IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re WOODBRIDGE GROUP OF COMPANIES, LLC, *et al.*,[1] Remaining Debtors.	Chapter 11 Case No. 17-12560 (BLS) (Jointly Administered)
WOODBRIDGE WIND-DOWN ENTITY, LLC and WB 714 OAKHURST, LLC, Plaintiffs, v. MONSOON BLOCKCHAIN STORAGE, INC., Defendant.	Adv. Proc. No. 19-50102 (BLS) **Related Adv. D.I.: 38, 39, 40**

REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANT'S MOTION TO (I) DISMISS IN FAVOR OF ARBITRATION OR (II) ALTERNATIVELY, TRANSFER VENUE

Evan T. Miller (No. 5364)
BAYARD, P.A.
600 N. King Street, Suite 400
Wilmington, DE 19801
Telephone: (302) 655-5000
Facsimile: (302) 658-6395
E-mail: emiller@bayardlaw.com

William A. Smelko
PROCOPIO
525 B Street, Suite 2200
San Diego, CA 92101
Telephone: (619) 525–3834
Facsimile: (619) 744–5447
E-mail: bill.smelko@procopio.com

December 30, 2019
Wilmington, DE

[1] The Remaining Debtors and the last four digits of their respective federal tax identification numbers are as follows: Woodbridge Group of Companies, LLC (3603) and Woodbridge Mortgage Investment Fund 1, LLC (0172). The Remaining Debtors' mailing address is 14140 Ventura Boulevard #302, Sherman Oaks, California 91423.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

I. NATURE AND STATE OF THE PROCEEDINGS

Defendant[1] respectfully submits this reply brief (the "**Reply Brief**") in further support of its *Motion to (I) Dismiss in Favor of Arbitration or (II) Alternatively, Transfer Venue* [Adv. D.I. 38] (the "**Motion**") and in response to Plaintiffs' *Opposition to Defendant's Motion to (I) Dismiss in Favor of Arbitration or (II) Alternatively, Transfer Venue* [Adv. D.I. 40] (the "**Opposing Brief**"). In support thereof, Defendant states as follows:

II. INTRODUCTION

Plaintiffs' Opposing Brief is beset by irony. Plaintiffs devote much ink and argument to the theory that Defendant seeks only to throw up roadblocks on the path to resolving the instant dispute; that Defendant—to achieve an end which is never quite made clear by Plaintiffs—wishes to engage in "stall tactics." Yet Plaintiffs opted to engage in nearly seven months of litigation over whether a default judgment should be granted. Plaintiffs yet again aggressively seek to initiate another round of lengthy litigation over the Complaint, instead of merely submitting the matter to a dispute resolution method to which the parties agreed and that courts (including this one) ***universally*** acknowledge as "quick and inexpensive." Plaintiffs never fundamentally articulate why they so stridently oppose arbitration as a means of resolution here, and their failure to do so undercuts much of their flawed legal reasoning.

To that end, the balance of Plaintiffs' brief is unavailing, and in many instances actually supports Defendant's points. One example presents itself in the seemingly uncontroversial idea that the Arbitration Clause and the Addendum can be harmonized; Plaintiffs argue that Defendant's addendum strikes a paragraph of the Agreement, yet that paragraph still "literally appears in the [Agreement]." Plaintiffs' inference by analogy, of course, being that the

[1] Terms not otherwise defined herein shall have the meanings ascribed to them in the *Opening Brief in Support of [the Motion]* [Adv. D.I. 39] (the "**Opening Brief**").

Arbitration Clause is negated by the Addendum's general retention of jurisdiction language, even though the Arbitration Clause itself still appears. Plaintiffs' analogy fails because they are citing to an example in which an Agreement term is being ***expressly*** excised. In other words, there is no way to harmonize a provision that references ***and*** deletes another. Conversely, the Arbitration Clause and the Addendum can quite easily be harmonized, for the unrebutted reasons provided in the Opening Brief—namely, they do not moot or contradict each other. Moreover, Plaintiffs quite ably make Defendant's point and that of the Third Circuit: if Plaintiffs intended to write alternative dispute resolution methods out of the Agreement, they could have done so in the same way Defendant did in their analogy. Plaintiffs did not do so, and this Court should not honor their breach by denying the Parties' right to arbitration.

