented that plaintiff's motion to dismiss Mezz Borrower's bankruptcy petition was "premature," plaintiff withdrew that motion without prejudice. Plaintiff did not seek to renew the motion during the bankruptcy proceedings or otherwise move to dismiss Mortgage Borrower's bankruptcy petition.

The bankruptcy cases were consolidated for joint administration. Plaintiff cooperated with a creditors' committee to develop and file a joint plan of liquidation. As part of the plan of liquidation, an auction

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[3] The filing of a bankruptcy petition "operates as a stay" of, among other things, any actions or proceedings against the debtor that were or could have been commenced before the bankruptcy proceeding, the enforcement of judgments already obtained against the debtor, and any acts to obtain or exercise control over the property of the bankruptcy estate, create or enforce a lien against the property of the estate or debtor, or to collect or recover a claim against the debtor that arose before the bankruptcy proceeding (11 USC § 362[a]).

sale was held in December 2016, during which plaintiff placed the winning credit bid—in the amount of $86 million—for the project site.[4] In early 2017, plaintiff and the borrowers' other creditors voted to accept the plan of liquidation, which Bankruptcy Court confirmed.

Meanwhile, in September 2016, plaintiff commenced this action in state court against defendants Philip Pilevsky, Michael Pilevsky, Seth Pilevsky, Prime Alliance Group Ltd., and Sutton Opportunity LLC—various affiliated persons and entities—alleging that defendants had tortiously interfered with the loan agreements between plaintiff and the nonparty borrowers. According to plaintiff, defendants had engaged in a scheme to obtain an ownership interest in the development project in violation of the loan agreements. Plaintiff averred that, as part of this alleged scheme, defendants loaned $50,000 to Mezz Borrower to retain counsel, transferred three rental apartments to Mortgage Borrower so that it would no longer be a single asset real estate entity, and sold a 49% interest in BH Sutton Owner LLC—the parent company of Mezz Borrower—to a Pilevsky entity, thereby transferring to defendants an indirect interest in the borrowers and the development project.[5] Plaintiff asserted that these actions violated the covenants in the loan agreements prohibiting the borrowers from incurring non-permitted indebted-

[4] Plaintiff submitted documents indicating that, by comparison, the appraisal value of the property at the time of the planned foreclosure sale was approximately $180 million.

[5] The only defendant that participated in the underlying bankruptcy proceeding was Prime Alliance with respect to its loan to Mezz Borrower.

ness, owning other assets, and transferring any interest in the borrowers, as well as those provisions requiring the borrowers to remain special purpose bankruptcy remote entities. With respect to damages sustained, plaintiff asserted that the conduct of defendants delayed its ability to exercise its contractual remedies—because the bankruptcy proceeding was more protracted due to the borrowers no longer qualifying as single asset real estate entities and having taken on another creditor[6]—which, in turn, resulted in a significant loss in value of the development site.

Defendants moved for summary judgment dismissing the complaint, as relevant here, on the ground that the action was preempted by the Bankruptcy Code. Supreme Court denied the motion, holding that the action was not preempted because it "d[id] not involve the bankruptcy" and, instead, defendants were alleged to have interfered with "separate contractual agreements." On defendants' appeal, the Appellate Division reversed and granted defendants' motion based upon its conclusion that plaintiff's claims were preempted by federal law because "plaintiff's damages [arose] only because of the bankruptcy filings" (168 A.D.3d 477, 89 N.Y.S.3d 630 [1st Dept. 2019]).

Plaintiff appealed to this Court as of right (*see* CPLR 5601[b][1]).

II.

Plaintiff argues that the Appellate Division erro-

[6] The loan was not alleged to be tortious on the basis that it facilitated the bankruptcy. Rather, the loan allegedly violated the borrowers' covenants not to accept any liabilities other than "Permitted Indebtedness," which provisions in the loan agreements were intended to minimize the number of the borrowers' creditors.

neously held that its tortious interference claims are preempted by federal bankruptcy law. Plaintiff contends that neither field nor conflict preemption precludes a New York court from adjudicating its tort claims, observing that the borrowers' bankruptcy proceedings were successfully concluded and that plaintiff's action against defendants—who were not the debtors in the bankruptcy proceeding—did not pose any obstacle to resolution of those proceedings. Plaintiff does not dispute that so-called bad-faith filing claims, or other tort claims premised upon conduct *within* a bankruptcy proceeding, may be preempted. However, plaintiff asserts that a distinction has been, and should be, drawn between such claims and those that, as here, allege wrongful conduct by non-debtor defendants that occurred prior to the bankruptcy proceeding and that are grounded in independent contractual obligations. According to plaintiff, preemption would unfairly deprive it of any judicial forum or remedy for defendants' alleged wrongdoing and would upset the expectations of numerous lenders for large-scale real estate projects governed by similar loan agreements.

In response, defendants urge us to uphold the dismissal of plaintiff's claims on preemption grounds. Defendants contend that federal law has occupied the field of bankruptcy, to the exclusion of state law remedies. Defendants also assert that allowing plaintiff's tort claims to proceed in state court would conflict with federal bankruptcy law because the potential liability against third parties would discourage lending to, and counseling for, debtors—thereby indirectly chilling bankruptcy filings. As for plaintiff's remedies, defendants argue that they are limited to those available against the debtors in the bankruptcy proceeding—namely, a motion to dismiss the proceeding or

for relief from the automatic stay imposed under bankruptcy law.

Although the parties cite varied case law from across the country relating to preemption in the bankruptcy context, no controlling precedent answers the question before us. Defendants' preemption arguments are not wholly implausible. Nevertheless, defendants ultimately "bear[ ] the 'considerable burden' of overcoming the presumption that Congress did not intend to preempt" plaintiff's tortious interference claims (*Nealy v. U.S. Healthcare HMO,* 93 N.Y.2d 209, 218, 689 N.Y.S.2d 406, 711 N.E.2d 621 [1999], quoting *De Buono v. NYSA–ILA Medical and Clinical Services Fund,* 520 U.S. 806, 814, 117 S.Ct. 1747, 138 L.Ed.2d 21 [1997]). For the reasons discussed herein, we conclude that defendants have not met that burden.

III.

The United States Constitution empowers Congress to establish uniform laws[7] on the subject of bankruptcy (*see* U.S. Const art I, § 8, cl 4), and Congress has effectuated this power by enacting the Bankruptcy Code (*see* 11 USC 101 *et seq.*). The Supremacy Clause, in turn, provides that federal law "shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing

[7] "The uniformity requirement is not a straightjacket that forbids Congress [from] distinguish[ing] among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner" (*Railway Labor Executives' Assn. v. Gibbons,* 455 U.S. 457, 469, 102 S.Ct. 1169, 71 L.Ed.2d 335 [1982]). Furthermore, "uniformity does not require the elimination of any differences among the States in their laws governing commercial transactions" (*id.*).

in the Constitution or Laws of any State to the Contrary notwithstanding" (U.S. Const art VI, cl 2). Therefore, "when federal and state law conflict, federal law prevails and state law is preempted" (*Murphy v. National Collegiate Athletic Assn.,* 584 U.S. ——, ——, 138 S.Ct. 1461, 1476, 200 L.Ed.2d 854 [2018]).

Preemption of state law may occur by express statutory provision or through implication, the latter of which may be accomplished through either federal preemption of the field of a particular subject matter or the existence of an irreconcilable conflict between federal and state law (*see Doomes v. Best Tr. Corp.,* 17 N.Y.3d 594, 601, 935 N.Y.S.2d 268, 958 N.E.2d 1183 [2011]; *Balbuena v. IDR Realty LLC,* 6 N.Y.3d 338, 356, 812 N.Y.S.2d 416, 845 N.E.2d 1246 [2006]; *Murphy*, 584 U.S. at ——, 138 S.Ct. at 1480). "Field preemption occurs when federal law occupies a 'field' of regulation 'so comprehensively that it has left no room for supplementary state legislation' " (*Murphy*, 584 U.S. at ——, 138 S.Ct. at 1480, quoting *R.J. Reynolds Tobacco Co. v. Durham County,* 479 U.S. 130, 140, 107 S.Ct. 499, 93 L.Ed.2d 449 [1986]; *see People v. First Am. Corp.,* 18 N.Y.3d 173, 179, 937 N.Y.S.2d 136, 960 N.E.2d 927 [2011]) or where there is a " 'federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject' " (*Arizona v. United States,* 567 U.S. 387, 399, 132 S.Ct. 2492, 183 L.Ed.2d 351 [2012], quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 [1947]). Conflict preemption, on the other hand, has been found "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress," the latter of which is often referred to as obstacle preemption (*Freightliner Corp. v. Myrick,* 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 [1995] [internal quotation marks and citations omitted]; *see Balbuena,* 6 N.Y.3d at 356, 812 N.Y.S.2d 416, 845 N.E.2d 1246). These categories "are not rigidly distinct" and, regardless of the type of preemption urged, "a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law" (*Virginia Uranium, Inc. v. Warren,* ––– U.S. ––––, 139 S.Ct. 1894, 1901, 204 L.Ed.2d 377 [2019] [internal quotation marks and citations omitted]).

Ultimately, any preemption analysis requires that we "ascertain the intent of Congress" (*Doomes,* 17 N.Y.3d at 601, 935 N.Y.S.2d 268, 958 N.E.2d 1183 [internal quotation marks and citation omitted]; *see Wyeth v. Levine,* 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 [2009]). "[B]ecause the States are independent sovereigns in our federal system," the United States Supreme Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action" (*Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 [1996]). Furthermore, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' [courts must] 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress' " (*id*., quoting *Rice,* 331 U.S. at 230, 67 S.Ct. 1146; *see Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 716, 105 S.Ct. 2371, 85 L.Ed.2d 714 [1985]). As the Supreme Court has acknowledged, "there is no question that States possess the 'traditional authority

to provide tort remedies to their citizens' as they see fit" (*Wos v. E.M.A.,* 568 U.S. 627, 639–640, 133 S.Ct. 1391, 185 L.Ed.2d 471 [2013], quoting *Silkwood v. Kerr–McGee Corp.,* 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 [1984]; *see CTS Corp. v. Waldburger,* 573 U.S. 1, 19, 134 S.Ct. 2175, 189 L.Ed.2d 62 [2014]). The presumption against preemption applies to preemption in the bankruptcy context (*see BFP v. Resolution Trust Corporation,* 511 U.S. 531, 546, 114 S.Ct. 1757, 128 L.Ed.2d 556 [1994]), and defendants here must overcome " 'the starting presumption that Congress does not intend to supplant state law' " (*De Buono,* 520 U.S. at 814, 117 S.Ct. 1747, quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 654, 115 S.Ct. 1671, 131 L.Ed.2d 695 [1995]).

Looking to congressional intent in regulating bankruptcy, the principal purposes of the Bankruptcy Code are to give a " 'fresh start' to the 'honest but unfortunate debtor' " (*Marrama v. Citizens Bank of Mass.,* 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 [2007], quoting *Grogan v. Garner,* 498 U.S. 279, 286, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 [1991]) by "provid[ing] a procedure by which ... insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt' " (*Grogan,* 498 U.S. at 286, 111 S.Ct. 654, quoting *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 [1934]). The Bankruptcy Code also aims to allow corporations to restructure so as to avoid liquidation (*see generally NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 528, 104 S.Ct. 1188, 79 L.Ed.2d 482 [1984]; *United States v. Whiting Pools Inc.,* 462 U.S. 198, 203, 103 S.Ct. 2309, 76 L.Ed.2d 515 [1983]), and to

ensure fair distribution of the bankrupt estate to creditors (*see Union Bank v. Wolas,* 502 U.S. 151, 161, 112 S.Ct. 527, 116 L.Ed.2d 514 [1991]; *Katchen v. Landy,* 382 U.S. 323, 328–329, 86 S.Ct. 467, 15 L.Ed.2d 391 [1966]).

To advance these congressional purposes, the Bankruptcy Code contains an intricate and comprehensive framework governing voluntary and involuntary bankruptcy filings for various persons and entities. The statutory scheme governs the filing and adjudication of bankruptcy petitions, creditor claims, adversary proceedings and counterclaims. Although the Bankruptcy Code incorporates state law in various respects, the Code generally prescribes which debts are dischargeable and which claims are allowable, as well as administration of the entire bankruptcy process. Further, the Code empowers the Bankruptcy Court to prevent litigants from misusing the bankruptcy process by authorizing the court, among other things, to address abuses of process (*see* 11 USC § 105[a]), dismiss certain petitions for abuse (*see e.g.* 11 USC §§ 303[i][2]; 707[b]; 1112), grant relief from the automatic stay (*see* 11 USC § 362[d][1]), or issue sanctions for willful violations of the stay (*see* 11 USC § 362[k][1]).

IV.

With the foregoing background in mind, we turn to application of the preemption doctrine to the facts of this case. Defendants make no claim of express preemption. Further, while defendants argue that field preemption precludes assertion of plaintiff's tort claims in state court due to the comprehensive federal regulation of bankruptcy proceedings, in our view, this contention does not merit extended discussion. Certainly, the Bankruptcy Code thoroughly governs the litigation and settlement of controversies between

debtors and creditors in connection with the bankruptcy estate; after all, Congress granted to federal District Courts "exclusive jurisdiction of all cases under title 11" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11" (28 USC § 1334[a], [b]), which they typically refer to Bankruptcy Courts (*see* 28 USC § 157[a]). Indeed, the Bankruptcy Code generally sets out the law that applies to bankruptcy petitions and claims filed in each bankruptcy case. However, defendants cite no provision of the Code that suggests a congressional intent to interfere with the authority of state courts to provide traditional tort remedies for claims brought by a *non-debtor* against alleged *non-debtor* tortfeasors for interference with contractual agreements that exist independently of a bankruptcy proceeding (*cf. Balbuena,* 6 N.Y.3d at 357, 812 N.Y.S.2d 416, 845 N.E.2d 1246). In fact, defendants concede that the Bankruptcy Code would provide no remedy for plaintiff's claims as asserted against defendants. To be sure, congressional silence as to remedies against third parties may not be dispositive. However, defendants point to nothing in the language, structure, or history of the Bankruptcy Code to support their contention that—in addition to occupying the field of bankruptcy adjudication as between debtors and creditors—Congress clearly and manifestly expressed an intent to encroach upon the state's dominion by foreclosing tort remedies for claims that are not asserted by or against a debtor and do not affect the bankruptcy estate, thereby removing all available judicial recourse for plaintiffs injured by tortious conduct of non-debtors if there is any tangential connection to a bankruptcy proceeding (*see Rosenberg v. DVI Receivables XVII, LLC,* 835 F.3d 414, 419 [3d Cir.2016]). To the extent that federal law occupies the field of bank-

ruptcy, the state law claims presented here do not trigger such preemption because they do not implicate debtor-creditor disputes relating to the bankruptcy estate.

The more complex question is whether plaintiff's tortious interference claims are impliedly preempted in accordance with principles of conflict preemption insofar as defendants suggest that permitting such claims to proceed in state court will undermine the accomplishment and execution of the full purposes and objectives of the Bankruptcy Code. "What is a sufficient obstacle [for purposes of preemption] is a matter of judgment, to be informed by examining the federal [law] as a whole and identifying its purpose and intended effects" (*Crosby v. National Foreign Trade Council,* 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 [2000]). Significantly, "the conflict between state law and federal policy must be a sharp one" and "federal law does not preempt state law under obstacle preemption analysis unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together" (*Figueroa v. Foster,* 864 F.3d 222, 235 [2d Cir.2017] [internal quotation marks and citations omitted]; *Witco Corp. v. Beekhuis,* 38 F.3d 682, 687 [3d Cir.1994]; *see also Boyle v. United Technologies Corp.,* 487 U.S. 500, 507, 108 S.Ct. 2510, 101 L.Ed.2d 442 [1988]).

In their bid for dismissal of plaintiff's claims, defendants do not identify any specific Bankruptcy Code provisions that have preemptive effect. Instead, defendants cite to various court cases addressing bad-faith filing or abuse of process claims, and analogize plaintiff's tortious interference causes of action to such claims. In that regard, courts have most often confronted preemption in the bankruptcy context in

relation to attempts by creditors and debtors to lodge state tort claims against each other for malicious prosecution or abuse of process, alleging bad-faith filings in a bankruptcy proceeding or wrongful conduct within that proceeding. Judicial authorities are divided on whether such claims are preempted. However, it is fair to say that the majority of courts have held that such tort claims—those premised upon a bankruptcy filing, itself, or other alleged wrongful conduct within a bankruptcy proceeding—are preempted (*see e.g. Metcalf v. Fitzgerald,* 333 Conn. 1, 3, 214 A.3d 361, 365 [2019], *cert denied* ––– U.S. ––––, 140 S.Ct. 854, 205 L.Ed.2d 460 [2020]; *Longnecker v. Deutsche Bank Nat. Tr. Co.,* 842 N.W.2d 680 [Iowa Ct. App. 2013]; *PNH, Inc. v. Alfa Laval Flow, Inc.,* 2011-Ohio-4398, ¶ 31, 130 Ohio St. 3d 278, 285, 958 N.E.2d 120, 127 [2011]; *Stone Crushed Partnership v Kassab Archbold Jackson & O'Brien,* 589 Pa. 296, 303, 908 A.2d 875, 880 [2006]; *Pertuso v. Ford Motor Credit Co.,* 233 F.3d 417, 426 [6th Cir.2000]; *Smith v. Mitchell Const. Co., Inc.,* 225 Ga. App. 383, 386, 481 S.E.2d 558, 561 [Ga. Ct. App 1997]; *MSR Expl., Ltd. v. Meridian Oil, Inc.,* 74 F.3d 910, 911 [9th Cir.1996]; *Gonzales v. Parks,* 830 F.2d 1033, 1035 [9th Cir.1987]; *but see Graber v. Fuqua,* 279 S.W.3d 608, 613–614 [Tex. 2009]; *U.S. Express Lines Ltd. v. Higgins,* 281 F.3d 383, 393 [3d Cir.2002]).

We need neither adopt nor reject the reasoning of these courts to resolve the instant appeal. It suffices to say that, where a tort claim is premised upon a bankruptcy filing, itself, or on conduct that occurs within a bankruptcy proceeding and under the purview of the Bankruptcy Court, the obstacle presented by state tort remedies is more readily discerned. Parallel tort actions in state court against a debtor or creditor based on that party's alleged wrongful con-

duct in a bankruptcy proceeding risks subverting the Bankruptcy Court's authority to adjudicate the validity of bankruptcy filings, or otherwise producing inconsistent standards or outcomes between state and federal law. Indeed, the Bankruptcy Code provides remedies for such claims as asserted between debtors and creditors by, for example, authorizing dismissal of bad-faith filings and empowering the Bankruptcy Court to take measures to prevent any abuse of process. While some courts have reasoned that "[s]tate courts are not authorized to determine whether a person's claim for relief under a federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one" (*Gonzales,* 830 F.2d at 1035; *see e.g. Metcalf,* 333 Conn. at 13, 214 A.3d at 370), in our view, this same obstacle is not presented under the circumstances here because no question is raised as to the propriety of the bankruptcy proceedings. Plaintiff's tortious interference claims—asserted against defendants who were not debtors in the bankruptcy proceedings and which are premised upon conduct that occurred prior to those proceedings—are peripheral to, and do not impugn, the bankruptcy process.

Significantly, plaintiff seeks to sue non-debtor third parties for alleged wrongful conduct that occurred prior to, and separate from, the bankruptcy proceedings. The Bankruptcy Code, however, is overwhelmingly concerned with *the debtor's* estate. Bankruptcy law and, in particular, chapter 11 bankruptcy, aims to "permit[ ] business debtors to reorganize and restructure their debts in order to revive the debtors' businesses" and "maximiz[e] the value of the bankruptcy estate" (*Toibb v. Radloff,* 501 U.S. 157, 163, 111 S.Ct. 2197, 115 L.Ed.2d 145 [1991]). The accomplishment of these purposes relies upon the proper

composition and allocation of the debtor's estate. Consequently, federal courts have "exclusive jurisdiction ... of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate" (28 USC § 1334[e][1]).

In light of these purposes of the Bankruptcy Code, a significant component of a preemption analysis in the bankruptcy context must be the degree to which the state claims interfere with the administration of the debtor's estate. Here, resolution of plaintiff's claims in state court does not risk interference with the Bankruptcy Court's control over, or disposition of, the bankruptcy estate insofar as the present suit does not impair the debtors' estates. The debtors in the bankruptcy proceedings—i.e., the borrowers—are unaffected by whether plaintiff prevails on its tort claims against defendants, and the state action has no impact on the borrowers' ability to obtain a "fresh start" (*Marrama,* 549 U.S. at 367, 127 S.Ct. 1105 [internal quotation marks and citations omitted]).

It is not disputed that valid contracts existed between plaintiff and the borrowers. Plaintiff's claims arising out of the borrowers' breach of those contracts *as asserted against the borrowers* were resolved by the bankruptcy proceeding. Here, plaintiff alleges that defendants knew of the relevant contractual terms and deliberately induced the borrowers' violations of those terms prior to the bankruptcy proceedings. In other words, plaintiff's allegations state a claim for tortious interference with contract, and the remedy for that tort will not affect the debtor's estate. As such, these claims will not encroach upon the province of the bankruptcy court. Stated simply, plaintiff's claims "do[ ] not require the adjudication of rights and duties of creditors and debtors under the Bankruptcy Code" (*Davis v. Yageo Corp.,* 481 F.3d

661, 679 [9th Cir.2007]; *cf. In re Extended Stay Inc.,* 435 B.R. 139, 151–152 [S.D. N.Y.2010]).

Rather, plaintiff alleges that certain conduct engaged in by defendants—before the bankruptcy proceedings were even commenced—tortiously interfered with its contractual rights under various loan agreements. Litigation of those claims will require resolution of whether: plaintiff had a valid contract with the borrowers; defendants had knowledge of that contract and its relevant terms; defendants intentionally and improperly induced a breach of that contract; and plaintiff sustained damages caused by that conduct (*see Oddo Asset Mgt. v. Barclays Bank PLC,* 19 N.Y.3d 584, 594, 950 N.Y.S.2d 325, 973 N.E.2d 735 [2012]; *White Plains Coat & Apron Co., Inc. v. Cintas Corp.,* 8 N.Y.3d 422, 426, 835 N.Y.S.2d 530, 867 N.E.2d 381 [2007]). Contrary to the dissent's assertion, our state courts will not be asked to determine whether the borrowers' bankruptcy petitions were filed in bad faith or whether defendants engaged in some wrongful conduct during the bankruptcy proceedings themselves. Regardless of whether the *borrowers* filed for bankruptcy in good or bad faith (*see generally* 11 USC § 362[d][1]), "plaintiff may recover damages for tortious interference with contractual relations even if defendant[s]... w[ere] engaged in lawful behavior" to the extent that their conduct, as non-debtors, is not alleged to have been in violation of the Bankruptcy Code (*NBT Bancorp v. Fleet/Norstar Fin. Group,* 87 N.Y.2d 614, 621, 641 N.Y.S.2d 581, 664 N.E.2d 492 [1996]). As defendants may be found to have tortiously interfered with plaintiff's contractual rights prior to the bankruptcy proceedings without any inquiry by the state court into whether any provision of the Bankruptcy Code was violated, those cases relied on by defendants and the dissent ad-

dressing preemption of bad-faith filing or abuse of process claims as between debtors and creditors are inapposite.

Defendants and the dissent point to *Choy v. Redland Ins. Co.,* 103 Cal. App. 4th 789, 796, 127 Cal. Rptr. 2d 94 [Cal. Ct. App. 2002] and *Astor Holdings, Inc. v. Roski,* 325 F. Supp. 2d 251, 263 [S.D. N.Y.2003] as compelling support for the conclusion that preemption is applicable here. Reliance on these cases is unpersuasive. In *Choy,* a California court concluded that the plaintiff's claim was preempted where plaintiff alleged that the defendants "induced" a debtor to "file a bankruptcy petition" in "order to benefit themselves" (103 Cal. App. 4th at 801, 127 Cal. Rptr. 2d at 102). Likewise, *Astor* "involved allegations that the defendant induced a third party to file for bankruptcy, harming the plaintiff" (325 F.Supp.2d at 262). Unlike in *Choy* and *Astor,* where the filing of the bankruptcy petitions themselves was "the basis" of the plaintiffs' claims (*id.*), plaintiff here does not allege that defendants induced the borrowers' bankruptcy petition but, rather, that they induced breaches of independent contractual provisions prohibiting asset and interest transfers and certain types of indebtedness.[8]

Federal caselaw addressing bankruptcy preemption of state-law tort claims against third parties differentiates between those claims that are based on conduct that occurs during bankruptcy, and conduct

[8] Indeed, the District Court permitted certain of the plaintiff's claims in *Astor* to proceed, including a claim that the defendant had tortiously interfered with a bankruptcy settlement agreement between the plaintiff and a debtor (*see Astor Holdings, Inc. v. Roski,* 325 F. Supp. 2d 251, 270 [S.D.N.Y.2003]).

undertaken by a third party before commencement of a bankruptcy proceeding. Contrary to the dissent's view, those cases neither find preemption merely because some fact questions might overlap with bankruptcy proceedings, nor base preemption on whether the damages resulting from a state-law tort or contract action would be calculated by the delay caused by the bankruptcy proceedings.

