UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GRUSS GLOBAL INVESTORS MASTER FUND, LTD., GRUSS GLOBAL INVESTORS MASTER FUND (ENHANCED), LTD., PERRY PARTNERS INTERNATIONAL, INC., PERRY PARTNERS L.P., TPG CREDIT OPPORTUNITIES FUND, L.P., TPG CREDIT OPPORTUNITIES INVESTORS, L.P., TPG CREDIT STRATEGIES FUND, L.P., THE VÄRDE FUND, L.P., THE VÄRDE FUND V-B, L.P., THE VÄRDE FUND VI-A, L.P., THE VÄRDE FUND VII-B, L.P., THE VÄRDE FUND VIII, L.P., THE VÄRDE FUND IX, L.P., THE VÄRDE FUND IX-A, L.P., VÄRDE INVESTMENT PARTNERS, LTD., VÄRDE INVESTMENT PARTNERS, L.P., VR LIQUIDITY CRISIS RECOVERY FUND, L.P., VR GLOBAL PARTNERS, YORK CAPITAL MANAGEMENT, L.P., YORK INVESTMENT MASTER FUND, L.P., YORK SELECT, L.P., YORK CREDIT OPPORTUNITIES FUND, L.P., HFR ED SELECT FUND IV MASTER TRUST, LYXOR/YORK FUND LIMITED, YORK SELECT MASTER FUND, L.P., YORK GLOBAL VALUE MASTER FUND, L.P., PERMAL YORK LIMITED, and YORK CREDIT OPPORTUNITIES MASTER FUND, L.P., AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., and THIRD POINT, LLC,

Plaintiffs,

-v-

DEUTSCHE BANK TRUST COMPANY AMERICAS,

Defendant.

DEUTSCHE BANK TRUST COMPANY AMERICAS,

Third-Party Plaintiff,

-against-

CAPMARK FINANCIAL GROUP, INC., CAPMARK CAPITAL INC., CAPMARK FINANCE INC., CAPMARK INVESTMENTS LP, COMMERCIAL EQUITY INVESTMENTS, INC., MORTGAGE INVESTMENTS, LLC, NET LEASE ACQUISITION LLC, SJM CAP, LLC and CRYSTAL BALL HOLDING OF BERMUDA LIMITED,

Third-Party Defendants.

Case No: 09-CV-9723-AKH

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S JULY 22, 2010 ORDER DENYING MOTION TO TRANSFER

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Plaintiffs, by their attorneys, Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP, hereby submit this Opposition to Defendant Deutsche Bank Trust Company Americas' ("DBTCA" or "Defendant") Motion for Reconsideration of the Court's July 22, 2010 Order Denying Motion to Transfer. DBTCA has not identified any material fact or controlling decision that the Court overlooked in deciding the Transfer Motion; nor do any of the allegedly new "developments" cited by DBTCA suggest that reconsideration is proper. Accordingly, the Motion for Reconsideration should be denied.

ARGUMENT

I. Defendant Falls Woefully Short of Meeting the Standard for Granting a Motion for Reconsideration

While Defendant cites the Local Rule that provides for motions for reconsideration, it does not even advert to—let alone state—the "exacting standard" that must be met for such a motion to succeed. *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH), 2008 WL 2704317 at *1 (S.D.N.Y. July 10, 2008) (Hellerstein, J.). As this Court has held:

> A motion for reconsideration may be granted to (1) correct clear error; (2) prevent manifest injustice; or (3) consider newly-available evidence. . . . The criteria are "strict;" reconsideration generally is denied unless the moving party can point to "controlling decisions or data that the court overlooked," and such matters must be of such importance as reasonably to expect that they "alter the conclusion reached by the court."

WTC Captive Ins. Co., Inc. v. Liberty Mut. Fire Ins. Co., 537 F. Supp. 2d 619, 623, *supplemented,* 549 F. Supp. 2d 555 (S.D.N.Y. 2008) (Hellerstein, J.) (citations omitted). Further, Local Rule 6.3 requires the party seeking reconsideration to "set[] forth concisely the matters or controlling decisions which counsel believes the court has overlooked."