For similar reasons, Plaintiffs' argument as to the presence of a "forum selection clause" controlling Defendant's alternative transfer request rings hollow. Plaintiffs yet again rely on a decision[2] of this Court which actually *endorses* Defendant's approach, as that opinion specifies that a valid forum selection clause is *not* determinative in the transfer analysis, but simply one facet of the "convenience of the parties consideration." Plaintiffs conspicuously omit this language from their reference to that opinion and their analysis of the same, and it's easy to see why.

Likewise, Plaintiffs' arguments against transfer of the instant matter (in lieu of arbitration) have been summarily rejected by opinions of this Court and nationwide. For one, hornbook law holds that a turnover request does not vest the Court with jurisdiction where entitlement to the sum is in dispute, as it is here. This Court also rejected the notion that a mere increased distribution to creditors—a point that is debatable in and of itself given the

[2] *DHP Holdings II Corp. v. Home Depot, Inc. (In re DHP Holdings II Corp.),* 435 B.R. 264, 269 (Bankr. D. Del. 2010), as more fully discussed *infra*.

substantially higher expense of litigation compared to arbitration—justifies jurisdiction under Section 1334(b). The reality is that whether this matter is core or non-core, post-confirmation or otherwise, the substantive controversy here is nothing more than a routine California real estate dispute that can most efficiently be dealt with in the location where all parties and counsel are located.

At bottom, then, the question remains quite simple: should this routine California real estate dispute be submitted to arbitration in California in accordance with the terms of the Agreement and its attendant documents? Defendant respectfully submits that both Parties' pleadings mandate that the answer should be "yes." In lieu of that, the Opposing Brief (let alone Defendant's Opening Brief) makes it clear that it would be far more cost efficient and fair for all parties to litigate this matter in the California Courts.

III. ARGUMENT

A. The Agreement Provides for Arbitration

Plaintiffs' entire argument rests on the assumption that the Addendum effectively replaced the mandatory arbitration clauses present in paragraph 22 of the Agreement. From that flawed premise, Plaintiffs aver that Defendant ignores whether an agreement to arbitrate exists in the first instance. Opposing Brief at ¶ 21. Plaintiffs point to the preamble of the Addendum which provides that the Addendum controls in the event of a conflict with the Agreement. *Id.* Since the Addendum purportedly contains a statement of exclusive jurisdiction, Plaintiffs mistakenly believe that this "forecloses arbitration," notwithstanding the fact that the Addendum makes ***zero*** references to arbitration or mediation.

Of course, if it were true that "sole and exclusive jurisdiction" clauses "foreclosed" any type of litigation or arbitration outside the confines of the Court, then the reams of opinions holding directly to the contrary wouldn't exist. Clearly this is not the case, and Plaintiffs

acknowledge as much by their silence on the issue. The Opposing Brief pays little mind to the *In re Continental Airlines, Inc*. decision cited in Defendant's Opening Brief, which required the Court to reconcile an exclusive jurisdiction clause in a plan with a contract's arbitration provision. *See* 236 B.R. 318, 323-24 (Bankr. D. Del. 1999*), aff'd*, 2000 WL 1425751 (D. Del. Sept. 12, 2000), *aff'd*, 279 F.3d 226 (3d Cir. 2002); *see also* Opening Brief, p. 14. The Court correctly found that the exclusive jurisdiction clause did not render the arbitration provision inert, holding so based at least in part on the principle that "no action of the parties can confer subject-matter jurisdiction upon a federal court" and "the consent of the parties is [therefore] irrelevant." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Erie Ins. Exch. v. Erie Indem. Co.*, 722 F.3d 154, 162 (3d Cir. 2013) ("federal courts are courts of limited powers, and those remedies do not permit us to create subject matter jurisdiction"); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 228–29 (3d Cir. 2004) ("The source of the bankruptcy court's subject matter jurisdiction is neither the Bankruptcy Code nor the express terms of the Plan. The source . . . is 28 U.S.C. §§ 1334 and 157"); *Gimaex Holding, Inc. v. Spartan Motors USA, Inc.*, 2016 WL 4056205, at *4 (D. Del. July 28, 2016) (litigating parties' agreement "cannot vest this court with subject matter jurisdiction over [pertinent] claims"). Thus, for purposes of establishing this Court's jurisdiction, the agreement of the Parties is largely irrelevant.