As the dissent observes, the Ninth Circuit Court of Appeals has held that federal law preempts state courts from determining a creditor's claim against a debtor asserting that the filing of a bankruptcy petition was an abuse of process (*see Gonzales v. Parks,* 830 F.2d 1033, 1035 [9th Cir.1987]) and a debtor's allegation that a creditor's assertion of a claim in a bankruptcy proceeding constituted malicious prosecution (*see MSR Expl., Ltd. v. Meridian Oil, Inc.,* 74 F.3d 910, 911 [9th Cir.1996]; *see also In re Miles,* 430 F.3d 1083, 1086 [9th Cir.2005] [holding that federal law preempted state claims alleging that "various (involuntary) bankruptcy filings and/or prosecution of them caused great emotional, physical, mental and psychological suffering and distress"]). However, the Ninth Circuit's holding in *Davis v. Yageo Corp.,* 481 F.3d 661, 679 [9th Cir.2007] undercuts the dissent's view that these cases support the proposition that any tort claims alleging that the damages incurred are causally connected to a bankruptcy proceeding are preempted.

In *Davis,* the complaint of minority shareholders alleged "that the directors and majority shareholder engaged in self-dealing to the detriment of the corporation through their decision to pursue bankruptcy and sought damages for breach of fiduciary duty under California state law" (*id.* at 679). The defendants argued that the plaintiffs' state law causes of action

were preempted because they essentially constituted claims that defendants had "improperly used the bankruptcy process" (*id.* at 678). The Ninth Circuit clarified that its prior cases, including *Gonzales v. Parks,* 830 F.2d 1033, *MSR Expl., Ltd. v. Meridian Oil, Inc.,* 74 F.3d 910 and *In re Miles,* 430 F.3d 1083, "hold only that state law causes of action for abuse of process and malicious prosecution involving conduct that occurred *during* bankruptcy are preempted" (*Davis,* 481 F.3d at 678). The Court explained that, by contrast, the plaintiffs' claims in *Davis* were not preempted because they "concern[ed] conduct that occurred prior to bankruptcy" and did "not require the adjudication of rights and duties of creditors and debtors under the Bankruptcy Code" (*id.* at 678, 679). The same is true here. Furthermore, the Ninth Circuit declined to hold the claims preempted despite the fact that the plaintiffs' damages could be traced to the bankruptcy proceeding, as the measure of the damages alleged was the difference in the value of the company's shares before and after the defendants' decision to file for bankruptcy (*see id.* at 674). Thus, the *Davis* court recognized that it is the nature of the legal claim, not the measure of damages, that is relevant to determining whether a state law claim is preempted.

As the dissent observes, plaintiff could have pursued a request for dismissal of the bankruptcy proceedings or relief from the automatic stay. However, the Bankruptcy Court's determination of any such request, while potentially reducing the amount of plaintiff's ultimate damages, would not have resolved the question of whether defendants' conduct was tortious and, as already noted, defendants do not claim that any remedy was available to plaintiff in the bankruptcy proceedings to compensate plaintiff for

defendants' alleged wrongdoing. Thus, this is not a situation where state and federal law provide "two separate remedies" for identical grievances, thereby leading to an inevitable conflict (*compare Garner v. Teamsters,* 346 U.S. 485, 499, 74 S.Ct. 161, 98 L.Ed. 228 [1953] [state remedy of granting injunction against picketing conflicted with federal law where federal law authorized National Labor Relations Board to issue cease and desist order or injunction if picketing violated federal labor law]).

In addition, viewing the Bankruptcy Code as a whole to discern the relevant congressional intent, it is noteworthy that the Code expressly authorizes the court to award judgment for monetary damages "proximately caused by" a bad-faith petition or punitive damages for a bad-faith petition only in the context of involuntary bankruptcy petitions (11 USC § 303[i][2]). No comparable statutory authorization for compensatory monetary damages exists in voluntary proceedings, weakening defendants' argument in support of federal preemption here (*see In re Repository Tech., Inc.,* 601 F.3d 710, 724 [7th Cir.2010]). In lieu of an express federal remedy authorizing monetary damages for bad-faith voluntary bankruptcy petitions—such as the one that exists for involuntary petitions filed in bad faith—the dissent offers several alternatives, none of which would permit recovery of the tort damages sought here and none of which address wrongs committed by a non-debtor third party. Dismissal of the bankruptcy petition (*see generally* 11 USC § 1112[b]) or lifting of the automatic stay (*see* 11 USC § 362[d][1])—the remedies relied on by defendants and the dissent to support preemption—merely operate to prevent future damages from accumulating; such remedies do not compensate for past injuries. Similarly, the sanctions available under

the Federal Rules of Bankruptcy Procedure do not, and are not intended to, compensate an injured third party (*see* Federal Rules of Bankruptcy Procedure, Rule 9011[c]). The existence of these remedies, then, is insufficient evidence of Congress's preemptive intent with respect to actions such as the instant one, inasmuch as none of the remedies extend to the prefiling conduct of third-party tortfeasors (*cf. In re Repository Tech., Inc.,* 601 F.3d at 724 [drawing distinction between voluntary and involuntary bad-faith filings in complete preemption analysis based on the lack of a damages remedy in voluntary petition cases]). Under these circumstances, any obstacle presented by plaintiff's tort claims, to the extent it exists, is simply too tenuous to trigger preemption.

A different conclusion is not necessitated by defendants' argument that, when the alleged tortious conduct consists of a scheme to hinder a creditor's ability to obtain expeditious resolution of a bankruptcy proceeding, permitting plaintiffs to assert tortious interference claims in state court against non-debtors may generate some tension between the state court action and the bankruptcy proceeding insofar as the alleged damages may flow from the delay occasioned by the latter. "The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power" (*Madeira v. Affordable Hous. Found., Inc.,* 469 F.3d 219, 241 [2d Cir.2006]; *see Silkwood,* 464 U.S. at 256, 104 S.Ct. 615; *see also Davis,* 481 F.3d at 679).

Defendants and various amici speculate that permitting plaintiff's state law claims to proceed will open the floodgates of litigation against attorneys who facilitate bankruptcy filings or provide other le-

gal advice to debtors, debt counseling agencies, restructuring firms, and lenders to distressed borrowers. We are confident that these concerns are overstated and, in any event, more appropriately addressed through the proper application of our tort law. In that regard, while we do not opine on the merits of plaintiff's tortious interference claims here, we note that New York courts have been skeptical of the viability of claims that attorneys, acting as agents of their clients, may be liable for tortious interference based on the provision of legal advice (*see e.g. Little Rest Twelve, Inc. v. Zajic,* 137 A.D.3d 540, 541, 27 N.Y.S.3d 142 [1st Dept. 2016]; *Burger v. Brookhaven Med. Arts Bldg.,* 131 A.D.2d 622, 623, 516 N.Y.S.2d 705 [2d Dept. 1987]; *Kartiganer Assoc. v. Town of New Windsor,* 108 A.D.2d 898, 899, 485 N.Y.S.2d 782 [2d Dept. 1985], *lv dismissed* 65 N.Y.2d 925 [1985]; *Goldner v. Sullivan, Gough, Skipworth, Summers & Smith,* 105 A.D.2d 1149, 1150, 482 N.Y.S.2d 606 [4th Dept. 1984]). Liability against debt counseling organizations on such a theory likewise seems speculative; many potential bankruptcy petitioners are financially bereft and close to breaching contracts with creditors, if not already in breach, due to their inability to satisfy their financial obligations. Plaintiffs alleging tortious interference may have difficulty establishing the elements of the claim, such as causation or improper inducement on the part of such agencies. Finally, we are not persuaded that any remaining risk of liability assumed by lenders who intentionally and improperly induce breaches of known contractual obligations by an entity that subsequently files for bankruptcy sufficiently "frustrate[s] 'a significant objective' " of the Bankruptcy Code so as to compel preemption (*Doomes,* 17 N.Y.3d at 603, 935 N.Y.S.2d 268, 958 N.E.2d 1183, quoting *Williamson v. Mazda Motor of America, Inc.,* 562 U.S. 323, 330, 131 S.Ct.

1131, 179 L.Ed.2d 75 [2011]).[9]

In sum, defendants have failed to meet their heavy burden of establishing that federal bankruptcy law preempts plaintiff's tortious interference claims that are based on pre-petition conduct and asserted against non-debtor defendants. Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to the Appellate Division for consideration of issues raised but not determined on the appeal to that Court.

Order reversed, with costs, and case remitted to the Appellate Division, First Department, for consideration of issues raised but not determined on the appeal to that Court.

Chief Judge DiFiore and Judges Wilson and Feinman concur.

Judge Rivera dissents and votes to affirm in an opinion in which Judges Fahey and Garcia concur.

RIVERA, J. (dissenting):

Plaintiff seeks to recover for damages allegedly caused by bankruptcies that it accuses defendants of facilitating solely to prevent recovery of collateral owed to plaintiff by one of the bankruptcy debtors. Plaintiff chose to forgo the array of federal remedies

[9] The dissent notes that plaintiff has repurchased the property and received a judgment against the loan guarantors for at least part of the funds loaned to borrowers (dissenting op. at ——). Needless to say, the fact that this plaintiff may have secured legal entitlement to recover from other parties a portion of its alleged damages resulting from defendants' conduct is irrelevant to the preemption question before us.

available to a creditor, like plaintiff, for such alleged misuse of the bankruptcy system. Plaintiff could have sought dismissal of the bankruptcy proceedings, relief from the automatic stay preventing plaintiff's recovery of the collateral, foreclosure on the property, or sanctions against the debtors for their improper conduct. Instead, plaintiff took a different course and allowed the bankruptcy claims to proceed, causing the alleged damages to accrue, only to file this separate action in state court against defendants for tortious interference with contract to recover the same damages. But "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" (*Astor Holdings, Inc. v. Roski,* 325 F. Supp. 2d 251, 262 [S.D. N.Y.2003] [emphasis in original] [citation omitted]). Therefore, the Appellate Division properly dismissed the state tort action. To put it bluntly, federal law preempts plaintiff's workaround of the bankruptcy system.

I.

A. The Loans and the Bankruptcy Action

Joseph Beninati aspired to develop a towering, waterfront apartment building in midtown Manhattan in the historic enclave of Sutton Place on the East River (the project). The project involved several entwined business entities. Beninati owned a membership interest in BH Sutton Owner LLC (Sutton Owner), which owned a 100% membership interest in BH Sutton Mezz LLC (Mezz Borrower). Sutton 58 Owner LLC (Mortgage Borrower) was a wholly owned subsidiary of Mezz Borrower and owner of the real property where the project was to be constructed.

Plaintiff, Sutton 58 Associates LLC, loaned to Mezz Borrower and Mortgage Borrower (collectively,

borrowers) an aggregate principal loan of $147,250,000 to finance construction of the building. The loans were documented in a mezzanine loan structure consisting of various loan agreements with provisions commonly used in the real estate development industry. As relevant to this appeal, borrowers covenanted to at all times remain "Special Purpose Bankruptcy Remote Entities" unencumbered by additional indebtedness and to refrain from owning any assets other than the project.[1] Together, these covenants limited borrowers to developing the project.

The loans matured, and borrowers defaulted. Plaintiff issued notices of default and sought to recover its agreed upon collateral by notice of a UCC auction sale of Mezz Borrower's membership interest in Mortgage Borrower. Borrowers sought to enjoin the sale in state court, alleging, among other things, that plaintiff's attempt to foreclose on the collateral without complying with the statutory procedures for foreclosing on a mortgage loan resulted in an "improper clogging of [Mortgage Borrower]'s [unwaivable] equity of redemption in real property." Finding that borrowers failed to establish irreparable harm,

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[1] A Special Purpose Bankruptcy Remote Entity, in accordance with the loan documents, is a corporation, limited partnership or limited liability company that, among other characteristics, is organized solely for the purpose of owning the project asset, and refrains from engaging in any business unrelated to ownership of the project or holding any additional assets other than the project. In comparison, the Bankruptcy Code defines "single asset real estate" as real property "constituting a single property or project, ... which generates substantially all of the gross income of a debtor ... and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto" (11 USC § 101[51B]).

likeliness to succeed on the merits, or that the equities tipped in their favor, Supreme Court denied borrower's motion to enjoin the UCC sale and ordered that the sale go forward.

Three days before the scheduled UCC sale, Mezz Borrower filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. Mezz Borrower attached an affidavit affirming that its filing was precipitated by plaintiff's attempt to foreclose on Mezz Borrower's membership interest in Mortgage Borrower, in which Mezz Borrower held "substantial equity."

Two weeks later, plaintiff moved the Bankruptcy Court to dismiss Mezz Borrower's petition under 11 USC § 1112(b), or, in the alternative, to modify the automatic stay under 11 USC § 362(d)(1). Plaintiff argued that Mezz Borrower was a "special purpose, bankruptcy remote, holding company" and the petition was "a classic bad-faith filing" only pursued by Mezz Borrower after Supreme Court "rejected [Mezz Borrower's] last ditch attempt to stave off a fully noticed UCC foreclosure." Plaintiff further characterized the petition as a "litigation tactic without the intention or serious hope of reorganizing" through bankruptcy.

In Mezz Borrower's opposition to plaintiff's motion to dismiss, Mezz Borrower painted a different picture. "Contrary to the position advanced by [plaintiff], this case is not a simple two[-]party dispute with creditors. Rather, it is a complex commercial transaction involving insatiable greed and disturbing facts." Mezz Borrower explained that it was not a "shell entity" but owned 100% of the membership interest in Mortgage Borrower as well as contracts to purchase air rights and assets that constituted the project, which had been appraised at a value of $181,000,000,

"an amount well in excess of any purported amounts claimed by [plaintiff] and all unsecured debt." In short, Mezz Borrower alleged that "review of the loan documents, exorbitant fees, transaction costs and reserves illustrate[d] a strange and unconscionable transaction," brokered by a lender who "sat at both sides of the negotiating table."

Prior to the hearing on the motion, Mortgage Borrower filed for reorganization under Chapter 11, and Mezz Borrower subsequently filed for joint administration of borrowers' bankruptcy petitions. Borrowers represented to the Bankruptcy Court that their bankruptcy filings "prevented their unscrupulous lenders from engaging in illegal activity through a 'back door play' against [borrowers]."[2] Following

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[2] Borrowers, seeking to subordinate and reduce the amount they owed defendants on the subject loans, commenced another action, an adversarial proceeding in bankruptcy court, alleging improper conduct by plaintiff and several nonparty entities (adversarial defendants), through their principals. Borrowers alleged breach of contract, breach of implied duty of good faith and fair dealing, contractual unconscionability, fraud, deceit, estoppel, equitable subordination, objection to claim, criminal usury, unjust enrichment and lender liability by the adversarial defendants. Borrowers also sought declaratory relief to determine the nature, extent, and validity of the defendants' liens against the project.

After a bench trial, the court found that borrowers failed to establish a basis for liability on all claims except the alleged criminal usury because one of the loans at issue carried a rate in excess of New York's criminal usury statute. The adversarial defendants agreed to waive their claim for interest on the building loan, which reduced plaintiff's secured claim under the loan agreements. The court further ordered that the adversarial defendants, including plaintiff here, were entitled to a credit bid of all or such portion of its allowed secured claims with respect to the sale of borrowers' assets

plaintiff's withdrawal of its motion, the court consolidated the two bankruptcies for joint administration. Within a few months, plaintiff and a creditors' committee jointly filed a reorganization plan that was accepted and confirmed by the Bankruptcy Court.

B.

Plaintiff's Tortious Interference Claims

During the pendency of the bankruptcies, plaintiff brought this action for tortious interference with contract against Prime Alliance Group, Ltd., and Sutton Opportunity LLC, and their three individual owners and managers, Philip Pilevsky and his sons Michael and Seth, in state court. Plaintiff alleged that the borrowers' bankruptcies, which defendants facilitated through their tortious conduct, stayed the foreclosure proceeding, causing plaintiff to incur damages and attorney's fees.[3] Borrowers' bankruptcies predominate plaintiff's narrative of the many vicissitudes of the underlying commercial transaction and the various litigations arising therefrom, including this appeal. Indeed, "bankruptcy" is mentioned 56 times in 41 of the 125 paragraphs of the complaint.

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[3] The majority is only partially correct that plaintiff sought damages "because the bankruptcy proceeding was more protracted due to the borrowers no longer qualifying as single asset real estate entities" (majority op. at ——). Plaintiff also sought damages incurred as a result of defendants' facilitation of the bankruptcy (by loaning funds to Mezz Borrower to commence its bankruptcy petition), which, in turn, triggered an automatic stay of the foreclosure sale. In other words, according to plaintiff, defendants caused an injury in tort, in the first instance, merely by the fact of Mezz Borrower filing its bankruptcy petition.

According to plaintiff, defendants were instrumental in a two-part scheme to prevent it from recovering its collateral for the loan maturity defaults.

> "Defendants, who were strangers to the Project, intentionally and improperly caused these contractual breaches in a scheme to benefit themselves and obtain an ownership interest in the Project [ ]. The [ ] Scheme had two parts.
>
> "First, when plaintiff tried to exercise its agreed-upon contractual remedies following the maturity defaults, Philip Pilevsky caused Prime Alliance to lend Mezz Borrower $50,000 (the 'Pilevsky Loan') to retain a law firm (in which another Pilevsky is a partner) to file a petition for bankruptcy and prevented plaintiff from exercising those remedies. This caused Mezz Borrower to breach no fewer than five contractual obligations to plaintiff[:] ... (a) not to file a petition for bankruptcy; (b) not to incur debt other than 'Permitted Indebtedness'; (c) to pay its liabilities out of its own funds and assets; (d) to consider the interest of plaintiff in connection with all of its corporate actions; and (e) to remain a special purpose bankruptcy remote entity.
>
> "Second, Michael Pilevsky and Seth Pilevsky caused Sutton Opportunity to transfer three rental apartments ... (the 'Pilevsky Apartments') to Mortgage Borrower to evade a fundamental protection in favor of plaintiff under bankruptcy law.... The Pilevsky Apartment transaction caused Mortgage Borrower to breach no fewer than seven contractual obligations to plaintiff[:] ... (a) not to file a petition for bankruptcy; (b) not to own any real proper-

ty or assets other than the Project property; (c) not to engage in any business unrelated to the Project; (d) not to make or permit the sale or transfer any indirect interest in Mortgage Borrower; (e) to pay its liabilities out of its own funds and assets; (f) to consider the interests of plaintiff in connection with all corporate actions; and (g) to remain a special purpose bankruptcy remote entity."

Plaintiff further claimed that defendants knowingly and willfully precipitated borrowers' misuse of the bankruptcy system.

"Philip Pilevsky has sworn under penalty of perjury that he caused Prime Alliance to make the Pilevsky Loan 'so that [Mezz Borrower] could file for reorganization under Chapter 11 of the Bankruptcy Code.' ... The Pilevsky Loan was made, and Mezz Borrower's bankruptcy petition was filed, just after this Court issued an order allowing plaintiff to foreclose and on the eve of that foreclosure. Mezz Borrower's managing member has sworn that Mezz Borrower filed for bankruptcy in order to avoid that foreclosure, which is a breach of Mezz Borrower's contract with plaintiff.

"The Pilevsky Apartments transaction was similarly willful and improper. The defendants urgently sought to get the Pilevsky Apartments into the hands of Mortgage Borrower, which immediately upon receipt of the Pilevsky Apartments filed a bankruptcy petition stating that it was subject to the Bankruptcy Code's restrictions on bankruptcy filings by 'single Asset Real Estate' businesses. Mortgage Borrower's managing member has sworn under oath that the transaction was in-

> tended 'to bring in equity' and unrelated real estate, which are breaches of Mortgage Borrower's contract with plaintiff."

According to plaintiff, the sole purpose of these machinations was to prevent plaintiff from swiftly recovering its collateral.

Plaintiff also alleged that the scheme allowed Mortgage Borrower to end its status as a single asset real estate entity in order to "dodge" the applicable Bankruptcy Code provisions.

> "The Bankruptcy Code, for good reason, disfavors a Single Asset Real Estate entity using bankruptcy to defeat the ordinary contractual remedies of its secured lender (here, plaintiff). Michael Pilevsky and Seth Pilevsky caused Sutton Opportunity to transfer the Pilevsky Apartments to Mortgage Borrower in order to allow it to seek to dodge these Bankruptcy Code provisions and to continue to avoid the consequences of its maturity defaults...."

To summarize the manipulative purpose of the bankruptcy filings, plaintiff explained that,

> "The Bankruptcy Code reflects a specific public policy that protects lenders to single asset real estate projects from 'eve of foreclosure' bankruptcy filings that delay lenders' rights to exercise their remedies. The Project at issue here is exactly the type of property covered by these statutory protections. The Pilevsky Apartments were transferred to Mortgage Borrower so that it could represent that it was not a Single Asset Real Estate business.
>
> "If Mortgage Borrower were engaged in a Single Asset Real Estate business,

> 362(d)(3) would allow plaintiff relief from the automatic stay to proceed with its foreclosure unless, within 90 days, the debtor starts servicing the mortgage debt or the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time.
>
> "If Mortgage Borrower were engaged in a Single Asset Real Estate business, 11 USC § 362(d)(3)(B)(ii) would allow plaintiff to be relieved from the Bankruptcy Code's automatic stay and to proceed with its maturity default remedies against Mortgage Borrower if Mortgage Borrower did not pay monthly interest payments to plaintiff within ninety days of the petition date."

Critically, plaintiff alleged that defendants' pre-bankruptcy conduct adversely affected plaintiff's rights as a creditor in the bankruptcy proceedings.

> "Section 362 (d)(3)(B)(ii) would apply here. On the date it filed for bankruptcy, Mortgage Borrower had no liquid assets, no income-generating assets, no employees, and no ability to make such monthly interest payments to plaintiff.
>
> "Furthermore, if Mortgage Borrower were engaged in a Single Asset Real Estate business, 111 USC § 362(d)(3)(B)(i) would allow plaintiff to be relieved from the Bankruptcy Code's automatic stay and to proceed with its maturity default remedies against Mortgage Owner if Mortgage Borrower did not file, within ninety days of the petition date, a plan of reorganization that has a reasonable possibility of being confirmed within reasonable time. A Chapter

> 11 debtor that is not engaged in a Single Asset Real Estate business does not need to satisfy this requirement in order to benefit from the Bankruptcy Code's automatic stay.
>
> "Section 362 (d)(3)(B)(i) would apply here. Mortgage Borrower was not able to file a plan for reorganization within ninety days of its April 6, 2016 petition date. The plan for reorganization Mortgage Borrower ultimately filed outside that time period does not have a reasonable possibility of being confirmed within a reasonable time. It calls for months of discovery and litigation before the bankruptcy court will even rule on it. And it requests the Property to be sold at a public sale after the conclusion of that litigation, even though Mortgage Borrower has a single secured creditor, plaintiff, and unsecured obligations that are dwarfed in size by plaintiff's secured claim."

These excerpts of the complaint amply demonstrate that plaintiff's tort claims arise from, and seek damages caused solely by, the bankruptcy filings. Without the bankruptcy filings there would have been no automatic stay, which means no delay, and no damages. Plaintiff can prevail on its state claims only if it establishes that defendants caused these damages from debtors' alleged bad-faith filings and misuse of the bankruptcy system.

Defendants moved for summary judgment on preemption grounds. The court denied the motion, concluding that borrowers' breaches of the loan agreements had nothing to do with bankruptcy, and it would not have to rule on the question of bad-faith filings, which was not addressed by the bankruptcy court. The Appellate Division reversed and granted defendants summary judgment as "plaintiff's damag-

es [arose] only because of the bankruptcy filings" and are thus preempted (168 A.D.3d 477, 89 N.Y.S.3d 630 [1st Dept. 2019]).