DBTCA falls miles short of meeting this test. It does not suggest that this Court's ruling was clear error or would create manifest injustice. Nor does DBTCA offer "newly-available evidence."[1] Instead, DBTCA suggests that reconsideration is warranted because the Court's July 22 Order neglects to "mention . . . the effect of the filing of proofs of claim . . . or of the lien avoidance litigation," or to state that "these proceedings in the Bankruptcy Court are 'core.'" Memorandum In Support of Defendant's Motion for Reconsideration of the Court's July 22, 2010 Order Denying Motion to Transfer (Docket No. 43) ("Memorandum") at 7. Furthermore, DBTCA argues, the Order Denying Motion to Transfer and Cross-Motion to Dismiss (Docket No. 38) ("Order") does not "take into account" two Second Circuit cases, only one of which was previously cited to the Court. *Id.* As the Court was fully aware of the facts that DBTCA now relies on, and as the two cited cases are at best peripheral to the issues before the Court, DBTCA has failed utterly to identify any "decisions or data that the court overlooked," much less ones that could reasonably be expected to "alter the conclusion reached by the court."

Contrary to DBTCA's contention, this Court's order addressed DBTCA's fundamental arguments that transfer was warranted because plaintiffs' claims against Capmark were "core" bankruptcy matters, and because DBTCA faced the risk of inconsistent outcomes in different courts—the Court simply rejected those arguments. See Order at 2 ("Defendant argues that since the bankruptcy court, in dealing with the *claims of plaintiffs against Capmark*, will have to construe the indentures, there is danger of inconsistent determinations if the district court retains this action.") and 3 ("Defendant seems to argue that plaintiffs' claims are derivative of *their*

[1] DBTCA notes that it has filed this motion "to call to the attention of this Court two developments" that had not occurred when it filed its brief—namely, that plaintiffs had filed proofs of claims, and that the Creditors Committee sought discovery in the Bankruptcy Court. Memorandum at 2-3. As DBTCA acknowledges, however, it brought both of these "developments" to the Court's attention in a six-page, single spaced letter (along with 70 pages of exhibits) submitted on July 7, 2010. Memorandum at 4.

bankruptcy claim against Capmark. This proposition will have to be tested, in the district court.") (emphases added).

DBTCA also faults the order for failing to "take into account" the Second Circuit's decisions in *Luan Investment S.E. v. Franklin 145 Corp.* (*In re Petrie Retail, Inc.*), 304 F.3d 223 (2002), and *Central Vermont Public Service Corp. v. Herbert*, 341 F.3d 186 (2003). Memorandum at 5-6. DBTCA cited *Petrie Retail* extensively in its memorandum of law in support of its Transfer Motion. The Order does "take into account" *Petrie Retail* by citing the Second Circuit's later decision in *Mt. McKinley Ins. Co. v. Corning Inc.*, 399 F. 3d 436, 448 (2d Cir. 2005), which distinguishes *Petrie Retail* based on its unique factual context. The Court did not "take into account" *Central Vermont* for a good and simple reason—neither party cited the case in any of the briefing on the Transfer Motion or in either party's letter to the Court. "[A] motion for reconsideration is not the time to bring a supposedly important precedent to the court's attention. Motions for reconsideration are not intended to save the parties from the consequences of their own research neglects." *WTC Captive Ins. Co., Inc.*, 537 F. Supp. 2d at 624.[2]

II. The Cases Cited By Defendant Do Not Support Transfer

Even if the Court elects to reach the merits of DBTCA's arguments, however, DBTCA has not cited any case law that suggests that denial of the Transfer Motion was error, much less

[2] DBTCA has additionally argued that its ability to present its arguments to the Court was prejudiced by the Court's decision not to hold oral argument on the Transfer Motion. Memorandum at 5. DBTCA did not even *request* oral argument in its Transfer Motion, and its July 7 letter states only: "*if this Court believes oral argument would be appropriate*, [DBTCA] requests that it be scheduled at the earliest convenient time." July 7, 2010 Ltr. at 6 (emphasis added). If DBTCA believed that oral argument was necessary to explain these issues to the Court, it could (and should) have suggested as much to the Court *before* the Transfer Motion was decided.