Plaintiffs dismiss the relevance of the Addendum's silence on arbitration and mediation as nothing more than "curious." Opposing Brief, p. 11 n.7. In so doing, however, they ignore explicit and binding precedent from the Third Circuit on this precise issue. In the seminal *Patten Securities Corp., Inc. v. Diamond Greyhound & Genetics, Inc.* decision, the Third Circuit addressed whether a forum selection clause foreclosed the parties from invoking their contractual

arbitration rights. 819 F.2d 400, 407 (3d Cir. 1987). Far from being merely "curious" to the Third Circuit, the opinion explains that "conspicuously absent from the forum selection clause in the underwriting agreement is any reference to arbitration whatsoever." *Id.* The court found that when drafting the forum selection clause, the drafter "could have made a reference to arbitration in the clause if it sought to have [the non-drafter] waive . . . arbitration by signing the Underwriting Agreement." *Id.* The court held that it cannot be said that the non-drafter "knew that it was waiving its right to the contractual remedy of arbitration, since any reference thereto is absent," *ergo* the clause is "at least ambiguous." *Id.* The Third Circuit found "nothing inconsistent between the arbitration obligation and the instant forum selection clause[, because both] can be given effect, for arbitration awards are not self enforceable." *Id.* Such awards "may only be enforced by subsequent judicial action." *Id.* Thus, "even if arbitration is completed, the forum selection clause would appear to dictate the location of any action to enforce the award." *Id.*

More than thirty years later, the Third Circuit continues to uphold the vitality of *Patten*'s 1987 holding. Last year's *Reading Health System v. Bear Stearns & Co.*, for instance, interpreted an even more restrictive forum selection clause than the one at issue in *Patten*, but still found *Patten*'s "reasoning leads us to the same conclusion here: [the non-drafting party seeking arbitration] did not waive its right to arbitrate" despite the terms of the agreement. 900 F.3d 87, 103 (3d Cir. 2018). To the contrary, the court began "by noting that any reference to arbitration is conspicuously absent from the forum-selection clauses." *Id.* (internal quotations omitted); *id.* (stressing that no word "even suggesting supersedence, waiver, or preclusion [of the right to arbitrate] exists" in the forum-selection clause) (*citing UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319, 330 (4th Cir. 2013)). The court found that had the drafting party opposing

arbitration sought to preclude any right to arbitrate, "it should have made a reference to arbitration in either the waiver provision or forum-selection provisions of the broker-dealer agreements." *Id.* (internal quotations and emphasis omitted); *see also In re CIT Grp. Inc.,* 2012 WL 831095, at *2 (Bankr. S.D.N.Y. Mar. 9, 2012) (sending claims to arbitration because exclusive jurisdiction retention provision "should not be construed in a manner that is fundamentally at odds not only with another provision of the Plan but also with the strong federal policy favoring arbitration agreements."); *Gadelkareem v. Blackbook Capital LLC,* 46 Misc. 3d 149(A), 13 N.Y.S. 3d 850 (N.Y. App. Term. 2015) (finding that a later contract that contained a jurisdictional provision did not supersede an earlier agreement to arbitrate, where the later contract "significantly, contained no express denial of the agreement to arbitrate.").

Plaintiffs' failure to foreclose mediation or arbitration in their Addendum ends the inquiry. The Third Circuit and numerous other courts consistently find that a forum selection clause and arbitration clause can and should be harmonized quite easily. Under controlling Circuit-level precedent, the same should and must apply here. Plaintiffs' efforts to argue otherwise simply miss the mark and inadvertently but functionally reinforce both Defendant's arguments and the holdings of *Patten* and *Reading*, published decisions which favor granting the Motion.