Plaintiff has recast as state law causes of action what are in fact complaints of bad-faith filings and misuse of the bankruptcy system. Litigation of these claims in state court frustrates the congressional purpose of the Bankruptcy Code's remedial provisions. It allows plaintiff to forego its federal remedies to avoid the damages it now claims to have incurred, even as it participates in the bankruptcies and recovers its collateral, and while it simultaneously requests that a state court declare it has been damaged by the improper actions taken in those same proceedings. The Appellate Division got it right; these claims are preempted.

II.

A.

Federal Bankruptcy Law Preemption of State Claims

The Supremacy Clause of the United States Constitution commands that federal law is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (U.S. Const, art VI, cl 2). In accordance with the Clause's preemption mandate, courts "must not give effect to state laws that conflict with federal laws" (*Armstrong v. Exceptional Child Ctr., Inc.,* 575 U.S. 320, 324, 135 S.Ct. 1378, 191 L.Ed.2d 471 [2015], citing *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 210, 6 L.Ed. 23 [1824]; *accord Cipollone v. Liggett Grp., Inc.,* 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 [1992] ["(S)ince our decision in *M'Culloch v. Maryland,* 17 U.S. (4 Wheat). 316, 427, 4 L.Ed. 579 (1819), it has been settled that state law that conflicts with

federal law is 'without effect' "]; *Murphy v. National Collegiate Athletic Assn.,* —— U.S. ——, 138 S.Ct. 1461, 1476, 200 L.Ed.2d 854 [2018] ["(W)hen federal and state law conflict, federal law prevails and state law is preempted"]). The Supremacy Clause "is essentially a power conferring provision, one that allocates authority between the national and state governments" (*Western Air Lines, Inc. v. Port Auth. of New York & New Jersey,* 817 F.2d 222, 225 [2d Cir.1987] [citation omitted]).

Whether state regulation of a particular subject matter "is invalid under the Supremacy Clause depends on the intent of Congress" (*Malone v. White Motor Corp.,* 435 U.S. 497, 504, 98 S.Ct. 1185, 55 L.Ed.2d 443 [1978] [citation omitted]; *see also City of New York v. ExxonMobil Corp. [In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.],* 739 F. Supp. 2d 576, 602 [S.D. N.Y.2010] ["(T)he touchstone of the doctrine of federal preemption is not fairness to the parties; it is Congressional intent"). "State action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment" (*Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 [2001]; *see also Balbuena v. IDR Realty LLC,* 6 N.Y.3d 338, 356, 812 N.Y.S.2d 416, 845 N.E.2d 1246 [2006] ["The Supremacy Clause, in article VI of the Constitution, may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law"] [citation an internal quotation marks omitted]).

I agree with defendants that litigation of the state

claims conflicts with bankruptcy law.[4] A conflict exists "where compliance with both federal and state regulations is a physical impossibility[,] or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Balbuena,* 6 N.Y.3d at 356, 812 N.Y.S.2d 416, 845 N.E.2d 1246, quoting *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 158, 98 S.Ct. 988, 55 L.Ed.2d 179 [1978]). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects" (*Crosby v. National Foreign Trade Council,* 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 [2000]). Critical to the analysis in this appeal, "when two separate remedies are brought to bear on the same activity, a conflict is imminent" (*Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776 [A.F.L.],* 346 U.S. 485, 498–499, 74 S.Ct. 161, 98 L.Ed. 228 [1953]).

Under its federal constitutional power to establish "uniform Laws on the subject of Bankruptcies through the United States," Congress enacted the Bankruptcy Code (U.S. Const, art I, § 8, cl 4; *accord Kunzler v. Kohaus,* 5 Hill 317, 324 [1842] ["The sub-

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[4] Because I conclude that conflict preemption applies here, I have no occasion to opine on defendants' field preemption argument. To the extent that the majority suggests that defendants are subject to a heavier burden to show preemption because state common law remedies are at issue (*see* majority op. at —— ["defendants have failed to meet their heavy burden of establishing that federal bankruptcy law preempts plaintiff's tortious interference claims that are based on pre-petition conduct and asserted against non-debtor defendants"]), I need not reach the issue. The question is whether Congress intended for the Code's remedial scheme to preempt plaintiff's claims given the *nature* of the claims, not the theory of liability in which they sound.

ject in respect to which uniform laws are authorized, is bankruptcy throughout the United States (and) the power conferred is without restriction, save in its uniformity"]). The Bankruptcy Code "provides a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights" (*Eastern Equip. & Servs. Corp. v. Factory Point Nat. Bank, Bennington,* 236 F.3d 117, 120 [2d Cir.2001], citing 11 USC § 101 *et seq.*). The Code provides a detailed procedure "by which [an] ... insolvent debtor[ ] can reorder their affairs" and "make peace with their creditors" (*Grogan v. Garner,* 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 [1991] [citation omitted]). It accomplishes this by enabling the continued operation of the subject estate through restructuring (*N.L.R.B. v. Bildisco & Bildisco,* 465 U.S. 513, 550, 104 S.Ct. 1188, 79 L.Ed.2d 482 [1984]) and the "equitable distribution of the bankrupt's estate" (*United States v. Embassy Rest., Inc.,* 359 U.S. 29, 31, 79 S.Ct. 554, 3 L.Ed.2d 601 [1959]). A good faith standard applies to bankruptcy petitions, which "furthers the balancing process between the interests of debtors and creditors which characterizes so many provisions of the bankruptcy laws and is necessary to legitimize the delay and costs imposed upon parties to a bankruptcy" (*In re C–TC 9th Ave. Partnership,* 113 F.3d 1304, 1310 [2d Cir.1997], quoting *Little Creek Dev. Co. v. Commonwealth Mortgage Corp. [In re Little Creek Dev. Co.],* 779 F.2d 1068, 1071 [5th Cir.1986]).

To ensure the proper functioning of the bankruptcy system, Congress has provided remedies to prevent bad-faith filings and actions intended to misuse the bankruptcy process. "[S]uch misuse is governed exclusively by [the Bankruptcy] Code" (*Astor Holdings,* 325 F. Supp. 2d at 262). These remedies include,

among other things, granting relief from the automatic stay upon a showing that a petition is part of "a scheme to delay, hinder, or defraud creditors that involved either [ ] transfer of all or part ownership of, or other interest in, [single asset real estate] without the consent of the secured creditor or court approval" (11 USC § 362[d][1]). A creditor may also seek to have the bankruptcy proceeding dismissed or have the proceeding converted to a proceeding under chapter 7 of the Bankruptcy Code (11 USC § 1112[b]).[5] Under Rule 9011 of the Federal Rules of Bankruptcy Procedure, the court may impose sanctions against parties, attorneys or law firms that have filed a petition "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" (Fed R Bankr P 9011[b][1]; *see also Midland Funding, LLC v. Johnson,* ––– U.S. ––––, 137 S. Ct. 1407, 1419 n. 5, 197 L.Ed.2d 790 [2017,

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[5] The Second Circuit Court of Appeals has recognized the following non-exhaustive list of indicia of bad-faith conduct:

> "(1) the debtor has only one asset; (2) the debtor has few unsecured creditors whose claims are small in relation to those of the secured creditors; (3) the debtor's one asset is the subject of a foreclosure action as a result of arrearages or default on the debt; (4) the debtor's financial condition is, in essence, a two party dispute between the debtor and secured creditors which can be resolved in the pending state foreclosure action; (5) the timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditors to enforce their rights; (6) the debtor has little or no cash flow; (7) the debtor can't meet current expenses including the payment of personal property and real estate taxes; and (8) the debtor has no employees" (*In re MBM Entertainment, LLC*, 531 B.R. 363, 408 [Bankr. S.D. N.Y.2015], quoting *In re C–TC 9th Ave. Partnership,* 113 F.3d at 1311; *see also* 9A Am Jur 2d Bankruptcy § 911).

Sotomayor, J., dissenting] [noting that Rule 9011 of the Federal Rules of Bankruptcy Procedure "authorize[s] a court to impose sanctions on parties who willfully file meritless claims"). Chapter 11 bankruptcy aims to "permit[ ] business debtors to reorganize and restructure their debts in order to revive the debtors' businesses" and "maximiz[e] the value of the bankruptcy estate" (*Toibb v. Radloff,* 501 U.S. 157, 163, 111 S.Ct. 2197, 115 L.Ed.2d 145 [1991]), but the Bankruptcy Code's remedial framework evinces Congress' clear and manifest interest to protect the proper "adjudication of the rights and duties of *creditors*" under the Code (*Davis v. Yageo Corp.,* 481 F.3d 661, 679 [9th Cir.2007] [emphasis added]).

The majority of courts to address the issue have concluded that state regulations, including tort actions, that conflict with this carefully designed federal statutory framework or obstructs its purpose are preempted (*see e.g. Metcalf v. Fitzgerald,* 333 Conn. 1, 214 A.3d 361, 379 [2019]; *PNH, Inc. v. Alfa Laval Flow, Inc.,* 130 Ohio St.3d 278, 958 N.E.2d 120, 126 [2011]; *Stone Crushed Partnership v. Kassab Archbold Jackson & O'Brien,* 589 Pa. 296, 908 A.2d 875, 886 [2006]; *Glannon v. Garrett & Assocs., Inc.,* 261 B.R. 259, 265 [D. Kan. 2001]; *Pertuso v. Ford Motor Credit Co.,* 233 F.3d 417, 426 [6th Cir.2000]; *Koffman v. Osteoimplant Tech., Inc.,* 182 B.R. 115, 127 [D. Md. 1995]).

The Second Circuit has explained that,

> "(1) Congress placed bankruptcy jurisdiction exclusively in the 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 grants Congress exclusive power over the bankruptcy law; (4) the Bankruptcy Code es-

> tablishes several remedies designed to preclude the misuse of the bankruptcy process; and (5) the mere threat of state tort actions could prevent individuals from exercising their rights in bankruptcy, thereby disrupting the bankruptcy process (*Eastern Equip.,* 236 F.3d at 121 [internal citation omitted], citing *MSR Expl., Ltd. v. Meridian Oil, Inc.,* 74 F.3d 910, 913–916 [9th Cir.1996]).

Remedies for bad-faith-filings and misuse of bankruptcy are well-covered terrain under the Code. Accordingly, the propriety of a bankruptcy filing is solely within the jurisdiction of the bankruptcy court because "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" (*Astor Holdings,* 325 F. Supp. 2d at 262, quoting *Choy v. Redland Ins. Co.,* 103 Cal. App. 4th 789, 800, 127 Cal. Rptr. 2d 94, 102 [Cal. Ct. App. 2002] [emphasis in original]).

B.

Elements of Common Law Tortious Interference with Contract

The substantive law of tortious interference with contract is also central to the analysis in this appeal. The common law elements of tortious interference with contract are "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v. Smith Barney,* 88 N.Y.2d 413, 424, 646 N.Y.S.2d 76, 668 N.E.2d 1370 [1996]; *see also Oddo Asset Mgt. v. Barclays Bank PLC,* 19 N.Y.3d 584, 594,

950 N.Y.S.2d 325, 973 N.E.2d 735 [2012]). Damages are an essential element of the tort (*Kronos, Inc. v. AVX Corp.,* 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 612 N.E.2d 289 [1993]). Another keystone is the requirement that the conduct is "without justification," which "draw[s] its substance from the circumstances of the particular situation at hand" (*Guard–Life Corp. v. Parker Hardware Mfg. Corp.,* 50 N.Y.2d 183, 190, 428 N.Y.S.2d 628, 406 N.E.2d 445 [1980]).

Our Court has observed that,

> "(t)he issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation" (*id.,* quoting Restatement [Second] of Torts § 767, Comment *b; accord NBT Bancorp v. Fleet/Norstar Fin. Grp.,* 87 N.Y.2d 614, 621, 641 N.Y.S.2d 581, 664 N.E.2d 492 [1996] ["(T)he degree of protection available to a plaintiff for a competitor's tortious interference with contract is defined by the nature of the plaintiff's enforceable legal rights"]).

Factors to be considered by the court are (a) "the nature of the conduct of the [party] who interferes (a chief factor in determining whether conduct is improper)" and that party's motive, (b) the interests sought to be advanced by the interfering party, (c) the broader social interests in protecting the "freedom of action" for the interfering party and the contractual interests of the party being interfered with, and (d) proximity to the interference of the conduct complained of (*Guard–Life Corp.,* 50 N.Y.2d at 190, 428

N.Y.S.2d 628, 406 N.E.2d 445). The interests of the party with whom the actor's conduct interferes, and the relationship between the parties are also relevant factors (*id.*).[6]

III.

As noted, plaintiff's state common law claims are for damages incurred due to the delay caused by the bankruptcy proceeding, occasioned by the filing, which triggered the automatic stay, as well as the change in the Mortgage Borrower's status from a special purpose bankruptcy remote entity to a holder of multiple assets. Plaintiff seeks compensatory damages, which, assuming plaintiff prevails, would require the court to calculate the loss flowing from the automatic stay and any additional delay caused by the status change. The court must also determine whether defendants *improperly* induced debtors to breach their contractual obligations, which would require the court to opine on the legitimacy of the debtors' bankruptcy proceedings and defendants' interest and role in facilitating debtors' filings. The court must also inquire into the causal relationship between plaintiff's damages and defendants' alleged tortious conduct, which turns in large part on the propriety of borrowers' bankruptcy proceedings.

The majority correctly expounds on the law and explains "that, where a tort claim is premised upon the bankruptcy filing, itself, or conduct that occurs

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[6] I need not address whether the majority's assertion that a claim of tortious interference with contract is a historic example of our state's regulation of public health and safety (majority op. at ——), because for purposes of preemption, the dispositive question remains whether Congress intended to preempt the state's regulation of the subject matter at issue.

within the bankruptcy proceeding and under the purview of the Bankruptcy Court, the obstacle presented by state tort remedies is more readily discerned. Parallel tort actions in state court against a debtor or creditor based on that party's alleged wrongful conduct in a bankruptcy proceeding risks subverting the Bankruptcy Court's authority to adjudicate the validity of bankruptcy filings, or otherwise producing inconsistent standards or outcomes between state and federal law" (majority op. at ——). But then the majority reaches the unfounded conclusion that plaintiff's case does "not impugn[ ] the bankruptcy process" (*id.*). It is as if the majority read a different complaint than the one filed by plaintiff in Supreme Court wherein it alleged repeatedly that the bankruptcy was commenced for an improper purpose, at the behest and for the benefit of defendants, and that defendants' conduct was willful and improper. The only way to read these allegations is that plaintiff "cast doubt upon," "call[ed] into question," and roundly "dispute[d] the truth, validity or honesty of" the bankruptcy proceeding, which, by definition, means plaintiff impugned the bankruptcy action (impugn, New Oxford American Dictionary [3d ed 2010]; impugn, Black's Law Dictionary [11th ed 2019]; impugn, Merriam Webster's Collegiate Dictionary 585 [10th ed 1993]).

Although, as the majority argues, a plaintiff may recover damages for tortious interference with contract even if the defendant "w[as] engaged in lawful behavior" (majority op. at ——, quoting *NBT Bancorp,* 87 N.Y.2d at 621, 641 N.Y.S.2d 581, 664 N.E.2d 492), nonetheless, under our law the allegedly tortious conduct must be "improper *under the circumstances*" (*Guard–Life Corp.,* 50 N.Y.2d at 190, 428 N.Y.S.2d 628, 406 N.E.2d 445 [emphasis added]).

The majority ignores our observation in *Guard–Life Corp.* that whether a defendant's conduct is tortious is necessarily particularized (*id.*). Here, plaintiff alleged that borrowers and defendants acted pursuant to a scheme to disadvantage plaintiff as creditor by filing for bankruptcy. If true, at a minimum, this constitutes improper conduct intended to achieve defendants' own ends by use of a surrogate with equally bad intentions and with the common goal to injure plaintiff.

Thus, contrary to the majority view, the state court is caused to invade the precinct of bankruptcy law to determine the merits of plaintiff's claim of tortious interference with contract. But federal courts have exclusive jurisdiction over that determination (*see Gonzales v. Parks,* 830 F.2d 1033, 1035 [9th Cir.1987] [stating that, allowing state courts to determine whether a claim for relief under federal law is of merit "would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating"]).

In *Choy v. Redland Insurance Co.,* 103 Cal. App. 4th 789, 127 Cal.Rptr.2d 94 [2002], the plaintiff brought a state court action against an insurance company and associated defendants. The plaintiff alleged that the defendants encouraged the insured to petition for bankruptcy for the "real purpose" of "frustrat[ing]" the plaintiff's "ability to seek and obtain a judgment against [the insured]" in excess of defendant insurer's policy limit (*id.* at 794, 127 Cal Rptr 2d 94). The claims were preempted because the "gist" of the plaintiff's complaint was the defendants' "misuse[ ][of] the bankruptcy process" and state court reme-

dies cannot serve as a vehicle to "circumvent well established federal rules relating to redress" for such misuses (*id.* at 802, 127 Cal Rptr 2d 94). Although bankruptcy law references state law, "the adjustment of rights and duties within the bankruptcy process itself is uniquely and exclusively federal" (*id.* at 797, 127 Cal Rptr 2d 94, quoting *MSR Expl.,* 74 F.3d at 914 [alteration omitted]). The "superimposition" of tort remedies "on the many activities that might be undertaken in the management of the bankruptcy process" would lend to intolerable exposure to claims of malicious prosecution (*Choy,* 103 Cal. App. 4th at 798, 127 Cal.Rptr.2d 94).

As recognized in *Choy,*

> "the highly complex laws needed to constitute the bankruptcy courts and regulate the rights of debtors and creditors also underscore the need to jealously guard the bankruptcy process from even slight incursions and disruptions brought about by state malicious prosecution actions. To put it another way, the problem here is not only one of state courts deciding issues of federal law in one manner or another. That is not an entirely unique situation, even when uniformity is required. The difficulty here goes much deeper. It is a question of state courts, in effect, interfering with the whole complex, reticulated bankruptcy process itself" (*id.* at 797–798, 127 Cal Rptr 2d 94 [internal citation omitted]).

As in *Choy,* if plaintiff incurred damages because of borrowers' improper bankruptcy filings, it was for the bankruptcy court to address those claims, not a state court (*id.* at 801, 127 Cal Rptr 2d 94).

Plaintiff here has made no claim—as it could not—

that its only remedy for its damages lies in state court because "the 'authorized proceeding' in bankruptcy was not only exclusive, it was adequate" (*id.; see supra* Part II.A). Plaintiff's choice to forego the remedies in the forum available to it under the Bankruptcy Code does not open the door to our courts.

The Ninth Circuit in *Gonzales* has explained that,

> "Congress' authorization of certain sanctions for the filing of frivolous bankruptcy petitions should be read as an implicit rejection of other penalties, including the kind of substantial damage awards that might be available in state court tort suits. Even the mere possibility of being sued in tort in state court could in some instances deter persons from exercising their rights in bankruptcy. In any event, it is for Congress and the federal courts, not the state courts, to decide what incentives and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties shall be utilized" (*Gonzales,* 830 F.2d at 1036).

In *Gonzales,* the court determined that permitting state court tort claims against a bankruptcy attorney "based on the filing of a bankruptcy petition," would distort exclusive federal jurisdiction in "much the same manner" as allowing tort damages against debtors (*id.* at 1036–1037).

Similarly, in *MSR Exploration,* the Ninth Circuit underscored the significance of the Bankruptcy Code's preemptive effect on state law remedies. The court explained that "[d]ebtors' petitions, creditors' claims, disputes over reorganization plans, disputes over discharge, and *innumerable other proceedings*"— all the business of the bankruptcy courts—would

"lend themselves to claims of malicious prosecution. Those possibilities might gravely affect the already complicated processes of the bankruptcy court" (74 F.3d at 914 [emphasis added]). The complaint filed by the debtors in *MSR Exploration* "self-consciously" sought damages for a claim allegedly maliciously filed and pursued during the plaintiffs' Chapter 11 bankruptcy proceeding, and the court understood that "the opportunities for asserting malicious prosecution claims," much like here, are "only limited by the fertility of the pleader's mind and by the laws of the state in which the proceeding took place" (*id.*).

Plaintiff's case here is indistinguishable in any meaningful way from *Astor Holdings.* In *Astor Holdings,* Second Circuit Judge Lynch, then a district-court judge sitting in the Southern District of New York, dismissed as preempted several tort claims that required the court to opine on whether the defendant filed bankruptcy documents in bad faith or for an improper purpose (325 F. Supp. 2d at 262). The plaintiff sponsor of robotic combat events, Astor Holdings, sued defendant Roski, a robot builder, and his promotional company, alleging that these nondebtors had, among other claims, tortiously interfered with contractual agreements between plaintiff and its joint venture partner, Thorpe. The plaintiff averred that Roski had assisted Thorpe in acquiring bankruptcy counsel, and it was counsel that suggested that Thorpe file for bankruptcy. Counsel advised Thorpe that bankruptcy could serve dual purposes of "reconfigure[ing]" his debt and "freeing him of his obligations" under the contractual agreements at issue (*id.* at 257). The plaintiff's complaint alleged that filing for bankruptcy was an effort to "divest [plaintiff] of its interest in the [subject] business" (*id.* at 260).

Closer inspection of Astor Holdings' complaint

demonstrates further similarities with the state claims asserted here. Astor Holdings also alleged that Roski's attorneys arranged for Thorpe to borrow $150,000 from the defendant "for the sole and express purpose of enabling Thorpe to file a bankruptcy petition. [Roski's] loan, which was secured by Thorpe's interest in the Venture, was used to pay a retainer to the bankruptcy counsel that [the defendant] picked for Thorpe." Astor Holdings contended that Roski and his attorneys, "who had formulated the strategy Thorpe and his bankruptcy counsel pursued" succeeded in "paralyzing Robot Wars and preventing the Venture from making any new deals."

Citing the Bankruptcy Code's remedies for abuse of process, the court held that "misuse of the [bankruptcy] process" is governed exclusively by the Bankruptcy Code (*id.* at 262). Notably, relying on *Choy,* the court rejected an argument advanced by plaintiff here, and adopted by the majority, to expound that defendants' nondebtor status was "a distinction without a difference," reasoning that preemption "implies" that a claim for which the Bankruptcy Code provides a remedy "cannot be the subject of regulation by state statutory or common-law remedies" (*id.*). Further, the court explained, any assertion that Thorpe petitioned for bankruptcy or filed certain papers in bad faith or for an improper purpose would be measured by state law, and therefore would be barred (*id.* at 263). Just so here, where plaintiff alleges that borrowers' bankruptcy petitions were filed for an improper purpose: to prevent plaintiff from exercising its contractual remedies by means of the foreclosure sale.

The majority unpersuasively attempts to distinguish *Choy* and *Astor Holdings.* The courts in those cases explained that the underlying *nature* of the claims is what matters in the preemption analysis.

For example, in *Choy,* "(t)he real purpose" of causing the non-party debtor to petition for bankruptcy "was to frustrate [the plaintiff's] ability to seek and obtain a judgment against [the debtor]" (103 Cal. App. 4th at 794, 127 Cal.Rptr.2d 94). The bankruptcy filing was "on the initiative" of the defendant, who paid the necessary filing fees, so that the defendant could "avoid liability" for its bad-faith conduct in rejecting the plaintiff's earlier offers to settle an insurance dispute (*id.*). In *Astor Holdings,* Roski's attorney "suggested that Thorpe file for bankruptcy" because the Venture Agreement was purportedly "onerous," "obscene," and "unconscionable" (325 F. Supp. 2d at 257). The attorney also suggested to Thorpe that bankruptcy could serve the dual goal of "reconfigur[ing]" Thorpe's debt and "freeing him of his obligations under the Venture Agreement" (*id.*).[7] Here, plaintiff alleges breaches of contract, but its complaint is with the actions taken in bankruptcy. As I have noted (*see supra* Section I.B), for purposes of preemption, what matters is not the source of the allegedly tortious conduct but that the damages flow from the bankruptcy proceedings. Indeed, the function of the doctrine is to *preempt* a litigant's "ability collaterally to attack bankruptcy petitions in the state courts," lest a patchwork "of laws

[7] The majority correctly notes that in *Astor* the District Court did not dismiss the plaintiff's claim that the defendant had tortuously interfered with a bankruptcy settlement (majority op. at —— n. 8) but fails to explain its relevance. The plaintiff alleged that Roski "set out to undermine the bankruptcy settlement, and Robot Wars itself, by causing Thorpe to renege on the promise to 'promote' Robot Wars" (*Astor Holdings,* 325 F. Supp. 2d at 269), which, unlike here, plainly does not implicate either the plaintiff's or debtor's status in the subject bankruptcy proceeding or the administration of the debtor's estate. And, of course, state courts are authorized to enforce settlement agreements.

of the state in which the proceeding took place" and "the fertility of the pleader's mind" "threaten the uniformity of federal bankruptcy law, a uniformity required by the Constitution" (*Choy,* 103 Cal. App. 4th at 798, 127 Cal.Rptr.2d 94, citing U.S. Const, art I, § 8, cl 4).