"clear error." The two cases DBTCA cites are not "controlling," and they are readily distinguishable. Neither case is sufficient to support the Reconsideration Motion.[3]

First, DBTCA cites *In re Petrie Retail, Inc.* for the proposition that "[w]here . . . an instrument must be interpreted in connection with a proof of claim, . . . litigation involving two non-debtor parties requiring interpretation of the same instrument is also a core bankruptcy proceeding." Memorandum at 5. *Petrie Retail* does not contain such a broad holding—in fact, the Second Circuit expressly disclaimed that it was endorsing the proposition for which DBTCA now cites it. The case addressed the question whether the bankruptcy court had jurisdiction to decide a post-petition dispute between two non-debtors over a pre-petition lease, "based on rights established in the [bankruptcy court's] sale order," and "[seeking] enforcement of a pre-existing injunction issued as part of the bankruptcy court's sale order and confirmation order." 304 F.3d at 229-230. That the plaintiff had filed a proof of claim was just one of three facts the Second Circuit took into consideration in determining that the proceeding at issue was core. *Id.* at 230. The Second Circuit emphasized, "We express *no view* as to whether any one of these facts alone would render a proceeding core." *Id.* at 231 (emphasis added). DBTCA's argument that *Petrie Retail* controls this case, therefore, relies on a supposed holding that the Second Circuit expressly declined to make: that plaintiffs' filing of proofs of claim in the Capmark bankruptcy *alone* rendered this action a core bankruptcy proceeding.

Second, DBTCA cites, for the first time in any briefing on this issue, *Central Vermont Public Service Corp.* This case is readily distinguishable. As an initial matter, *Central Vermont*

[3] In the interest of economy, Plaintiffs will not respond point-by-point to the factual assertions in the Reconsideration Motion, as they are almost entirely duplicative of DBTCA's July 7, 2010 letter. Plaintiffs instead refer to their July 15, 2010 letter for a more detailed discussion of those factual assertions. Plaintiffs reiterate their conclusion in their letter to the Court that "the 'additional grounds' cited by DBTCA in its letter are not additional, nor do they constitute new grounds for granting the motion to transfer." July 15, 2010 Ltr. at 4.

addressed the denial of a Fed. R. Civ. P 60(b)(4) motion to vacate for want of jurisdiction; therefore, the Second Circuit had to decide only whether there was "an arguable basis for jurisdiction." 341 F.3d at 190. The Second Circuit held that the proceeding at issue was "arguably . . . core." *Id.* at 191. Furthermore, while the claims in *Central Vermont* were technically between non-debtors, the creditors at issue sought to bring claims against the non-debtor entities solely as "'derivative or alter-ego claim[s]'" reaching through to debtor entities. *Id.* at 192 (quoting complaint). Plaintiffs have not pleaded—and DBTCA has not suggested—that DBTCA shares a sufficiently close relationship with the Capmark debtors that a derivative or alter-ego claim would be appropriate.[4]

It is hardly surprising that the Order did not cite these two cases—neither case supports the broad propositions DBTCA ascribes to it, and neither suggests (let alone compels the conclusion) that this action is a core bankruptcy proceeding. DBTCA fails to identify any "matters or controlling decisions" that the Court has overlooked, as required by Local Rule 6.3. Instead, it seeks only "to reargue [an] issue[] that ha[s] already been decided," *WTC Captive Ins. Co., Inc.*, 537 F. Supp. 2d at 624, but offers no persuasive reason for doing so.

III. Oral Argument is Unnecessary

Finally, DBTCA suggests that it plans to "discuss all of these above issues further with the Court at the pre-trial conference" on August 20, 2010. Memorandum at 7. Of course, under Local Rule 6.3, the decision whether to allow oral argument on the Reconsideration Motion lies solely with the Court. DBTCA has raised no meritorious issues here, and, as the Court has elsewhere observed, "disagreement with my rulings does not qualify as basis for a motion for

[4] To the extent that DBTCA seeks to revive its argument that the claims in this proceeding are "*de facto*" claims against the Capmark debtors, that argument has already been presented to and considered by the Court in the extensive briefing on the Transfer Motion; DBTCA suggests nothing in the Reconsideration Motion that would affect the Court's analysis on that point.

reconsideration." *In re September 11 Litig.*, 236 F.R.D. 164, 175 (S.D.N.Y. 2006) (Hellerstein, J.). The time and resources of both the Court and the parties would be better spent planning for the litigation to come, rather than re-arguing issues that have already been decided.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Reconsideration Motion be denied.

Dated: August 16, 2010.

By: /s/

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