Plaintiffs make much of Defendant's [B]uyer Addendum No. 1 to the Agreement that expressly strikes Paragraph 26 of the Agreement. Since the text of Paragraph 26 still visibly appears in the Agreement, Plaintiffs cite the striking as evidence that Defendant's harmonization and surplusage arguments must fail. *See* Opposing Brief at pp. 11-12 ("The preprinted language in Paragraph 26 still literally appears in the parties' Purchase Agreement; it is simply superfluous and of no effect"). Plaintiffs, however, do not seem to realize they've crumbled their own

argument—they do not dispute that Defendant *properly* struck Paragraph 26 of the Agreement by way of *specific reference* in their addendum; Plaintiffs thus contradict themselves not one page prior, by summarily dismissing *their own* failure to include a specific reference—in this case, a specific denial of arbitration (or outright striking of Paragraph 22) in their Addendum. *See* Opposing Brief at p. 11 n.7 ("Defendant's curious assertion that 'the Addendum does *not* expressly disavow mediation or arbitration,' Mot. at 11 n.5, is only true in the limited sense that the Addendum does not use the words "mediation" or "arbitration.""). In so doing, they've become the exact party that the Third Circuit and other courts have admonished for omitting reference to arbitration in their retention of jurisdiction language. At best, Plaintiffs create an ambiguity by way of their omission. Significantly, the solution in those cited cases was to grant arbitration, as the Court should do here.[3]

B. Arbitration is Not Foreclosed by the Exclusions or the Sale Order

Plaintiffs alternatively oppose arbitration on the grounds that it falls within the Exclusions referenced in Paragraph 22 of the Agreement or that the Sale Order mandates jurisdiction in the Bankruptcy Court. Both arguments fail. As to the former, Plaintiffs conclude that because the Complaint invokes Bankruptcy Code section 542 to seek turnover of the

[3] Incidentally, this finding would be entirely consistent with the California decisions in *Sandquist v. Lebo Automotive, Inc.*, 376 P.3d 506, 514 (Cal. 2016) and *Laymon v. J. Rockcliff, Inc.*, 219 Cal. Rptr. 3d 185 (Cal. Ct. App. 2017), as cited in Defendant's Opening Brief. *See* Opening Brief at pp. 9, 12 n.7 (*citing Sandquist*, 376 P.3d at 514 ("general principle of contract interpretation applies equally to the construction of arbitration provisions"; i.e., where "the drafter of a form contract has prepared an arbitration provision whose application to a particular dispute is uncertain, ordinary contract principles require that the provision be construed against the drafter's interpretation and in favor of the nondrafter's interpretation.")); *id.* (*citing Laymon*, 219 Cal. Rptr. 3d. at 192 (general rule that arbitration should be upheld "unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute.")).

Whatever vitality Plaintiffs' arguments maintained in opposition to these holdings, it is vitiated when read in concert with the Third Circuit's rulings in *Patten* and *Reading*, among others. This Court has likewise rejected Plaintiffs' argument that, because the Agreement is a form contract, *Sandquist's* "general principle" is without relevance here. *See DHP Holdings II Corp. v. The Home Depot, Inc. (In re DHP Holdings II Corp.)*, 435 B.R. 264, 269 (Bankr. D. Del. 2010) ("***DHP I***") (denying that a "forum selection clause that is part of a form contract not bargained-for should be given less weight").

Escrowed Funds and because it includes an attendant (if not redundant) declaratory request for relief, that the matter is both core and "within the jurisdiction of a . . . bankruptcy court." Opposing Brief at p. 14, ¶25. But Plaintiffs give short shrift to applicable case law underpinning section 542, an omission which is fatal to their arguments.

An action is outside the scope of section 542(b) unless there is a debt that is "matured, payable on demand, or payable on order." *DHP 1*, 435 B.R. at 271 (citing 11 U.S.C. § 542(b)). Most courts require that the debt be undisputed for the action to be core. *Id.* (citing *United States v. Inslaw, Inc.,* 932 F.2d 1467, 1472 (D.C. Cir. 1991) (stating that "[i]t is settled law that the debtor cannot use the turnover provisions of [section 542] to liquidate contract disputes or otherwise demand assets whose title is in dispute."); *Centennial Coal,* 278 B.R. at 58 (holding that an action to collect amounts owed under a pre-petition agreement, that was disputed, is non-core); *Asousa P'ship v. Pinnacle Foods, Inc. (In re Asousa P'ship),* 264 B.R. 376, 384 (Bankr. E.D. Pa. 2001) (section 542(b) is "available to debtors to obtain what is acknowledged to be property of the bankruptcy estate.")).