The majority's reliance on *Davis* is no more availing. In *Davis,* the basis of the plaintiff minority shareholders' claim of breach of fiduciary duty was grounded in their allegation that defendants caused the corporation to petition for bankruptcy without "considering other alternatives that may have yielded greater value for the corporation and its shareholders" (481 F.3d at 665). In other words, defendants' alleged tortious act was their failure to represent the best interests of plaintiffs by presenting bankruptcy as one option among others. Thus, "plaintiffs' breach of fiduciary duty claims [were] not based on 'activities that might be undertaken in the management of the bankruptcy process,' " (*id.* at 679–680, quoting *MSR Expl.,* 74 F.3d at 914). In contrast, the damages here flow solely from defendants' facilitation of borrowers' bankruptcies and the additional attendant delay related to administration of that process, which, according to plaintiff, would not have occurred but for defendants' alleged inducement of borrowers' contractual breaches.[8]

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[8] The majority claims that my analysis compels preemption in cases where "some fact questions might overlap with bankruptcy proceedings" (majority op. at ——). As I explain, the preemption analysis requires careful scrutiny of the substantive nature of the claim, and its potential disruptive impact on the bankruptcy system by, as here, avoiding the remedial framework of the Bankruptcy Code. Unlike the majority I do not ignore plaintiff's allegations and the leitmotif of its complaint that defendants

Davis illustrates that the ultimate legal conclusion turns on whether there has been *misuse* of the bankruptcy system. In *Davis,* the majority shareholders made no allegation that defendants had abused the bankruptcy system but instead argued that the defendants had a duty to weigh different options to yield the greatest value in the company's shares. In contrast, plaintiff's claim here is that defendants, acting in concert with borrowers, took advantage of "the adjustment of rights and duties within the bankruptcy process" to upset plaintiff's status as a first-tier creditor in borrowers' bankruptcy proceedings (*Choy,* 103 Cal. App. 4th at 797, 127 Cal.Rptr.2d 94, quoting *MSR Expl.,* 74 F.3d at 914).

In finding no preemption here, the majority relies on the premise that the plaintiff's claims "do not implicate debtor-creditor disputes relating to the bankruptcy estate" (majority op. at ——). To the contrary, if plaintiff's claims are credited, the purpose of the bankruptcy filings was solely to delay plaintiff's recovery of its collateral. In fact, plaintiff initially argued to the bankruptcy court that the filing was in bad faith. However, it withdrew its motion and instead supported the reorganization plan. In doing so, plaintiff chose to forgo its remedy for the borrowers' alleged misuse of bankruptcy law and the bankruptcy system. Plaintiff cannot now seek to have a state court decide whether the damages were caused by delay from the improper bankruptcy filings. To permit such action would interfere with and undermine the uniform remedies enacted by Congress in the Bankruptcy Code.

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and borrowers labored towards one end—filing bankruptcy to undercut plaintiff in its position as borrowers' secured creditor.

The majority's other argument that plaintiff's state claims are not preempted because the defendants are nondebtors and their alleged actions occurred prior to the bankruptcy, is no more persuasive. First, the preemption analysis does not turn on whether the defendants are nondebtors, but rather on the fact that the Code is written to address the impact of the alleged scheme on the bankruptcy proceeding (*see Astor Holdings,* 325 F. Supp. 2d at 262; *Gonzales,* 830 F.2d at 1035). In other words, the issue is plaintiff's "interfer[ence] with the whole complex reticulated bankruptcy process itself" by its choice to shop forums and forego the remedial mechanisms exclusive to the bankruptcy court and gamble on a state remedy instead (*Choy,* 103 Cal. App. 4th at 798, 127 Cal.Rptr.2d 94).

Moreover, plaintiff was a creditor in the bankruptcy proceedings when it simultaneously filed these state claims and relied on those federal proceedings to support its allegations that defendants' scheme undercut its creditor status. The majority's view that there is an insufficient connection is simply belied by the plaintiff's narrative of the interdependent actions of defendants and borrowers.

Second, the conduct alleged here was to facilitate the bankruptcies, so the fact that acts were taken prefiling is unsurprising. For example, a debtor who, before filing, secures a loan to pay the bankruptcy filing fee or acquires property to undercut a creditor's remedies—as plaintiff asserts happened here—would be relevant to the bankruptcy court's assessment of the motives of the debtor (*cf. National Hockey League v. Moyes,* No. CV-10-01036-PHX-GMS, 2015 WL 7008213, at *6 [D. Ariz. Nov. 12, 2015] [rejecting the plaintiff's argument that its tort claims are not preempted because the claims comprise pre-filing

conduct on the ground that, when an injury "might never occur, and thus plaintiff's claim would not accrue ... 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"] [citation omitted]). As this example illustrates, for preemption purposes there is no analytically sound basis to distinguish between preparatory actions that make possible the bankruptcy filing. The latter cannot occur without the former—indeed that is plaintiff's core argument in support of its claims, i.e., but for defendants having loaned money to borrowers to finance the bankruptcy filings and defendants' transfer of the apartments that transformed Mortgage Borrower from a special purpose bankruptcy remote entity, there would be no automatic stay and delay of the foreclosure sale, which is what plaintiff alleges caused its losses.

Contrary to the majority's characterization of plaintiff's claims, the state lawsuit is an attempt to avoid the remedies of the Bankruptcy Code. Indeed, plaintiff filed a motion to dismiss Mezz Borrower's bankruptcy petition, which it withdrew after the court indicated that it was premature because, were the court to afford plaintiff relief at that early stage, it would have had to adopt the view based on plaintiff's disputed assertions that the proceeding was a two-party dispute with no additional creditors. Such a view would require the court to have disregarded the existence and appointment of the committee of unsecured creditors, and that was "asking a lot of [that] early stage of the case." Rather than pursue remedies under the Bankruptcy Code for the alleged misuse of the bankruptcy system by refiling its mo-

tion at the appropriate time and pursuing sanctions, plaintiff seeks to have our state courts decide that defendants' actions were for an improper purpose, caused plaintiff damages, and therefore warrant compensation to plaintiff. But the Bankruptcy Code provides the exclusive remedies for these alleged injuries. As *amicus curiae* Melanie L. Cyganowski, former Chief Judge of the United States Bankruptcy Court for the Eastern District of New York, explains, "[t]he only significance of [d]efendants' allegedly tortious conduct is that it facilitated or affected the nature of, the [b]ankruptcies. The damages [p]laintiff claims to have sustained all resulted from [d]ebtors' bankruptcy filings" (*see* brief for *amicus curiae* Melanie L. Cyganowski at 6). And as *amicus curiae* details, the Bankruptcy Code afforded plaintiff various remedies for that alleged tortious conduct.

The Bankruptcy Code's remedial scheme includes a set of "comprehensive and purposeful procedures designed to achieve uniformity, fairness and efficiency in the administration of bankruptcy cases" (*id.* at 2). The only remedy plaintiff chose to pursue was the credit-bid for debtors' assets under 11 USC § 363(k), which allowed it to purchase the property at an auction sale, almost one month after filing the underlying tort claims in state court. The United States Supreme Court has explained that "[t]he ability to credit-bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan" (*RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639, 644, 132

S.Ct. 2065, 182 L.Ed.2d 967 [2012]).[9] Thus, plaintiff simultaneously invoked remedies from federal and state courts to address damages flowing from the bankruptcy filings—exactly the type of dual proceedings Congress sought to preempt.[10]

Apart from incorrectly approving state litigation of issues that fall squarely within the exclusive jurisdiction of the bankruptcy court, the majority's decision will affect debtor access to bankruptcy remedies and the "fresh start" allowed by Congress. The fear of state litigation may disincentivize lawyers and poten-

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[9] As *amicus curiae* notes, had Mortgage Borrower been a "single asset real estate" debtor, at most the earliest date upon which plaintiff could have obtained relief from the automatic stay under 11 USC § 362(d)(3) would have been on July 5, 2016 (Cyganowski brief at 13 n 4). Plaintiff purchased the property under its winning credit-bid on December 13, 2016, meaning that Mortgage Borrower's changed status as a "single asset real estate" debtor resulted, at most, in a delay of approximately six months (*id.*).

[10] The majority makes the remarkable assertion that "defendants do not claim that any remedy was available to plaintiff in the bankruptcy proceedings to compensate plaintiff for *defendants'* alleged wrongdoing" (majority op. at ——). Defendants have described several remedies plaintiff could have sought during the bankruptcy proceedings to prevent, mitigate, or recoup the alleged damages plaintiff requests in state court, remedies further detailed by *amicus curiae* former Chief Judge Cyganowski. For example, plaintiff could have moved to dismiss the bankruptcy cases on the ground that they were filed in bad faith (*see* 11 USC § 1112[b]), moved to lift the automatic stay (*see* 11 USC 362), or sought sanctions for filing a meritless claim (*see* Fed R Bankr P 9011). Had plaintiff pursued its initial motion and succeeded, there might well be no injury to remedy. Further, the majority has failed to identify, because it cannot, what would be plaintiff's damages were borrowers not to have filed for bankruptcy.

tial secondary lenders from assisting debtors who wish to file for bankruptcy but need legal counsel and financial assistance to do so, impacting those with the little to no resources and a low credit rating (*see* brief for *amicus curiae* Legal Services NYC Bankruptcy Assistance Project, for defendants-respondents, at 6–8; brief for *amicus curiae* Bullard Group at 15–16; *see also* Alana Abramson, "People are Very Scared." Why Small Businesses Hit by Coronavirus Are Struggling to Get Emergency Loans [Apr. 9, 2020, 3:41 PM] [explaining that "(i)t may be the companies most in need of assistance" during the coronavirus pandemic that "are the companies that don't have a current banking relationship"]; Paul Kiel, *What Happens When You Can't Afford to Go Bankrupt,* Washington Post [Mar. 2, 2018, 3:28 PM] ["Scores of people considering bankruptcy told me the same thing again and again: if they had $1,000 to pay an attorney, then they probably wouldn't need to file (for bankruptcy) in the first place"]; David Skeel, Bankruptcy and the Coronavirus 5, Brooklings [2020] ["The costs of bankruptcy for small and medium-sized businesses are substantial—often 30% of the value of the business—and two-thirds are liquidated rather than reorganizing"]; Chrystin Ondersma, *Small Debts: Big Burdens,* 103 Minn L Rev 2211, 2233 [2019] ["Although purportedly designed to keep out high-income debtors, the effect of the 2005 amendments (to the Bankruptcy Code) has been to reduce access for the poorest debtors who cannot afford the increased fees and who have difficulty navigating the complex technical rules without attorneys"]). The majority opines that state claims against attorneys and debt counseling entities are likely to fail (majority op. at ——). And yet this is the first time our Court has addressed the viability of a claim for tortious interference with contract against a nondebtor. It remains to be seen as to what other

parties shall be subject to the ruling here, notwithstanding the majority's speculative "optimism" about the narrow class of defendants who will be dragged into state court by litigious lenders.

IV.

According to the majority, plaintiff's state claims for tortious interference with contract against defendants "are peripheral to, and do not impugn, the bankruptcy process" (majority op. at ——). That conclusion will come as a surprise to defendants who plaintiff alleges were parties to a "scheme" that depended on and succeeded only by virtue of borrowers' bankruptcy filings. It is also contrary to Congressional intent in enacting our reticulated Bankruptcy Code with remedies for a party aggrieved by the type of manipulation of the bankruptcy system alleged by plaintiff in its state action. And I do not anticipate it will be well-received by the bankruptcy courts, which have exclusive jurisdiction over bankruptcy filings and sole authority to determine whether a bankruptcy petition is filed in bad faith.

Notably, this plaintiff recovered $86 million as a creditor in the bankruptcy proceeding, achieved its goal of purchasing the property from one of the borrowers, and obtained a $24 million judgment against the loan guarantors. Plaintiff obtained everything our federal and state legal systems allow. Plaintiff's state action is merely an attempt to avoid litigating in bankruptcy court the impact of defendant's alleged scheme to manipulate plaintiff's status as a creditor of the bankruptcy petitioners. Put another way, plaintiff's state action is for damages incurred by the delay in purchasing the property that resulted from borrowers filing for bankruptcy. If there's no bankruptcy filing, there's no delay, and no damages. Without damages, there is no viable state claim. There is

nothing peripheral about that. The majority plainly misconstrues the matter when it suggests that "this is not a situation where state and federal law provide 'two separate remedies' for identical grievances" (majority op. at ——). The voluminous record before us tells a different story.

In sum, plaintiff's complaint is "self-consciously and entirely one which seeks damages for a claim filed and pursued in the bankruptcy court" (*MSR Expl.,* 74 F.3d at 912). Plaintiff "allege[s] state law tort causes of action for damages entirely predicated upon the filing and prosecution of" the bankruptcy petitions (*In re Miles,* 430 F.3d 1083, 1093 [9th Cir.2005]). Therefore, plaintiff's claims are preempted by federal law. I dissent.

APPENDIX B

No. 654917/16

SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

SUTTON 58 ASSOCIATES LLC,
Plaintiff-Respondent,

v.

PHILIP PILEVSKY et al.,
Defendants-Appellants.

Entered January 10, 2019

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 8, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's claims, in which the sole damages plaintiff claims are losses resulting from the delay of a real estate project due to the bankruptcy filing of two nonparty entities, are preempted by federal law (*see Astor Holdings, Inc. v Roski,* 325 F Supp 2d 251, 262-263 [SD NY 2003]). We note that in the bankruptcy proceedings, plaintiff moved to dismiss Mezz Borrower's petition as filed in bad faith but voluntarily withdrew that motion. As in *National Hockey League v Moyes* (2015 WL 7008213, 2015 US Dist LEXIS 153262 [D Ariz, Nov. 12, 2015, No. CV-10-01036-PHX-GMS]), and unlike *Davis v Yageo Corp.* (481 F3d 661 [9th Cir 2007]), plaintiff's damages arise only because of the bankruptcy filings.

In light of the above disposition, we need not reach

the parties' arguments about the *Noerr-Pennington* doctrine and veil-piercing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: JANUARY 10, 2019

/s/

Clerk

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY
PART 54

Index No. 654917/2016

SUTTON 58 ASSOCIATES LLC,
Plaintiff,

v.

PILEVSKY, PHILIP, et al.,
Defendants.

[Filed March 8, 2018]

DECISION, ORDER AND TRANSCRIPT OF ORAL PROCEEDINGS HELD BEFORE THE HONORABLE SHIRLEY WERNER KORNREICH, DATED MARCH 6, 2018, APPEALED FROM, WITH NOTICES OF ENTRY

Upon the foregoing papers, it is ordered that this motion for summary judgment is denied for the reasons stated on the record, which shall be e-filed by movants.

Dated: 3/6/18 /s Shirley Werner Kornreich

TRANSCRIPT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
CIVIL TERM - PART 54

Index No. 654917/2017 [sic]

SUTTON 58 ASSOCIATES LLC,
Plaintiff,

v.

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

March 6, 2018

BEFORE: HONORABLE SHIRLEY WERNER KORNREICH, JUSTICE

* * *

[2] Proceedings

THE COURT: Good morning.

MR. GREENBERG: Good morning.

MR. HAMERMAN: Good morning.

MR. SCHUMAN: Good morning.

MR. MILLER: Good morning.

MR. GILMORE: Good morning.

THE COURT: You may be seated.

All right. What I have in front now is a summary judgment motion made by all of the Defendants to dismiss the complaint. And the complaint basically alleges one cause of action -- I think one is tortious interference with contract. One or two.

MR. GREENBERG: It's two causes of action because it is against two separate entities, but both -- and the individuals. They are both tortious interference claims.

THE COURT: I read it yesterday, but my mind is such a siv. Right. So, it includes two different causes of actions, but they are both for tortious interference.

Basically, what is raised here is the Noerr-Pennington defense. That is a major defense in this case.

I will hear from you, counsel.

MR. SCHUMAN: Your Honor, good morning. Adam **[3]** Schuman from Perkins Code for Defendants. With me are my colleagues Keith Miller and Martin Gilmore.

Your Honor, Plaintiffs seek to relitigate here their disappointment about prior bankruptcy, the filing of bankruptcy --

THE COURT: I'm not quite sure that is exactly the issue. And, I mean, I understand Noerr-Pennington. I can see where that would be an issue were it the party who filed for bankruptcy in this case.

You know, this is a really strange case And I usually lay out the facts and I didn't. Basically, what this is -- you can have a seat.

And I should probably lay out the facts. It is always easier for the court reporter when I do.

What happened here is a land developer decided to develop a property, three properties I think it was, but it was several properties on the far East Side around Sutton Place. And bought up, I guess they were in the form of townhouses, but smaller buildings and was going to build a very tall high-rise. They needed a

zoning change in order to do that and got the zoning change; although, the community was not happy with it because it was going to be one of those, almost like one of those sliver buildings that was going to be very tall.

[4] The developer needed money. It borrowed approximately, I think it was close to $150 million, if I recall, from the Plaintiff.

Now, the papers, the loan papers are similar to loan papers I see all the time And what happened is a lender who is lending all that much money to an entity which is really a single purpose entity, and the only thing the entity has is the land and is going to develop this land.

And it will often provide that if that entity does go into bankruptcy or something similar to bankruptcy, that is an event of default. But they also do put in other things in the contract which was in this contract as well. And I say it was about $150 million. But, typically, there was the mortgage loan, the mezzanine loan and build-out loan which was very minimal, for little over a million.

Two major were the mortgage loan and that was secured by the mortgage, and I'm sure there were UCC filings, and then there was a mezzanine loan which was for a lot less perhaps. I think it was for like maybe one hundred twenty some odd dollars. The mezz loan was the rest, whatever it was.

But what the contract usually provides is -- this contract, there was a separate mezzanine loan and a **[5]** separate mortgage loan. The mezzanine loan basically said that -- that the borrower shall not directly or indirectly create or incur or assume any indebtedness more than $50,000, except for trade

indebtedness that had to be paid off basically within 30 days because they didn't want creditors basically.

Also, it provided that for each of the loans, the borrower would pay their own -- out of their own -- liabilities of their own funds and assets.

It also said that, and this is very important, in terms of the mortgage loan, that the borrower would remain an entity that just was -- the only business would be developing the property, owning the property and developing the property. And so a single purpose entity. It would not enter into any other business. It would not do anything else. And that it would be solely organized for that purpose and wouldn't engage in anything else.

And this is important to the lender and that dealt with the mortgage borrower. There are other things as to the mezzanine loan. It was also only to be organized solely for the purpose of acting as member of the limited liability company that owns the property. And there are all of those other obligations in the contract that had nothing really outwardly to do with **[6]** the bankruptcy, but would impact on a bankruptcy filing if there were a bankruptcy, but it was --- did not have, on its face, anything to do with the bankruptcy.

So, these were all obligations of the mezzanine borrower, the mortgage borrower, borrower for the building, building of the property as well. And, basically, and even though -- you know, there1s a subtext here because, number one, if there were no other creditors, then it's not likely that there would be a bankruptcy committee, a trustee, other creditors. There would not be a bankruptcy.

Further, if it was no other business, only a single purpose entity, then the Bankruptcy Court would

probably not grant a bankruptcy. It would just not be a viable bankruptcy action. Basically those were just parts of the contract.

What happened here, and I'm not even going to posit on the record why the Defendants in this case, and the Defendants in this case are all related. It's Mr. Philip Pilevsky, who owns a number of entities which -- some are which -- are named as entities as Defendants. And that would be, I think it's Prime Alliance Group, LTD is his entity.

He also owns Philip International. All of these entities are related. His two sons, Michael **[7]** Pilevsky and Seth Pilevsky, who own Sutton Opportunity, LLC which is a Delaware LLC, which was created after the mezzanine bankruptcy, but before the mortgage borrower went into bankruptcy, which was the property itself.

And, in any event, what happened here is Philip Pilevsky, through one of its entities, sent the borrower $50,000 in order to hire a lawyer, lawyer being his nephew, in order to file a bankruptcy action.

That $50,000 then became a debt in the bankruptcy for the mezzanine and the one who filed for bankruptcy was the lender became a debt for the mezzanine borrower, which was -- which violated the contract.

But, be that as it may, the person who arranged all of this, the original lawyer, was the general counsel for Philip International, Mr. Pilevsky's entity, but not named, an unnamed entity. Plus, in an e-mail or some note, Mr. Philip Pilevsky said he was sending the $50,000 on behalf of his son Michael on behalf of Sutton Opportunity, LLC which was a newly created, a brand new entity which was -- which became a partial partner of the borrower and that, again, was

against the contract clauses. They were not allowed to bring in someone else.

And, on top of all of that, apartments, three **[8]** small Queens apartments, which had been sponsor apartments, I assume, of a co-op that had belonged to the Pilevskys, but was owned by an entity, another entity not named, but by Philip Pilevsky, these three small apartments were transferred to, I think the mortgage borrower, and so that now there is a breach because they are in a new business and now all of a sudden it's not a single purpose entity.

These are worth a minimal amount of money, but, but, somehow Philip Pilevsky, one of his entities transferred these properties, but on behalf of Sutton and his son so that Sutton could become a member of the mortgage borrower.

I mean, then the mortgage borrower then files for bankruptcy also and has all of the creditors and is not a single purpose entity.

In any event, there were so many breaches of the contract as a result. And that is the crux of the complaint.

Let me hear from you.

MR. SCHUMAN: Your Honor, the breach of any contract provision is only relevant here and only is in the complaint insofar as it relates to the bankruptcy.

THE COURT: Why?

MR. SCHUMAN: Because --

[9] THE COURT: Certainly for the Defendants, who probably wanted a piece of this development, you are right. But, if you look at the contract itself, it has nothing to do with the bankruptcy. It deals only with the contract.

What you are asking me to do is throw this out, upend the way contracts are written here in New York City and upend the whole development industry, land development industry. Maybe I'm wrong.

MR. SCHUMAN: Respectfully, if you look at the complaint, Plaintiff's complaint, if I may, I have a handout 1 shared with Plaintiffs that summarizes their own allegations.

THE COURT: This is summary judgment, not a motion to dismiss.

MR. SCHUMAN: Yes.

It repeatedly alleges underlying the two tortious interference counts that there was prohibition of filing for bankruptcy under that contract you cite --

THE COURT: Because that would cause a default. There was prohibition as well as all other prohibitions. There was also a prohibition to file for bankruptcy, only in the sense that if they did file for bankruptcy, it caused a default.

MR. SCHUMAN: Those are --

[10] THE COURT: It does not stop them from filing for bankruptcy, but it causes default,

MR. SCHUMAN: In connection with the complaints, allegations of tortious interference, these provisions cited are only relevant insofar as the Defendants allegedly caused the breach of those provisions. That is relating to the bankruptcy, reorganization.

Whether it's a $50,000 loan that hired bankruptcy counsel or a transfer of three apartments relating to whether it's a special purpose vehicle or not, it is only relevant to the bankruptcy. All of the issues were serviced, raised in the bankruptcy.

Your Honor, you noted the Noerr Pennington doctrine. We believe that causes a basis for dismissal here, but federal preemption, Bankruptcy Court had the issues before it --

THE COURT: 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.

Let's just -- I don't want to go into what the bankruptcy judge did or did not do, but he did not really have this in front of him. This is a totally separate issue.

[11] MR. SCHUMAN: Your Honor, respectfully, Plaintiff -- respectfully, Plaintiff had formally challenged the bankruptcy case filing in Bankruptcy Court. They filed for a bad faith filing. They cited the same contract provisions that you cite now in their motion. This is in --

THE COURT: There was no decision on a motion to dismiss. In fact, Justice Sherwood -- something that was not brought to the bankruptcy judge's attention, had denied a TRO in this case prior to bankruptcy.

MR. SCHUMAN: In the bankruptcy case, Plaintiffs raised this issue. They raised whether it is a special purpose vehicle. They raised the issue of transfer of the three apartments. They ultimately withdrew that motion and --

THE COURT: Right. It was not ultimately decided. It was not decided.

MR. SCHUMAN: But it was before the Bankruptcy Court. There was no secret. There was testimony taken --

THE COURT: As I said, I'm not going to comment on Judge Lane, okay.

MR. SCHUMAN: Your Honor, we're not asking you to comment.

Our point is --

[12] THE COURT: He did not --he made no decision on this. He made -- chose not to make a decision on this. And, in fact, it was withdrawn. It was not before him. In that sense, he didn't rule. He didn't rule.

MR. SCHUMAN: To the extent these issues were available, briefed, whether he ruled or not, your Honor, it is our position that that creates the basis for federal preemption. We cited multiple cases -- -

THE COURT: There's no federal preemption here. I don't see it.

MR. SCHUMAN: Your Honor, we would ask --

THE COURT: When a judge decides not to rule for whatever reason, he has not ruled.

MR. SCHUMAN: We're not asking you to find collateral estoppel or res judicata, but preemption when it comes to these issues having already been surfaced, whether resolved directly or not, had been surfaced in the bankruptcy case. That is not something this Court, respectfully, should be --

THE COURT: I don't have to rule about the bankruptcy. This case does not involve the bankruptcy itself. It involves separate contractual agreements which your clients clearly knew about and were involved in.

[13] I think, maybe there is -- on this record, there is a good chance they aided and abetted in these breaches and were involved in tortious interference. On this record there is a good chance that is the case,

I don't know for sure because we have not even done any discovery. We have to go forward with discovery. The Plaintiffs have no discovery.

And that is another issue. It's a little early for summary judgment. I think there is an interesting issue of piercing the corporate veil. I think on this record it appears to be here, but, there is certainly enough here where all of these different entities were acting on behalf of each other. It was like one big piggy bank here.

MR. SCHUMAN: If I may, your Honor, I would like to revisit the corporate veil issue, but first still on Noerr-Pennington and preemption. With all respect, your Honor, I don't think the contract alleged violations can be divorced from the bankruptcy.

THE COURT: Why not?

MR. SCHUMAN: Because there is no claim. This is not the type of case cited by Plaintiffs, American Mortgage or otherwise, where there is actually a claim, like a breach of contract claim or a breach of guarantee claim if there wasn't a bankruptcy.

[14] Here, the entire lawsuit turns on there having been a bankruptcy. Nobody is saying we want $50,000 back or there is something regarding the three properties that was fraudulent or inappropriate.

It's only relevant insofar as it causes the bankruptcy allegedly. And if you were to look --

THE COURT: Well, that's why they were put in, the clauses were put in. But all of their complaints stem from breaches of these clauses, not from the bankruptcy, but from breaches of these clauses.

MR. SCHUMAN: Insofar as the breach allegedly, for example, on the $50,000 funding for bankruptcy

counsel, your Honor, we cite the Baltimore Scrap case which holds that Noerr-Pennington should apply to --

THE COURT: But those cases, all of those cases dealt with the bankruptcy itself. They were not dealing with other causes of -- other clauses of the contract.

MR. SCHUMAN: The clauses, your Honor, this is the Intervention Energy case, are all relevant only insofar as they try to restrict the debtor from filing for bankruptcy. Insofar as they try to do that, then the debtor files for bankruptcy, that is protected under Noerr-Pennington.

THE COURT: I don't think Noerr-Pennington is **[15]** that broad.

MR. SCHUMAN: I think if it's not that broad, it's potentially a flood gate.

THE COURT: It is not at all a flood gate. I think it's the opposite.

By arguing what you are arguing, I think that, as I said earlier, would undermine the way business is dealt with in New York City when it comes to lenders and developers. It just upends all of these contracts and the way business has been done for years.

MR. SCHUMAN: Your Honor, we also cite cases as to whether these provisions are enforceable because you cannot restrict filing for bankruptcy --

THE COURT: This does not restrict filing for bankruptcy. Nowhere in that contract does it say you cannot file for bankruptcy. Nowhere. In either contract.

MR. SCHUMAN: It actually does. It's actually cited in the complaint at paragraph 26 as well as 25, 4 and 3.

THE COURT: It says you are in default if you do; is that what it says?

MR. SCHUMAN: It says -- yes. It talks --

THE COURT: Which is not quite the same thing.

MR. SCHUMAN: If you read -- in the context of **[16]** the complaint in Plaintiff's own language repeatedly they cite $50,000 and the three apartments transfer as causing the bankruptcy. That is the basis for the tortious interference.

So, whenever any potential Defendant in the future is going to possibly lend some money that goes toward filing of a bankruptcy they are exposed down the road after the bankruptcy, after the plan is confirmed to being sued for tortious interference

THE COURT: Are you advocating what your clients did here as something good, is that what you are arguing, that this should happen all the time?

MR. SCHUMAN: Your Honor, I'm not --

THE COURT: Is that your argument?. That the Court should look kindly upon what your clients did? That should happen in every case?

MR. SCHUMAN: I am saying it's --

THE COURT: That that should --

MR. SCHUMAN: Respectfully, it's a slippery slope if all it takes is a $50,000 loan -- -

THE COURT: That was hardly all, number one. I don 't think it is a slippery slope at all. I think there are separate breaches we're talking about here. Totally separate breaches that don't say anything about bankruptcy in any of those clauses. There is a number of **[17]** them. We can ignore the one or two bankruptcy clauses that bankruptcy would be a

default. Even ignoring that, there are plenty of clauses in that contract that were breached.

MR. SCHUMAN: Your Honor, this case is not about the breach. If you look and re-read the complaint which we ask, respectfully, you do after this argument, even the preliminary statement repeatedly turns entirely on the filing of bankruptcy and the alleged actions by my clients that somehow promoted or caused that filing. Caused the funding of the bankruptcy attorney. Caused it not to be treated as a special purpose vehicle.

Those issues were also raised throughout the bankruptcy. They weren't hidden. They were litigated. Plaintiff itself had brought a motion on these issues --

THE COURT: The Plaintiff withdrew its motion and did not go forward with any motions to dismiss and the court didn't reach it.

MR. SCHUMAN: Your Honor, we don't believe that is a material distinction under Noerr-Pennington or preemption.

THE COURT: If it stated this was only about the bankruptcy, you are right. This is different from the cases cited in your brief. This is not based upon the bankruptcy. It's based upon various clauses in the **[18]** contract that were breached.

MR. SCHUMAN: Your Honor, with all respect, I don't think that's what the complaint alleges.

If you took the words bankruptcy out of the complaint, there would be nothing left. There would not be a claim and the complaint would be a fraction of its size.

It's all alleged to turn on the filing of the bankruptcy. It's all about the bankruptcy. Alleged delay, changes in the real estate market during that alleged delay.

There is no claim here if it's not because of the alleged actions causing the bankruptcy and how the bankruptcy was then monitored.

Your Honor, if I can turn to piercing the corporate veil, there is no domination or abuse of the corporate -
-

THE COURT: I think there are plenty of, you know, there's plenty in the complaint that talks about the interaction between all of the different entities and the Pilevskys.

And, frankly, I think, there has been a very recent case called Cortland Street Recovery Corporation v. Bonderman, a Court of Appeals case, 2018 Westlaw 942335, and I think it is directly on point.

[19] MR. SCHUMAN: Your Honor, you know, we had cited Justice Freed in the Brown case where it's more than conclusory allegations needed to move forward from the pleading stage -- -

THE COURT: I think this is much more closely related to Cortland which is a Court of Appeals case.

MR. SCHUMAN: Your Honor, we respectfully ask that you revisit the complaint. Here, there is no abuse of the corporate privilege alleged. There is nothing inappropriate or illegal. These are family-owned entities . They have appropriate books and records. The transactions are --

THE COURT: We don't know that, number one; although, from what's said already in the complaint it appears that the apartments came from a Philip

Pilevsky entity. There was no consideration . It went from -- on behalf of Sutton to the mortgage borrower, again, you know, so Sutton got the credit for it. But they didn't pay for it.

Philip Pilevsky gave the $50,000 on behalf of Michael Pilevsky on behalf of Sutton. It just looks to me that maybe this is not the case. They basically -- it was all coming out of the same pocket.

MR. SCHUMAN: Your Honor, obviously when you have entities, and it's also the same on the Plaintiff's **[20]** side, the name Sutton in connection with a building that's going to be on Sutton Place they create entities relating to certain projects. There's nothing inappropriate about that.

And they obviously need to provide assets to the entities. That, in and of itself, does not create any alleged wrongdoing.

THE COURT: However, you know, I think it is just basic law that if any of the Defendants, and here, Philip Pilevsky, exercised complete dominion and control over several of the corporate entities and abused the privilege of doing business in the corporate forum to perpetrate a wrong or injustice as alleged here, you at least have enough to make out a viable corporate piercing, piercing of the corporate veil.

MR. SCHUMAN: Insofar as the complaint uses those words alleged abuse, alleged domination, that's conclusory.

THE COURT: I'm not looking at those words. I'm looking at the facts they have alleged. The apartments, the $50,000 going from one to the other. Mr. Pilevsky's own words in the e-mail saying I am giving you the $50,000 on behalf of Michael who, on behalf of Sutton, an entity that was being formed. All

being formed and all done by one of Mr. Pivelsky's own **[21]** GC for one- of his entities who was doing all of the legal work for Michael Pilevsky and Seth Pilevsky and Sutton Opportunity. It all seemed to be it was one big enterprise.

MR. SCHUMAN: If I may, there is nothing inappropriate about a lawyer having, where there is no conflict, more than one client, even on this new transaction.

THE COURT: But she was the GC for Philip International, which was one of Philip Pilevsky's businesses. She took money from one of Philip Pilevsky's entities.

She took apartments that belonged to another one of Mr. Philip Pilevsky's entities and she transferred those on behalf of Sutton Opportunity to a mortgage buyer to give Sutton Opportunity a piece of that mortgage -- I don't mean buyer. Borrower.

It seems to me it's all treated as one.

MR. SCHUMAN: Your Honor --

THE COURT: It may not be. But we're just at the very beginning. There has not been discovery here.

MR. SCHUMAN: Whether one lawyer handled those transactions or two lawyer, that should not make a difference, we submit, in whether this withstands a motion for summary judgment on this point.

[22] Also, this was all transparent.

Piercing the corporate veil requires domination and abuse of the corporate privilege. As you see in the bankruptcy, again coming back to the bankruptcy, these issues were aired there. They are in affidavit --

THE COURT: That is the important thing. We're not dealing with bankruptcy here. I emphasized that

again. We're dealing with a separate contract. Separate breaches. Not the bankruptcy.

Let me hear from the other side.

MR. GREENBERG: Thank you, your Honor.

Ronald Greenberg. With me are my colleagues Natan Hamerman and Dan Leonard from the Kramer firm.

Your Honor, candidly, I had a 25-minute argument prepared. I was going to walk your Honor through the facts which --

THE COURT: Well, go ahead.

MR. GREENBERG: No. I'm going to distill my argument really down to two points because it would be wasteful, your Honor, to tell you facts the Court already knows and the law that your Honor knows better than we do.

I want to point to something that your Honor said in a slightly different context. This argument that, you know, these -- your Honor had it exactly right **[23]** that your Honor should change how business is done in New York and that's exactly what they're asking.

And this argument that the contract event of default provisions are somehow void against public policy and these other loan covenants, these common things that your Honor said you see a thousand times, SPEs, et cetera, is astonishing, especially in this context.

Nobody fell off the turnip truck yesterday. My adversaries are sophisticated. We try to do okay. This is a wonderful commercial court to be practicing in. The clients on both sides are decades of lending and borrowing. This is how business is done in this town, your Honor.

And the most astonishing thing they said on this point and in their reply, and a case that he just cited here on page 7 of their reply, where they go further than just addressing the event of the default prevision. And we've cited cases.

Your Honor had the distinction exactly right. You cannot prohibit a bankruptcy. That would be against public policy. You can certainly call a bankruptcy event of default without prohibitibg it and the cases so say .

They on reply, they didn't do this in their **[24]** opening papers, but on reply they come back and say those provisions, meaning not the event of default provision, but the loan covenant that caused this to be a special purpose entity, those provisions are classic special purpose vehicle covenants whose use is simply a disguised form of bankruptcy waiver. As such, they are unenforceable as a covenant and not to file for bankruptcy itself.

So, don't listen to them. Your Honor had it exactly right when they're telling you that they're not asking you to change how business is done in this town. They are absolutely are, And that's right in the Noerr-Pennington argument.

I think your Honor has it exactly right on these other claims. This is a million miles away from preemption. Nothing is preempted here, These are for breaches that, under state law, that occurred prior to the bankruptcy.

And, by the way, this is really their second motion to dismiss. They are calling it a summary judgment motion, but as you heard over and over, it's an attack on the pleading. The reason is they had an initial motion to dismiss, as your Honor I'm sure will recall,

was denied, that attacked our damages which he now is attacking again on a motion for summary judgment.

[25] The only other quick point I'll make on the piercing claim, your Honor is, again, is exactly right. Not only have we alleged way more than a complaint usually does and they're attacking the pleading, but the First Department has said more than once that these types of claims attacking intent are exactly the type that should not be granted on summary judgment particularly before we've had any discovery.

The last thing I'll say, your Honor, is I heard my adversary say that these transactions were transparent. Your Honor, that's anything but the case. In fact, they used the lawyer, as your Honor noted, Pilevsky's lawyer, not only to represent the father and son and son's entities, but also the borrower and the borrower's principal and now they're telling us every thing in this transaction is privileged and we can't have it. And we'll fight that fight, your Honor. But this is the opposite of transparent.

So, unless the Court has any questions.

THE COURT: I don't.

I am going to deny this summary judgment from the bench. I think that it's, even though it is a summary judgment motion, there has been no discovery here.

I think there is clearly on it's face an action **[26]** alleged as to tortious interference as to the piercing of the corporate veil. I cited the Cortland Street case and as that court said, whether Plaintiff can ultimately prove its allegations is not a consideration in determining a motion to dismiss. And this is, in a sense, a motion to dismiss because there has been no discovery.

Furthermore, a fact latent claim to pierce, there are plenty of facts here I think on their face make out a valid claim, a fact latent claim to pierce a corporate veil is unsuited for resolution on a pre-answer pre-discovery motion to dismiss. Again, this is a vsummary judgment motion, but there has been no discovery here yet. It's very similar to that, this Cortland case.

(Transcript continues on the next page.)

[27] I believe that there is plenty here in terms of an argument regarding the veil piercing.

So, I am denying summary judgment in total for all of these reasons. I think there is, perhaps, a good claim here and it needs discovery.

This shall constitute the Decision and Order of the Court.

MR. GREENBERG: Thank you, your Honor.

(Record is closed.)

** ** **

This is certified to be a true and accurate transcription of my stenographic notes.

/s/ Carolyn Barna
CAROLYN BARNA
SENIOR COURT REPORTER

APPENDIX D

No. 654917/2016

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

SUTTON 58 ASSOCIATES LLC, Plaintiff,

v.

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

[Filed] September 16, 2016]

COMPLAINT

Plaintiff Sutton 58 Associates LLC, by its undersigned counsel, for its complaint, alleges upon information and belief, except for information about itself as to which it has personal knowledge, as follows:

NATURE OF THE ACTION

1. This is an action against Prime Alliance Group, Ltd. ("Prime Alliance"), Sutton Opportunity LLC ("Sutton Opportunity"), and their respective principals, Philip Pilevsky, and his sons, Michael Pilevsky and Seth Pilevsky, for tortious interference with contract. The action arises out of maturity defaults on secured loans totaling $147.25 million that plaintiff made to two non-party borrowers to develop a super-tall tower at Sutton Place and 58th Street in Manhattan (the "Project"). The maturity defaults were followed by additional contractual breaches and frivolous tactics by the borrowers, "Mezz Borrower" and "Mortgage Borrower" (as hereinafter defined). The borrowers, each now in bankruptcy, continue to be in default of numerous contractual obligations and still

have not repaid any portion of the loans.[*] Meanwhile, the Project is at a standstill. Plaintiff, whose loan proceeds funded the Project almost entirely, has been and continues to be damaged by the borrowers' breaches of contract. Plaintiff sues defendants for willfully causing the borrowers to breach their contractual obligations to plaintiff after the loans matured.

2. Defendants, who were strangers to the Project, intentionally and improperly caused these contractual breaches in a scheme to benefit themselves and obtain an ownership interest in the Project (the "Pilevsky Scheme"). The Pilevsky Scheme had two parts.

3. First, when plaintiff tried to exercise its agreed-upon contractual remedies following the maturity defaults, Philip Pilevsky caused Prime Alliance, to lend Mezz Borrower $50,000 (the "Pilevsky Loan") to retain a law firm (in which another Pilevsky is a partner) to file a petition for bankruptcy that prevented plaintiff from exercising those remedies. This caused Mezz Borrower to breach no fewer than five contractual obligations to plaintiff. Specifically, Mezz Borrower had signed a loan agreement with plaintiff agreeing: (a) not to file a petition for bankruptcy; (b) not to incur debt other than "Permitted Indebtedness"; (c) to pay its liabilities out of its own funds and assets; (d) to consider the interests of plaintiff in connection with all of its

[*] Plaintiff has filed a motion for summary judgment in lieu of complaint against the borrowers' principals to enforce a guaranty. *See Sutton 58 Associates LLC v. Beninati et al,* Index No, 651296/2016 (Komreich, J.), The motion has been fully briefed and oral argument is scheduled for November 17, 2016. To date, the borrowers' principals have not paid any of the amounts they guaranteed.

corporate actions; and (e) to remain a special purpose bankruptcy remote entity.

4. Second, Michael Pilevsky and Seth Pilevsky caused Sutton Opportunity to transfer three rental apartments in Lynbrook, New York (the "Pilevsky Apartments") to Mortgage Borrower to evade a fundamental protection in favor of plaintiff under bankruptcy law, Mortgage Borrower faced a formidable obstacle in using bankruptcy to avoid the consequences of its maturity defaults because it was a "Single Asset Real Estate" entity. The Bankruptcy Code, for good reason, disfavors a Single Asset Real Estate entity using bankruptcy to defeat the ordinary contractual remedies of its secured lender (here, plaintiff). Michael Pilevsky and Seth Pilevsky caused Sutton Opportunity to transfer the Pilevsky Apartments to Mortgage Borrower in order to allow it to seek to dodge these Bankruptcy Code provisions and to continue to avoid the consequences of its maturity defaults. In consideration for the Pilevsky Apartments plus $150,000 in cash, the Pilevsky entity Sutton Opportunity received an indirect 49% equity interest in Mortgage Borrower. The Pilevsky Apartment transaction caused Mortgage Borrower to breach no fewer than seven contractual obligations to plaintiff. Specifically, Mortgage Borrower had signed loan agreements with plaintiff agreeing: (a) not to file a petition for bankruptcy; (b) not to own any real property or assets other than the Project property; (c) not to engage in any business unrelated to the Project; (d) not to make or permit the sale or transfer of any indirect interest in Mortgage Borrower; (e) to pay its liabilities out of its own funds and assets; (f) to consider the interests of plaintiff in connection with all corporate actions; and (g) to remain a special purpose bankruptcy remote entity.

5. The Pilevsky Scheme was willful and improper. The Pilevsky defendants and the defendant entities they dominated and controlled knew exactly what they were doing.

6. Philip Pilevsky has sworn under penalty of perjury that he caused Prime Alliance to make the Pilevsky Loan "so that [Mezz Borrower] could file for reorganization under Chapter 11 of the Bankruptcy Code." Philip Pilevsky directed the Pilevsky Loan proceeds to be used to retain not just any law firm to file Mezz Borrower's bankruptcy petition, but the law firm where Philip Pilevsky's nephew Jordan Pilevsky is a partner. Philip Pilevsky swore that he caused Prime Alliance to advance the funds at the request of Michael Pilevsky – his son and co-owner of Sutton Opportunity with Philip Pilevsky's other son Seth Pilevsky. The suspicious timing of the Pilevsky Loan corroborates Philip Pilevsky's sworn statement about its purpose; The Pilevsky Loan was made, and Mezz Borrower's bankruptcy petition was filed, just after this Court issued an order allowing plaintiff to foreclose and on the eve of that foreclosure. Mezz Borrower's managing member has sworn that Mezz Borrower filed for bankruptcy in order to avoid that foreclosure, which is a breach of Mezz Borrower's contract with plaintiff.

7. The Pilevsky Apartments transaction, was similarly willful and improper. The defendants urgently sought to get the Pilevsky Apartments into the hands of Mortgage Borrower, which immediately upon receipt of the Pilevsky Apartments filed a bankruptcy petition stating that it was not subject to the Bankruptcy Code's restrictions on bankruptcy filings by "Single Asset Real Estate" businesses. Mortgage Borrower's managing member has sworn under oath that the transaction was intended "to

bring, in equity" and unrelated real estate, which are breaches of Mortgage Borrower's contract with plaintiff.

8. The Pilevsky Scheme has damaged and continues to damage plaintiff. The Pilevsky Scheme has prevented plaintiff from exercising plaintiffs contractual remedies for maturity defaults that took place in January 2016. This delay poses significant risks to plaintiff because community groups, including the East River 50s Alliance, and politicians, including the Manhattan Borough President, have organized and arc lobbying to change zoning laws for the specific purpose of preventing construction of the Project. Adding to the harm caused by this delay, since January 2016, the market for luxury high-rise apartments in Manhattan and developments like the Project has eroded. The zoning and market risks already have decreased the value of the Project by millions of dollars and, as time passes, the Pilevsky scheme threatens to cause plaintiff damages of tens of millions of dollars. The Pilevsky Scheme also has caused plaintiff to incur attorneys' fees and other costs, which already are substantial and are likely ultimately to mount into millions of dollars. This lawsuit seeks compensatory and punitive damages, interest, attorneys' fees and costs against Philip Pilcvsky, Michael Pilevsky, and Seth Pilevsky, personally, and against their entities, Prime Alliance and Sutton Opportunity.

PARTIES

9. Plaintiff is, and at all relevant times has been, a limited liability company organized and existing under the laws of the state of Delaware. Its principal place of business is 101 Park Avenue, Suite 2602, New York, New York 10178.

10. Defendant Philip Pilevsky is an individual residing at 227 Smith Street, Woodmere, New York. He is the father of Michael Pilevsky and Seth Pilevsky.

11. Defendant Michael Pilevsky is an individual residing at 318 Kirby Avenue, Woodmere, New York. He is the son of Philip Pilevsky and brother of Seth Pilevsky.

12. Defendant Seth Pilevsky is an individual residing at 121 Willow Road, Woodmere, New York. He is the son of Philip Pilevsky and brother of Michael Pilevsky.

13. Defendant Prime Alliance is a corporation organized and existing under the laws of the State of New York. Its principal place of business is 295 Madison Avenue, 2nd Floor New York, New York 10017. Philip Pilevsky is the president and sole shareholder of Prime Alliance.

14. Defendant Sutton Opportunity is a limited liability company organized and existing under the laws of the State of Delaware. Michael Pilevsky and Seth Pilevsky own 100% of Sutton Opportunity.

15. Non-party Philips International Holding Corp. ("Philips International") is a corporation organized and existing under the laws of the State of New York. Its principal place of business is 295 Madison Avenue. 2nd Floor New York, New York 10017. Philip Pilevsky is the founder and CEO of Philips International, and Michael Pilevsky and Seth Pilevsky are both executives at Philips International.

16. Non-party Jordan Pilevsky is an individual residing at 794 Roosevelt Street, Far Rockaway, New York. He is the nephew of Philip Pilevsky and cousin of Michael Pilevsky and Seth Pilevsky. He is a partner

at the law firm LaMoniea Herbst & Maniscalco, LLP ("LH&M").