Plaintiffs are well-aware that the instant matter and their depiction of the facts in the Complaint are heavily disputed by Defendant. Indeed, Defendant disputed them before the Complaint was even filed. It follows then that Plaintiffs' mere labeling of this breach of California contract case as one for turnover is nothing more than semantics and a means for masking the fact that this is a state law dispute. *See DHP Holdings II Corp. v. Peter Skop Industries, Inc. (In re DHP Holdings II Corp.),* 435 B.R. 220, 226 (Bankr. D. Del. 2010) ("***DHP 2***"*)* (abstaining from 542 action because, *inter alia,* the dispute was not intertwined with the estate's administration and state law issues predominated). The fact that creditors may reap a benefit from any recovery against Defendant is immaterial. *See id.*; *see also Mintze v. Am. Gen'l*

Fin. Servs., Inc. (In re Mintze), 434 F.3d 222, 231 (3d Cir. 2006) (rejecting the argument that an inherent conflict exists between the arbitration of claims and the purpose of the Bankruptcy Code because of the potential that an arbitrator's decision could negatively impact distributions to a debtor's creditors).

Such claims, then, provide no basis for the Court to exercise core jurisdiction. *Valley Media, Inc. v. Toys R Us, Inc. (In re Valley Media, Inc.),* 289 B.R. 27, 31 (Bankr. D. Del. 2003) (finding an action to be non-core where it was "nothing more than a state law breach of contract claim disguised in bankruptcy terms."). To the extent the Court does *not* find the declaratory judgment count to be redundant to the turnover request or otherwise non-core, then the Court can and should sever it from issues agreed to be arbitrated. *See Omna Med. Partners, Inc. v. Carus Healthcare, P.A. (In re Omna Med. Partners, Inc.),* 257 B.R. 666, 669 (Bankr. D. Del. 2000) ("It is feasible . . . to allow the state court to conclude the case in front of it, leaving for this Court only a determination as to the effect of the bankruptcy filing on the parties' rights."); *Sun Healthcare Grp.. Inc. v. Levin (In re Sun Healthcare Group, Inc.),* 267 B.R. 673, 679 (Bankr. D. Del. 2000) (allowing judgments to be entered in state court with the enforcement left to the bankruptcy court).

Plaintiffs' final argument on arbitration—that the Sale Order's language dictates jurisdiction in the Bankruptcy Court—fundamentally misconstrues what was effectuated by the Court when it entered its order. Specifically, paragraph 2 of the Sale Order provides that the "Purchase Agreement is authorized and approved in its entirety." Sale Order at ¶ 2. That "Purchase Agreement" contains a provision for arbitration that, based on the voluminous precedent issuing from this circuit and courts around the country, should be honored and harmonized with the retention of jurisdiction language present in the Addendum, the Plan, and

the Sale Order. *See Patten* and *Reading Health*, *supra*. Defendant does not deny that the Court has authority to interpret its own orders; the present Arbitration Motion is requesting that the Court do precisely that, in effect: honor the provision of the Agreement this Court previously approved by compelling the arbitration provided for in the Agreement's text. *SFC New Holdings, Inc. v. The Earthgrains Co. (In re GWI, Inc.)*, 269 B.R. 114, 118 (Bankr. D. Del. 2001) (finding debtors ratified agreement with arbitration clause by way of their plan and confirmation order, therefore granting motion to compel arbitration over debtors' objections that the plan reserved jurisdiction). Plaintiffs cannot be entitled to cherry-pick the provisions of the Agreement or the Sale Order that seemingly support their interpretation of the dispute, yet ignore the provisions that compel the very arbitration they're opposing. Likewise, if and when the matter is resolved by arbitration, the Court will be in position to enter an order accordingly.[4]