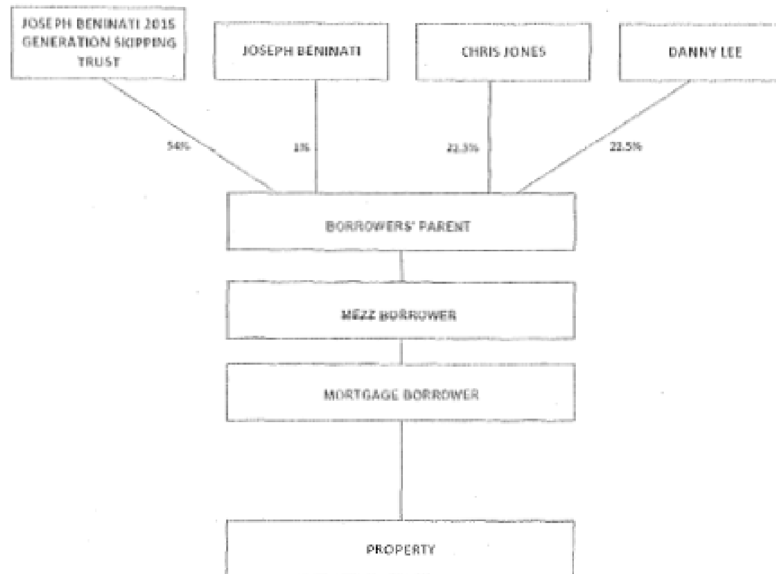
17. Non-party borrower Sutton 58 Owner LLC ("Mortgage Borrower") is a limited liability company organized and existing under the laws of the State of Delaware. Mortgage Borrower is, and at all relevant times has been, the direct owner of the assets of the Project, which consist of a real estate development at 428-432 East 58th Street in New York City (the "Property").

18. Non-party borrower BH Sutton Mezz LLC ("Mezz Borrower"; together with Mortgage Borrower, the "Borrowers") is a limited liability company organized and existing under the laws of the Stale of Delaware. Mezz Borrower owns, and at all relevant times has owned, 100% of the membership interests in Mortgage Borrower.

19. Non-party BH Sutton Owner LLC ("Borrowers' Parent") is a limited liability company organized and existing under the laws of the State of Delaware. Borrowers' Parent owns, and at all relevant times has owned, 100% of the membership interests in Mezz Borrower.

20. Immediately before the Pilevsky Scheme, Joseph Beninati, the Joseph Reninati 2015 Generation Skipping Trust, Christopher Jones, and Daniel Lee owned 100% of the membership interests in Borrowers' Parent.

21. The loan agreements between Borrowers and plaintiff describe the following ownership structure of Mortgage Borrower, Mezz Borrower, and Borrower's Parent as it existed before the Pilevsky Scheme:



22. According to Mr. Beninati, Sutton Opportunity now owns 49% of the membership interests in Borrowers' Parent because of the Pilevsky Apartments transaction.

FACTUAL BACKGROUND

Plaintiff's Contracts with Borrowers

23. As of 2013, the Property site consisted of three walk-up apartment buildings. Messrs. Beninati, Jones, and Lee planned for the Project to involve: (a) buying those low-rise buildings, (b) emptying those buildings of their rental tenants, (c) demolishing those buildings, (d) buying air rights from other properties, and (e) building an approximately 1,000-foot residential apartment building at the Property site.

24. In order to finance the Project, Borrowers and plaintiff created a mezzanine loan structure consisting

of a Mezzanine Loan Agreement in the amount of $20,000,000, an Acquisition Loan Agreement in the amount of $125,850,000, and a Building Loan Agreement in the amount of $1,400,000, all dated as of June 19, 2015 (collectively, the "Loan Agreements").

25. In their respective Loan Agreements, 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; (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.

26. Specifically, both Borrowers separately agreed:

(a) **Not To File for Bankruptcy:** Section 7.1(j) of each Loan Agreement states: "An 'Event of Default' shall exist with respect to the Loan if . . . any petition for bankruptcy, reorganization or arrangement pursuant to federal bankruptcy law . . . shall be filed by or against, consented to, or acquiesced in by, Borrower or Guarantor . , . (The word "Borrower" is defined in tire Mezzanine Loan Agreement to mean Mezz Borrower and is defined in the Acquisition Loan Agreement and Building Loan Agreement to mean Mortgage Borrower.)

(b) **To Incur Only "Permitted Indebtedness":** Section 4.16 of each Loan

Agreement states: "Borrower shall not, directly or indirectly create, incur or assume any indebtedness other than (i) the Building Loan and (ii) unsecured trade payables incurred in the ordinary course of business relating to the ownership and operation of the Property which (A) are not evidenced by a note, (B) do not exceed, at any time, a maximum aggregate amount of $50,000 and (C) are paid within thirty (30) days of the date incurred (collectively, 'Permitted Indebtedness')."

(c) **To Use Its Own Funds and Assets to Pay Obligations:** Section 4.10 and Schedule 3(xv) of each Loan Agreement states that the Borrower "will pay its own liabilities . . . out of its own funds and assets."

(d) **Not To Have Unrelated Assets or Businesses:** Multiple provisions reinforce this obligation.

- In Section 4.11 of the Acquisition Loan Agreement and Building Loan Agreement, Mortgage Borrower agrees and covenants: "Borrower shall not enter into any line of business other than as owner and developer of the Property. Borrower shall not purchase or own any real property other than the Property and the Contract Property [a parcel at 426 East 58th Street, adjacent to the Property]."
- In Section 4.10 and Schedule 3(i)-(iii) of the Acquisition Loan Agreement and Building Loan Agreement, Mortgage Borrower agrees and covenants, in

relevant part, that it: (i) "will be organized solely for the purpose of . . , owning the Property"; (ii) "will not engage in any business unrelated to . . . the ownership of the Property"; and (iii) "will not have any assets other than those related to the Property."

- In Section 4.20 of the Acquisition Loan Agreement and Building Loan Agreement, Mortgage Borrower agrees and covenants: "Borrower shall not . . . engage in any business activity not related to the ownership and operation of the Collateral or the Property . . . ."
- In Section 4.10 and Schedule 3(i)-(iii) of the Mezzanine Loan Agreement, Mezz Borrower agrees and covenants, in relevant part, that it: (i) "will be organized solely for the purpose of. . . acting as a , . . member of the limited liability company that owns the Property"; (ii) "will not engage in any business unrelated to . . , the ownership of the Property . . . or . . . acting as a member of the limited liability company that owns the Property"; and (iii) "will not have any assets other than those related to the Property or its . . . member interest in the . . . limited liability company that owns the Property."
- In Section 4.10 and Schedule 3(xxviii) of the Loan Agreements, each of Mortgage Borrower and Mezz Borrower agrees and covenants that it, "will have an express acknowledgment in its organizational documents that Lender is an intended

third-party beneficiary of the 'special purpose' provisions of such organizational documents."

(e) **Prohibition on Transfer of Indirect Interest in Borrower:** Section 4.18 of each Loan Agreement states: "Borrower shall not directly or indirectly make, suffer or permit the occurrence of any Transfer without the prior written consent of Lender, to be granted or withheld in Lender's sole discretion." A "Transfer," which is also prohibited by Section 7.1(d) of each Loan Agreement, is defined in Section 1.1.2 of each Loan Agreement to mean "any sale, conveyance, transfer, assignment ... in or affecting (x) all or part of the Property (including any legal or direct or indirect interest therein), (y) any direct or indirect interest in Borrower or (z) all or any part of the Collateral or (ii) any change of Control of Borrower."

(f) **To Consider the Interests of Plaintiff:** Section 4.10 and Schedule 3(xxix) of each Loan Agreement agrees and covenants that the Borrower "will consider the interests of its creditors in connection with all corporate, partnership, or limited liability actions, as applicable."

(g) **To Remain a Special Purpose Bankruptcy Remote Entity:** Section 4.10 of each Loan Agreement agrees and covenants that the Borrower "shall at all times be a Special Purpose Bankruptcy Remote Entity." Any breach of the Schedule 3 obligations set forth above in paragraph

26(c), (d) and (f) of this Complaint violates that covenant.

(h) **Cross-Default:** Section 7.1(p) of each Loan Agreement provides that "[a]n 'Event of Default' shall exist with respect to the Loan if . . , an 'Event of Default' occurs under [the other Loan Agreements]."

27. In addition, Mezz Borrower and plaintiff signed a Pledge and Security Agreement dated as of June 19, 2015, in which Mezz Borrower pledged, as collateral for the Mezzanine Loan, its 100% membership interest in Mortgage Borrower. Mezz Borrower and plaintiff agreed that, upon a maturity default, plaintiff could sell that membership interest in Mortgage Borrower at a UCC foreclosure sale.

28. Specifically, Section 6(a) of the Pledge and Security Agreement states: "Whenever an Event of Default shall exist, Lender may exercise from time to time any rights and remedies available to it under the UCC as in effect in the State of New York or otherwise available to it under the Loan Documents or other applicable law."

29. This reassured plaintiff that upon a maturity default, plaintiff would not be exposed to the risk, of holding onto the Property, managing or developing the Property, or the vagaries of an uncertain real estate market, zoning regulations, or community activism seeking to hinder or to stop the development of the Property.

The Maturity Defaults

30. As set forth in the Loan Agreements, the maturity date of each loan was January 19, 2016.

31. Neither on January 19, 2016, nor since have Borrowers repaid any amounts due under the Loan Agreements.

32. On January 20, 2016, plaintiff sent the Borrowers notices of maturity defaults under the three Loan Agreements.

33. On January 20, 2016, plaintiff also sent Mezz Borrower a notification of disposition of collateral. The notification of disposition of collateral stated that, pursuant to the Pledge and Security Agreement, plaintiff had a perfected security interest in the collateral for the Mezzanine Loan, consisting of Mezz Borrower's 100% membership interest in Mortgage Borrower, and that plaintiff would conduct a UCC foreclosure sale of that collateral on February 11, 2016.

34. On February 5, 2016, plaintiff sent Mezz Borrower a notice informing it that plaintiff had rescheduled this UCC foreclosure sale to take place on February 29, 2016.

35. On February 17, 2016, Borrowers filed suit in this Court, seeking a preliminary injunction and a permanent injunction restraining and enjoining plaintiff from conducting a UCC foreclosure sale, whether on February 29, 2016, or any other date.

36. On February 23, 2016, Justice O. Peter Sherwood denied Borrowers' motion for a preliminary injunction, holding that Borrowers were unlikely to succeed on the merits, that they would not be irreparably harmed by the UCC foreclosure sale, and that the equities favored allowing plaintiff to enforce its contractual rights. Justice Sherwood ordered that the UCC foreclosure sale could proceed on Monday, February 29, 2016.

Mezz Borrower's Bankruptcy Filing and the Pilevsky Loan

37. At 3:30 p.m. on Friday, February 26, 2016, the last business day before the UCC foreclosure sale, Mezz Borrower filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code, which automatically stayed the UCC foreclosure sale that Justice Sherwood had allowed to proceed only three days earlier.

38. Mezz Borrower filed with its bankruptcy petition an affidavit signed by Mr. Beninati in which he swore that Mezz Borrower's "Chapter 11 filing was precipitated by, among other things, litigation with one of its lenders and an attempt by [plaintiff] to foreclose on the [Mezz. Borrower's] membership interest [in Mortgage Borrower] through a quick sale under the Uniform Commercial Code." Mr. Beninati's affidavit did not mention that Justice Sherwood had ordered that plaintiff could proceed with the UCC foreclosure sale.

39. The law firm LH&M, in which Jordan Pilevsky is a partner, signed and filed Mezz Borrower's February 26, 2016 bankruptcy petition.

40. Mezz Borrower did not pay LH&M's retainer out of its own funds and assets. Indeed, in the February 26, 2016 affidavit that he signed on behalf of Mezz Borrower, Mr. Beninati swore that Mezz Borrower had a single asset consisting of its ownership interest in Mortgage Borrower, and no employees.

41. On February 26, 2016, Prime Alliance loaned Mezz Borrower $50,000 to retain LH&M to file Mezz Borrower's bankruptcy petition and thereafter to act as its counsel in the bankruptcy case.

42. Mezz Borrower's bankruptcy petition, signed both by LH&M and by Mr. Beninati, lists this $50,000 loan from Prime Alliance to Mezz Borrower as a debt of Mezz Borrower.

43. Philip Pilevsky, the president and sole shareholder of Prime Alliance, swore in an April 21, 2016 declaration: "The Retainer was wired from Prime Alliance to LH&M on February 26, 2016 so that the [Mezz Borrower] could file for reorganization under Chapter 11 of the Bankruptcy Code. . . . Jordan Pilevsky is my nephew and a partner at LH&M. Prime Alliance advanced the Retainer to LH&M at the request of Michael Pilevsky, one of the principals of Sutton Opportunity LLC, Michael Pilevsky is one of my sons."

44. On March 10, 2016, plaintiff moved to dismiss Mezz Borrower's bankruptcy case or to lift the automatic stay, so that plaintiff could proceed with the UCC foreclosure sale and staunch the damages flowing from the maturity defaults under the Loan Agreements. In support of that motion, plaintiff argued that the bankruptcy case should be dismissed because it arises out of a one-creditor, one-asset dispute.

45. Mezz Borrower successfully used the Pilevsky Loan to argue that its bankruptcy case should not be dismissed because Mezz Borrower has multiple creditors.

46. The Pilevsky Loan caused Borrowers to violate multiple provisions in the Loan Agreements.

47. The Pilevsky Loan caused Mezz Borrower to breach its contractual obligation to plaintiff under Section 7.1(j) of the Mezzanine Loan Agreement not to file a petition for bankruptcy.

48. The Pilevsky Loan caused Mezz Borrower to breach its contractual obligation to plaintiff under Section 4.16 of the Mezzanine Loan Agreement not to incur debt other than "Permitted Indebtedness." The Pilevsky Loan is not Permitted Indebtedness for three reasons. First, it is not an "unsecured trade payable[] incurred in the ordinary course of business relating to the ownership and operation of the Property" under Section 4.16. Second, it was not "paid within thirty (30) days of the dale incurred" under Section 4.16, nor, according to Philip Pilevsky's April 21, 2016 declaration, was it intended to be so paid. Third, according to Mezz Borrower's sworn bankruptcy petition, when Mezz Borrower incurred the Pilevsky Loan, its total Permitted Indebtedness exceeded the "maximum aggregate amount of $50,000" permitted by Section 4.16.

49. The Pilevsky Loan caused Mezz Borrower to breach its contractual obligation to plaintiff under Section 4.10 and Schedule 3(xv) of the Mezzanine Loan Agreement to "pay its own liabilities ... out of its own funds and assets."

50. The Pilevsky Loan caused Mezz Borrower to breach its contractual obligation to plaintiff under Section 4.10 and Schedule 3(xxix) of the Mezzanine Loan Agreement to consider the interests of plaintiff in connection with all corporate, partnership, or limited liability actions.

51. The Pilevsky Loan caused Mezz Borrower to breach its contractual obligation to plaintiff under Section 4.10 and Schedule 3 of the Mezzanine Loan Agreement to be "at all times a Special Purpose Bankruptcy Remote Entity."

52. The Pilevsky Loan also caused Mortgage Borrower to be in default of its contractual obligations to plaintiff under the cross-default provisions in

Section 7.1(p) of the Mortgage Loan Agreement and Section 7.1(p) of the Building Loan Agreement.

Mortgage Borrower's Bankruptcy Filing and the Pilevsky Apartments

53. On April 6, 2016, Mortgage Borrower filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code. That petition was also signed and filed by the LH&M law firm.

54. Mortgage Borrower filed with its bankruptcy petition a declaration signed by Mr. Beninati in which he swore that Mortgage Borrower's "Chapter 11 filing was precipitated in order to protect itself from [plaintiff]."

55. In Mortgage Borrower's bankruptcy petition, Mr. Beninati swore that Mortgage Borrower's business was not "Single Asset Real Estate" as defined in 11 U.S.C. § 101(51B). To similar effect, Mortgage Borrower filed along with its bankruptcy petition a motion representing that it has assets in addition to the Property.

56. To make these representations, Mortgage Borrower relied solely upon the Pilevsky Apartments – three small (one-bedroom) cooperative apartments located at 504 Merrick Road, Lynbrook, New York that have nothing to do with the Project – that Michael Pilevsky and Seth Pilevsky caused Sutton Opportunity to transfer to Mortgage Borrower just before it filed for bankruptcy.

57. The Bankruptcy Code reflects a specific public policy that protects lenders to single asset real estate projects from 'eve of foreclosure' bankruptcy filings that delay lenders' rights to exercise their remedies. The Project at issue here is exactly the type of property covered by these statutory protections. The Pilevsky

Apartments were transferred to Mortgage Borrower so that it could represent that it was not a Single Asset Real Estate business.

58. If Mortgage Borrower were engaged in a Single Asset Real Estate business, 11 U.S.C, § 362(d)(3) would allow plaintiff relief from the automatic stay to proceed with its foreclosure unless, within 90 days, the debtor starts servicing the mortgage debt or the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time.

59. If Mortgage Borrower were engaged in a Single Asset Real Estate business, 11 U.S.C. § 362(d)(3)(B)(ii) would allow plaintiff to be relieved from the Bankruptcy Code's automatic stay and to proceed with its maturity default remedies against Mortgage Borrower if Mortgage Borrower did not pay monthly interest payments to plaintiff within ninety days of the petition date.

60. Section 362(d)(3)(B)(ii) would apply here. On the date it filed for bankruptcy, Mortgage Borrower had no liquid assets, no income-generating assets, no employees, and no ability to make such monthly interest payments to plaintiff. To this day, that continues to be the case.

61. Furthermore, if Mortgage Borrower were engaged in a Single Asset Real Estate business, 11 U.S.C. § 362(d)(3)(B)(i) would allow plaintiff to be relieved from the Bankruptcy Code's automatic stay and to proceed with its maturity default remedies against Mortgage Borrower if Mortgage Borrower did not file, within ninety days of the petition date, a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time. A Chapter 11 debtor that is not engaged in a Single Asset Real

Estate business does not. need to satisfy this requirement in order to benefit from the Bankruptcy Code's automatic stay.

62. Section 362(d)(3)(B)(i) would apply here. Mortgage Borrower was not able to file a plan for reorganization within ninety days of its April 6, 2016 petition date. The plan for reorganization Mortgage Borrower ultimately filed outside that time period does not have a reasonable possibility of being confirmed within a reasonable time. It calls for months of discovery and litigation before the bankruptcy court will even rule on it. And it requests the Property to be sold at a public sale after the conclusion of that litigation, even though Mortgage Borrower has a single secured creditor, plaintiff, and unsecured obligations that are dwarfed in size by plaintiffs secured claim.

63. The circumstances of the Pilevsky Apartments transaction demonstrate that it was intended to frustrate plaintiff's maturity default remedies and escape Section 362's restrictions on bankruptcy filings by Single Asset Real Estate businesses.

64. Before the bankruptcies, the Pilevsky Apartments were owned for many years by Lynbrook Apartment Associates, an entity affiliated with Philips International – the holding corporation founded and led by Philip Pilevsky that also employs Michael and Seth Pilevsky. Certain of the defendants had a longstanding relationship with the Lynbrook building and had been instrumental in organizing it as a cooperative.

65. This all began to rapidly change after this Court denied the Borrowers' motion for a preliminary injunction to stop the UCC foreclosure sale, as the defendants began to implement the Pilevsky Scheme.

66. On February 25, 2016, two days after the preliminary injunction was denied, defendant Sutton Opportunity was incorporated at the behest of Philip, Michael, and/or Seth Pilevsky.

67. Shortly thereafter, Sutton Opportunity arranged to obtain a 49% ownership stake in Sutton Parent in exchange for contributing to Mortgage Borrower the Pilevsky Apartments and cash, including $150,000 to pay LH&M a retainer to file a bankruptcy petition for Mortgage Borrower.

68. Tellingly, the transaction was between Sutton Opportunity and Mortgage Borrower – *not* the principals of Sutton Parent, who were the actual owners of Sutton Parent's equity. This was part of defendants' willful and intentional design. If the Sutton Apartments and cash had been transferred to Sutton Parent's principals (as would have made sense since they owned the equity in Sutton Parent), Mortgage Borrower would not have been able to fund its bankruptcy, and Mortgage Borrower would not have been able to evade the Single Asset Real Estate provisions in the Bankruptcy Code.

69. During the subsequent weeks, defendants hurried to complete the transaction to which they had just agreed so that Mortgage Borrower could file a bankruptcy petition. Lynbrook Apartment Associates transferred its interest in the Pilevsky Apartments to Sutton Opportunity on March 30, 2016; Sutton Opportunity then immediately transferred the Pilevsky Apartments to Mortgage Borrower on the same day. Less than one week later, on April 6, 2016, Mortgage Borrower filed for bankruptcy.

70. During a sworn examination by the United States Trustee, Mr. Beninati admitted that the Pilevsky Apartments are not related to the Project and

were not acquired for any independent business purpose. Mr. Beninati also admitted: "There are three tenants living in them now, because we're managing them." When asked why Mortgage Borrower acquired the Pilevsky Apartments, Mr. Beninati said that he wanted to "bring in equity." Mr. Beninati provided no explanation why Mortgage Borrower would want the Pilevsky Apartments as opposed to more cash and no explanation why title to the Pilevsky Apartments was transferred to Mortgage Borrower rather than Sutton Parent.

71. The Pilevsky Apartments do not provide any material economic benefit to the Borrowers. The Pilevsky Apartments earn a net cumulative monthly rent of only $600. The Pilevsky Apartments' supposed aggregate value is not more than $250,000. Neither the rent nor the aggregate value is even a fraction of a percent of the Borrowers' debt and extraordinary bankruptcy-related expenses, Nor do they assist the Borrowers in advancing the Project, which is expected to require well in excess of $500 million in additional construction financing to complete.

72. The manner and speed in which the Pilevsky Apartments transaction took place, the lack of any Project-related purpose, and the absence of any business justification for the Borrowers all confirm that the real goal of this transaction was to frustrate plaintiffs bargained-for rights in furtherance of the tortious Pilevsky Scheme.

73. The Pilevsky Apartments transaction caused Mortgage Borrower to breach its contractual obligations to plaintiff under Section 7.1(j) of the Acquisition Loan Agreement and Section 7.1(j) of the Building Loan Agreement not to file a petition for bankruptcy. It provided cash to pay LM&H to file Mortgage Borrower's bankruptcy petition, and

Mortgage Borrower used the Pilevsky Apartments to represent that it was not a Single Asset Real Estate business.

74. The Pilevsky Apartments transaction caused Mortgage Borrower to breach its contractual obligations to plaintiff under Sections 4.10, 4.11, 4.20, Schedule 3(i)-(iii), and Schedule 3(xxviii) of the Acquisition Loan Agreement, and Sections 4.10, 4.11, 4.20, Schedule 3(i)-(iii), and Schedule 3(xxviii) of the Building Loan Agreement, not to have assets or businesses unrelated to the Property.

75. The Pilevsky Apartments transaction caused Mezz Borrower to breach its contractual obligations to plaintiff under Sections 4.10, and Schedule 3(i)-(iii) of the Mezzanine Loan Agreement not to have assets or businesses unrelated to the Property.

76. The Pilevsky Apartments transaction caused Mortgage Borrower to breach its contractual obligations to plaintiff under Section 4.18 of the Acquisition Loan Agreement and Section 4,18 of the Building Loan Agreement not to make, suffer or permit tire occurrence of any "Transfer" as defined therein. *See* Paragraph 26(e) above,

77. The Pilevsky Apartments transaction caused Mezz Borrower to breach its contractual obligations to plaintiff under Section 4.18 of the Mezzanine Loan Agreement not to make, suffer or permit the occurrence of any "Transfer" as defined therein. *See* Paragraph 26(e) above.

78. Each of Messrs. Beninati, Lee, and Jones signed a Guaranty of Recourse Obligations respecting each of the Loans, stating in relevant part: "Guarantor hereby acknowledges that it owns . . . indirect ownership interests in Borrower." The Pilevsky Apartments transaction caused "indirect ownership interests in

Borrower" to "Transfer" to Sutton Opportunity within the meaning of Section 4.1 8 of each of the Loan Agreements.

79. The Pilevsky Apartments transaction caused Mortgage Borrower to breach its contractual obligations to plaintiff under Section 4.10 and Schedule 3(xv) of the Acquisition Loan Agreement and Section 4.10 and Schedule 3(xv) of the Building Loan Agreement "to pay its own liabilities ... out of its own funds and assets."

80. The Pilevsky Apartments transaction caused Mortgage Borrower to breach its contractual obligations to plaintiff under Section 4.10 and Schedule 3(xxix) of the Acquisition Loan Agreement and Section 4.10 and Schedule 3(xxix) of the Building Loan Agreement to consider the interests of plaintiff in connection with all corporate, partnership, or limited liability actions.