C. <u>As a Practical Matter, Arbitration is Appropriate</u>

Defendant would be remiss if it did not reiterate the practicalities of the request it is making, which is entirely consistent within the confines of California real property law. As argued in the Opening Brief, this Court has found "[t]here are significant countervailing policies favoring arbitration. Arbitration is quick and inexpensive." *GWI*, 269 B.R. 114, 118 (Bankr. D. Del. 2001) (granting motion to compel arbitration in favor of defendant in response to debtor's adversary proceeding for determination that it was entitled to release of escrowed funds); *see also In re Paragon Offshore PLC*, 588 B.R. 735, 762 (Bankr. D. Del. 2018) (granting motion to compel arbitration in favor of defendants, finding the Court must compel arbitration "even where

[4] *But see* Opening Brief at p. 12 n.6 (*citing In re PRS Ins. Grp., Inc.*, 2003 WL 21262446, at *3 (Bankr. D. Del. May 30, 2003) (this Court declining to retain jurisdiction over "any issue, [because] the arbitrator can decide ***<u>all</u>*** disputes," despite Debtors asking the Court to retain jurisdiction over "the ultimate issue" of who is entitled to certain trust funds on the grounds that "they are property of the estate and thus within [the Court's] exclusive jurisdiction.") (emphasis added). The Court there found the arbitrator capable of determining what the agreements provide, what amounts are owed pursuant to the same, and what constitutes property of the bankruptcy estate. There was, "therefore, no reason for this Court to retain jurisdiction." *Id.*)).

the result would be the possibly inefficient maintenance of separate proceedings in different forums"). That Plaintiffs wish to engage in many more months of costly litigation, discovery, and briefing on this issue is indicative that their arguments accusing Defendant of utilizing road blocks or stall tactics are merely skin deep.

D. In Lieu of Arbitration, Transfer is Warranted

Plaintiffs strenuously argue the Addendum's "forum selection clause" controls the transfer analysis here. *See* Opposing Brief, pp. 17-18. They cite numerous non-bankruptcy cases for the purposes of detailing the interplay between a forum selection clause and venue transfer factors. *See id.* at p. 17. They then cite to an opinion issued out of this Court—*DHP 1*[5]—and completely omit language of the same which is critical to the instant dispute. *Id.* at pp. 17-18. Such omission, whether inadvertent or otherwise, unsurprisingly undercuts the entire premise of their arguments.

In a sense, Defendant is in a position arguing both for and against the enforcement of a "forum selection clause." Absolutely no reason exists why the Arbitration Clause should be excised from any interpretation of the Agreement, and the Addendum does not change that conclusion. This Court approved the Agreement with the Arbitration Clause and it can be seamlessly harmonized with the language in the Addendum, as numerous courts have done. As such, the entire debate about which clause controls is unnecessary, at best.

Notwithstanding, Defendant's alternative request to transfer venue obviously only arises in the scenario where the Court finds that the Addendum forecloses Defendant's arbitration rights. But even then, this Court has found that "on a motion to transfer venue . . . ***the presence of a valid forum selection clause is not determinative***. . ." *DHP 1*, 435 B.R. at 269 (emphasis added). Ultimately, "whether the action should be transferred involves a multi-factored test

[5] *See* Footnote 3, *supra*.

incorporating the forum selection clause ***as one facet*** of the convenience-of-the-parties consideration." *Id.* at 269-70 (internal quotations omitted and emphasis added). Ironically, the *DHP 1* Court actually found that forum selection clauses in core matters are *less* likely to be enforced, *see id.* at 270, and Plaintiffs fail to reconcile that language with their positions in favor of this being a core dispute. *Compare* Opposing Brief at pp. 14, 16 (arguing this is a core matter) *with* Opposing Brief at pp. 18-19 (citing *DHP 1* and *Welded Constr., L.P. v. The Williams Cos. (In re Welded Constr., L.P.)*, 2019 WL 5394054, at *12 (Bankr. D. Del. Oct. 16, 2019), but remaining silent on their discussion of core/non-core relevance). To be sure, such inconsistencies are common throughout Plaintiffs' analysis. *See* Opposing Brief at 19 (citing *Barry v. Santander Bank, N.A. (In re Liberty State Benefits of Del., Inc.)*, 2015 WL 5468786 (Bankr. D. Del. Sept. 16, 2015)) (Plaintiffs quoting *Barry*'s statement that the "economics of the estate's administration must be incorporated into any venue transfer analysis in the bankruptcy context" and that the estate needs to "minimize . . . expenses," despite the incongruity that Plaintiffs are vigorously pursuing litigation over the much less expensive option of arbitration).

Even if this Court were to place any relevance upon the Addendum's jurisdiction provision (which it should not), it is still but one factor in the transfer analysis; indeed, the balance of the factors relied upon by Plaintiffs justifies transferring this matter to the California Court:[6]

> *Factors 1 & 2 – Forum Preferences*: the California Court is not some random, irrelevant location vis-à-vis the dispute here. Rather, it is centrally located to all parties, facts, and counsel. *See Northfield Labs.*, 467 B.R. at 591 (granting transfer where alleged misrepresentations were made in the district being transferred to, the debtor's primary place of business was in its district, the debtor's business records were located there, and

[6] Plaintiffs do not utilize the same factors or framework this Court employed in *Shield v. Northfield Labs. Inc. (In re Northfield Labs. Inc.)*, 467 B.R. 582, 589 (Bankr. D. Del. 2010) when considering a request under Bankruptcy Rule 7087. *Cf.* Opening Brief at pp. 19-22 (citing *Northfield*). As such, there is not always a direct analogue between the *Northfield* factors used by Defendant and the test Plaintiffs use. Plaintiffs fail the twelve-factor test they rely on, in any event.

"many of the defendants were present in its district"); *Zazzali v. Wavetronix, LLC (In re DBSI, Inc.)*, 2014 WL 4828882, at *6 (D. Del. Sept. 25, 2014) (granting transfer due to many defendants being located in or around the state of the proposed transferee court). Plaintiffs have no cognizable reason for requesting this matter to be heard here, especially given that they are more than a year removed from Plan confirmation.

Factor 3 – Location Where the Claim Arose: this matter is unquestionably a prototypical California real estate dispute. According to the Complaint, virtually every operative fact took place either in California or among California parties or counsel. One of Plaintiffs' own citations dictates this factor warrants transfer in that instance. *Santander Bank*, 2015 WL 5468786 at *5 (analyzing where "the events most factually relevant" to the plaintiff's claim occurred and finding in favor of transfer on this factor).

Factor 4: Location of Books and Records: taken in isolation from the other factors, this factor is at best neutral for Plaintiffs; in context, however, transfer makes far more sense.

Factor 5: Convenience of the Parties: Plaintiffs provide nothing to rebut Defendant's argument that convenience lies with the California Court, aside from further reliance upon their forum selection clause argument. But in addition to the fact that the opinion they extensively rely upon indicates that "even where there is a contractual forum selection provision, the Court should consider if there is some inconvenience to the parties," *DHP 1* at 274, they fail to reconcile their contradictory core/non-core assertions with their desire to rely upon the purported forum selection clause, as noted above. Moreover, the *Welded* opinion which Plaintiffs cite noted that this factor weighed against transfer, at least in part because doing so would be financially disadvantageous for the estate and its creditors, especially where new counsel in the transferee district would be needed. *See Welded*, 2019 WL 5394054 at *14. The opposite is true here: Plaintiffs are well-situated with California counsel, yet are still pushing for a far more expensive litigation option for the post-confirmation estate.

Factor 6: Convenience of Witnesses: as with Factor 4, taken in isolation from the other factors, this factor is at best neutral for Plaintiffs and favors transfer to California.

Factor 7: Enforceability of Judgment: the Parties agree on this factor.

Factor 8: Practical Considerations: as this Court has stated, the test for this factor is "whether it is actually easier, faster or less expensive to litigate *this* adversary in another forum." *DHP 1*, 435 B.R. at 274 (citations omitted). Defendant respectfully disagrees that being forced to oppose a motion for default judgment constitutes the type of deep, substantive involvement in a proceeding that mandates the Court's further oversight. The California Court would be at little, if any, substantive deficit vis-à-vis the Court. *See Centennial*, 282 B.R. at 145, 148 (granting transfer after concluding that it "will not delay the adjudication of this proceeding and/or significantly increase the costs of litigation for Plaintiff . . . [because the proceeding] has not progressed past the preliminary pleading stage").