81. The Pilevsky Apartments transaction caused Mortgage Borrower to breach its contractual obligations to plaintiff under Section 4.10 and Schedule 3 of the Acquisition Loan Agreement and Section 4.10 and Schedule 3 of the Building Loan Agreement to be "at all times a Special Purpose Bankruptcy Remote Entity."

82. The Pilevsky Apartments transaction also caused Mezzanine Borrower to be in default of its contractual obligations lo plaintiff under the cross-default provisions in Section 7.1(p) of the Mezzanine Loan Agreement.

Defendants' Willfulness

83. Defendants had actual knowledge of plaintiffs contracts with the Borrowers.

84. In addition, defendants had actual knowledge that the Pilevsky Scheme would cause the Borrowers to breach contractual obligations to plaintiff and cause damages to plaintiff.

85. Prior to the Pilevsky Scheme, the Borrowers' sole purpose was the Project.

86. Prior to the Pilevsky Scheme, the Project and plaintiffs funding of the Project were public knowledge.

87. Defendants are sophisticated real estate investors.

88. Philip Pilevsky has been in the real estate industry for decades.

89. Philips International has holdings in hundreds of properties and has millions of square feet of property under management.

90. Prior to the Pilevsky Scheme, defendants had actual knowledge of the Project and that plaintiff had funded the Project.

91. Prior to the Pilevsky Scheme, defendants had actual knowledge that plaintiff would not have funded the Project without any contract.

92. Michael Pilevsky asked his father Phillip Pilevsky to cause Prime Alliance to make the Pilevsky Loan so that Mezz Borrower could file for bankruptcy.

93. Philip Pilevsky and Prime Alliance knew that this bankruptcy filing would trigger the Bankruptcy Code's automatic stay and prevent plaintiff from proceeding with the UCC foreclosure sale scheduled for the next business day.

94. Michael Pilevsky and Seth Pilevsky caused Sutton Opportunity to transfer the Pilevsky Apartments and $150,0000 in cash in exchange for a

49% ownership stake in Sutton Parent so that Mortgage Borrower could file for bankruptcy and represent that it was not engaged in a Single Asset Real Estate business.

95. Michael Pilevsky, Seth Pilevsky, and Sutton Opportunity had actual knowledge that Mortgage Borrower's bankruptcy filing would trigger the Bankruptcy Code's automatic stay and prevent plaintiff from exercising its maturity default remedies.

Plaintiff's Damages

96. The Pilevsky Scheme has prevented plaintiff from exercising its contractual remedies for maturity defaults that took place in January 2016. This delay has damaged and will continue to damage plaintiff.

97. On January 21, 2016. East River 50s Alliance filed an application to rezone the area east of First Avenue between 52nd Street and 59th Street, where the Property is located, in order to limit the size of any new construction at 260 feet.

98. East River 50s Alliance has been publicly supported in this rezoning effort by the Manhattan Borough President, City Council Members, a State Senator, Community Board No. 6, and others.

99. East River 50s Alliance has held a rally to support this rezoning effort.

100. Community opponents of the Project have publicly stated that the Borrowers' principals used deceit to obtain the air rights for the Project and to remove pre-existing rental tenants from their homes at the Project site.

101. The threat that the Property site will be rezoned has already caused the Project to lose value.

102. If the Property site is rezoned during the delay caused by the Pilevsky Scheme, plaintiffs damages may be in the tens of millions of dollars.

103. In addition, numerous news articles since January 2016 have commented on the declining prices and troubles in the market for luxury high-rise apartments in Manhattan and developments like the Project.

104. These market developments already have decreased the value of the Project and threaten to cause plaintiff tens of millions of dollars in damages.

105. Plaintiff already has paid significant attorneys' fees and has incurred other costs because of the Pilevsky Scheme. Those costs will increase as time passes.

FIRST CAUSE OF ACTION
(Against Philip Pilevsky and Prime Alliance for Tortious Interference with a Contractual Relationship)

106. Plaintiff repeats and realleges the allegations set forth above in paragraphs 1 through 105, as though fully set forth herein.

107. Plaintiff has valid contracts with the Borrowers.

108. At all relevant times, Prime Alliance and its principal, Philip Pilevsky, had actual knowledge of the contracts between plaintiff and the Borrowers.

109. Philip Pilevsky and Prime Alliance willfully, intentionally, maliciously, and without reasonable justification tortiously interfered with, and induced and procured breaches by Borrowers of their Loan Agreements with plaintiff.

110. As a result of Philip Pilevsky and Prime Alliance's wrongful actions, plaintiff has been injured and is entitled to recover compensatory damages, punitive damages, pre-judgment and post-judgment interest, and the attorneys' fees and costs plaintiff incurs in prosecuting this action.

111. Philip Pilevsky is the president and sole shareholder of Prime Alliance.

112. Philip Pilevsky completely dominated, managed, and controlled Prime Alliance, including with respect to the matters described in this Complaint.

113. Philip Pilevsky used Prime Alliance to tortiously interfere with plaintiffs Loan Agreements with the Borrowers as described in this Complaint.

114. An adherence to the fiction of a separate corporate existence of Prime Alliance would result in injustice to plaintiff.

115. Philip Pilevsky is personally responsible for his own and Prime Alliance's tortious conduct toward plaintiff, and he and Prime Alliance should both be held jointly and severally liable to plaintiff for compensatory damages, punitive damages, pre-judgment and post-judgment interest, and the attorneys' fees and costs plaintiff incurs in prosecuting this action.

SECOND CAUSE OF ACTION
(Against Michael Pilevsky, Seth Pilevsky, and Sutton Opportunity for Tortious Interference with a Contractual Relationship)

116. Plaintiff repeats and realleges the allegations set forth above in paragraphs 1 through 115, as though fully set forth herein.

117. Plaintiff has valid contracts with the Borrowers.

118. At all relevant times, Sutton Opportunity and its principals, Michael Pilevsky and Seth Pilevsky, had actual knowledge of the contracts between plaintiff and the Borrowers.

119. Michael Pilevsky, Seth Pilevsky, and Sutton Opportunity willfully, intentionally, maliciously, and without reasonable justification tortiously interfered with, and induced and procured breaches by the Borrowers of their contracts with plaintiff.

120. As a result of Michael Pilevsky, Seth Pilevsky, and Sutton Opportunity's wrongful actions, plaintiff has been injured and is entitled to recover from them compensatory damages, punitive damages, pre-judgment and post-judgment interest, and the attorneys' fees and costs plaintiff incurs in prosecuting this action.

121. Michael Pilevsky and Seth Pilevsky are the sole shareholders of Sutton Opportunity, an entity created to effectuate the Pilevsky Apartment transaction.

122. Michael Pilevsky and Seth Pilevsky completely dominated, managed, and controlled Sutton Opportunity, including with respect to the matters described in this Complaint.

123. Sutton Opportunity was incorporated for a single purpose – to tortiously interfere with plaintiffs Loan Agreements with the Borrowers.

124. An adherence to the fiction of a separate corporate existence of Sutton Opportunity would result in injustice to plaintiff.

125. Michael Pilevsky and Seth Pilevsky arc personally responsible for their own and Sutton Opportunity's tortious conduct toward plaintiff, and they and Sutton Opportunity should all be held jointly and severally liable to plaintiff for compensatory damages, punitive damages, pre-judgment and post-judgment interest, and the attorneys' fees and costs plaintiff incurs in prosecuting this action.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment as follows:

a. On the First Cause of Action, awarding against Philip Pilevsky and Prime Alliance, jointly and severally, and in favor of plaintiff, compensatory damages, punitive damages, both in amounts to be proved at trial, together with pre- and post-judgment interest and the attorneys' fees and costs plaintiff incurs in prosecuting this action.

b. On the Second Cause of Action, awarding against Michael Pilevsky, Seth Pilevsky, and Sutton Opportunity, jointly and severally, and in favor of plaintiff, compensatory damages, punitive damages, both in amounts to be proved at trial, together with pre- and post-judgment interest and the attorneys' fees and costs plaintiff incurs in prosecuting this action; and,

c. Awarding in favor of plaintiff such other and further relief as is just and proper.

Dated: New York, New York
September 16, 2016

KRAMER LEVIN NAFTALIS
& FRANKEL LLP
By: /s Ronald S. Greenberg
Ronald S. Greenberg

Scott Ruskay-Kidd
Jeffrey P. Dunlap
Daniel Leonard

1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

Attorneys for Plaintiff

APPENDIX E

No. 16-10455 (SHL)

UNITED STATES BANKRUPCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

BH SUTTON MEZZ LLC, Debtor

[Filed March 10, 2016]

SUTTON 58 ASSOCIATES LLC'S MOTION TO DISMISS THIS CHAPTER 11 CASE PURSUANT TO BANKRUPTCY CODE § 1112(b) OR, IN THE ALTERNATIVE, TO MODIFY THE AUTOMATIC STAY PURSUANT TO BANKRUPTCY CODE § 362(d)(1)

Sutton 58 Associates LLC ("Lender") hereby moves for entry of an order, pursuant to § 1112(b) of the Bankruptcy Code, dismissing the Chapter 11 case filed by BH Sutton Mezz LLC ("Sutton Mezz" or the "Debtor"), or in the alternative, for an order, pursuant to Bankruptcy Code § 362(d)(1), modifying the automatic stay to permit Lender to pursue its state law remedies against the Debtor in this two-party, one asset dispute.

Preliminary Statement

1. This case is a classic bad-faith filing. The Debtor is a special purpose, bankruptcy remote, holding company with no operations or employees, whose only asset is a 100% equity interest in a property owning non-debtor subsidiary. It is encumbered by a $20 million secured loan that matured in January and has not been repaid. The case was filed after the New York State Supreme Court rejected the Debtor's last ditch attempt to stave off a fully noticed UCC foreclosure. In

short, this is exactly the sort of tactical filing that has been repeatedly condemned by the Second Circuit and should therefore be dismissed.

2. This case arises out of the acquisition and development of real estate at 428-432 East 58th Street in New York City (the "Property"). The Property is owned by non-debtor Sutton 58 Owner LLC ("Sutton Owner"). Sutton Mezz, in turn, is a holding company that owns a 100% ownership interest in Sutton Owner (the "Membership Interest"). To finance the initial stages of the development, Lender loaned $127.25 million to Sutton Owner, secured by first and second lien mortgages on the Property (the "Property Loans"). Lender also loaned $20 million to Sutton Mezz, secured by the Membership Interest (the "Mezz Loan"). Both the Property Loans and Mezz Loan matured on January 19, 2016. In the seven weeks since, no payments of any kind have been made by the Borrowers on any loan.

3. When the Mezz Loan was not repaid at maturity, Lender sought to foreclose on the Membership Interest under New York's Uniform Commercial Code (the "UCC"). A foreclosure sale was scheduled for February 29, 2016. Although the loans were indisputably in default from nonpayment, the Debtor and Sutton Owner (together, the "Borrowers") filed suit in New York State Supreme Court to enjoin the foreclosure, contending, among other things, that the sale was not being conducted in accordance with the UCC and that the Court should disregard the mezzanine structure as illusory. On February 23, 2016, Commercial Division Justice O. Peter Sherwood denied Borrowers' motion for a preliminary injunction, finding, among other things, that Borrowers were unlikely to succeed on the merits of their claim, that they would not be irreparably harmed by the

foreclosure sale, and that the equities favored allowing Lender to enforce its rights as agreed by the parties. Rather than appeal or seek a stay in the Appellate Division, Sutton Mezz filed this case to do what the state court would not: stop Lender from foreclosing on the Membership Interest.

4. As the Second Circuit recognized in *In re C-TC 9th Avenue P'ship,* 113 F.3d 1304 (2d Cir. 1997), this is precisely the type of case that does not belong in Bankruptcy Court: a single asset dispute between two parties – a debtor and its sole secured creditor – that can be fully resolved in the state court system. The Debtor has no operations or employees and no assets other than the Membership Interest. While the Debtor lists unsecured creditors, they appear to be creditors of Sutton Owner (architects, contractors, engineers, etc.), not Sutton Mezz, and their claims are dwarfed by the Mezz Loan. More importantly, Sutton Mezz's organizing documents, and the terms of the Mezz Loan, forbid the Debtor from incurring more than a token amount of such debt. The vast majority of any such obligations would therefore be *ultra vires* and unenforceable. In short, there is nothing here to reorganize – just a dispute over Lender's right to foreclose on the Debtor's sole asset – and thus the real purposes for this filing were improper ones: forum shopping and opportunistic exploitation of the automatic stay. Dismissing the Petition would correct this misuse of bankruptcy, while leaving the Debtor free to seek further relief in the state courts pending a rescheduled sale.

5. Alternatively, this Court should modify the automatic stay pursuant to Bankruptcy Code § 362(d)(1) to permit Lender to pursue its state law remedies. All of the factors favoring dismissal of the Petition also favor lifting the stay. Moreover, the

Debtor is continuing to use Lender's collateral without the Lender's consent and without so much as offering any adequate protection to Lender. With no cash flow, no operations and no other assets, the Debtor lacks the means to do so. This is yet another reason to lift the stay.

Factual Background

6. The facts underlying this Motion are set forth in the accompanying Declaration of N. Richard Kalikow, Lender's principal (through intermediate holding companies). We summarize those facts here for the Court's convenience.

A. The Project

7. For the past few years, Sutton Owner has pursued an extraordinarily ambitious real estate development project at 428-432 East 58th Street in New York City. Affidavit of Herman Carlinsky ("Carlinsky Aff.") [Doc. # 3] ¶ 7. Sutton Owner's business consisted of: (i) buying the existing-low-rise buildings, (ii) emptying them of rental tenants, (iii) demolishing them, (iv) buying air rights from other properties, and (v) building a super-tall residential tower exceeding 1,000 feet. REDACTED

REDACTED. Kalikow Decl. Exh. A at 7-8, 12; Exh. H.

8. Sutton Mezz's role in the project was limited. Its business and corporate purpose was (i) to "acquire, own, hold, sell, transfer, pledge, or otherwise dispose of a limited liability company interest in, and to be and act as a member of, [Sutton Owner];" and (ii) to perform under the documents governing the Mezz Loan. Kalikow Decl. Exh. B at §§ 7(i) and (ii).

B. The First Financing (January 2015)

9. In January 2015, Lender's affiliate, Gamma Lending S58 LP, provided $63 million in initial financing for the development project (the "First Financing") – or about 11% of the total financing Sutton Owner acknowledges it needed. The First Financing was broken into two separate loans: an acquisition loan of $43 million made to Sutton Owner, and a mezzanine loan of $20 million, made to Sutton Mezz. Kalikow Decl. Exhs. II and C.

10. In both the First Financing and the subsequent financing (described below), the Debtor was structured as a special purpose, bankruptcy remote, holding company. The Debtor's Amended and Restated Limited Liability Company Agreement (the "Operating Agreement") expressly restricts the Debtor's activities "in order to qualify the Company as a 'special purpose entity.'" Kalikow Decl. Exh. B at § 9(d)(i). Among other things, the Operating Agreement imposes stringent restrictions on Sutton Mezz's ability to incur unsecured debt-provisions that are typical for a special purpose entity ("SPE") such as the Debtor. In particular, Section 9(d)(iv)(D) of the Operating Agreement provides that the Debtor shall "not incur, create or assume any indebtedness other than as expressly permitted under the [Mezz Loan documents]." *Id.* at § 9(d)(iv)(D). Section 4.16 of the Mezz Loan agreement, in turn, provides that Sutton Mezz is not permitted to "incur or assume any indebtedness other than ... unsecured trade payables incurred in the ordinary course of business relating to the ownership and operation of the Property which (A) are not evidenced by a note, (B) do not exceed at any time a maximum aggregate amount of $50,000 and (C) are paid within thirty (30) days of date incurred."

Kalikow Decl. Exh. C at § 4.16. Consistent with these restrictions, Section 4.30 of the Mezz Loan agreement also prohibited Sutton Mezz from entering into virtually any contractual obligations other than those in its organizational documents and the loan agreements. *Id.* at § 4.28.

11. The Debtor's sole asset is a 100% Membership Interest in Sutton Owner. Sutton Owner, in turn, owns the Property. To secure the Mezz Loan, Sutton Mezz pledged the Membership Interest to Lender as collateral. Kalikow Decl. Exh. D at 1. The loan documents for the First Financing provided, among other things, that if Borrowers were unsuccessful at obtaining other funding and at maturity could not repay either the acquisition loan or the mezzanine loan, then Sutton Mezz's ownership interest in Sutton Owner could be sold at a UCC foreclosure sale. *Id.* at § 6(a). Sutton Mezz also expressly agreed that any notice of such UCC foreclosure sale "shall be deemed reasonably and properly given if given at least ten (10) days before such disposition." *Id.*

12. Undoubtedly aware that the initial short-term $63 million First Financing represented a fraction of the total time and financing necessary to develop the Property, the Borrowers' manager, Joseph Beninati, made numerous statements about his efforts to find further financing. In December 2014, Mr. Beninati stated he was already "working to finalize" deals to obtain "several hundred million dollars" from China. Kalikow Decl. Exh. E at 1. On January 7, 2015, Mr. Beninati boasted that there was "serious competition" among five companies, including several large Chinese companies, to invest and that right after closing the First Financing, Mr. Beninati would start a process to bring in those bids, in the amount of hundreds of millions of dollars. Kalikow Decl. Exh. F at 1. On

January 9, 2015, Mr. Beninati stated "With Chinese. [T]hey are all in and boiling hot for this deal." Kalikow Decl. Exh. G at 1. In the spring of 2015, Mr. Beninati even hired Cushman & Wakefield to solicit interest. Kalikow Decl. Exh. H at 4; Exh. I. Despite these efforts, however, Mr. Beninati did not locate any such financing.

C. The Second Financing (June 2015)

13. Without third party financing, in the summer of 2015, Borrowers sought a second round of financing (the "Second Financing") from Lender (an affiliate of the original lender). The Second Financing was intended to be a short-term bridge loan with a term of seven months. The original mezzanine loan was refinanced with a second $20 million mezzanine loan. The property level loan (taken on by non-debtor Sutton Owner) was also refinanced, but the amount of the loan was materially increased from $43 million to $125.8 million. Pursuant to the loan documents these additional funds were to be used to, among other things, purchase certain additional neighboring air rights and repay the First Financing. Kalikow Decl. Exh. J § 2.1. Sutton Owner also borrowed $1.4 million from Lender under a Building Loan. Kalikow Decl. Exh. K.

14. No changes were made in the structure of Sutton Mezz in connection with the Second Financing. The Operating Agreement and the new mezzanine loan documents again barred Sutton Mezz from incurring any debt other than limited and *de minimis* trade debt of not more than $50,000 in the aggregate that was to be paid off in 30 days. Kalikow Decl. Exh. L at § 4.16; *see also id.* at § 4.30 (prohibiting Sutton Mezz from virtually all contractual obligations, other

than those in its organizational documents and loan documents).

15. As it had in connection with the First Financing, Sutton Mezz again agreed that upon either Borrower's default, the Membership Interest could be sold through a UCC foreclosure sale and that any notice of that sale "shall be deemed reasonably and properly given if given at least ten (10) days before such disposition." Kalikow Decl. Exh. M at § 6(a); *see also id.* Exh. L § 7.1(p) (stating that an event of default under the Property Loans would be a default under the Mezz Loan). This agreement reassured Lender that if either Borrower defaulted, Lender would not be stuck with a matured but unrepaid loan, and would not need to expose itself to the fluctuations of an uncertain real estate market, zoning regulations, or community activism seeking to hinder or to stop the development of the Property. Kalikow Decl. ¶ 41.

16. Thus, Borrowers, led by experienced real estate developers and advised by sophisticated counsel, twice negotiated and executed hundreds of pages of meticulous financing documents that provide for an SPE, bankruptcy remote, mezzanine loan secured by the Debtor's sole asset and consenting to a 10-day UCC foreclosure sale remedy.[1]

D. The Borrowers Again Fail to Locate Further Financing

17. In August 2015, Mr. Beninati was interviewed by the *New York Times*. "After months of fruitless

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[1] Mr. Benninati's profile on his company's website states that he has decades of experience in commercial and residential real estate and has completed billions of dollars of acquisitions, development, construction, and real estate finance transactions. Kalikow Decl. Exh. HH.

hunting, Mr. Beninati said he remained confident he would find a partner. ... 'It's a real opportunity to do something special,' Mr. Beninati said, 'but if a joint venture partner doesn't show up, I'll have no choice but to sell.'" Kalikow Decl. Exh. H at 4.

18. Throughout fall 2015, Mr. Beninati tried to obtain replacement financing to take out Lender and fund the long term development of the Property. Mr. Beninati hired The Carlton Group to assist with this effort. REDACTED

REDACTED. *See* Kalikow Decl. Exhs. A & P. Despite these efforts, the Borrowers did not secure financing to fund the entire project – or even funds to refinance the outstanding (and maturing) loans.

19. On January 19, 2016, the loans matured. Notwithstanding the many months of efforts by Mr. Beninati, Borrowers were still unable to find alternate or additional financing. The Borrowers did not repay any portion of the outstanding loans and have not made any payments of any nature thereon since. Kalikow Decl. ¶ 2.

E. Recent Events Relating to the Property

20. Various recent events may jeopardize the development of the Property and the value of Lender's collateral.

21. Community Opposition: On January 21,2016, the East River Fifties Alliance, joined by several city and state representatives, including the Manhattan Borough President, submitted a proposal to the Department of City Planning to create new zoning for the Property's location that would "Banish Megatowers." Kalikow Decl. Exh. O. The proposed zoning restrictions would limit the height of buildings in the district to no more than 260 feet, a fraction of

the height that Sutton Owner planned. *Id.* On February 8, 2016, it was reported that the project "has received a great deal of pushback from community groups like the East River 50s Alliance" and already "has taken a significant height cut going down from the original planned 80 stories down to 62 stories." Kalikow Decl. Exh. P.

22. Fluctuations in the Lending and Economic Environment: On February 4, 2016, *The Real Deal* reported that "[w]ary of a slowdown in high-end apartment sales and a potential supply glut, lenders are beginning to retreat from Manhattan's luxury condominium market. Many banks are either cutting down their luxury condo construction lending or stepping away from the market altogether, according to brokers and lenders." Kalikow Decl. Exh. Q. The article states that after a three-year period of record-setting luxury condominium sales, "the market is showing signs of a correction." *Id.*

F. Lender's Efforts to Foreclose on its Collateral, and Borrowers' Failed Preliminary Injunction Motion

23. On January 20, 2016, Lender sent Borrowers notices of default. Lender also sent Sutton Mezz a notice informing it that, in accordance with the Mezz Loan agreement, Lender would conduct a UCC foreclosure sale on February 11 – 22 days later. Kalikow Decl. Exhs. N, R, & S. Lender sent a subsequent notice to plaintiffs on February 5, 2016, rescheduling the UCC foreclosure sale for February 29, with a deadline of February 24 for submission of bid deposits. Kalikow Decl. ¶ 25, Exh. U.

24. To prepare for the UCC sale, Lender retained Eastdil, the nation's largest broker for real estate investment properties. In consultation with Eastdil,

Lender advertised the sale in *The Wall Street Journal* and *Real Estate Alert* on February 10 and again on February 17. Kalikow Decl. Exhs. V & W. Lender also advertised in *The New York Times* on February 18 and in *The New York Post* on February 23. Kalikow Decl. Exhs. X & Y. On February 11, Eastdil also sent a "Teaser Blast" by direct personal e-mail to 266 major potential bidders. Kalikow Decl. Exhs. Z & AA.[2]

25. Eastdil also created a data room containing information for potential bidders. That data room included relevant loan documents, membership certificates, zoning documents, notices relating to plaintiffs' defaults and indebtedness, documents relating to an air rights agreement with the owner of another property, bidding procedures, demolition permits, and a title abstract. Kalikow Decl. Exh. BB. Before the filing of the Petition, nine potential bidders signed confidentiality agreements and were given access to the due diligence material in this data room. Kalikow Decl. Exh. JJ at ¶ 10.

26. On February 17, 2016, the Borrowers filed an action in New York State Supreme Court, and immediately sought a temporary restraining order (the "TRO"). In their papers, Borrowers did not dispute that they had defaulted on the loans, that the loans had matured, that the full balance was due and owing, and that nothing had been repaid. Rather, the Borrowers asked the Court to disregard the commercially reasonable and commonly-used structure of a mezzanine loan secured by an equity pledge and the SPE structure of the loan transaction.

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[2] *Real Estate Alert* is a publication that is frequently used and consulted by the real estate investors Eastdil was targeting. Similarly, Eastdil's "Teaser Blast" was transmitted to a who's who of real estate investors. Kalikow Decl. Exh. JJ at ¶ 6.

The Borrowers also asserted that the UCC foreclosure sale process was flawed. Among other things, Borrowers incorrectly alleged that the sale was being conducted on too short notice, that Lender had advertised only in a single publication with too few subscribers, and that Lender had not made information concerning the sale available to prospective purchasers in an online data room as is customary.

27. A TRO was entered (Kalikow Decl. Exh. CC), pending argument of the preliminary injunction motion, which occurred on February 23, six days before the scheduled UCC foreclosure sale. After argument, the Court denied the motion on the record, finding Borrowers were not likely to succeed on the merits, would not be irreparably harmed by the foreclosure sale, and that the balance of the equities favored allowing Lender to foreclose on the pledged membership interest – the Debtor's sole asset – as provided by the parties' agreements. Kalikow Decl. Exhs. DD at pp. 37-39 & T.

G. Sutton Mezz Files for Bankruptcy to Avoid Foreclosure

28. Rather than appealing the denial of the Court's ruling to the Appellate Division, Sutton Mezz instead filed for bankruptcy on Friday, February 26, 2016. It thereby obtained an unbonded stay of the foreclosure sale that the New York Supreme Court – the forum originally chosen by the Borrowers – had allowed to proceed only a few days earlier.[3] In his first day

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[3] Lender had requested that, if a preliminary injunction was granted, a $15 million bond be required to account for the potential diminution in value of Lender's collateral during the

affidavit, the Debtor's president concedes that the purpose of the filing was to avoid "an attempt by [Lender] to foreclose on the Debtor's membership interest." Carlinsky Aff. ¶ 18.

29. In addition to the Mezz Loan, Sutton Mezz's Petition alleges roughly $3,500,000 in unsecured debt. Many, if not all, of the listed claims appear to relate to services (architects, engineers, interior designers) provided to the non-debtor Sutton Owner, not to Sutton Mezz.[4] Nowhere, moreover, does the Petition explain how Sutton Mezz could properly have incurred such obligations without violating the prohibitions in its Operating Agreement and the Mezz Loan Documents. Kalikow Decl. Exh. B at § 9(d)(iv)(D); Exh. L at § 4.16.

Argument

I. THE CASE SHOULD BE DISMISSED AS A BAD FAITH FILING

30. This Court is empowered under Bankruptcy Code § 1112(b) to dismiss a bankruptcy case that was filed in bad faith, *e.g.,* as a litigation tactic without the intention or serious hope of reorganizing. *See, e.g., In*

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pendency of the litigation. Since Justice Sherwood found that no injunction was warranted, he did not rule on the bond.

[4] Perhaps reflective of the Debtor's mischaracterization of third party claims, two of the Debtor's alleged creditors have filed mechanics liens against the Property naming *non-debtor Sutton Owner,* not Sutton Mezz, as liable on their claims. Regardless, these liens, and a third filed against Sutton Owner and the Property, give Lender yet additional reason to be concerned that the value of its collateral is at risk and is not adequately protected by the Debtor, as creditors take action against the underlying Property due to nonpayment. Kalikow Decl. ¶ 47, Exhs. EE, FF, & GG.

re C-TC 9th Ave. P'ship, 113 F.3d 1304, 1310-12 (2d Cir. 1997) ("*C-TC*"); *In re Cohoes Indus. Terminal, Inc.,* 931 F.2d 222, 227-28 (2d Cir. 1991) ("*Cohoes*"); *In re MBM Entm't, LLC,* 531 B.R. 363, 408 (Bankr. S.D.N.Y. 2015); *In re Hartford & York LLC,* No. 13-45563-ESS, 2014 WL 985449, at *6 (Bankr. E.D.N.Y. Mar. 13, 2014). The appropriateness of dismissing bad-faith filings, as has happened here, is widely recognized.[5]

31. While a moving party bears the initial burden of demonstrating "cause" for dismissal under § 1112(b), "once the good faith of a debtor is called into question, the burden shifts to the debtor to demonstrate that the petition was filed in good faith." *In re Syndicom Corp.*, 268 B.R. 26, 49 (Bankr. S.D.N.Y. 2001); *see also In re Fraternal Composite Serv., Inc.,* 315 B.R. 247, 249 (Bankr. N.D.N.Y. 2003) (same), *aff'd sub nom. Fraternal Composite Servs. v. Karczewski*, 315 B.R. 253 (N.D.N.Y. 2004). A finding of bad faith need not be based on or equated with allegations of actual fraud or malice. A debtor may have a sincere desire to preserve its assets, but a petition will still not be in "good faith" unless it is motivated by a realistic desire to reorganize rather than merely to thwart

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[5] *See, e.g., In re Premier Auto Servs., Inc.,* 492 F.3d 274, 280-281 (4th Cir. 2007) (finding bad faith where Chapter 11 petition filed just two days before debtor's tenancy was to expire); *In re Cedar Shore Resort, Inc.,* 235 F.3d 375, 380-382 (8th Cir. 2000) (affirming dismissal of petition filed for primary purpose of preventing shareholders from pursuing state court lawsuit); *In re SGL Carbon Corp.,* 200 F.3d 154, 163-165 (3d Cir. 1999) (dismissing Chapter 11 petition filed to change venue of antitrust litigation without valid reorganizational purpose); *In re Phoenix Piccadilly, Ltd.,* 849 F.2d 1393, 1395 (11th Cir. 1988) (Chapter 11 petition filed in bad faith warranting dismissal where petition was filed to frustrate secured creditor's attempt to foreclose on debtor's sole assets).

creditors and escape the effects of non-bankruptcy litigation. *See In re Syndicom Corp.*, 268 B.R. at 49-50.

A. **The Petition Was Filed to Obtain a Litigation Advantage in a Two-Party Dispute and Thus Lacks a Good-Faith Basis for Invoking Bankruptcy Jurisdiction**

32. Where, as here, a debtor filing for bankruptcy has a single asset, has no reasonable prospects of being a going concern, and has as its primary purpose "a hope to relitigate a state court action," a bankruptcy petition should be dismissed as filed in bad faith. *In re Project Orange Assocs.,* LLC, 432 B.R. 89, 113 (Bankr. S.D.N.Y. 2010) (quotation omitted). Indeed, the bad-faith filing doctrine has been applied with particular vigor in the context of two-party single-asset real estate cases, similar to this one, where the courts have repeatedly reaffirmed that "debtors cannot manipulate the Bankruptcy Code to thwart the legitimate rights of secured creditors to realize on their claims." *In re Shea & Gould,* 214 B.R. 739, 744 (Bankr. S.D.N.Y. 1997); *see also In re Northtown Realty Co., L.P.,* 215 B.R. 906, 914 (Bankr. E.D.N.Y. 1998) (finding bad faith based on intent to delay or frustrate efforts of secured creditor to enforce legal rights).

33. *C-TC* is a leading case in this regard. The debtor in *C-TC* was an entity formed for the purpose of purchasing and managing property, which was then pledged as security for the loan financing the purchase. 113 F.3d at 1306-07. When C-TC failed to make required payments, the lender sued for foreclosure, but on the same day the court approved the appointment of a receiver to conduct a foreclosure sale, C-TC filed a bankruptcy petition to halt the process. *Id.* at 1307. The Bankruptcy Court ultimately

found this to be a bad faith filing based on its conclusions that C-TC had filed the petition primarily "as a litigation tactic" to avoid foreclosure on its one asset and that the dispute could have been fully resolved in a non-bankruptcy forum. *Id.* at 1309-10.

34. The Court of Appeals ultimately affirmed the Bankruptcy Court's bad-faith finding, concluding that the Chapter 11 filing had been made "with no hope of reorganization and at the very moment that the state litigation had taken a turn adverse to C-TC, making mortgage foreclosure imminent." *Id.* at 1310. The court based its finding in part on a series of factors initially set forth in *Pleasant Pointe Apartments, Ltd.* v. *Kentucky Housing Corp.,* 139 B.R. 828 (W.D. Ky. 1992):

(1) the debtor has only one asset;

(2) the debtor has few unsecured creditors whose claims are small in relation to those of the secured creditors;

(3) the debtor's one asset is the subject of a foreclosure action as a result of arrearages or default on the debt;

(4) the debtor's financial condition is, in essence, a two-party dispute between the debtor and the secured creditors which can be resolved in the pending state foreclosure action;

(5) the timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditors to enforce their rights;

(6) the debtor has little or no cash flow;

(7) the debtor cannot meet current expenses including the payment of personal property and real estate taxes; and

(8) the debtor has no employees.

C-TC, 113 F.3d at 1311 (citing *Pleasant Pointe Apartments,* 139 B.R. at 832). The Second Circuit affirmed the finding of bad faith in *C-TC* after observing that most of the *Pleasant Pointe* factors applied. This eight-factor analysis has been widely employed to assess the potential bad faith of bankruptcy filings. *See, e.g., In re Syndicom Corp.,* 268 B.R. at 50-51 (finding bad faith based on *C-TC* factors*); In re Northtown Realty Co.*, 215 B.R. at 915-16 (same); *In re Hartford & York LLC,* No. 13-45563-ESS, 2014 WL 985449, at *6 (Bankr. E.D.N.Y. Mar. 13, 2014) (same); *see also In re Laguna Assocs. Ltd. P'ship,* 30 F.3d 734, 738 (6th Cir. 1994) (articulating similar multipart test).

35. Another similar case is *JER/Jameson Mezz Borrowers II, LLC,* 461 B.R. 293, 296 (Bankr. D. Del. 2011). In that case, a chain of hotels were owned and operated by various operating companies, and the ownership of those companies was held by an entity called JER/Jameson Mezz II, LLC ("JER Mezz II"). *Id.* at 296. JER Mezz II had borrowed funds to acquire the operating entities and pledged its ownership interest as collateral. After a time, JER Mezz II was unable to repay its lender and the lender took steps to conduct a UCC foreclosure. The day before the auction was scheduled to occur, JER Mezz II filed for chapter 11 relief. *Id.* The lender filed a motion to dismiss the case or, in the alternative, to lift the automatic stay. *Id.* After undertaking a multi-factor analysis substantially similar to the *C-TC* test, Judge Walrath found that "virtually all of the [relevant] factors are

present," and dismissed the case with prejudice after finding that the petition was filed in bad faith and for no legitimate bankruptcy purpose. *Id.* at 299. The *JER/Jameson* case underscores how the present scenario (a holding company whose sole asset is stock in a company that owned real estate) represents a classic bad faith filing.

36. These cases often boil down to an assessment of whether a bankruptcy petition was filed primarily as a litigation tactic or whether the debtor in fact has a reasonable probability of being able to reorganize as a viable business under the protection of Chapter 11. "[A]n entity may not file a petition for reorganization which is solely designed to attack a judgment collaterally – the debtor must have some intention of reorganizing." *C-TC,* 113 F.3d at 1310 (citing *Cohoes*, 931 F.2d at 228). The protections of Chapter 11 are intended to be available only to those parties that seriously intend to reorganize, thereby yielding some benefit for creditors as a trade-off for the breathing room provided by the automatic stay. "Chapter 11 is not a procedural vehicle which may be commandeered solely for 'the purpose of invoking [its] automatic stay.'" *In re Premier Auto. Servs., Inc.,* 492 F.3d 274, 281 (4th Cir. 2007) (citation omitted). Nor is Chapter 11 intended to give debtors "the option of litigating a dispute with a single party ... in an alternative forum, when the Debtor has no other need of or use for the bankruptcy court." *In re Fraternal Composite Serv., Inc.,* 315 B.R. at 250. In short, bankruptcy must be used as a shield to facilitate legitimate reorganization efforts, not as a sword to collaterally challenge state court litigation results with which the debtor is unhappy or as a tool to forum-shop. *See In re Briarpatch Film Corp.,* 281 B.R. 820, 834-35 (Bankr. S.D.N.Y. 2002) (debtor cannot use bankruptcy as

"sword" to relitigate unfavorable judgments rather than taking state court appeal).

37. The Second Circuit has focused on the timing of the filing of a petition as a strong indication of a debtor's true intention. In *C-TC,* for example, "the Chapter 11 filing was made with no hope of reorganization and at the very moment that the state litigation had taken a turn adverse to C-TC" – on the eve of foreclosure of the debtor's only asset. 113 F.3d at 1310. Similarly, in *In re Wally Findlay Galleries (New York, Inc.)*, 36 B.R. 849 (Bankr. S.D.N.Y. 1984), the Bankruptcy Court dismissed as a bad-faith filing a case commenced the same day as entry of a judgment ordering the debtor to make certain payments to its creditors. *Id.* at 850-51. The Bankruptcy Court found it evident that the debtor had employed Chapter 11 not to reorganize, but to relitigate the lost motions, which was "an impermissible use of Chapter 11." *Id.* at 851.

38. As demonstrated below, all of these factors point to the conclusion that the instant Petition lacks a good-faith basis and was filed merely as a litigation tactic.

B. <u>This Case Presents a Classic Bad-Faith Filing</u>

39. The Petition in this case is a paradigmatic bad-faith filing. All of the classic indicia of "single asset" cases reflected in the *C-TC* factors are present here.

40. <u>Factor 1</u>: The Debtor was formed for the purpose of owning a single asset (the ownership interest in Sutton Owner) and, indeed, the parties agreed that it was a "Special Purpose Bankruptcy Remote Entity." Kalikow Decl. Exh. C at § 3.1. The Debtor acknowledges that its sole asset is the Membership Interest. Carlinsky Aff. ¶ 12 ("The

Debtor's assets consist of its membership interest in Sutton 58 Owner LLC.").

41. Factor 2: The Debtor claims only a limited number of unsecured creditors – each of which has a relatively small amount of debt in relation to the Lenders' claims. Even if properly listed as owed by the Debtor (and there is reason to be skeptical), that debt was improperly incurred by Sutton Mezz. As noted above, the Debtor is an SPE that was prohibited from incurring unsecured debt greater than $50,000 in the aggregate, that was required to be paid off within 30 days. The alleged unsecured claims scheduled with the Debtor's petition far exceed this limit. The Debtor should not be allowed on the basis of these *ultra vires* acts – in violation of its own operating agreement – to render itself something other than the bankruptcy remote SPE it agreed to be. Indeed, as a matter of law, acts in violation of the operating agreement are considered null and void. *See, e.g., Feeley v. NHAOCG, LLC,* CA. No. 7304-VCL, 2012 WL 4859132, at *7 (Del. Ch. Oct. 12, 2012); *In re Tri-River Trading, LLC,* 329 B.R. 252, 265 (B.A.P. 8th Cir. 2005) *aff'd sub nom. DeBold v. Case,* 452 F.3d 756 (8th Cir. 2006); *In re Min Sik Kang,* No. 1:15-CV-00953 LMB, 2015 WL 5786692, at *6 (E.D. Va. Sept. 30, 2015).

42. Moreover, these unsecured claims are almost entirely trade debt for architects, engineers, and construction, among other things, that facially appear to relate to the underlying property owner, and not the Debtor. Insofar as these claims really are against non-debtor Sutton Owner, these unsecured creditors would not be prejudiced by the dismissal of this case, because

they will be free to pursue their claims against that non-debtor entity.[6]

43. Factor 3: The Debtor's single asset – the Membership Interest – is the subject of foreclosure proceedings that the State Court, after a hearing on the merits, has declined to enjoin.

44. Factor 4: The Debtor's financial situation is in essence a two-party dispute between itself and Lender, and that dispute is fully capable of being resolved through state court proceedings.

45. Factor 5: The timing of the Petition plainly reflects an attempt to frustrate the Lender's bargained for rights. The Mezz Loan matured seven weeks ago. As authorized by the Mezz Loan documents, Lender has sought to conduct a UCC Foreclosure relating to its undisputed collateral, the Membership Interest. To stop that sale, the Borrowers first brought suit in New York State Supreme Court. Only when that litigation failed did they file this case. In fact, Sutton Mezz's First Day Affidavit frankly admits the filing was made to stop the UCC Foreclosure. Carlinsky Aff. ¶ 18. At the same time, Sutton Mezz offers no plan for reorganization and, in the days since, has filed no substantive motions of any kind. Indeed, because the Debtor has no other business activities or significant creditors, there is nothing credibly to reorganize – only a binary question of whether or not Lender will be permitted to enforce its contractual rights to foreclosure on the Debtor's sole asset. In other words, this is a classic two party dispute between debtor/owner and lender that should be resolved in

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[6] There is no indication that any creditor was pressuring Sutton Mezz to file for bankruptcy or were otherwise pursuing it. This also militates in favor of dismissal. *JER/Jameson,* 461 B.R. at 299.

state court, and does not warrant the broader purposes of this Court. And if this case were to be dismissed (or the automatic stay lifted to permit foreclosure proceedings to go forward, as discussed below), the Debtor would still have ample opportunity to obtain any relief to which it might be entitled in the state court system.

46. Factors 6 and 7: The Debtor has no cash flow whatsoever, and lacks any ability either to develop and complete the underlying project or meet the project's current expenses. The lack of funding and any operations by the Debtor underscores that the sole purpose of this case is to obtain a delay, rather than reorganize.

47. Factor 8: The Debtor has no employees. Carlinsky Aff. ¶ 8.

48. By contrast to the classic bad-faith facts present here, motions to dismiss have been denied where debtors were conducting active businesses involving multiple constituencies and thus had a legitimate need to use the bankruptcy process to facilitate negotiations and compromises among multiple parties to restructure the company going forward. *See, e.g., Cohoes,* 931 F.2d at 228-29 (denying motion to dismiss where debtor conducted significant business, faced financial stress and mounting expenses at the time it filed petition, and persisted in actual attempt to reorganize even after losing litigation that had driven it into bankruptcy); *In re Sletteland,* 260 B.R. 657, 667 (Bankr. S.D.N.Y. 2001) (contrasting two-party cases in finding that "Debtor's interests are sufficiently complex and sophisticated to justify giving him the opportunity to utilize the flexible procedure of Chapter 11 in an attempt to restructure his debt, satisfy his creditors, and retain a residual interest if he is so entitled" and finding that

there had been "no attempt on the part of the Debtor to relitigate or forum shop"). This case, to the contrary, involves only a two-party dispute over a single asset, and the bankruptcy filing was motivated solely by litigation tactics and forum shopping to obtain delay. This case does not necessitate negotiating compromises with multiple creditor constituencies. Rather, the only thing that this Debtor is attempting to do is buy time so that it can do what it has known it must do for months – repay the loans <u>*and*</u> secure much more substantial financing to allow the non-debtor Sutton Owner to develop the Property, or sell its assets. Bankruptcy protection is not intended to be a vehicle to obtain an extension of a maturity deadline merely because the debtor did not act with sufficient diligence earlier. *In re Cinole, Inc.,* 339 B.R. 40, 45 (Bankr. W.D.N.Y. 2006) (finding that the filing of a petition was improper and in bad faith where debtors filed for bankruptcy to stop a tax sale "and buy time to raise capital or get financing to rehabilitate the distressed properties").

49. In short, the relevant factors overwhelmingly support a finding of bad faith and dismissal of Sutton Mezz's Chapter 11 case.

II. <u>IN THE ALTERNATIVE, THE AUTOMATIC STAY SHOULD BE LIFTED BECAUSE LENDER'S INTEREST IN THE COLLATERAL CANNOT BE ADEQUATELY PROTECTED</u>

50. The same factors that warrant dismissal also warrant entry of an order modifying the automatic stay to permit Lender to proceed with its efforts to foreclose on its collateral (subject to the Debtor's ability to seek to forestall that result through ordinary state court processes). An application to modify the stay based on a debtor's bad-faith filing is decided

under the same standards as a motion to dismiss the entire case. *See In re 234-6 W. 22nd St. Corp.,* 214 B.R. 751, 757-60 (Bankr. S.D.N.Y. 1997) (applying *C-TC* and *Laguna* factors to determine that debtor's bad faith filing constituted necessary "cause" to grant relief from automatic stay pursuant to Bankruptcy Code § 362(d)(1)); *In re Syndicom Corp.,* 268 B.R. at 48-49 ("'the standards for bad faith as evidence of cause,' whether in the context of dismissal or relief from the stay, 'are not substantively different from each other.'") (citing *234-6 West 22nd St.,* 214 B.R. at 757).

51. The stay also should be lifted because the Debtor has not even attempted to, and cannot, offer Lender adequate protection for the use of Lender's collateral as required by the Bankruptcy Code. Section 363(e) of the Bankruptcy Code provides that a court shall condition a debtor's use of property pledged to a creditor as collateral on the debtor's provision of adequate protection. Where there is a lack of adequate protection, section 362(d)(1) provides that the court shall grant relief from the automatic stay such as by terminating, annulling or modifying the stay to allow the creditor to protect its interests. "If the value of collateral is threatened, creditors may seek adequate protection and relief from the automatic stay, giving the permission to foreclose on the property." *In re Price*, 370 F.3d 362, 373 (3d Cir. 2004); *see also In re Rosen*, 208 B.R. 345, 356 (D.N.J. 1997) (noting that a bankruptcy court may grant stay relief "where a secured creditor lacks adequate protection because there is a threat the value of the property may decline."); *In re Sterling Dev., Inc.,* No. 11-08-14208 MA, 2009 WL 196250, at *3 (Bankr. D.N.M. Jan. 26, 2009) ("A creditor seeking relief from the automatic stay for cause based on a lack of adequate protection

must demonstrate that its collateral is declining in value, or that there is a threat of a decline in value, in order to establish a prima facie case.").

52. Here, the Debtor is continuing to use Lender's collateral. However, the value of that collateral is threatened by numerous factors, including actions and liens filed by creditors against the underlying Property owned by the non-debtor, the risk that community opposition will grow to any development, and that the zoning regulations governing the Property will be altered to forbid construction going forward as planned. Kalikow Decl. Exh. O. The value of the collateral also is threatened by volatility in the real estate financing world. These factors all dramatically affect the likelihood of raising the necessary financing – which efforts have failed over the course of the last year and show little if no prospects of being successful now that the Debtor has filed for bankruptcy.

53. Above all, given that the Debtor is a single asset entity, has no cash flow whatsoever, and that the project is not even anticipated to be complete until 2019 (even if the non-existent financing suddenly appeared), there is no viable mechanism by which the Debtor could provide adequate protection payments to Lender. This inability is yet another reason why the stay should be lifted and Lender should be permitted to pursue its state law foreclosure remedies.

Notice

54. Pursuant to Rule 2002(a)(4) of the Federal Rules of Bankruptcy Procedure, notice of this motion has been given to the Debtor, the Office of the United States Trustee, and all creditors listed in the Petition, and all other parties in interest who have requested

notice in the Chapter 11 case. Lender submits that no further notice is required.

Conclusion

55. For the foregoing reasons, Lender respectfully requests that the Court (1) enter an order, in the form attached as Exhibit 1 hereto, granting Lender's motion to dismiss the case or, in the alternative, lifting the automatic stay and (2) grant such other and further relief as is just.

Dated: New York, New York
March 10, 2016

Respectfully submitted,

KRAMER LEVIN NAFTALIS & FRANKEL LLP

By: /s/ Adam C. Rogoff
Adam C. Rogoff, Esq.
P. Bradley O'Neill, Esq.
Natan Hamerman, Esq.

1177 Avenue of the Americas
New York, New York 10036
Tel: 212-715-9100
Fax: 212-715-8000

Counsel for Sutton 58 Associates LLC

APPENDIX F

1. U.S. Const. art. I, § 8, cl. 4 provides:

The Congress shall have Power * * * To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States[.]

2. 11 U.S.C.A. § 105 provides, in relevant part:

Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

* * *

3. 11 U.S.C.A. § 362 provides, in relevant part:

Automatic stay

* * *

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if--

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later--

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that--

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real

property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either--

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

* * *

4. 11 U.S.C.A. § 1112 provides, in relevant part:

Conversion or dismissal

* * *

(b)(1) Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dis-

miss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

(2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that--

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)--

(i) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.

(3) The court shall commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 15 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.

(4) For purposes of this subsection, the term “cause” includes--

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

(B) gross mismanagement of the estate;

(C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;

(D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;

(E) failure to comply with an order of the court;

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;

(G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;

(H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);

(I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;

(J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;

(K) failure to pay any fees or charges required under chapter 123 of title 28;

(L) revocation of an order of confirmation under section 1144;

(M) inability to effectuate substantial consumma-

tion of a confirmed plan;

(N) material default by the debtor with respect to a confirmed plan;

(O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and

(P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

* * *