Factor 9: Relative Administrative Difficulty in the Two Fora Resulting from Congestion: as with Factors 4 and 6, taken in isolation from the other factors, this factor is at best neutral for Plaintiffs. That said, this Court is routinely acknowledged and commonly known as one of the busiest in the country for commercial bankruptcies.

Factor 10: Public Policies of the Fora: on this factor, Plaintiffs offer nothing but a conclusory statement that the California Court has no policy interest in resolving this "garden variety" California real estate dispute. First, this Court already heard and rejected Plaintiffs' argument. *See Centennial Coal*, 282 B.R. at 148 (finding that although the issues involved are neither novel or complex, "it would be more appropriate for a local judge to decide the matter[, as a] federal judge sitting in [the transferee state] is more likely to be familiar with the applicable state law issues than this Court and has a greater interest in deciding issues which may affect [transferee state] residents and/or the development of [transferee state] common law . . . [Thus, the transferee] court has a greater interest in deciding the matter."). Ultimately, "the most important consideration is whether the requested transfer would promote the economic and efficient administration of the estate." *DHP 1*, 435 B.R. at 275. On this point, all parties, counsel, facts, and law revolve around California. *See* Opening Brief at pp. 19-21.

Factor 11: Familiarity of the Judge with State Law: The same rationale from Factor 10 applies to this factor and correspondingly favors transfer. *See Welded*, 2019 WL 5394054 at *16 (finding this factor weighs in favor of transfer, because even though "the Court routinely applies state law, a judge sitting in [the transferee state] might be more familiar with issues arising under [transferee state] law.").

Factor 12: Local Interest in Deciding Local Controversies: While Plaintiffs find "no reason to believe" that the California Court has any local interest in resolving this California-centric real property ownership dispute, this Court has held otherwise. *See Centennial Coal*, 282 B.R. at 148. For the reasons and holdings cited in Factors 10 and 11, this factor highly favors transfer.

IV. CONCLUSION

At bottom, no rational reason supports requiring the Parties to incur any further expenses litigating this matter. This Court should direct the Parties to arbitrate in accordance with the Agreement. Failing that, then the fairest and most economical option is to have this matter heard in the court closest to the parties, counsel, property and facts. Plaintiffs' arguments to contrary are replete with contradictions, if not outright foreclosed by governing Third Circuit law. Defendant thus reiterates its request that this Court (i) grant the motion to dismiss in favor of

arbitration; (ii) alternatively, transfer the Adversary Proceeding to the California Court; and (iii) overrule the objections raised in the Opposition Brief.

Dated: December 30, 2019
Wilmington, Delaware

BAYARD, P.A.

/s/ Evan T. Miller

Evan T. Miller (No. 5364)
600 N. King Street, Suite 400
Wilmington, DE 19801
Telephone: (302) 655-5000
Facsimile: (302) 658-6395
E-mail: emiller@bayardlaw.com

- and -

William A. Smelko
PROCOPIO
525 B Street, Suite 2200
San Diego, CA 92101
Telephone: (619) 525–3834
Facsimile: (619) 744–5447
E-mail: bill.smelko@procopio.com

Counsel for Defendant

CERTIFICATE OF SERVICE

I, Evan T. Miller, hereby certify that on this 30th day of December 2019, I caused copies of the **Reply Brief in Further Support of Defendant's Motion to (I) Dismiss in Favor of Arbitration or (II) Alternatively, Transfer Venue** to be served via first class mail on the parties listed below:

Bradford J. Sandler
Colin R. Robinson
Pachulski Stang Ziehl & Jones LLP
919 N. Market Street, 17th Floor
Wilmington, DE 19801

Richard M. Pachulski
Andrew W. Caine
Pachulski Stang Ziehl & Jones LLP
10100 Santa Monica Boulevard, 13th Floor
Los Angeles, CA 90067-4100

Kenneth N. Klee
Michael L. Tuchin
David A. Fidler
Jonathan M. Weiss
Klee, Tuchin, Bogdanoff & Stern LLP
1999 Avenue of the Stars
Thirty-Ninth Floor
Los Angeles, CA 90067

/s/ Evan T. Miller
Evan T. Miller (No. 5364)